BOOK REVIEWS


The expert utility commissioner, lawyer, engineer, accountant or economist will find many discussions of interest in this work, but it is more especially useful as a handbook of public utility rate regulation for the non-expert. It is a concise statement in plain and simple language of the issues involved in almost every phase of utility rate regulation. The authors find the valuation concept as the basis of all rate regulation and trace the historical development of this concept prior to Smyth v. Ames,1 from 1898 to the World War, and since the War. The case of the railroads is so special that they very justifiably devote an entire chapter to their problems, and conclude this historical survey with consideration of the underlying judicial conceptions of utility control.

Part II deals with the determination of "fair value" as to both tangibles and intangibles, together with consideration of rate of return. By the end of this part they have drawn a pretty clear picture of the mess we are in because of the indefiniteness and uncertainty of valuation principles, with the resulting long, expensive and unsatisfactory findings which are often out of date before they are reached. They might have given many illustrations of this, such as the recent Illinois Bell Telephone case, which dragged through eleven expensive years from 1923 to 1934, went twice to the Supreme Court, and resulted in an order for a return by the company of more than $22,000,000 collected from the public. No note seems to have been taken of the fact that the company had the use, roughly speaking, of the equivalent of $110,000,000 for one year, or of $10,000,000 for ten years, a tidy gift by the public. The authors do point out that the valuation of the railroads of the country has cost $183,000,000, or more than $730 for every mile of road in the land. It is their view that the results are of little value.

The authors might have cited the many evidences of dissatisfaction of the public, as shown by the so-called "Washington Plan" for valuation by negotiation as a substitute for expensive valuation investigations, by the New York legislation for emergency rate orders, by the recommendation of the Governor of Michigan to the Commissioners that they make a rate reduction order for electric service without valuation hearings, by the proposed legislation in Illinois, Massachusetts and other states and by bills recently introduced in Congress. These are only a few of the signs of the times. The Consolidated Gas Company, which for years has been almost constantly in rate litigation, is said to have proposed to the mayor of New York the acceptance of the "Washington Plan", in order to prevent the building of a rival municipal plant, and the chief attorney of the company is reported to have said that expensive valuations are about over. To these might be added the T. V. A., one of the objects of which is to furnish a yardstick by which to measure public utility rates, and the similar projects of the St. Lawrence waterway, the Boulder Dam and the other huge hydroelectric projects of the government now under way.

Having shown the undesirable present conditions, Part III is devoted to a proposal for a satisfactory rate base, beginning with the criteria for such a base and concluding with a discussion of the constitutionality of such a switch to a new standard based on facts and certainties instead of theories and indefiniteness.

1. 169 U. S. 466 (1898).
The authors are probably right in contending that it is because of a failure of the legislatures to adopt definite rules and policies following *Munn v. Illinois* that we are in this parlous condition. Most of rate regulation is essentially legislative. The courts are not concerned with methods, but only with confiscation. Lack of legislative directions to commissions led the courts to get over into the administrative field with results that are highly unsatisfactory. The problem of the book then is whether it is now too late to correct this. The thesis that it is not is ably argued. It is made clear that much of the confusion has resulted from applying to public utility property private property concepts. It is hardly to be expected that the courts will make such a radical change from the present pronouncements as to rate base as is urged by our authors. There are some signs that legislatures might do so. In the present conditions as to fixing rates there is much to support such a legislative undertaking.

It would be interesting to discuss the chapter on depreciation, the treatment of that vague and arbitrary element, going value, and especially the details of fixing that ideal fixed rate base. For these and most other matters the reviewer must refer the reader to the book. It is so clear and so concise that this should be no hardship.

*Edwin C. Goddard.*†


This is, indeed, a timely book. And, although many books and articles today deal with certain particular relations between business and government, this is one of the few attempts at a comprehensive study of the problem.

A mere glance at the contents of the volume indicates its scope: two introductory chapters on the Constitution, five on the Sherman Act and other restrictive legislation, three on the regulation of railways, public utilities and securities, three on public finance, taxation and expenditures, nine on labor problems, and additional chapters on Business Pressure Groups, Self-regulation in Business, the Recovery Act, and Crisis Legislation.

In planning this volume, the authors undoubtedly faced several alternative methods of presenting the problem. They might have organized the book about the abstract relations between business and government; this they have not done. They preferred the empirical method, with significant general implications fairly closely confined to the particular situations described. In the hands of a competent teacher or intelligent reader, the general significance for social theory will be readily drawn from the abundance of valuable material which the book presents.

Then, again, the authors faced the problem of discussing solely the relational aspects of government and business, or of dealing in addition with the analysis of these two factors separately. Whatever may be the logical necessity of the problem, the book is largely a discussion of governmental activity and its relation to business. Indeed, it may be offered as a criticism that the book, in its analysis of governmental and legal functions as such, repeats much material which is readily available elsewhere. And if it is necessary to treat of the constituents of a relationship in order to deal properly with the relation itself, then one might have expected more emphasis on the description and analysis of business activities themselves. This the book does not adequately do. Certainly a part of the

† Professor of Law, University of Michigan.

2. 94 U. S. 114 (1876).
problem of the relationship between business and government consists in discovering what potentialities of socially acceptable self-regulation business itself possesses, and what actualities it has accomplished; the section of the book devoted to this field deals largely with relatively superficial or incidental factors.

More pointedly one may ask why the chapter on Pressure Groups treated the subject so gingerly, and why so little account was taken of the broader and more professional aspects of business management; both subjects being more ably handled in an otherwise inferior book, The Ethical Problems in Relations of Business to Government. One wonders, also, why in the chapter on Bankruptcy no mention was made of the Donovan Report or of the splendid record of the Irving Trust Company, with its emphasis on business rather than legal methods; the Plummer Report, which is dealt with, was important and pertinent but constitutes a relatively inadequate picture of the situation. In the discussion of Rate Bases, pp. 275 ff., the absence of McCardle v. Indianapolis Water Co. is notable; and a failure to include United Railways and Electric Co. of Baltimore v. West prevented the authors from showing how a perfectly well-knit judicial solution could come to grief in the face of business realities. Conversely, another omission prevented the authors from disclosing the far-reaching effect of a freak decision, such as that in the pathological Raladam case on promising trade-association practice. But these are merely soft spots in an admirably constructed book.

The necessity of condensing even the pertinent material has led to difficulties which the authors well realize, but against which the reader should be on guard. Thus, on page five, the statement that Congress has apparently adopted the axiom of “when in doubt use the commerce power”, with the corollary “when the commerce power will not work try the tax clause”, is too pat and misleading a description of what in actuality is far less simple. Again (p. 26), to state that the decision of Wilson v. New hinged on the proposition that “one form of obstruction to interstate commerce was the strike”, is to put the matter inaccurately; a mistake which is highly significant in view of the fact that the case is cited in a general introductory section. Not only does the word “strike” not appear in the decision, but the phrase which was used, namely, “threatened interruption to commerce”, was consistently attributed throughout the decision to the failure of employers and employees to agree on, and the absence of, a scale of wages. Perhaps the court was guilty of rationalization or euphemism here. But, if this tack is to be followed, it becomes all the more necessary for such a book throughout to “pierce the ermine”, in order to discover the factual basis of government, as well as to “penetrate the veil” of corporate entities or of consolidated balance sheets in order to learn what the realities of business are. The authors have done a notable thing in pointing out (p. 45) that “due process” is by no means merely a procedural rule; but in elaborating its substantive features they might have stressed the point that a large part of these consist in the economic and social views of the human beings who constitute the membership of the court.

A fundamental assumption underlying this book—indeed, and of course, of most books which aim to be scientifically descriptive and not evangelical—is that

2. 272 U. S. 400 (1926).
3. 280 U. S. 234 (1930).
5. 243 U. S. 332 (1917).
6. Contrast the treatment of judicial decisions in this book with the penetrating and realistic analysis of Edward S. Corwin, The Twilight of the Supreme Court, in which the author shows how in fifty years the social-economic doctrine of laissez-faire became cloaked with judicial pomposity.
the problems suggested by the title can be dealt with rationally. We seem to have learned much more readily to discount the moral or ethical factors in the situation—to see that governmental standards of "fairness" vary as did the length of the chancellor's foot, and that the business man's plea of "fairness" shifts with the direction in which the price-level is moving. But we are not nearly so realistic in subjecting rational considerations to the same sceptical tests. Nor are the authors of this book an exception, for they stress altogether too much the ration-ale of the relations between business and government. This may do for a law book, where "reason" is postulated as a basic sanction; but even this may be and is being questioned in the treatment of legal problems. It certainly will not do for a book on business; and it follows that the emphasis on such a postulate will prevent one from probing to the bottom of the relations between business and government. Of course, reason can and should penetrate the data presented by irrational acts; and there can be cooperation between business and government on a rational basis, with even some mutual ethical bows interspersed. But it must be remembered also that a veritable slugging match is going on, with at least some half-dozen body blows having been exchanged between business and govern-ment during the last half-century; and the power behind these blows far transcends the scientific or ethical rules of the match. The book we are reviewing is an admirable scientific description of the rational factors of the situation.

C. F. Taeusch.†


In the process of editing the manuscript that in its printed form is familiar to us as Bracton's Note Book, Maitland was surprised and delighted to find on many of the surviving rolls marks which generally distinguished cases copied into the Note Book. The correspondence between the transcripts in the Note Book and the scored entries on the judicial rolls was such as to raise a very strong presumption that the marks had been made by the man for whom the book was compiled, to guide the copyists in their work. Now between the Note Book and Bracton's treatise there are so many points of contact that it is difficult to consider them the work of any but the same man—surely the possessory judgment that Bracton recovered in 1887 has since been undisputed and undisturbed and may well be considered no longer a recovery of saisina but of ius†—and thus it must seem highly probable that Bracton himself scored the cases on the rolls that correspond to those copied into the Note Book. Maitland argued further that

† Associate Professor of Business Ethics, Graduate School of Business Administration, Harvard University.


1. I MAITLAND, BRACTON'S NOTE BOOK (1887) 116, 117: "And now the question whether this Note Book was really Bracton's or no, must be left to the judgment of the learned world. An effort has here been made to state the evidence impartially; but of course I was happy in believing that his work was in my hands, and my eyes may have been shut to facts which made against this pleasant belief. What is now to be wished is that someone will go through the book with the design of showing that it is not entitled to the name under which it is here published. Some one fact established by him might make worthless any argument drawn from the manifold coincidences . . . (But meanwhile) must we not say that until evidence is produced on the other side, Bracton is entitled to a judgment, a possessory judgment? Et ideo consideratum est quod Henricus recuperauit seisinam suam, salvi jure cuiuslibet."
two other rolls which he found similarly marked must likewise have been marked by Bracton, and although he was unable to find the marked cases of these rolls in the *Note Book*, still there was no evidence that the whole of the *Note Book* had survived, and in all probability a final quire or series of quires which had contained them had been detached and lost long before the book came into the hands of Chief Justice Sir Anthony Fitzherbert in the early sixteenth century. These two rolls, that of a Lincolnshire eyre of 1218-19 and that of a Worcestershire eyre of 1221, have now been edited for the Selden Society by Mrs. Doris M. Stenton to whom we already are indebted for many excellent editions of English mediæval judicial and financial records. With the exception of a few of the pleas of the crown heard at Worcester, the rolls contained in the present volume have never yet appeared in print, but, of more importance, the cases marked by Bracton can now be studied for the first time in their context and thus perhaps the principles upon which his selection was made more fully understood. For it should here be explained that only a small part of the matter that appears on any roll is marked; only those cases which were thought of more than usual interest were to be put into the *Note Book* for future use. Maitland's words upon the *Note Book* are useful:

"Now to select important cases from these rolls would be difficult. The endeavour, likely enough would fail, for so much of our old law has been utterly forgotten that perhaps there is no one now competent to say what are the important, the leading cases. A false measure, an unfounded theory might well make the selection unfair and give us the anomalous instead of the normal. What then would we not give, such of us as really care for the history of our law, could we find the selection made for us by some thirteenth-century lawyer, could we find some note book in which such a lawyer had copied the cases which were the most interesting to him and to the men of his time, some book in which he jotted down his own remarks on those cases? What would we not give could we indulge the hope that the maker of that book was Bracton?" 2

The *Note Book*, of course, made accessible a great mass of cases which has served as a quarry from which material for the history of legal development in the age of Bracton might be drawn, but it was hoped that with the publication of the rolls used by Bracton some further indication of his method, perhaps along lines anticipated by Maitland in the passage above, might be gained. An examination of the cases printed in the present volume finds that hope unfulfilled: largely, it must be confessed, because the hope itself is insufficiently grounded. Two only of the many rolls upon which the treatise is based have been printed in their entirety, and thus observations based solely upon them can be at the most tentative, nevertheless the statement that Bracton's choice of cases depends not upon a "juristic bias" but very largely upon the detailed information the case might supply regarding the practice of the courts finds strong support. Of Bracton's apparent preference for the work of Patteshull and Raleigh, and of Maitland's thought that perhaps Bracton regarded them as the heads of a school of law and lawyers, there is no indication: nor will this come as a surprise to those acquainted with Professor Woodbine's introduction to his edition of the *De Legibus*. The aim of the treatise was practical: in it justices and their clerks might find plain directions as to how enrollments should be made, detailed rules touching summons and essoins, careful accounts of the exceptions possible in the various types of plea. Bracton's aim was to put into permanent written form the everyday law which he himself administered and which Patteshull and Raleigh had administered

2. 1 id. II, 12.
before him. There is, it is true, a jurisprudential setting: the treatise has depths not found in its later, severely practical, epitomes: But Bracton's frequent statement of doctrine in terms of substantive as distinguished from adjective law must not be permitted to overshadow the fact that much of his treatise, as well as Hengham's, is shaped about the writs and their uses. The information he supplies as to the proper form of action, enrollment, and general procedure is taken from cases—"facia et casus qui quotidie emergunt et eveniunt in regno Anglie"—and it is evidently with nothing more than this practical objective in mind that he scored the rolls printed here.

Attention should be called to a good many interesting cases. Bracton (fo. 285b) notes that a layman cannot bring the assize utrum and in Britton that view is unquestioned. In the present volume, however, five cases allow the layman the assize (118, 384, 426, 976, 1041), though he is successful in only one (976). In passing it may be noted that Mrs. Stenton's explanatory note to 333 misses the point; the assize no longer retained a particle of its original character, which had been that of a preliminary action to determine the competency of courts—the case rests upon the uncontradicted assumption that admitted church land fell wholly without the jurisdiction of the king's courts. Three cases illustrate the wide discretionary powers of the justices (218, 991) and indicate that no check had been placed upon them in the thirty years that intervened between Glanvill and the fifth year of Henry III. Three instances on the Worcestershire roll which place emphasis upon the unjust element in the novel disseisin formula are of importance for the light they throw upon Maitland's analysis:

"The formula of novel disseisin inquires of the recognitors whether the plaintiff has been disseised iniuste et sine judicio. This might suggest that it is possible to disseise a person sine judicio and yet not iniuste. Such however is not, as it seems to me, Bracton's doctrine."

In the first case (935), a guardian grants to another the land of his ward. This is a wrongful act, but nevertheless the donee is placed in seisin. He is then disseised by the ward. The jurors very carefully note that the disseisin was not unjust, because the seisin had been acquired from a guardian. The case seems contrary to the accepted (Maitland's) view but may be placed upon the ground that the ward's disseisin occurred within the four day period normally allowed the disseisee to recover seisin. Another instance (950) occurs when land is sold to the vendee but without livery of seisin. He later takes seisin, and the vendors bring the assize. The jurors reply that the vendee took the land with the goodwill (per bonam voluntatem) of the vendor and not unjustly. In the third case (1282), a certain Agnes held land in dower and gave it by charter to one Richard. She could not do this lawfully, but after her death, the jurors relate, Richard maintained himself in seisin for three weeks until he was ejected by Alfred, to whom the dower should have reverted. Richard brings the assize, but his seisin is not protected. These three cases, two of which (935, 1282) were marked by Bracton, may be said to point toward an emphasis upon the element of unjust disseisin not suspected by Maitland or to a conception of seisin not as mere possession but as possession shot through with elements of right—"une jouissance

---

The method of choosing recognitors (365) and the details of the essoin de malo lecti (1051) are fully described. Two cases (946, 1061), both of which Bracton marked, distinguish between the judgment and the counsel of the court—the recovery of land per consilium curie is no defense to the assize of novel disseisin. Twice in his treatise (fo. 54b and 246b) Bracton states that in the eyre of Martin of Patteshull in Worcester in the fifth year of Henry III it was held that if anyone to whom an advowson is given grants it away before he has presented, his gift is invalid. He quotes no other rolls in support of this thesis. None of the cases of darrein presentment recorded in the present volume is in point, and the good state of preservation in which the roll is found precludes the suggestion that the case Bracton is quoting is lost. Bracton may well have been the victim of a too rapid reading of 992. Two cases on damages in the assize of novel disseisin (940, 1057) should be added to the notes to Professor Woodbine's articles on the origins of the action of trespass.

Mrs. Stenton has edited the rolls with her usual competence. Readers will appreciate the admirable index which runs to some two hundred and sixty columns. Plates have been included to illustrate both the Note Book itself, to which the present volume is in many ways a supplement, and the markings found on the rolls. The lengthy introduction concerns itself, as is natural, with Bracton, and there is some discussion of the marked cases. The Selden Society is to be congratulated upon the appearance of a volume which must rank as their best since Hilary Jenkinson's Exchequer of Pleas.

S. E. Thorne.†


Political economy was well named the "Dismal Science"; the forebodings of its prophets fill one with dismay and their cures seem at times worse than the disease. The world-wide economic collapse has brought forth an immense amount of writing on this subject by amateurs and professionals, little of which is hopeful and less helpful, but which with its pseudo-scientific jargon exercises a certain fascination over the general reader seeking a panacea that will rid him of his troubles. Dr. Beard's work is not of this type. In a former volume, The Idea of National Interest, a study was made of the principles controlling the policy of American statesmen and diplomats. Here the author sets forth his own conception of national interest as a guide to future policy. Both volumes were prepared under the auspices of the Social Science Research Council with the aid of a grant from the Carnegie Corporation, but the author alone assumes responsibility for the views presented. The early chapters contain a critical review of the various schools of economic thought from Adam Smith to Marx that have influenced American politics. No one of these systems is adequate, in the author's opinion, to meet the present crisis in a way that will realize the supreme national interest which he defines as the creation and maintenance of a high standard of life for all the people and ways of industry conducive to the promotion of individual and social virtues within the frame of national security. It is proposed that there shall be a clean sweep of traditional economic theories and a comprehensive survey made to determine the physical needs of the people with a view to establishing a fundamental standard of life budget for the nation by means of "engineering rationality". This would be followed by an equally thorough survey of American resources and technical arts and, after the resources of the nation

†Assistant Professor and Librarian, Northwestern University School of Law.
had been exploited with the utmost efficiency in the production of goods and services, then only would foreign trade be permitted, under government control and limited to the exchange of home products for products not produced in the United States or deemed essential. The basic element in national policy, as he conceived, is the “greatest possible insulation of internal economy from the disruptions of uncontrolled international transactions”. It means a renunciation of imperialism, colonies, world trade and spheres of influence, and a limitation of armaments to the necessities of continental defense. Nations choosing the predatory course could continue fighting over crumbs of trade; the American republic would have no part in it but would follow Voltaire’s advice in *Candide* and cultivate its own garden. Dr. Beard develops his thesis with earnestness and skill, raising controversial questions too numerous to be discussed here which must be left to the experts. It may well be that, in the words of the author, “the antarctic tendencies of other governments will force such a concentration of policy and power in the United States, despite all theoretical objections that ingenuity can devise and offer.” If the world is in for a long period of despotism, militarism, trade barriers, and economic autonomy, then isolation may be unavoidable. But who can foresee the policy of Europe even for the next decade? The author believes that the action of the present administration is in accord with his thesis except in the matter of excessive military expenditures, but it is evident that some high officials have not given up the hope of restoring foreign trade and international good will. Nevertheless, it cannot be denied that isolationist sentiment is strong, and political isolation may be followed by economic and cultural isolation. But, again, who knows? Certainly in the past the trading nations have been the most dynamic.

Not to be regarded as a theorist only, the author outlines a plan for putting his program into effect without disrupting democratic institutions. This would include a partial reorganization of the government, strengthening the powers of the executive, and a presentation of the prepared economic plan to the people for full discussion and adoption. One may doubt whether the voters of a nation so wide in extent and with such diverse points of view would knowingly submit themselves to a social experiment involving rigorous control and inevitable hardships. Prolonged misery accelerates change, but such change is usually accomplished by violence. It is human material that the publicists must deal with, and deep seated national characteristics cannot be ignored. The American has a lawless streak in him and yet is intensely legalistic. He will entertain a new scheme of improvement with the enthusiasm of a revivalist and then proceed to wreck it by obstruction and noncompliance. Conceivably, an engaging orator might win a majority for a planned economy which would be left for enforcement to unpopular bureaucrats and the corner policeman until dropped for some other scheme. The Yankee has been a smart trader from the beginning and would hate to go back to rug weaving. Probably in time, disciplined by repeated misfortunes, he will resign some of his cherished illusions. But he thinks he is moving rapidly as it is, and to push him too fast might lead to disappointment and reaction. Not one of the despotic states set up in Europe, Communist or Fascist, could carry on without a firing squad and the United States is not prepared for that as yet. Another thing—people who have employed and worked under engineers have not the same naive faith in their infallibility as the intellectuals. Engineers are competent and incompetent, like others, and it must embarrass the more modest of them to find themselves elevated to the rank of rain makers.

*William H. Lloyd.*

† Professor of Law, University of Pennsylvania.

The Revue Internationale du Droit Maritime was founded in 1885 and continued uninterruptedly until 1922. Under the inspiration of M. Léopold Dor a change was then effected, and a new series under the happier title of the Revue de Droit Maritime Compare was begun. The professed object of the new series was dual. The first, immediate and practical, was to aid the practising lawyer in his search for authority; the second, more remote and vague, was to encourage the march toward a uniform maritime law. To accomplish these ends the Revue was divided into five parts, comprising: leading articles, cases, legislation, documents and bibliography. For source material the principal maritime nations of the world were to be drawn on.

How far the Revue is accomplishing the second of its declared objects must remain a matter of large conjecture especially in view of the timid progress which even formal unification is now making. M. Siesse’s article in the current number, despite professions of progress, gives added proof of this. But however remote the prospect of any real uniformity, there can be no doubt that the Revue is more than fulfilling its first and major objective. It is rendering a real service to the practising attorney and it is doing it in a somewhat unique manner. Most of our legal periodicals both here and abroad place emphasis on leading articles and attach only a subsidiary importance to discussion of cases. This is left for the reports and digests. The Revue de Droit Maritime Comparé, on the other hand, puts emphasis on cases and attaches only a subsidiary importance to articles. A page analysis of the current number, for instance, will disclose a meagre thirty pages devoted to articles as opposed to almost 350 pages devoted to cases. In a sense the Revue thus combines the desirable function of an ordinary periodical with the more practical function of a digest, a combination well calculated to serve its purpose. While the vast majority of cases are mere abstracts, editorial selection is also exercised, and quite a few are reported in full. In addition editorial comments, bristling with authority, accompany the reported cases and constitute one of the most valuable features of the Revue. In fact, these editorial comments, though not featured, usually display a more genuine scholarship than is to be found in the leading articles themselves.

The current number follows the format, scope and general content of its predecessors and equals them in interest. The leading articles, while not heavily weighted on the side of the scholarship, are at least informative and useful. The first, by M. Smeesters and the late M. Audouin, contains a persuasive defense of all three of the resolutions on general average adopted in 1933 by l’Union Internationale d’Assurances Transports; the second, by M. Siesse, contains an interesting account of the 1933 meeting at Oslo of the Comité Maritime International.

For American lawyers M. Siesse’s article merits more than mere passing notice. Though a minor point, he mentions, for instance, that delegates from England, Belgium and Holland all declared their local legislation, based substantially on the Hague Rules, was found to be working well with a notable decrease of litigation. Such observations are worth noting in view of our long pending

I. The extent to which substantial uniformity is lacking despite a formal uniformity may be seen by comparing English and American interpretations of the Harter Act, especially with reference to invalidating clauses. Australasian United Steam Navigation Co. v. Hunt, [1921] 2 A. C. 351; The Susquehanna, 296 Fed. 461 (C. C. A. 4th, 1924); see TEMPERLEY AND ROW-LATT, CARRIAGE OF GOODS BY SEA ACT (1925) 112.
White Bill, designed, as is well known, to supplant the Harter Act with the Hague Rules.

M. Siesse's article, however, is chiefly valuable for the light it throws on the one resolution which in the course of the conference finally attained the dignity of formal adoption. This resolution concerns criminal jurisdiction in collisions on the high seas and limits this jurisdiction either to the state of the officer's domicil or to the flag state. That the resolution is designed to fill the unfortunate gap seen to exist at the time of the famous Lotus case is confirmed by the discussion which took place during the conference. Though the need for such a resolution was also debated, doubtless few will disagree with M. Ripert's observation that it is worth while as it cuts down a possible source of future conflict, a desideratum ardently to be sought, especially at a time when expressions of aggressive nationalism and even of xenophobia are rampant.

Attempts in the conference to extend this limited criminal jurisdiction into territorial waters, as well as attempts to get concurrence on other questions, failed. As previously stated the conference is another reminder that the way to uniformity is a very slow and painful one.

Of the many cases set out in the Revue little can be said in detail. All three of the Italian cases reported in full, the Ada, the Adele and the Bucaresti, involve points of live interest to American lawyers. Attached to the first is a scholarly comment on the right of a seaman to get a salvage award. The decision itself allowed the award, the seaman having remained with and saved the vessel after the master had ordered its abandonment. The last, although it rested on the interpretation of specific articles of the Italian Code, also involved the much mooted question of the effect to be given recitals in bills of lading. Of the French decisions the interesting Mékong case was ultimately decided by the Cour de Cassation on a point of pleading, but the added comment goes deeper and contains an excellent discussion of presumptions of negligence for defective deliveries. The general thesis is sustained that such presumptions should play no part in collision cases. Passing reference to the res ipsa loquitur doctrine includes many references to American cases. Among the English cases reported and commented on is the interesting House of Lords' decision in Leisbosch, Dredger v. S. S. Edison, a case whose implications on causation and remoteness of damage are by no means of interest to admiralty lawyers alone. In a five-page comment the editors of the Revue reach the conclusion, generally acceptable in the United States, that the decision is sound despite its apparent severity. Of the seventyodd American cases, all extracted from American Maritime Cases, none attained the dignity in the current number of a full report or comment. The Supreme Court decision in United States v. Flores, though included among the seventy, fared no better than the rest.

Enough has been said to show the general character and real usefulness of the Revue. Unfortunately there are also some debit items. It is marred somewhat by typographical errors, a fault all too frequent in French publications, and its marshalling of cases loses some value owing to unavoidable editorial delay. To mention only one instance, the current number gives a summary of the Circuit Court of Appeals opinion in the Isis case, despite the fact that the Supreme

---

2. H. R. 3830, 71st Cong., 1st Sess. Originally introduced in 1923 by Representative Edmonds, of Pennsylvania, it was again introduced in 1929 by Representative White, of Maine.
7. 63 F. (2d) 248 (C. C. A. 2d, 1933).
Court reversed that decision almost a year and a half ago. While subsequent volumes may correct this, the delay will be appreciable.

Hardy C. Dillard.†


Mr. Justice Brandeis's criticism of the evils of the large corporation is well known; a recently published volume of his miscellaneous papers recalls that criticism at a time when capitalism appears to be moving on to yet greater concentrations of economic power. Now is the time to ask whether the concentration of economic power can be avoided or whether Mr. Brandeis in seeking to avoid it yearns nostalgically for liberties that passed with the nineteenth century.

Mr. Brandeis lays his curse upon bigness for three major reasons. Firms get too big to treat with their employees upon equal terms, too big to be efficient and too big to give their rivals a fair chance. These three approaches suggest widely different criteria by which to control the maximum size of firms.

There runs persistently through these papers the complaint that corporations of the size of the United States Steel Corporation are so powerful that it is inconceivable that they should be willing to treat with their workers upon equal terms. (39, 47, 74, 141.) They use their powers of resistance, their influence and their connections to prevent labor organization; they stamp out strikes and prevent them by espionage; it is useless to expect such absolute power to be surrendered. Corporations of such size inevitably set industrial bondage beside political freedom (39, 70, 72); they are states within the political state and more powerful than their host (72). They differ from the smaller corporation not in motivation but in their ability to translate their will into fact (70). Mr. Brandeis would destroy the large corporation because he looks forward to an industrial democracy in which workers will share not only profits but also responsibility for management, bearing the burden of mistaken policies in the same way as the employer. But, irrespective of the size of corporations, it is doubtful whether workers wish to undertake these functions, and Mr. Brandeis does not explain how they can do so. The attitudes of employers towards the unionization of workers have changed depressingly little since Mr. Brandeis was elevated to the Supreme Court, but these attitudes are not peculiar to the very large units; the history of the nineteenth century is full of complaint of the inability of workers to bargain with employers on a basis of equality even though production was organized on a small scale. The remedy for the crushing out of labor unions lies not in restrictions on the size of corporations; investigation of union leadership and judicial and legislative policy concerning labor union activities provides a better approach.

The large corporation is accursed also because of the absentee ownership that it involves. (74 et seq.) Stockholders become so numerous that none accepts responsibility for the policy of the corporation. The increasing diffusion of ownership intensifies this situation and is to be condemned rather than praised (77). Directors hold too many directorships to be acquainted with the details

† Associate Professor of Law, University of Virginia.

8. May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, 290 U. S. 333 (1934). Curiously enough, the current number of the REVUE, though it abstracts the Circuit Court's opinion, contains a reference in its bibliography (p. 523) to a law review comment on the Supreme Court holding.

I. The references in parentheses are to the pages in THE CURSE OF BIGNESS.
of the administration of each corporation. Labor policy is regarded as a detail of daily administration and is left to managers who act as stewards; industrial absolutism again results. The inference is that we should set an upper limit to the number of stockholders in each corporation, such that each can be reasonably well acquainted with the problems and policies of the corporation. Thus we may develop among owners that responsibility the disappearance of which Mr. Brandeis believes must be fatal to the public interest (110). Labor relations would doubtless be more humane, but workers might be worse off. A great many of the techniques of production that have been introduced in recent years would have to be abandoned; real participation in management by owners is possible only with quite small units. Efficiency being reduced, there would be less output. Investors would be prevented from spreading their risks very widely, but ability to regulate risks would diminish the need to spread them.

Mr. Brandeis also criticises the tendency of corporations to become too large to be economical as producers and distributors. He notes that economies may be obtained although firms grow beyond the size of the most economical plant; they may continue to benefit because they can economically collect market information or conduct research (135). He insists, however, that trusts and monopolies have never arisen out of attempts to attain the most economical size; “there is nothing in our industrial history to indicate that there is any need whatever to limit the natural growth of a business in order to preserve competition” (114). Thus growth may be either “natural” or “unnatural,” and if “unnatural” growth can be prevented competition will, apparently, be preserved. Mr. Brandeis accordingly supported the 1914 anti-trust policies. The various practices resorted to by inordinately powerful trusts in the effort to gain still further power should be specifically condemned, e.g., cutthroat competition, discrimination against buyers who refuse to deal exclusively with one seller, espionage, bogus independents and the like (105, 124, 131). The Federal Trade Commission, acting as policeman and inspector, was to secure compliance with the law, substituting publicity for secrecy concerning methods of doing business (134). Faults in the judicial machinery had hitherto enabled the trusts to attain power and to escape penalties when they had been adjudged guilty of flagrant breaches of the law. The Federal Trade Commission has been established, but the legal machinery has not been improved; the judiciary has severely pruned the powers of the Federal Trade Commission. Nevertheless the more crass monopolistic practices have probably waned in importance; yet firms have continued to grow in size.

This growth has been achieved largely through mergers. Mr. Brandeis refers to these methods of growth also as “unnatural”. Will the prohibition of mergers maintain competition? Mergers are one way of concentrating an increased volume of business under a single control. Price competition and sales promotion are alternative methods of attaining the same end. All can be used to obtain control of a market but all are equally useful in concentrating business to take advantage of more economical methods of production. To prohibit the merger would be to insist that business may be concentrated only by price cutting or by expenditure upon advertising or other methods of promoting sales. Yet the merger may be the more desirable method. A reduction in price by one firm to a level a little below that charged by his rivals does not usually attract all the business to the price cutter. Goodwill prevents rapid changes of allegiance on the part of buyers. Where they do change their allegiance, such differences in price are likely to be rapidly eliminated by rival firms accepting the lead of the price cutter. All must be content with lower prices until some firms pass out of business. Firms do not have to be so large that they can be called “trusts” before they take account of the effect of a period of low prices upon their profits. The
merger may seem a more attractive way of obtaining more business because the cost is more definite; thus enlargements in the scale of production promising more economical production may be made if mergers are permitted which would not be made if innovators must run the risk of starting a price war. A merger may also be less wasteful of plant than price cutting; the latter may result in new investment by the innovator at a time when existing plant is being driven out of use. Mergers would be indefensible in a world of perfect markets; they are defensible in a world of imperfect markets. But they are capable of evil. They induce uneconomical concentrations of business by their promise of promotion profits and by the speed and secrecy with which concentration can be brought about to control a market. They give little assurance that the benefit of economies of production will be passed on to buyers.

Regulation of the size of firms by merely eliminating unfair competition and mergers as "unnatural" forms of concentration will not, therefore, restore all the benefits of competition. The promised fruits of competition, *via*, the most economical adaptation of the means of production to the satisfaction of effective demand, prices that just cover the cost of production including a normal profit, and a constantly operating urge to the improvement of the technique of production, need no advertising. But can they be obtained by limiting the size of corporations? More than once Mr. Brandeis refers to the *dictum* "the law does not make mere size an offence" (107) and properly points out that size may be the result of fair competitive effort in the past and yet create gross inequality between competitors. herein lies the dilemma of competition; few economists would agree with Mr. Brandeis that "competition is in no sense inconsistent with large scale production and distribution" (109). Pursuit of economies of production, while perhaps rarely resulting in the survival of only one firm, often result in the survival of a relatively small number of firms. As these numbers diminish the influence of each on the market becomes more recognizable; an increase in output by one affects the price and has a perceptible effect upon its own revenue. It begins, like a monopolist, to seek the best combination of output and price. If any large proportion of all its costs are overhead costs *i.e.*, costs that do not vary directly with contemporary changes in output, it becomes fearful of price cutting in times when there is much unused plant in the industry. It seeks to dissuade price reductions by discouraging rivals from expecting great response from buyers when the price is cut. It seeks to bind its customers to it by advertising and other methods of sales promotion; its costs mount and, as profits fall, criticism of prices is dulled. Efforts to stave off price wars lead to efforts to prevent any change in price for long periods; or changes in prices are regulated by the acceptance of one firm as a leader. The Supreme Court then declares that "the fact that competitors may see fit in the exercise of their own judgment to follow the prices of another manufacturer does not establish any suppression of competition or show any sinister domination". Leadership is, however, rarely accepted without question; in consequence leaders tend to select policies likely to rouse no rival to defiance. If, therefore, we wish to maintain competition by setting limits to the size of corporations the limits must be set so as to eliminate these types of behavior.

The technical difficulties of prescribing these maximum limits are obvious enough. The desire to do so is conceived of a dislike of planning and the centralization of power that accompanies it. Yet this policy involves planning of an unnecessarily indirect and cumbersome kind. In order to determine the number of firms required in each industry it is necessary to establish criteria of competi-

tive conduct that are capable of general application. These criteria must be continuously applied to each market and the number of firms adjusted to the number required. Some means must be found of attracting additional firms into the industry when competitive conduct begins to fade away. It would be wise also to calculate the costs of this policy; there is no reason whatever to expect that the size of firms calculated by reference to the probability of competition in the future will also permit the most efficient operation. A number of now existing firms would require to be partitioned and smaller scale production might involve considerably higher costs. This possibility of increasing costs has perhaps been overestimated in the past but it cannot be ignored. But in the last resort the whole policy is self-defeating. One does not maintain competition by setting rigid limits to the size of firms; those already of the permitted size but who realize that they could produce more cheaply upon a larger scale are frustrated; they must lose their vigor of management. Faced by the dilemma of competition that is self destroying, the Supreme Court has grasped one horn and Mr. Brandeis the other. The former has argued that if the large firm has grown as a result of fair competitive effort in the past, the fact that its growth has so reduced the number of firms in the market that future competition is improbable is merely unfortunate. Mr. Brandeis says keep firms small or there will be no competition in the future; he refuses to face the fact that if firms are prevented from striving to attain the most economical size, we have no competitive struggle.

Two interesting dissenting opinions by Mr. Justice Brandeis are included in the volume, viz., those in the Oklahoma ice case and the Florida chain store tax case. Direct commitments of personal opinion concerning the curse of bigness are, of course, absent from these decisions, which turn more upon the powers of states rather than upon the wisdom of their policies. A reference in the ice case to a "common belief" that unbridled competition was one of the main causes of the present depression suggests that there has been too much rather than too little competition. Mergers cannot be blamed for taking the bridle off competition. Unfortunately the remark is not elaborated. In this case, moreover, Mr. Brandeis shows how even the pursuit of the most efficient size may result in local monopoly and explains the unsatisfactoriness of competition between a small number of firms. He would have permitted state control of entry into ice manufacturing as a means of regulating an industry inevitably monopolistic (prices being also controlled). His earlier writings, however, condemn efforts to control the prices of monopolies; profits may thus be reduced but prices are unlikely to be because the limitation of profit paralyzes initiative.

In the Florida chain store case Mr. Justice Brandeis dissented from a decision of his colleagues that a tax upon chain stores imposing heavier taxes where the stores were located in more than one county was invalid. Mr. Brandeis refers to the probable intent of the state to hamper the large chain stores and remarks that the wisdom of this policy is for the determination by the state. But the attack upon the large corporation inevitably revives the old antagonisms. He recalls the far-reaching consequences of the separation of ownership from control and remarks that the chain store corporations which were hampered were among the largest in the country. The state may have hoped to obstruct the concentration of wealth and power in large corporations or to discourage absentee ownership which was thwarting American ideals, converting independent tradesmen into clerks and "sapping the resources, the vigor and the hope of the smaller cities and towns." How often this plaint must have been uttered by individuals displaced by machines or newer methods—even in what we now regard

UNIVERSITY OF PENNSYLVANIA LAW REVIEW

as the most competitive era in our history. The prosperity of the past, on the other hand, came, Mr. Brandeis suggests, through the courage, energy and resourcefulness of small men whose initiative and effort are paralyzed by the large units; "only through participation by the many in the responsibilities and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of liberty" (178).

Can we resist and reverse forces that appear to be an integral part of the life of our times? Doubtless we can if we are sufficiently determined. But clearly we are not, partly for the good reason that we should pay a considerable price in reduced efficiency and in interference with business activity for the empty shell of competition. Mr. Brandeis's charges against the big corporation are justified. But as the bigness is difficult to remove it is better to attempt to raise the curse, to turn to the specific shortcomings of large units and deal with each. The dilemma presented by the self-destructive tendencies of competition must be met by planning the control of the broad outlines of the industrial system—not by binding the feet of industry.

Arthur Robert Burns.t


It has recently become the fashion for state governments to institute what is known as economy and efficiency surveys. Harassed by taxpayers' associations, chambers of commerce and other propagandist organizations, governors and legislatures have been asking technical experts to show them how to carry on the essential services of the state in a period of declining revenues. Many of these surveys have been worthless. They have too often been the work of bureaus or organizations located at a distance from the state being surveyed. These bureaus have sent their men into the state fully equipped with pictures in their heads of an administrative and governmental set-up to which they have tried to compel the local folks to conform. The results have not been complimentary to the theoreticians. The local folks have often decided that efficiency was bought at too high a price if it involved scrapping cherished traditions and time honored institutions.

What the people of Pennsylvania might have resented if told to them by outlanders, they may take to heart when stated by competent technicians from two of the largest universities in the state. This is a survey of the government of Pennsylvania by Pennsylvanians. It covers every phase of the state government and embraces almost every department and agency. Although less attention is given to the legislature and the judiciary than to the executive branch, recommendations are made which apply to the three branches. "There has been no desire," the report states, "to propose any sweeping or spectacular changes in the state government structure." Favorably impressed with the effectiveness of the existing organization, the attitude of the surveyors has been to invite changes in the belief that these will strengthen the work of the state government.

There may be some who doubt whether a spirit of friendly and sympathetic cooperation can or should exist between the staff of a survey and the department heads whose work is being scrutinized. But any other attitude is quite impossible. The recommendations of a survey need not be acceptable to the administrative officer whom they concern, but if they have not been worked out with his

† Professor of Political Science, Columbia University.
active assistance they are almost certain to rest upon a foundation insufficient to sustain them against his attack. The Pennsylvania survey appears to have enjoyed the cooperation of the survey staff and the department heads to the degree necessary to secure sound recommendations.

This report is more than a collection of recommendations resulting from a survey; it is a handbook of the government of the Commonwealth of Pennsylvania. With its useful index and abundant statistical data, the book should serve as a guide to public officials of the state which will enable them to bring about greater economy and efficiency on their own account without legislative intervention.

William Seal Carpenter.

† Professor, Department of Politics, Princeton University.
BOOK NOTES


In four recent disturbances of the sort which, if applied to super-heated nationalisms, may in the future provoke another world-wide war-disaster, the United States has made hesitating efforts to recognize its duties and liabilities as a leading power of the globe. Effective cooperation is denied by an opinion bloc nourished upon unctuous shibboleths framed by planter-politicians to gratify an agrarian, independent populace now extinct. "Consultation" is the latest device to lull the statesman who denies Europe's effective existence because he cannot see it from the rotunda of his midwestern state capitol. Mr. Cooper peddles the nostrum convincingly; but his clear account of its workings shows that peace will not ride far drawn by two horses so refractory as the United States and the League of Nations, even when the two are drawn together by the yoke of consultation. The doctrine is a patch, a string in place of the proper harness; but it will have served its purpose if it can draw our nation close enough to break us to cooperative effort. Consultation will have succeeded if further exertion toward international peace should follow as a consequence in the future.


Titles always lie. This book is no autopsy; it is a description of a spectral revel, in which every skeleton, large and small, now reposing in the diplomatic closet of the Department of State is made to emerge, and to dance at the end of strings skillfully pulled by the author. For accompaniment there is a genteel hymn of hate (of the Monroe Doctrine, of course) in South American rhythm. The burden of the whole ballet is that the Monroe Doctrine has been unnecessary, selfish, imperialistic, burdensome and harmful to true Pan-Americanism. Much of what the author has to say is true; the object of the work is to publicize these truths in the hope that some of the enormous globules of self-satisfaction in the United States may be punctured, and the way cleared for a sensible, understanding policy toward the countries of Latin and South America. The arrangement of the material is interesting and new, the style sufficiently journalese to permit of wide reading; the task set should be performed reasonably well, even though dry bones do clack a little loudly now and then.


Perhaps the world does move; but the criticisms levelled thirty years ago at universities and intermediate schools by President Lowell sound strangely pertinent today, and in many respects the goals of which he dreamed are still remote. The authority with which this author may speak is beyond cavil; the ideals which he urged will remain for years a spur to progress. Most important, those ideals must be kept in mind constantly in order that there may be no sliding back from eminences attained. This collection of papers shows the fault of all collections—there is much twisting and untwisting the same rope; but it is fully competent to serve as a reminder of evils which threaten constantly, and is indeed a scholarly formulation of bits of wisdom accumulated while administering a notable educational policy.

1. The Chaco and Leticia disputes in South America, and China's resistance to slow engulfment by Russia and Japan.