REVIEWS

A TREATISE ON THE LAW OF CONTRACTS. By Samuel Williston. Revised Edition. By Samuel Williston and George J. Thompson. New York: Baker, Voorhis & Co., 1936–1938. Vol. I, pp. xix, 926, Vol. II, pp. xi, 927–1723, Vol. III, pp. xii, 1725–2579, Vol. IV, pp. xiii, 2581–3669, Vol. V, pp. xiv, 3671–4699, Vol. VI, pp. xiv, 4701–5726, Vol. VII, pp. iv, 5727–6703, Vol. VIII, pp. 6705–7725. $85.00.

THE great architect is one who knows how to create a structure that combines the useful and the beautiful. The great legal theorist, the architect of doctrinal structure, should do no less. Although the primary object should be to mold and synthesize the fragments as they come from the courts into a system of doctrine that can be used to achieve desirable social ends, yet it can not be denied that there is a place for legal aesthetics. Any kind of legal work, however excellent in other respects, will suffer if orderly arrangement, good grammar or correct spelling are lacking. A body of law, though nicely calculated to serve the ends of justice, leaves something to be desired if it abounds in unsightly anomalies, piles exception upon exception, or is otherwise lacking in unity and coherence.

The serviceable and harmonious in all realms frequently, perhaps normally, go hand in hand, and each contributes to the other. But not always. Also at times there are conflicts, so that it becomes necessary to make a choice. What are the relative values of utility and symmetry in the field of law? Shall we tolerate occasional injustice for the sake of the symmetry of the legal structure or shall we endure the blemish of a concept if in some applications it fails to yield an acceptable result? Voices to which we are all disposed to listen have been heard on the issue.

> CARDOZO: "Concepts are useful, indeed indispensable, if kept within their place. We will press them quite a distance. Many a time they will give rise to rules which might just as well be opposite were it not that in giving adherence to the opposite we would mutilate the symmetry of the legal order, the relation of its parts, its logical coherence. These are values deeply imbedded in our law and its philosophy . . . A time comes, however, when the concepts carry us too far."[1]

> POUND: "Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation."[2]

1. PARADOXES OF LEGAL SCIENCE (1928) 62–63.
2. *Mechanical Jurisprudence* (1908) 8 COL. L. REV. 605.

Professor Williston is generally recognized as one of the great architects of the law. Llewellyn in the dedication of his Sales casebook has referred to him as "the master and the builder of our law of sales." No less is he the master and the builder of our law of contracts. Yet there have been times when I have felt that he has pressed a concept too far, that his emphasis on the nicety of internal structure has led to the undue subordination of practical ends, that in rare moments at least he has lost sight of the fact that the law of contracts was made for man, not man for the law of contracts.

An example of such overemphasis on the symmetrical is to be found in the treatment of reward cases. The learned author insists that all the services for which a reward is offered must be rendered after knowledge of the offer, in order to justify a recovery. That one who communicates with the police before learning of the offered reward thereby disqualifies himself from ever gaining a legal right to it, or any part of it, is contrary to the sense of justice of most people, and the majority of cases, where the problem has arisen, are opposed to such a view. But Williston says these cases are unsound and the only support he adduces for his position is a highly unreal supposititious case involving a Christmas present, which he says is the same on principle.[3] To this supposititious situation the reader is supposed to react in the opposite way. Therefore the effect of the reasoning is that in order to do justice to the mythical receiver of a Christmas gift, the principle must be preserved that the whole consideration must be given after knowledge of the offer, no matter what the injustice to actual persons who give information leading to the solution of crimes.

Again there is criticism in the treatise of the obviously sensible practice followed by most courts of dividing up rewards where several persons, though acting independently, have contributed to the accomplishment for which the reward was offered.[4] This also in the name of "principle." The truth is that principles of law developed largely for the commercial world simply do not work well in this little corner of affairs. But I would have no objection—and I do not see why anyone other than a legal Bunthorne should object—to letting the law of rewards have its own little anomalous wing in the house of contracts.

Let me hasten to add, however, that the kind of reasoning referred to above is not typical of the treatise. Most of the argument proceeds on quite a different level. Practical considerations are taken into account. Even the plea for what the author calls "respect for logic" is made on the ground that such respect alone makes possible the settlement of controversies without recourse to the courts. And "practical convenience is more important than logical exactness," but such considerations "must be very weighty to justify infringing the underlying principles of the law of contracts."[5] One may question the possibility or desirability of stifling litigation by "logical exactness"[6] and the pertinency of the thought as it relates to the argument against the doctrine of anticipatory breach, where it finds expression. Yet the ap-

3. § 33A.
4. § 74A.
5. § 1321.
6. See my review of Morris, *How Lawyers Think* (1937) 32 ILL. L. REV. 383, 384.

proach indicates no blind following of traditional "principle." Indeed with a greater or less degree of articulateness, principles are constantly evaluated in the light of administrative and social policy and the reaction of the average man to the results of their application. The view that a promise may be supported by a promissory estoppel is guardedly accepted with a minimum of historical argument,[7] although prior to the Restatement it was hardly looked upon as respectable, and after the Restatement Pollock at least regarded the doctrine as highly anomalous.[8] Professor Williston also espouses the view that an offer for a unilateral contract becomes irrevocable before acceptance if there is part performance,[9] in spite of the violence done to the general principle that offers are revocable.

Although in some instances Professor Williston has looked with favor on the mutilation of basic dogma by the ingrafting of new principles or the carving out of exceptions in the interest of justice or practical convenience, he has nevertheless, regardless of the social or moral considerations involved, remained adamant in refusing to look with equanimity on what he would doubtless think of as the torture of a concept to make it apply to a given situation. Once a principle or rule is established, there is no countenancing of any play at the joints. For example, he deplores the enforcement of charitable subscriptions either on the theory of mutual promises by subscribers for the benefit of the charitable institution or on the theory of a counter-promise by the institution to apply the amounts to be received for a stated purpose.[10] Implicitly the loose use of theories such as these is attributed to judicial stupidity or perversity. Seldom is there indicated any appreciation of the fact that concept wrenching is often due to social drives such as those which Billig has suggested may account for the state of the law of charitable subscriptions.[11]

Professor Williston has thus had a stabilizing influence on the law of contracts. Legal progress through the expansion of concepts has met with his constant opposition. Yet he is a conservative only in the sense in which Holmes was a liberal. His views on social questions are seldom ascertainable, for these he deemed irrelevant to his task. Such expressions as we have, however, mark him as at least mildly liberal in his social outlook.[12] What may pass for conservatism is actually austerity. In other words, his is a conservatism that is essentially intellectual, but only a little less stifling to progress on that account.

Whatever one may think of the philosophy underlying the treatise, it is clear that its discussions make an appeal to the legal craftsman. It is now trite to say that it is one of the real masterpieces of American legal writing. For seventeen years judges, practitioners and law teachers have found in the

7. § 139.

8. Pollock, Book Review (1933) 47 HARV. L. REV. 363, 365.

9. §§ 60, 60A.

10. § 116.

11. *The Problem of Consideration in Charitable Subscriptions* (1927) 12 CORN. L. Q. 467; SELECTED READINGS ON THE LAW OF CONTRACTS (1931) 542.

12. See *Freedom of Contract* (1921) 6 CORN. L. Q. 365; SELECTED READINGS ON THE LAW OF CONTRACTS (1931) 100.

first edition the most reliable answers to many of their questions and stimulation as well as quotation for the development of their legal arguments. The new edition differs from the first only in that it is more complete, more accurate, and covers many new developments since 1920. A wealth of material has been added to the footnotes and many additional sections have been interspersed. No doubt much of the credit for the additions is due to the co-author of the revision, Professor Thompson.

The errors in the first edition needing correction were surprisingly few considering the broad scope of the subjects covered. An example of an improvement in the interest of accuracy is to be found in the sections dealing with the cancellation of mutual debts. The material contained in the first edition[13] now appears with considerable elaboration[14] in a new chapter entitled "Conditions Implied in Fact and Independent Duties." In dealing with the effect of non-payment of an installment of the price in a divisible sales contract when the seller defaults in deliveries, the first edition stated that the buyer may not refuse payment because of a *later* default by the seller. The real problem, however, arises in the case of a *prior* default, and some of the cases cited held that such a default had no effect on the buyer's obligation. The new edition changes the word "later" to "previous." The first edition unduly minimized contrary authority, and gave an erroneous notion of the Illinois view, which is to the effect that the obligation to pay is excused if the damages for the seller's breach exceed the payment due and the buyer offers to release the damages to that amount. In the second edition the authorities on this point are accurately stated.

A number of the more than one hundred and thirty new sections are devoted to exposition of Restatement rules.[15] Notable among the others are those containing discussions of new developments in the law relating to letters of credit[16] and bankruptcy.[17] The six meager sections of the first edition on commercial arbitration have been expanded into a new chapter containing eighteen sections.[18] This chapter reflects many of the views of Mr. Philip G. Phillips, whose assistance is acknowledged in a footnote. A remarkably large amount of material is presented in brief compass with excellent critical comment, although some of the author's objections to the extension of arbitration are based more on a theory than on actual conditions, and the attempted sharp distinction between commercial and industrial arbitrations tends to minimize elements that are common to both procedures.

Even an eight volume treatise, when it covers so broad a field, has its limitations. A topic of such vast and increasing importance as the enforcement of collective labor agreements is covered in a little more than two pages,[19] although it should be stated that collective bargaining and other labor problems

13. § 859.
14. §§ 887E–887G.
15. §§ 1A, 2A, 57A, 60A, 103G, 140, 440A, 445A, 1516A.
16. §§ 1011A–1011E.
17. §§ 1982A–1982C, 1998A–1998D, 2000A–2000C.
18. Chap. LVII.
19. §§ 379A, 1423A.

are dealt with elsewhere. Requirement and output contracts[20] and the employee's bonus[21] doubtless receive as much space as can be afforded in a treatise. But the treatment of these subjects as well as the material on collective labor agreements is most inadequate, because each is included in a chapter devoted to a single doctrine and the discussion is confined to the application of that doctrine. Thus cases on the employee's bonus, covered in the consideration chapter, raise questions not only of consideration, but of offer and acceptance, conditions, statute of frauds, and certainty of terms. Collective labor agreements raise many problems other than that of the application of the third party beneficiary doctrine. On the other hand the inclusion of the subjects of real estate brokers' compensation[22] and exclusive sales agencies[23] in the chapter on contracts of employment has permitted a fuller treatment.

The interpretation of more or less standard provisions in contracts seems to come within the subject of the treatise. Although a number of common types of clauses are discussed in the new edition, as for example, satisfaction clauses,[24] it is probable that even an eight volume treatise could not cover very many of them. Some additional room for other subjects might have been made by curtailing the material on risk of loss in real estate contracts. This pet subject of the author received an inordinate amount of space in the first edition, yet it has been expanded in the new edition from forty-one to fifty-three pages.[25]

In closing I relate an incident that on its face may be thought to interject an inappropriate note of frivolity. But its point is a serious one, and with that explanation I risk it. Once I was going over the case of *Allegheny College v. National Chautauqua County Bank*[26] with my Contracts class. We came to the language of the court, " . . . though professing to apply to . . . (charitable) subscriptions the general law of contract, we have found consideration present where the general law of contract . . . would have said that it was absent." In a spirit of mild protest at the figure of speech I inquired, "Who is 'the general law of contract?' " As I look back I suppose the reply was obvious. With one accord the class responded, "Williston!" And there was merit in the answer, not only because the professor had said in his treatise exactly what the learned judge put into the mouth of the abstraction, but because Professor Williston, as no other individual, does personify the American law of contracts.

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20. § 104A. See also § 421A.
21. § 130B.
22. § 1030A.
23. § 1027A.
24. § 675A.
25. §§ 927–952.
26. 246 N. Y. 369, 159 N. E. 173 (1927).

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ANNOTATIONS ON SMALL LOAN LAWS. Small Loan Series. By F. B. Hubachek. New York: Russell Sage Foundation, 1938. Pp. lxv, 255.

THE preface states that "this is essentially a legal reference book." As such, it is competent and complete. It provides information as to all American statutes and decisions concerning the regulation of the small loan business. After general annotations dealing with the purpose and interpretation of the statutes and the cases involving their constitutionality, it proceeds to sectional annotations of the Sixth, or latest, Draft of the Uniform Small Loan Law, sponsored by the Department of Remedial Loans of the Russell Sage Foundation. The annotations give the state laws and decisions on the points covered by the twenty-seven sections of the uniform law. Thereafter follow a discussion of devices and methods used to evade statutory interest limitations, together with the relevant provisions of the uniform law controlling such evasions, then appendices containing drafts of acts, citations of cases, a bibliography, and an adequate index. The book is therefore the necessary desk manual for all those concerned with the legal aspects of this important business.

I do not wish to dismiss it, however, as being merely the competent legal tool which it is. A word should be said of the broader aspects of the accomplishment which this work signalizes. For here is the culmination of a successful laboratory experiment in social research leading to governmental action with important results. The rapacity of the loan shark has been proverbial, but for generations we did nothing about it except to forbid usury. This did not lessen the economic need, but made its satisfaction more expensive by driving the business underground. As a competent commentator puts it, the "most obtrusive characteristic of American money lending in the nineteenth century and the early years of the twentieth was its illegality."[1] This situation can be traced to the failure of American states generally to repeal their old usury laws, restricting lawful interest on loans to a maximum of 6, 8 or occasionally 10 per cent a year. Beginning in 1907, however, the Russell Sage Foundation sponsored competent and authoritative research in this field. From 1916 on it has recommended successive drafts of a Uniform Small Loan Law. As it happens, the author and his father have been connected with most of the legislation and much of the litigation in this field in their capacity as counsel for a small loan company; and the author has been chairman for ten years of the law committee of the American Association of Personal Finance Corporations. The consequence of the research and of the public agitation for protection of the small borrower is that thirty-three states[2] now have legislation regulating the industry along lines for the most part either directly following or similar to those pointed out by the research. The business is one of the most strictly regulated industries in the country; indeed some say it is the most strictly regulated. Nevertheless it has grown and prospered, while supplying a real social need. The story is a thrilling and a satisfying one. It is a case study of research productive of results of governmental action which has protected the needy, and at the same time benefited the business itself by directing it along respectable and legal lines.

1. May, *Small Loans* (1934) 14 ENCYC. SOC. SCIENCES 105, 107.
2. Including the District of Columbia and Hawaii.

Perhaps other industries prone to despise academic research and to resist public control might gain by a study of this history.

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THE FEDERAL DEATH TAX. By John E. Hughes. Chicago: Callaghan & Co., 1938. Pp. xiv, 519. $10.00.

PLINY the younger has been credited with the complaint that a death tax is an unnatural exaction since it augments the grief and sorrow of the bereaved.[1] Although Mr. Hughes professes at the outset to "favor an Estate Tax" on the usual social grounds,[2] he later betrays such an animus towards the tax, at least in its present form, as to make Pliny's disapproval seem mild indeed.[3]

That the author writes from a "point of view" is, of course, entirely proper and tends to impart color to the book where it might otherwise be flat. But to the extent that it lacks objectivity, its usefulness as a guide to the future is necessarily impaired. Thus, Mr. Hughes defends[4] at length the decision in *Bowers v. Commissioner,* 90 F. (2d) 790 (C. C. A. 7th, 1937), where the court had plainly departed from established principles. Shortly after publication of the book, that decision received the most crushing blow that can be dealt by the Supreme Court, namely, a *per curiam* reversal.[5] But even though it frequently plays the role of the advocate, rather than that of the scholar, this volume will be helpful to counsel seeking support for their position in litigation.

The book contains much that is useful. It could hardly be otherwise when viewed against the broad background of the author's rich practical experience and in the light of the rigorous standards which he set for himself in its preparation.[6] There are fourteen chapters, one of which deals with the gift tax. The first chapter contains a concise history of Federal death tax legis-

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1. See SHULTZ, TAXATION OF INHERITANCE (1926) 6.
2. See Pp. iv-v.
3. See Pp. 45-47.
4. Pp. 71 *et seq.*
5. Helvering v. Bowers, 303 U. S. 618 (1938).

Similarly, the author quite plainly attempts to prove that the Joint Resolution of March 3, 1931 [c. 454, 46 STAT. 1516 (1931)], is unconstitutional [pp. 174-178], and here again publication was followed by a unanimous decision of the Supreme Court reaching the contrary conclusion. Helvering v. Bullard, 303 U. S. 297 (1938).

6. The Preface states that he "has read the briefs in every Federal Estate Tax case presented to the Supreme Court of the United States, many briefs in the Circuit Courts of Appeal and Board of Tax Appeals, and has also read the recommendations of the Treasury Department, Reports of the Committee on Ways and Means of the House of Representatives, Reports of the Senate Finance Committee and the Debates in Congress concerning each Estate Tax Law enacted by Congress and the amendments thereto." P. iii.

lation and a brief outline of the structure of the present law. The second and third chapters are not confined to the estate tax, but are concerned generally with the constitutional scope of the Federal taxing power and rules for interpreting tax statutes. It is in that discussion of constitutional questions that the book is probably weakest. The comments are frequently superficial and sometimes misleading.[7]

The next three chapters deal with the heart of the estate tax, namely, what is included in the gross estate. The treatment of deductions in chapter VII is adequate, although here, as in other fields of taxation, the hazards of rapid obsolescence at the hands of the Supreme Court after publication are strikingly revealed.[8] Chapter VIII consists of a thorough discussion of valuation of property for estate tax purposes and has an astoundingly exhaustive appendix which classifies the decisions in accordance with the type of property involved. The next five chapters—dealing with rates of tax, duties of the executor, administrative and procedural matters, and problems affecting estates of non-resident aliens—proceed in a conventional, if somewhat perfunctory manner. A final chapter, which treats of the gift tax, does not contribute very much over and above a mere restatement of the statutory provisions and the Treasury regulations.

While *the* book on estate taxes remains yet to be written, Mr. Hughes' volume nevertheless represents a distinct contribution. Perhaps it may be an impossible or futile task to attempt a definitive treatise on this subject. In any event, the constant outpourings of the courts with respect to the existing statute and the proposals for rather fundamental legislative changes in the estate tax structure[9] combine to make the task an uninviting one.

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PRICE AND PRICE POLICIES. By Walton Hamilton and Associates. New York: McGraw-Hill Book Co. 1938. Pp. xiii, 565. $4.00.

THIS book is the report of a six-man exploring party into the greatest present day frontier of American public policy. The operating characteristics of seven major industries have been examined with price and price policies as a point of departure. Such surveys should have been made long ago for every major business, but the difficulty is that "arrangements which make up an

7. Thus, at page 9, note 5, appears the unqualified statement that "The income tax is a direct tax." But even the much criticized opinion in Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 579 (1895), shows that it would be unwarranted to assume that a tax on income derived from professional services is a direct tax.

8. Taft v. Commissioner, 304 U. S. 351 (1938), which was decided after publication of the book, has already become a cornerstone of the law with respect to deductions.

9. See Statement of Roswell Magill, the then Undersecretary of the Treasury, discussing a proposal to consolidate the estate and gift tax provisions. N. Y. Times, August 21, 1938, pp. 1, 15.

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industry can never be caught and imprisoned within the pages of a book; usages are gone or remade before we can exhaust their actuality." For six individuals to carry through such a survey of even seven major industries was a tour de force. Recognition of its extent should be adequate coverage for the limitations of the pictures presented. As the book is modestly described by the principal author in the introduction "It exhibits only a few fragments from the world of business . . . Persons in quest of a royal road to an understanding of how the whole economic order works must go elsewhere. Here is set down no more than a prologue to American industry."

This book projects the fearless curiosity of a lawyer led through the fields of economics into fact, in his search for tests as to what the public interest really demands in regulation of industry. While Professor Hamilton is a teacher of law, the gap between his profession and this work is bridged by the anti-trust concept evolved by the courts—that there may lawfully exist such animals as cooperative restraints of competition which are reasonable and in the public interest, or at least not against the public interest. These restraints are usually related to price. The first step in the quest for standards of judgment as to when industries—in pricing or otherwise—are operating in the public interest must be to find out how industry operates. But the fact, emerging with startling force from a reading of this book, is that there is no such thing as "industry". Rather, each industry is most distressingly dissimilar in its major characteristics from other major industries. If the study of industry now under way in Washington under the auspices of the National Economic Committee should perform for each major industry the task of exploration that has been begun by Professor Hamilton and associates, the foundation for erection of standards and determination of public policy would be laid. But in view of the fundamental dissimilarities between industries much wise thinking would remain after the laying of the foundation.

Assuming that price and price policies are understood at least for a single industry, the problem remains of establishing devices of control consistent with our constitutional law and the stubborn practical realities of that industry. A device must not be too exclusively based on force of authority or it will run afoul of both the constitutional law and the untractable facts. One of the contributions of this book is the modest recognition of the necessity not only for a practical means of raising serious industrial problems, but also for caution in the experimental approach to their solution. It is submitted that the field is so far from being understood, that the experimentation must involve a very minor degree of coercion, either from the State or from recognized industry agencies, or it will be impossible to avoid the type of breakdown illustrated by the NRA prior to the Schechter case.

The authors point out that as a part of the continual shift of industries from the competitive pattern to public utility status "It came to be questioned whether the ideas from which the anti-trust acts were fashioned were the most enduring stuff." Again, "A test of a public policy by reference to the facts is difficult; there are far more accounts of how competition is supposed to operate in general than of its actual performance in specific industries."

This book is the initial effort to meet the latter need. The selection of industries for the start is interesting and justified by the results. The three

majors at the top of the list supplement each other—the automobile, the automobile tire, and gasoline. Public policy in connection with such industries cannot be well considered unless it recognizes that in industries which depend upon each other the effect of one price policy on supply and demand may be practically, if not entirely, immaterial compared to the force of the activity or inactivity of the other related industry. The next selection, cottonseed, is a fascinating picture of a structure of joint products, oil, meal, hulls, and linters, and the relation of costs and prices under such circumstances. Dresses, one of our most important industries, where small units prevail and old-fashioned competition might be expected to demonstrate its virtues, is shown as a medley of customs, romantic notions, of untrained entrepreneurs, insecurities, rigidities, abuses and dilemmas. Whiskey and milk, the remaining two industries, of course introduce new elements of public policy and accretions of regulation, but the area affected by the public policy and the extremely miscellaneous and accidental interrelations of differing public policies applied to the same industry by states, cities and the Federal Government, are worthy subjects for an entire book in themselves.

The insight of the authors into fundamental intangibles of the several industries is illustrated by their comments on the plight of the automobile industry in time of depression. After observing that the drying up of demand would bankrupt any industrialist "less munificently buttressed with cash surpluses", they go on to point out that even with such surpluses the "going would be difficult were not the manufacturer in a strategic position to distribute the costs of adversity." The costs can, and as recognized by this approach, *must,* be shifted "to other corporate units who can levy no demands upon his treasury—to manufacturers of raw materials, whose charges represent some 60 per cent of the wholesale value of the car; to laborers, for whom no employment can be found and who therefore have no claim to wages. As a result, the industry's disaster appears publicly in the garb of a deficit in the purchase of steel, coal, machine tools; in the balance sheets of parts makers, who go under quietly; in the losing race between income and outgo of the dealer; in the shock of a lower living standard, which the laborer must take; in the expenditures of the government for relief. Here are several grounds of complaint, yet there is no personal villain in sight."

The authors' treatment of the tire industry recognizes the correlative effect of concentration in related and dependent industries. Thus: "the great concentration in the automobile industry has produced an equal concentration in the buying of tires." In this connection the importance of such intangibles as the friendship between Firestone and Ford, the vital necessity of holding a large contract to avoid destructive rearrangements and higher unit costs, and the loss of prestige that would follow loss of an important contract, are listed as background for the "bitter struggle" among the large tire manufacturers for contracts from automobile companies. "There is a competition of giant business as well as of petty trade. It is quite fitting for the government to insist upon a fair field and no favors among rival tradesmen. But in its regulatory endeavors it should trim its sails to the winds of change that blow; it should not attempt to impose the hypothetical norms of trust-busting statutes upon an industry already overcompetitive. And it should not play

favorites between rival forms of marketing, or, above all, put a premium upon inefficiency."

One of the most interesting studies in the collection is the study of dresses and, here again, the ordinary rules of orthodox economics seem to be of slight importance in the exploration or description of what actually happens. The importance of personnel, in an industry where style may be expected to rule any program, overshadows all other considerations. Here, too, is exposed the fallacy in the classical assumption that the operation of free competition may be counted upon to move forward the welfare of the efficient and eliminate the inefficient. Here, as elsewhere in less startling degree, the threat or arrival of insolvency is more likely to engender a change in name than actual disappearance of concerns, and "inefficient" concerns and individuals, far from being eliminated by insolvency, return to the fray strengthened by freedom from capital expenses borne by their competitors. This study is highly recommended for sheer interest as well as for the light thrown on the operation of one enormous segment of industry where the large concern is non-existent.

The final monograph by Professor Hamilton, entitled "The Politics of Industry", broadens the book by a wealth of illustration from industries other than the seven majors. While the lack of conformity between orthodox economic assumptions and the actual operation of the chosen seven industries might seem a factor resulting from the choice, the references to other major industries suggest that a broader survey would show departure from orthodox theory to be the rule rather than the exception.

The kaleidoscope of price seems to leave little of simplicity conforming to the romantic notion that price-making can be relied on as a simple regulator to keep industry in order. To list the departures from the norm in price-making takes Professor Hamilton page after page of almost index terseness. Consider the important matter of the ever-shifting changes in make-up of the good itself for which price is set. In many situations constant *product* change may go on with little or no relationship to price change: "For many commodities a conventional unit measurement has been established in the likeness of a convenient coin. A bar of chocolate has through prosperity, depression, and a business upturn remained true to its nickel; the accommodation of the commodity to changing costs has been made in thickness—its least visible dimension. A loaf of bread, so far as the eye can detect, may retain its identity for months; yet slight additions or decrements of weight make its fixed price a variable. . . . A Gillette razor blade has for thirty years, except for an occasional lapse or a bargain offer, sold at 5 cents; but in that period the blade has undergone constant modification. The price of a well-known shoe has until recently stood foursquare against all the winds of economic fortune, though the pairs that have carried name and price tag present a slowly changing parade. Women's dresses have for years been grooved into the same price lines. Yet at any moment the articles priced at an identical figure may not have even a silhouette in common, and between the garment of 1920 and that of current vintage lies a revolution in design and taste. . . . In fact, a long catalogue of wares is beat upon too insistently by taste and technology to yield the materials upon which statistics of price may be firmly grounded."

Many other variables are pointed out, such as the giving of premiums, gratuities, varying guarantees, service, return privileges, etc. The moral: "The distinction between flexible and inflexible prices must be accepted with critical scrutiny; the stability of a price that seems to stand against the buffets of a disorganized market may conceal breakdowns in other terms of the bargain" and, "the function of price has less to do with the creation of demand than with the disbursal of custom among competitors." Not only is assumed rigid price to be taken critically, but flexibility may be a hoax in its pretense of public protector. Consider farm products, bituminous coal, textiles, and the building trades. "A flexible price has been unable to turn an advancing technology to effective use, has aggravated the host of the unemployed, and in its failures has created sources of further demoralization."

While they are in accord with most current observers that, in knowledge, technique, and resource, human and material, the stuff of a greater abundance is at hand, and therefore that we should grasp that greater abundance, the authors should be listened to when they conclude: "If a new agency is to be invoked against disorder it must be fitted to its office. . . . The state, with the club of the criminal law, can never beat the behavior that attends the pursuit of gain into accord with rigid norms. The quick staccato of industry cannot be timed to the decorous processes of a legal procedure developed in the days of petty trade. . . . A proper freedom of collective action, within the strict limits of public interest, must be accorded agencies of business." Of course, this means authority and control, both public and private. Some may prefer the clock turned back. "But from authority it is too late now to effect an escape. The sovereignty of the market is past; the political controls are here and we must subdue them to the public interest as best we can." Granting the inevitable, there is still a yearning for simplicity, but the prophet does not hold out hope of simplicity and, as befits a prologue which exposes an almost infinite variety of problems, exhorts only to base exercised authority on adequate knowledge, "a suiting of policy to the industry, and the contrivance of measures to meet the occasion." This is good advice.

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New York, N. Y.

AMERICAN FAMILY LAWS, Vol. V, INCOMPETENTS AND DEPENDENTS. By Chester G. Vernier, assisted by J. Rex Dibble and Richard A. Frank. Stanford University Press, 1938. Pp. xxxiii, 707. $6.50.

WITH this useful and interesting work, supplemented by another[1] which brings the material in the five volumes up to date, Professor Vernier concludes his monumental survey of the family laws of 51 American juris-

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1. American Family Laws, 1938 Supplement, by Chester G. Vernier, assisted by Richard A. Frank. Pp. xxiii, 178. $3.50.

dictions.[2] The present volume, naturally, follows the plan of its predecessors. Its four parts, dealing respectively with Infants, Aliens, Drunkards, and Insane Persons, are divided into sections, each of which contains a summary of the relevant statutes, accompanied in some instances by a short discussion of the case law and by brief critical comment; a table giving the content of the statutes in each jurisdiction, or in some instances simply a list of statutory citations; and a bibliography of pertinent legal literature, including law review notes and comments. Federal statutes are not included, nor is non-legal literature.

In some instances[3] the omission of case materials and Federal statutes and treaties[4] (to which, however, reference occasionally is made) necessarily prevents anything like complete coverage of the matters in hand. It would exhibit a gross lack of understanding to characterize these omissions as regrettable in a work of this scope. For not since Stimson's American State Law has the mass of state statutes in a sizeable legal area been gathered together and interpreted in the light of a critical analysis of subject-matter. Now, other students, possessing less ingenuity and painstaking scholarship, can use Vernier's work in conjunction with their own investigations of more accessible materials.

Volume V, as the Preface notes, does not fall strictly within the field of family law but relates rather to the law of persons. Since traditionally the two are studied together when the law of persons outside the family is studied at all, few will quarrel with Professor Vernier's combination of subject-matter. In some ways this final volume is more revealing than any of the others, for most of the topics which it treats have not been dealt with to any extent in previous literature and have received much less popular attention than marriage law administration, divorce, and the status of married women, or even illegitimacy and non-support. Consequently this latest volume will well repay a systematic examination. Various aspects of infancy, such as apprenticeship, susceptibility to service of process, and minors' bank deposits; the entire matter of the civil status of aliens; public provision for the care of drunkards; and numerous specific regulations pertaining to the capacity of insane persons, are dark corners of the law. It is important to have light cast into them, both because of their social significance and because of their occasional importance in individual affairs.

Especially valuable is Professor Vernier's assembly of materials relating to insanity. Here it clearly appears that mental disorder is a matter of legal concern in surprisingly numerous connections and that statutory definitions of "insanity", together with legal methods of determining its existence, are utterly confused and unsatisfactory. It would be an incalculable boon if the author's work were to stimulate legislative clarification and reform in this vital matter.

2. The previous volumes are: I, INTRODUCTORY SURVEY AND MARRIAGE (1931), Book Review (1932) 42 YALE L. J. 158; II, DIVORCE AND SEPARATION (1932), Book Review (1933) 42 YALE L. J. 1001; III, HUSBAND AND WIFE (1935), Book Review (1936) 45 YALE L. J. 742; IV, PARENT AND CHILD (1936).

3. See § 282, on emancipation.

4. See Part X, Aliens.

American state legislation possesses, on the one hand, a variety that springs both from its popular origin and from the multifarious nature of the life with which it deals. On the other, it possesses fragments of a scarcely-visible pattern which gives ground for the hope that statesmanship may yet succeed in producing an administrable system of law. Professor Vernier has laid bare the variety of state legislation in family law and, at the same time, has applied the magic chemical that has revealed the elements of its pattern. As a consequence, the world of American legal scholarship is permanently in his debt.

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A REVIEW OF BOOK REVIEWS

FEDERAL JUSTICE. By Homer Cummings[1] and Carl McFarland.[2] New York: The Macmillan Co., 1937. Pp. vii, 549. $4.00.

Federal Justice, subtitled *Chapters in the History of Justice and the Federal Executive,* has fared well in the hands of reviewers in about thirty publications of wide circulation or of scholarly or professional standing.[3] In only one has

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2. Assistant Attorney General of the United States.

3. Including the following hereinafter referred to in the text or notes: Marquette Law Review, Herbert W. Rice (April, 1937); Hartford (Conn.) Daily Times, Bulkley S. Griffin (Jan. 9, 1937); Review of Reviews, Herschell Brickell (Feb., 1937); California Law Review, Wendell Berge (May, 1937, Vol. XXV, No. 4); Boston University Law Review, John D. O'Reilly, Jr. (June, 1937, Vol. XVII, No. 3); American Political Science Review, J. A. C. Grant (April, 1937, Vol. XXXI, No. 2); Christian Science Monitor, F. L. P. (Weekly Mag. Sec. Jan. 27, 1937); Springfield (Mass.) Republican (Sunday, Jan. 31, 1937); Yale Review, Harvey C. Mansfield (Summer 1937, Vol. XXVI, No. 4); Federal Bar Association Journal, John W. Brabner-Smith (April, 1937, Vol. III, No. 1); University of Pennsylvania Law Review, Fred P. Glick (April, 1937, Vol. LXXXV, No. 6); Commonweal, William Franklin Sands (Feb. 19, 1937, Vol. XXV, No. 17); New York Herald Tribune, Mark Howe, Jr. (New York Herald Tribune Books, Sunday, Jan. 31, 1937); New York Times, Francis Brown (Jan. 11, 1937), and see also New York Times Book Review, Charles Willis Thompson (Jan. 31, 1937); Philadelphia Record, Ralph W. Wescott (Jan. 5, 1937); News and Observer (Raleigh, N. C.), Josephus Daniels (Mar. 7, 1937); Washington Daily News, H. L. (Jan. 5, 1937); Georgetown Law Journal, Oscar A. Provost (May, 1937, Vol. XXV, No. 4); American Bar Association Journal, James Grafton Rogers (June, 1937, Vol. XXIII, No. 6); Daily Journal of Commerce (Seattle), Chas. S. Albert (Mar. 17, 1937); New York World Telegram, Herbert Little (Jan. 6, 1937); Chicago Daily News, Judge James H. Wilkerson (Jan. 27, 1937); Bridgeport (Conn.) Sunday Post, Anne Whelan (Jan. 10, 1937); Time (Law, Feb. 1, 1937); Saturday Review, Charles Bunn (Feb. 6, 1937, Vol. XV, No. 15, New York); Evening Star (Washington, D. C.), Rex Collier (Jan. 8, 1937); New York Post, Herschel Brickell (Jan. 13, 1937); Journal of Criminal Law and Criminology, William Renwick Riddell (Sept.-Oct., 1937); Stamford (Conn.) Advo-

the review been unfavorable. An independent appraisal is of course the function of a reviewer. In this case, however, a survey of prior reviews is of more than usual interest and throws light both upon *Federal Justice* and the curious art of book reviewing. As an experiment, at least, the views of these earlier reviewers—with no design to turn the tables to show the reviewers reviewed—will serve as an introduction to the brief estimate of this reviewer.

The reviewers have characterized the contents of the volume in one or both of two ways. They have listed the historical subjects or periods treated in successive chapters of the book—the problems and methods of the Federalists; the controversies of the Jeffersonian period; the struggle over the second Bank of the United States in Jackson's time; the legal incidence of territorial expansion; slavery, Civil War, and reconstruction; lawlessness in the far West (and corruption in Washington); politics, business, and the western railroads; extraordinary litigation over basic patents which have become the symbol of American civilization; the sordid story of American prisons; the development of federal detective agencies (recently a timely subject but given a scant chapter); fraud and high scandal in the disposition of natural resources; the legal sidelights on the World War; the development of a federal criminal law; and the use of troops for law enforcement in times of peace. Also they have emphasized the colorful story of the peculiar origins, growth, responsibilities, and shortcomings of the officers of the Department of Justice and their historical predecessors, the "progress of jurisprudence from the earliest days in American political history,"[4] the administration of federal justice, or the development of the American constitutional system—as these several themes "reflect the dominant tendencies of American life,"[5] "mirror the nation's growth,"[6] or affect or have been affected "by the life and times of our people in each period of our national development."[7]

On the whole, the volume has been found readable for lawyers and laymen alike, as well as both nonpartisan and dispassionate—conclusions which have come perhaps as somewhat a surprise, since the writings of public officers are commonly suspect as dull and biased.[8] The one unfavorable review, in the New York Herald Tribune, adds to its other statements the observation that, while "occasionally illuminating" but "never inspiring", the authors, "like good lawyers", have plodded "with heavy foot-noted tread from one topic to another"—though it speaks of the first chapters as "written with discriminating intelligence" (other reviewers seem to prefer later chapters) and the whole as "written with careful industry." James Grafton Rogers, in the American Bar Association Journal, concludes that "it is not for the reading of him who runs." However, other reviewers, in both technical and popular publications, find it not only readable but "interesting", "fascinating",

cate (Jan. 6, 1937). Of these, the review in the New York World Telegram is identical with that in the Washington Daily News, and the review in the New York Post is an adoption of the one in the Philadelphia Record.

4. Christian Science Monitor.
5. New York Herald Tribune.
6. Time Magazine.
7. California Law Review.
8. See opening paragraph of review in New York Times for January 11, 1937.

"entertaining", "absorbing", "suitable for evening reading", "exciting", "vital", "colorful", "clear and simple" in style, "notably devoid of the obfuscations of legal phraseology and ideology", "meaty", the product of "gifted pens", and, in the words of Francis Brown in the New York Times, a book which "despite its forbidding title contains wit, humor and good English prose". Mr. Justice Riddell, of the Supreme Court of Ontario, in the Journal of Criminal Law and Criminology, speaks of it as a "handsome" and "charming volume" which "must be read to be appreciated . . . Oh! *si sic omnia.*"

Few of the reviewers suggest any bias or partisanship in the volume. The hostile reviewer in the New York Herald Tribune deplores as "unpardonable" the omission of chapters on the scandals of the Harding administration and the legal difficulties raised by prohibition, and concludes, somewhat irrelevantly, that "apparently Democratic devotion to Federalism has become so passionate that discussion of the corruption of Republican officers of the Federal government must be suppressed." The Commonweal review echoes this thought on Federalism more searchingly and in less bitter words, while the Marquette Law Review mentions the omissions as merely "minor defects in an admirable survey". However, these omissions were undoubtedly deliberate. The authors may have had in mind that these subjects had recently been given much attention in the press and elsewhere, would require a great deal of space, might seem to be an unfair emphasis on the less favorable aspects of the work and problems of recent administrations of another political faith, and could therefore be eliminated without affecting the essential story. It should be noted that both subjects are touched upon. The earlier background of the land and oil scandals is developed, and the position of prohibition in the development of federal criminal law is sketched.

The Seattle Journal of Commerce sees "an occasional tendency to slam the Supreme Court and not to hold John Marshall as sacrosanct as the legal fraternity in general is wont to do", Time Magazine finds an "emphasis and appreciable New Deal bias" placed on some of the "references by Presidents and great U. S. legalists to the Constitution and the Supreme Court", the New York Times discerns "a readiness to bear down on men who were inclined to favor unduly business or financial groups", and the American Bar Association Journal perceives that "here and there the interpretations of events are tinged a little with current political views" but suggests, later, that the chapters "on the various epochs of legal warfare between the government and successive groups of private enterprises are the most interesting in the book." Other reviewers find the volume dispassionate, carefully avoiding partisanship or propaganda, and written "with rare good taste."[9]

As might possibly have been anticipated, and despite Mr. Cummings' carefully explanatory and explicit introduction and acknowledgments, there is a curious issue raised by some of the reviews in respect to the authorship of the book.[10] But no reason appears for believing that the acute understanding

9. California Law Review; Hartford (Conn.) Daily Times; American Political Science Review; Georgetown Law Journal; Chicago Daily News; Bridgeport (Conn.) Sunday Post; Federal Bar Association Journal; Stamford (Conn.) Advocate; News and Observer (Raleigh, N. C.); Daily Journal of Commerce (Seattle).

10. Seattle Journal of Commerce; New York Times; American Bar Association Journal; New York Herald Tribune; The Yale Review.

displayed in the book of the types of legal problems which reach the Attorney General, and of the difficulties encountered in answering them, and the acute understanding and clear account of the inter-departmental struggles and political pressures to which the Department of Justice and the Attorney General are unavoidably subjected have come from others than Mr. Cummings and Mr. McFarland, who have personally and officially experienced these struggles and pressures.

If style is a criterion, the volume is undoubtedly the work of Mr. Cummings and Mr. McFarland. To one who has read with care even a part of their previous individual writings, in innumerable instances there are to be found combined in *Federal Justice* the smooth running, rhythmic prose of Mr. Cummings and the thoughtful provocative inexplicities of Mr. McFarland. In the last analysis, however, the authors should regard the doubts as to authorship as flattering, for their basis would seem to be that *Federal Justice* is far too good a book for public servants to have written, even in an administration which seems to produce many books and which shows a distinct partiality for scholarly (perhaps at times in the eyes of some, too scholarly) administrators.

While the reviews differ somewhat—and conceivably might have varied as widely as the personalities and interests of the reviewers—they indicate a surprising agreement. *Federal Justice* has very properly fared well in the hands of the reviewers in respect both of the rather extraordinary number of reviews and the very large majority which comment with favor, some with very good favor, upon the book. It was a great undertaking, well done. No one before had comprehended the possibility of such a book or dared to attempt the gargantuan task, both personal and supervisory, of assembling and classifying the materials, and then analyzing and writing about them. The volume is a great service to history, to the science of government, and to democracy. Especially is it a service to democracy because one cannot read it without a thankful appreciation of the fact that democracy, clumsy and inefficient in some aspects as it is, is so only as the incidental price of the great virtues of freedom, and that democracy, though it lumbers in its motion, lumbers inevitably forward.

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AMERICA ON RELIEF. By Marie Dresden Lane & Francis Steegmuller. New York: Harcourt, Brace & Co., 1938. Pp. 180. $2.00.

THE success of democracy depends upon widespread understanding of the functioning of its institutions. It is highly desirable, therefore, that a large audience should be secured for a book dealing with those new institutions in the field of public assistance which have come into existence during the present decade. The great expansion of legislation in the spheres of social

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welfare, social insurance, and unemployment relief increases the timeliness of this discussion of the evolution of the relief set-up since 1933, of the relief problems presented by specific groups, such as women, white-collar workers, and young persons, and of the unmet needs of certain groups of the relief population. The authors' treatment is fundamentally sympathetic but there is criticism of particular policies and methods. Criticisms of the present work program arise principally out of the conviction that it has been a mistake for WPA to swing "far away from the social workers who ran the FERA, far away from social work technique in relief."

The social worker's attitude is revealed, for instance, in the authors' contention that there is no justification for the payment of a security wage to artists, musicians, and theatre workers higher than that paid to carpenters, painters, and electricians. "From the viewpoint of need, it would be difficult to build a case for special treatment of this particular group of workers over and above other groups." This attitude disregards an underlying principle of the security-wage schedule—that all WPA employees shall not be reduced indiscriminately to the same dull, basic level of need. On the contrary, it is the purpose of the WPA to render the conditions of employment as nearly like regular employment as possible (within the obvious limitations imposed by the fact that this public employment will be confined to the period during which private employment is not available). Unless WPA employees are able to regard their jobs as genuine employment, the benefits of work over the dole can hardly be realized. Accordingly, differential wages are paid, not only according to variations in living costs and local prevailing hourly wage rates, but also according to the training and qualifications necessary for the assigned job and according to prevailing estimates of the social value of the contribution made.

The book fails to emphasize that the American preference for work instead of a dole is founded largely on the fact that every man's activities are normally organized around a job. Our habits and thinking are shaped by the fact that the economic head of a household has some sort of employment. When the rewards of work are regarded from a social point of view, such factors as social status and mental satisfaction are hardly less prominent than the wages received.

The authors are critical of the failure of existing relief programs to incorporate vocational training programs to a greater extent, notably for unskilled workers and youths without work experience. Concededly, a more effective organization of the labor market is desirable. Perhaps this improved organization should include job-training as well as job-placement. In this connection, however, an obvious fact is often lost sight of: unemployment exists predominantly because of a shortage of jobs and not because trained workers are lacking for available jobs. The authors also criticize the Federal Government for turning its back on the health problem. There is widespread agreement that this is a major field where Federal action is not only urgently required but highly probable. Present planning and future action have as a point of departure the very comprehensive National Health Survey undertaken during the winter of 1935–36 by the Department of Public Health with WPA funds, the findings of which are now becoming available in printed form.

The authors conclude their study with the recommendation that: "what is at present a work relief program should be transformed into a Federal employment program, divorced administratively from any Federal relief organizations which might exist. It should offer genuine employment on projects of material or cultural value, suited to the capabilities of the workers and related to the functions of the permanent departments of the government . . . Eligibility for such work should be based not on the worker's need but on his skill . . . When, after a worker's period of insured unemployment is exhausted, there is still no opening in his own occupation, the employment office should place him on a new job in private industry, or on a work program."

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