BOOK REVIEWS

MOORE'S FEDERAL PRACTICE. By James W. Moore and Joseph Friedman. Matthew Bender & Co., Albany, 1938. (3 Volumes). Pp. xxvii, 827; xvi, 2666; xli, 4017. Price: $25.00.

The Chairman of the Supreme Court Advisory Committee has stated that the Federal Rules of Civil Procedure, eighty-six in number, are brief and extremely simple and cover the same ground as eleven hundred sections of the New York Code of Civil Procedure.[1] Such brevity and simplicity may provoke a reaction similar to that over a century ago when "many older lawyers who were in full practice when Blackstone's Commentaries first appeared in this country, were frequently heard to regret and complain that he should have so simplified and arranged his subject, and so clearly explained the principles of law, that the same amount of knowledge which had cost them years to collect might be obtained in a short time." [2]

But even a hasty survey of *Moore's Federal Practice* will assure the faithful defenders of vested procedural information that the eighty-six rules, brief and simple as they are, do not make "legal principles accessible to mere amateurs".[3] For example, though Rule 2, on One Form of Action, is stated in only thirteen words one hundred and ten pages of explanatory text follow. And Rule 3, on Commencement of Action, stated in twelve words, requires fifty pages of such text.

The lengthy textual analyses which follow most of the rules, and make necessary a three volume work, are in marked contrast to "the simplicity and brevity of statement which the rules contemplate." [4] But they are not explanatory merely of the rules but purport to furnish a completely self-sufficient treatise on practice under the new rules. Therefore the authors have included under each rule, where deemed necessary, a discussion of the origin of the particular rule, whether in English, federal or state practice, of pertinent federal statutes and of related problems of federal jurisdiction. By this integration there is made available to the seasoned federal practitioner a text which links, in part, his experience with the new federal practice. This may gain for these new rules the approval of the conservative attorney or judge, who feels "that everything which has power to win the obedience and respect of men must have its roots deep in the past." [5] And this inter-relation of the new rules with federal jurisdiction may be welcomed by the teacher of the subject, for frequently are found discussions of revered casebook landmarks, such as *Hurn v. Oursler*,[6] *Liberty Oil Co. v. Condon National Bank* [7] and *Supreme Tribe of Ben Hur v. Cauble*.[8]

The merit of this work is not that of "a gentleman's law book, clear, but not deep".[9] Rather it is that of a detailed, comprehensive and scholarly treatise, which draws heavily on law review material, which does not hesitate to point out ambiguities in the rules, and which suggests protective steps

1. PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND (1938) 393.
2. KNAPP, SKETCHES OF EMINENT LAWYERS (1821) 62.
3. 2 LEGARÉ, WRITINGS (1845) 110.
4. Rule 84.
5. 1 BRYCE, THE AMERICAN COMMONWEALTH (Rev. ed. 1910) 28.
6. 289 U. S. 238 (1933). Vol. 1, pp. 155, 158.
7. 260 U. S. 235 (1922). Vol. 1, pp. 107, 124, 135.
8. 255 U. S. 356 (1921). Vol. 2, pp. 2239, 2286.
9. 2 LEGARÉ, *loc. cit. supra* note 3.

to be taken by cautious practitioners prior to judicial settlement of procedural uncertainties.[10] As evidence of the practical worth of the book there may be cited the discussion of non-resident motorist statutes under Rule 4 on Process, of pleading jurisdiction and of the amount in controversy under Rule 8 on Pleading, of contribution among tort-feasors under Rule 14 on Third-Party Practice, and of the federal assignment statute under Rule 17 on Parties. For those unfamiliar with pre-trial procedure there is included a form of a pre-trial order of court in the analysis of Rule 16. The mechanical make-up of the work, and aid in expeditious use, is explained in the preface. The thirteen page schedule of time covering all the rules should prove of value to the practitioner and judge.[11] And the probable effect of the doctrine of *Erie Railroad Co. v. Tompkins* on some of the new federal rules is pointed out.[12]

The third volume contains a supplementary discussion, of one hundred and thirty-three pages, of original and removal jurisdiction of district courts, of venue and of appellate jurisdiction. This volume also includes fifty-six forms, twenty-seven of which were prepared by the Advisory Committee, with annotations and cross-references to the text.

As expected, the investigations of the authors, one as Chief of the Research Staff of the Reporter to the Supreme Court Advisory Committee and the other as a member of that staff, have aided in the production of more than a mere practice manual. For those not engaged in the federal practice a study of the work should prove profitable as it presents readable essays, rather than disjointed annotations, on liberal and modernized procedure. And for those who have studied with care the eighty-six brief and simple rules and the Advisory Committee's Notes, the three volumes may be used as a reference work. It cannot therefore be said of this work what Thomas Jefferson said of Blackstone's Commentaries that "it is nothing more than an elegant digest of what they will then have acquired from the real fountains of the law." [13]

Julian S. Waterman.†

SELECTED STUDIES IN FEDERAL TAXATION (SECOND SERIES). By Randolph E. Paul. Callaghan & Co., Chicago, 1938. Pp. xiii, 447. Price: $5.00.

This book, like its predecessor of the same name, consists of a number of articles on entirely separate questions, though all relate to federal income, gift, or estate tax problems. In this book, there are seven such articles, having no particular connection with each other except as already stated; but each discusses a problem where, in the opinion of the author, the present situation is uncertain or unsatisfactory. It should be noted that the author had the assistance of Mr. Philip Zimet in two of these articles, and that the last one is stated as having been written solely by Mrs. Paul.

The preface to the book appears to accept the "realist" legal philosophy, almost to the extent advocated by Jerome Frank; but the articles themselves show little influence of such ideas. The preface is also rather remarkable in the author's confessing astonishment that there is so little uniformity in the various state tax systems; an astonishment which it would seem that

† Dean of the Law School, University of Arkansas.

10. Vol. 1, pp. 255, 270, 287, 781; Vol. 2, p. 2193.

11. Vol. 1, pp. 388-400.

12. 304 U. S. 64 (1938). Vol. 1, pp. 103, 570; Vol. 2, p. 2252.

13. 12 JEFFERSON, WRITINGS (Mem. ed. 1905) 392.

the slightest research would have removed long ago. But perhaps this is meant as an argument that federal tax matters should be less complex.

The first article relates to the effect on federal taxation of local rules of property. It is obvious that such effect as local rules have is to discourage equality, uniformity, and simplicity; though it is freely conceded that any considerable simplicity in federal tax matters can not be attained. Many reasons for this are given, though the author perhaps neglects the importance of the many remedial provisions intended to remove some of the major hardships of a less complicated law.

A number of statutory provisions in the federal laws are noted where there is an explicit refusal to follow the state property rules. One of the worst examples of this was in the apparently moribund Undistributed Profits Tax, where corporations were penalized for failure to make dividends which were illegal or even criminal under the law of the state. On the other hand, there are a number of express provisions subjecting particular features of the problem to the rules of the state laws.

The worst problem, at least from the standpoint of statutory interpretation and administration, is whether subjection to state rules should be implied, or the contrary. The author objects to a construction in favor of implied subjection to state rules if it is possible to avoid it. As horrible examples of the lack of uniformity which such unnecessary subjection to state laws gives, he cites the situation as to trusts for alimony, depletion, community property, and state rules as to the vesting or contingency of interest. Some of these difficulties cannot perhaps be avoided. It is certain that the precise state terminology is unimportant; but, on the other hand, it seems impossible for the Federal Government to tax one on income from property which, according to the law of the state which governs, he does not own. As might be expected, there is more uniformity in collecting than in imposing taxes, as here the state rules have little or no effect. The author feels that the recent decision of *Erie Railroad Co. v. Tompkins*[1] does not evidence any intention by the Supreme Court to magnify the importance of state laws; but it is difficult to see how it can have any other effect.

The next article relates to federal tax compromises. The author criticises, with much justice, the rulings prohibiting the Treasury Department from compromising taxes where liability or collectibility is not in question. This is done informally anyway. The problem is linked up with that as to the validity of non-retroactive regulations which interpret the statute; such regulations when merely procedural are unquestionably valid. It is demonstrated that Congress intended to give the Treasury this broader power, but it is admitted that its validity can be attacked under the doctrine that legislative power cannot be delegated. While the author seems disposed to think that this rule has been entirely done away with—a contention which is distinctly questionable—yet his argument that this is not an undue delegation and will be sustained, seems probably correct. He seems to show some tendency to confuse retroactive and double taxation, which are not the same thing; but it must be conceded that retroactive taxation frequently leads to double taxation. He believes that Congress should delegate to the Treasury full power to compromise tax cases, even where the legality and collectibility of the tax is in question, if it is considered that this will avoid undue hardship to the taxpayer; and the reviewer is inclined to agree. There seems to be little danger that the Treasury would treat this power as an invitation to throw away government revenue.

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1. 304 U. S. 64 (1938).

Next comes a discussion of *res judicata* in federal taxation. Much of this article does not deal with tax law at all, but with the principles of *res judicata* in general. The tax problem is posited by *Tait v. Western Maryland Ry. Company*,[2] which held that a court decision as to income tax in one year was binding upon the taxpayer and the government as to the same questions and the same tax in subsequent years. The decision has been severely criticised, but the author seems inclined to admit that it may be correct. His contention that *res judicata* is necessary in tax matters in order to enforce the Statute of Limitations seems questionable; but here, as elsewhere, the doctrine is necessary to protect the courts and perhaps, to some extent, other taxpayers. The author does criticise vigorously and justly the distinction which the Supreme Court has made as to *res judicata* in suits against a collector, as distinguished from suits against the Commissioner of the United States. This is a purely procedural distinction, and a judgment in one sort of action should be as binding as in the other. It would seem that it is time to abolish suits against collectors, anyway.

The author says that *res judicata* "should be employed to save unnecessary litigation, but not to perpetuate error." Quite so; but how is this to be done? Here he is fairly specific, but certainly radical. He suggests following the *Tait* case generally, but with a statutory provision that a judgment should not be binding in subsequent years if it is seriously detrimental to uniformity between taxpayers. This is certainly handing the Treasury Department a good deal of discretion, which many judges would undoubtedly regard as quite inadmissible; but there is something to be said for it.

The fourth article relates to the definition of "earnings and profits" for the purpose of corporate distributions. The problem arises, because it is only a distribution by a corporation from earnings and profits that constitutes a taxable dividend.

In its solution, state corporation laws as to dividends are not necessarily conclusive. It is clear that earnings and profits may include non-taxable earnings—even earnings that could not be constitutionally taxed by the United States—and may be diminished by undeductible expenses. In addition there is, or may be, a difference as to the base for determining taxable profit, and the base for earnings and profits; but as to this, the authorities are not clear. Whether a distribution in kind by a corporation constitutes earnings and profits depends on the unsettled question whether the corporation realizes gain thereby. But the most serious problems are dividends paid out of unrealized appreciation, and corporate gain or loss on reorganizations or similar transactions, which are not closed because of special statutory provisions. As to the first, the author expresses the opinion that they should not be taxed; if they are, it would seem logical that unrealized losses should be deducted from earnings and profits. It seems to be not only logical but sound policy to correlate taxable dividends and the effect on earnings and profits. As to gain or loss on reorganizations or similar transactions, the same argument applies; and it is the opinion of the author that the statute also prescribes this result. The Treasury itself seems to be in accordance with the view of the author, but at least some of the decisions of the Board of Tax Appeals take the view that such a gain or loss does affect earnings and profits even though the Statute prescribes that it does not give rise to taxable profit or deductible loss. The desirability of a final court decision on this point is both indicated and stated.

Next comes the question of "step transactions". The problem is stated as one of "separating or segregating transactions"; that is, whether two or

2. 289 U. S. 620 (1933).

more transactions which have some connection in fact should be treated separately for tax purposes, or as a unit. The problem is a difficult one, and many of the suggested solutions do not help. For instance, the author demonstrates that the familiar segregation of "form" and "substance", however realistic it sounds, is actually a purely metaphysical test. He also shows that resort to the so-called "intention of the parties" is also non-productive, but this can be better discussed in connection with the next article.

The parol evidence rule—if there is any such thing—is obviously not applicable, since the government is a party to all tax controversies. However, various writings made as part of the same transaction are generally construed together. But this is not always so; for instance, a single instrument may create more than one trust. The author demonstrates that the courts—whatever they say—are in fact influenced in this problem by an apparent motive of tax avoidance, and they seek to defeat it: a tendency which he somewhat doubtfully approves. The courts also consider the ultimate result as important, but it cannot be decisive; otherwise, step transactions would always be treated together. Apparently the most important and most often used test is that of interdependency. It is said that this test should be somewhat "refined", but the precise nature of the suggested refinement is not clear. Even this test is not always used, and perhaps should not be. The author concludes somewhat discouragingly but, certainly sensibly: "The problem is, in a sense, insoluble; but at least it should be so stated as not to intensify the difficulties or enmesh the courts in a tangle of conflicting and meaningless generalities."

The next article deals with motive and intent in federal tax law. The author distinguishes "immediate" and "ulterior" intent, but ulterior intent seems indistinguishable from motive. Roughly, and to use the reviewer's own expression (for which the author is not responsible), intent seems to be the mental side of what one does; motive is why he does it.

The author says that psychology has taught us much about the mind of man, but seems to admit that it has not taught us any way to find out mental processes other than through the words and deeds of the person involved. In tax matters, motive is usually more important than intent; this is unfortunate, because it is much harder to ascertain. The author casts much scorn upon the frequent judicial delvings into "legislative intent", saying that this is pure fiction. More specifically, he criticises the tendency to lay considerable stress upon administrative rulings promulgated before the statute is re-enacted. He says that most of the members of the legislative body know nothing about these rulings. This may be granted, but those who are actually concerned in drafting the legislation usually do, as is evidenced by the frequent passage of legislation doing away with some particular administrative ruling. The author also believes that the power to tax is much broader than the power to raise revenue; that it is regulatory and may even be confiscatory. It is submitted that this is unsound. The author properly condemns the idea that the power to tax is the power to destroy; but if the power to tax includes unlimited power to regulate, it is in fact the power to destroy. In this connection, the author expresses the opinion that judges are too timid in legislating. This is, perhaps, generally true, but one can hardly blame them for being a little more timid in filling in tax legislation than would ordinarily be the case.

The chief problem, however, is the effect of the motive or intent of the taxpayers themselves. Here it is conceded that if any importance is to be given, there must be a pragmatic test. But it is demonstrated that the taxpayer's motive is often made material by the very terms of the tax statute.

For instance, he cites the recent change of the burden of proof with respect to "incorporated pocket-books", though it may be added that he has some doubt as to the effectiveness of this change. Then we have the problem of transfers to foreign corporations for the apparent purpose of avoiding the federal tax; here the Government usually wins. Another important example is gifts in contemplation of death, for Federal Estate Tax purposes. Here it is suggested that the presumption be put in terms of the age of the donor at the time of the gift rather than, as at present, on the date of death.

Even more troublesome are situations where taxpayers' motives are important even though the statute does not say so expressly. One important example is the often-criticised case of *Gregory v. Helvering,*[3] holding that an ostensible corporate reorganization was not free from tax where it had no business purpose. The decision seems probably sound. Though it does bring in intent and motive, these are susceptible of a reasonably objective test. It is admitted that the case has not, as was predicted, resulted in a flood of litigation. It is pointed out that the provision in the Gift Tax Law making a purported sale for inadequate consideration constitute a taxable gift, has been construed by the Bureau as applying only when a donative intent is shown. This is clearly commendable, since otherwise everyone who made a bad bargain would be additionally penalized by having to pay a gift tax. And, more generally, the motives of the taxpayer (especially to avoid taxes) have some evidentiary importance with respect to the facts themselves.

The author's conclusion that the courts are justified in giving some weight to intent and motive seems well taken. He shows that an attempt to block all methods of tax evasion by specific provisions in the statute would give rise to hopeless complexity, and is really impossible anyway, since Congress cannot permanently out-guess taxpayers' counsel. The only possible solution is a consideration of intent and motive, which seems worthwhile even though it does make the law less certain.

The last article relates to the tax status of will contestants. This is the most strictly legalistic article in the book, at least so far as tax law is concerned. The problem involves both estate and income taxes, but is more important in connection with the latter. It arises only in case of a contest, or at least a threatened contest, of a will, which dispute is settled by compromise. The basic problem is whether the contestant who is thus bought off receives taxable income. The constitutionality of imposing an income tax in this situation is unsettled, but the opinion is expressed that it will probably be upheld. Furthermore, there can be no doubt that it is included by the terms of the statute, unless explicitly exempted. The only possible statutory exemption is property acquired by "inheritance". It is clear that a person named in a prior will who is paid for not contesting a subsequent will does not receive such payment by inheritance. But in the more usual situation where only one will is involved, it is more arguable. There is considerable disagreement among the states as to whether such a payment is subject to an inheritance tax; and the author is of the opinion that such disputes should, in the interest of uniformity, be disregarded for federal tax purposes. It is argued that legalistically the situation has all the elements of a contract. The right to contest the will is acquired by inheritance; but it, of course, has no exchangeable value. From this it would follow that the payment constitutes taxable income. But the author immediately rejects his own legalistic argument by contending that the problem should be treated from the realistic business point of view. From this standpoint, it

3. 293 U. S. 465 (1934).

is a non-taxable exchange. The right to contest, while not itself exchangeable, is actually as valuable to the owner as what he can get for it—namely, the amount paid to him for withdrawing his contest. This seems abundantly sensible. He adds that if the courts decide otherwise, and subject such amounts to tax, they should be explicitly exempted in the statute, so as to encourage compromises. Possibly this suggestion might be criticised as tending to increase the number of contests of wills; but in such contests the tax problem is rarely the vital one.

The book includes a table of secondary authorities, and a table of cases. It also has an adequate index. The general make-up is excellent, the extensive footnotes being in a very readable type. One rather irritating habit is that of placing many of the footnotes where it is necessary to read further in the text in order to understand the note itself. But this, at worst, is annoying rather than really serious.

The problems are certainly well-selected; all of them are of considerable importance and great difficulty. Under each problem there is a full collection of the authorities, and an extremely valuable discussion of them. The conclusions are sometimes—though not often—open to question, but are invariably stimulating and helpful. The book cannot, therefore, fail to be interesting and valuable to anyone concerned with federal tax problems.

Robert C. Brown.†

BUSINESS ORGANIZATION AND COMBINATION. (Revised Edition). By Richard N. Owens. Prentice-Hall, Inc., New York, 1938. Pp. xi, 697. Price: $3.75.

The present volume is a revised edition of the first edition of this book which appeared in 1934. Such developments as the Securities Legislation of 1933 and 1934, the Public Utility Act of 1935 and a number of other important statutory developments, both state and federal, necessitated the new edition. There have been added four new chapters dealing with the control of security issues, the economics of the corporation, the momentous and practically important chain-store problem, and the present status of anti-trust laws.

Part One deals with non-corporate forms of business organizations. Herein are discussed in a simple and lucid manner the single proprietorship, the partnership, the joint stock company, and the Massachusetts trust.

Part Two deals with the corporation and discusses, both from the business and social viewpoints, its history and nature, the corporate charter and by-laws, capital stock and shares of stock, control of corporate security issues, directors, the investment trust (including its practices), and the economics of the corporation.

Part Three deals with industrial combination. Chapter XIV in this part is particularly helpful, for it discusses the various types of modern industrial combination and the respective advantages and disadvantages of large size business.

Part Four deals with methods of combination. Herein are discussed so-called "gentlemen's agreements", price and profits pools, the "trust", and the community of interest problem. There are also chapters dealing with the consolidated company, the leased company, and the holding company. The two concluding chapters take up trade associations and the so-called cooperatives.

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† Professor of Law, Indiana University.

Part Five deals with the regulation of combinations: (a) Under common law; (b) Under state anti-trust legislation; (c) Under the Federal anti-trust acts, both before and after 1913. An entire chapter in this part is devoted to the organization and methods of the Federal Trade Commission. Another deals with the chain-store problem and price legislation. This latter topic is timely, because there is much agitation for an intelligent solution of this serious issue. Certainly it should not be made a football of practical politics. Chapter XXI, which concludes Part Five, deals with the present status of the anti-trust laws. The author's conclusion is that the failure of the competitive system and the growth of monopolistic practices will result in either "increased regulation of private industry or the speeding up of the trend towards government ownership."

On the whole, the book is well written, although here and there it is marred by errors of style and grammatical construction.

A few points deserve discussion. Justice Brandeis and some others still believe in the protection and encouragement of the single proprietorship in business. Obviously Professor Owens has his doubts on this thesis, for he says: "No attempt should be made to support an institution which society has outgrown. While the single proprietorship is suited to some lines of activity, it is decidedly inadequate to meet the needs of business and society in other lines. The tendency to develop large producing and distributing units, which has been in evidence during the last seventy-five years or more, is likely to continue, and we shall witness greater efforts both to regulate industry and to prevent concentration."

In connection with the nature of the corporation, there is a very interesting discussion of the encroachments of corporations, in recent years, upon the domain of professional men, particularly of lawyers. After indicating that corporations usually do not possess the right to practice the learned professions under our law as it now stands, Professor Owens suggests that, despite these legal prohibitions, the fact remains that corporations possess marked advantages over the individual lawyer for the performance of certain kinds of law work. He says: "Corporations, in fact, possess important advantages over the individual lawyer for certain types of legal work because of their continuous life and responsibility, their financial strength, and their ability to employ a specialized staff of legal advisers. Many persons contend that the states should frankly recognize the fact that corporations actually do practice law and should undertake to regulate corporate legal practice."

This book should prove helpful as a text in business schools. It will also prove useful, in the reviewer's opinion, as a reference book in connection with law courses which deal with corporate finance, although the frequent lack of citations may prove a drawbook in this latter respect. An index, which is clearly printed in large readable type and easy for tired eyes to read, adds to the usefulness of the book.

Maurice I. Wormser.†

THE ROBINSON-PATMAN ACT. By Wright Patman. The Ronald Press Company, New York, 1938. Pp. viii, 408. Price: $4.50.

This book was prepared by the co-author of this important legislation in response to numerous requests from persons who desired information about the Act and sought interpretations of its various provisions. The purposes of the work, according to the author, are "to clarify the intent and

† Professor of Law, Fordham University.

scope of the Act, establish its function which is to serve rather than to circumscribe business, and define the sound management policies which insure honest operation under the Act."

Written simply and clearly in non-technical language, the volume, obviously for business executives rather than their counselors at law, nevertheless should prove valuable to lawyers who, in struggling with the perplexing clauses of the Act, would like to know the aims and opinions of its sponsors. The material is arranged topically according to the several provisions and requirements of the law, with chapters on the principal problems that are related to it. Each chapter is followed by a helpful series of typical questions and opinions pertinent to the major issues in the particular subject. Over a hundred pages of appendices contain the Act itself, the reports of the Congressional committees concerned with it, and excerpts from the Congressional Record of the House and Senate debates on the bill. The author believes this material to be "primarily of interest to lawyers in advising clients and in preparing cases which may arise under the Act."

As might be expected in a presentation by an outstanding advocate of the Act, the discussion can scarcely be termed an objective analysis. Indeed, the justification of the Act, to protect the independent merchant and the manufacturer from the nefarious practices of large buyers, is repeated again and again. There is also considerable duplication of descriptive material relating to the growth of the large-scale marketing agencies and the development of trade tactics necessitating the passage of the Robinson-Patman Act. The activities of the Congressional investigating committee, of which Representative Patman was chairman, are detailed several times. In a number of instances the interpretation of complex problems is entirely too simple to be convincing. An important example of this occurs in the discussion of unit cost, in which the problem of allocating costs among the various products of a concern, especially over a period of time, is greatly oversimplified, and the matter of joint costs is not even mentioned. In this connection, the designation of unit cost as the yardstick measuring the limit to which prices may be cut without constituting unfair price competition is a fundamental economic criticism of the law. The ten-page examination of the probable constitutionality of the law contains not a single reference to court decisions on comparable legislation.

"What you can and cannot do under this law" is the subtitle of the book. That this represents wishful interpretations in certain instances is already indicated by some of the decisions of the Federal Trade Commission, especially in the *Kraft* [1] and *Bird* [2] price-discount cases of last year, which in part are at variance with the opinions voiced by Mr. Patman. On the other hand, the decision of the Commission in the *Biddle* [3] case, which was affirmed in May, 1938, by the Circuit Court of Appeals,[4] prohibits the payment of brokerage by sellers to buyers' intermediaries, in accordance with the rigid interpretation of Mr. Patman.

The primary objective of the Act, which amplifies Section 2 of the Clayton Act, is "to prevent discrimination between competing customers of a seller". Just as the Sherman Act of 1890 was directed at monopolistic actions by sellers toward buyers, the Robinson-Patman Act aims to prevent large-scale buyers from taking unfair advantage of sellers. The author

1. *In re* Kraft-Phenix Cheese Corp., 2 C. C. H. Trade Reg. Serv. ¶ 9061 (8th ed. 1937).
2. *In re* Bird & Son, *id.* ¶ 9060.
3. *In re* Biddle Purchasing Co., *id.* ¶ 9058.
4. Biddle Purchasing Co. v. Federal Trade Comm., 96 F. (2d) 687 (C. C. A. 2d, 1938).

states the purpose of the law in these words: "The expressed purpose of the Act is to protect the independent merchant, the public whom he serves, and the manufacturer from whom he buys. How? By making it unlawful for any person engaged in commerce to discriminate in price between purchasers of commodities of like grade and quality; by prohibiting the payment of brokerage or commission under certain conditions; by suppressing pseudo advertising allowances; and by providing for the measuring and payment of damages to the injured party who may have been injured by reason of actions which are prohibited by the Act."

No one can justifiably take exception to any legal attempt to abolish unfair competitive practices, such as the payment of unearned brokerage commissions to buyers by sellers or the receipt by buyers of advertising and promotional allowances unless for services actually rendered. On the other hand, attempts to prevent integrated distributing agencies from assuming and performing various marketing functions more effectively or efforts to limit the size of quantity discounts on large purchases, even though such differentials are based on proved savings, strike a blow at efficient methods of marketing. It is extremely dubious that the rapid growth of large marketing agencies during recent decades has been based, as the law seems to imply, on unfair business practices. It is more probable that the sponsors of the Robinson-Patman Act, associations of independent wholesalers and retailers, were motivated by the desire to restrict the severe and spreading competition of such large-scale distributors as chains, mail-order houses, and department stores. Whether this will be the ultimate result of the law is questionable, as early investigations and decisions by the Federal Trade Commission indicate that mass buyers, in some instances, may justly claim under the provisions of the Act even larger quantity discounts than were formerly received from manufacturers, and that some small buyers have not been "paying their way" on small purchases. Manufacturers who previously were forced to pay unearned sums to large buyers may eventually derive more benefit from the Act than the smaller distributors who obtained its passage.

After reading Mr. Patman's defense of the law, it is not altogether clear whether he is attempting merely to eliminate unfair buying practices of large distributors or is convinced that such large marketing agencies should be curbed primarily to aid small independent merchants to remain in business.

George M. Modlin.†

PRACTICE AND EVIDENCE BEFORE THE UNITED STATES BOARD OF TAX APPEALS. (Second Edition). By Charles D. Hamel. Prentice-Hall, Inc., New York, 1938. Pp. cvi, 558. Price: $6.00.

This edition constitutes a marked improvement over the 1929 edition. The author as the first chairman of the Board of Tax Appeals participated actively in the original formulation of the rules, a discussion of which constitutes the major portion of the book, and his experience in that post, coupled with his recent work as an active practitioner in Washington specializing in tax work, has well qualified him, theoretically and practically, to write this work.

In his volume Mr. Hamel has collected the various decisions of the Board of Tax Appeals and of the federal courts pertaining to the subject and presented them to the reader in compact and logical form. The fact that

† Assistant Professor of Economics, Princeton University.

the appendix contains the District of Columbia code, with annotations pertaining to evidence, which is not available in either the Commerce Clearing House or Prentice-Hall loose leaf tax services is, in itself, sufficient reason for the publication. It should be noted that while the statute provides [1] that

1. 45 STAT. 872 (1928), 26 U. S. C. A. § 611 (1935).

hearings before the Board shall be conducted in accordance with such rules of practice and procedure as the Board may prescribe, it also provides that the rules of evidence applicable in the Courts of Equity of the District of Columbia shall be followed. In addition to printing the annotated code, Mr. Hamel has devoted the second part of the book to the subject of evidence and he gives a broad line of many of the rules with special reference to Board of Tax Appeals cases and federal decisions involving tax matters which the practitioner will find of value. Another helpful feature of the volume is the discussion and explanation of the bureau procedure leading to an appeal before the Board.

Practice is a difficult subject for an author, involving as it does so many matters which are not the subject of written opinions. The usual author confines his book to the decisions and leaves the practitioner the recourse of consulting with the court clerk to obtain the practical details. It is to be regretted that Mr. Hamel has not utilized his practical knowledge of the practice before the Board of Tax Appeals and given his readers the benefit of his experience with practice problems. A further criticism might be offered that the work is a compilation rather than a critical analysis of the procedure before the Board, indicating that the author has placed considerable reliance on the digests and the arrangement of his material and given little attention to errors of reasoning, discussion of fundamental principles, or the presentation of his personal views on the subject.

Edward B. Hodge, Jr.†

BOOK NOTES

MR. JUSTICE HOLMES AND THE SUPREME COURT. By Felix Frankfurter. Harvard University Press, Cambridge, 1938. Pp. 139. Price: $1.50.

Oliver Wendell Holmes was unique as a Supreme Court Justice principally because—as Morris R. Cohen once put it—"having become conscious of his own limitations, he refused to do what his colleagues were doing, namely, using the judicial office to veto legislation that did not conform to their own ideas of economic policy". Skepticism and its necessary concomitant, humility, were the motifs of Holmes' attitude and made consistent much of what he did. He, like the very few others who have been in the Socratic tradition, was aware of the uncertainty and relativity of all knowledge and therefore tended to be agnostic to "fighting faiths" and indeed to "the very foundations of [his] own conduct". Holmes on the bench had the will to let legislatures alone because he realized that generally he knew no more than they concerning what was good. Only when so predicated can tolerance and liberalism be secure.

I do not mean that Holmes was intellectual jelly. His mustaches bristled too much for that. Strong feelings underlay the exasperated, contemptuous tone of so many opinions. For example, he thought Manchester economics valid, beauty good and most men stupid. However he didn't believe himself sure of enough to deny to the citizens of a republic the pleas-

† Member of the bar, Philadelphia.

ure of banging their heads when it so suited them. His predilections were not confused with the necessary.

There may have been some reason for his restraint when met with the minutia of the contemporary social sciences, which bored him and which he liked to ignore. He was no Brandeis, almost counting the pounds of ice sold in Oklahoma. But to compensate, Holmes enjoyed flashes of insight which illumined the theme of an era with the perspicacity of Marx or Spengler. And beyond today's statistics were the arts, history, philosophy, where Holmes was perhaps peerless among his brethren save for Cardozo. The delightful informal correspondence with John Wu, for example, is catholic in its range and information.

Holmes appreciated the mutability of values, the purposelessness of the universe, the impotence of a man under a sky that "rolls impotently on". Calvinists don't essay the role of Canute. The Justice was satisfied to remain aloof, the cloistered and gentle epicurean of the Rubaiyat. He lacked the Jesuitic fervor of Brandeis. Nor did he write with the warmth, the sensuous delight and richness of Cardozo. Holmes was a stylist, after perfection, but it was a cold and laconic perfection.

It does not surprise that this reticence and his wit put Oliver Wendell Holmes, Jr., a poet's son, to the fore in a court created in the heavy image of the meddlesome Marshall.

I haven't forgotten that this is a book review. Felix Frankfurter has caught the temper of Holmes in eighty-three pages of this little book written for laymen. The concern of the book is constitutional law, under the heads of "Property and Society", "Civil Liberties and the Individual" and "The Federal System".

In the first, Holmes permitted a wide range of government experimentation despite its impact upon the traditional property rights. He looked kindly on taxes; they "buy civilization". But in the second, as a skeptic wanting free discussion, he resented legislative interference with the civil liberties, and resisted it. Frankfurter finds this consistent. I don't. Skeptics ought to doubt the validity even of skepticism. Once the retreat from anarchy be made, the will of the majority ought in every instance to prevail as due process of law. Of course, I must admit that the protection accorded free speech against congressional interference, at least, is more specific than the vague outlines of the Fifth and Fourteenth Amendments. Holmes did prefer war's exigencies to the liberties of the individual. The explanation may lie in his desire to preserve the Federal Government, which he wanted perhaps as much as he wanted anything. That may explain also his disapproval of state laws of predominantly extra-territorial effect. But Holmes sharply distinguished between such legislation, affecting the nation, and statutes chiefly internal in their effect, affecting wealth alone.

Holmes therefore was not always aloof. No man can be, I suppose. The pattern of motives is too complex. As administrator or legislator Holmes might have been less restrained; I have been told that I have made him too passive even as Supreme Court Justice. Perhaps he has been drawn idealistically here, and his chief attitude mistakenly made exclusive. But it certainly must be conceded that Holmes was characterized by his detachment, and he was generally more disinterested than other dissenters: Fuller, Harlan, McKenna, Pitney, Clarke and Brandeis. Incidentally, one-third of the book is given to an excellent summary, prepared by several Harvard fellows, of the decisions invalidating state laws under the Fourteenth Amendment, with the names of the dissenting Justices. It shows that Holmes dissented quite infrequently, and usually only in the most vital cases.

Private law is not discussed, which is proper, for the influence of Holmes was not so significant there. When all that's needed is a rule, and one rule is not demonstrably better than another, inertia will preserve the old. Holmes analysed and restated, and he cleared away much nonsense. But his brilliance was static, shying from the determined lawmaking of Cardozo.

In the main we must agree with Frankfurter's opinion of Holmes as expounder of the Constitution: "He exhibited the judicial function at its purest. He transcended his own preferences. . . . He was as modern when he ended his work as when began it."

Harold E. Kohn.†

OLD YUKON: TALES, TRAILS AND TRIALS. By James Wickersham. Washington Law Book Co., Washington, 1938. Pp. xi, 514. Price: $4.00.

Judge Wickersham certainly merits his title as "Alaska's Pioneer Judge, Congressman, and Explorer". He did more than participate in the civilization of this vast hinterland; he was one of its guiding spirits. If for no other reason than to preserve a record of his notable exploits and great public career, this exciting book has merited publication. It is a tribute to a living pioneer.

In a pleasant style the book tells of the hardships and achievements of a pioneer judge assigned to a vast snow-covered and undeveloped district, extending over 300,000 square miles. His adventures include sitting on hundreds of mining cases in the midst of gold strikes, holding trial for famous outlaws, traveling by dogsled and by foot for hundreds of miles over snow-covered mountains in sub-zero weather to hold court, dealing out pioneer justice to native Indians, participating in the solution of famous mining conspiracies emanating from the States and employing the device of the "floating court" to take care of the scattered cases in this huge district. Yet, in spite of all this, he found time and energy to hunt wild game, visit Indian camps, accomplish the first ascent by a white man of Mount McKinley, the highest peak in America, discover gold mines, and take a leading part in the development of cities, courts, jails, schools and newspapers. The modern city of Fairbanks still bears the name he gave it.

All his episodes are related in an exciting manner. The trials and tribulations of pioneer justice should fascinate the modern lawyer. At times the author is carried away by his enthusiasm and yields to difficult digressions on Alaskan history and the native mode of living. The local terminology and geographical technicalities may confuse the average reader and slow up the exciting pace set by the more adventurous tales. However, two novel features equalize this drawback; a bit of appropriate verse, chosen from literary works on Alaskan history heads each chapter; and throughout the entire book personal events are made more realistic by excerpts from the author's daily diary. Beside affording pleasant diversion, *Old Yukon* offers to every American, whether connected with the legal profession or not, an opportunity to appreciate the pioneering spirit without which the comforts and conveniences of our modern civilation would have been impossible.

L. S. F.

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† Member of the bar, Philadelphia; Law Clerk, Court of Common Pleas No. 6, Philadelphia.