

BOOK REVIEWS.

MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION. Edited by Arthur T. Vanderbilt. The Law Center of New York University, New York, 1949. Pp. xxxii, 752. \$7.50.

A few weeks ago I received, from the Chairman of my State Bar Association's Committee on Selection and Tenure of Judges, a request for assistance in determining the situation existing in other states with regard to the matters within the province of his Committee. Two days later this book came to my desk. It contains the answers. Under the circumstances, my opinion of it is very high.

The volume is essentially an inventory of the extent to which the states measure up to the minimum standards of judicial administration formulated by the American Bar Association in 1938 upon the recommendation of its Section of Judicial Administration. This applies to the Chapters on Managing the Business of the Courts (also dealing with post-1938 development of Administrative Offices for courts), Rule-Making, Selection and Service of Juries, Pretrial Conferences, Trial Practice, Evidence (also taking into account the pertinent provisions of the American Law Institute's Model Code), and Appellate Practice. The Chapter on Judicial Selection, Conduct and Tenure compares the existing situation with the A.B.A.'s recommendations of 1937. *Traffic Courts* by George Warren, published in 1942 after preliminary publication of a monograph in 1940, and approved by the A.B.A. and other organizations forms the basis of the comparisons made in the Chapter on Trial Courts of Limited Jurisdiction: Traffic Courts and Justice of the Peace Courts. The final Chapter on State Administrative Agencies and Tribunals discusses present systems in relation to provisions of the Federal Administrative Procedure Act and of the Model State Administrative Procedure Act.

The pertinent Association committee reports are reprinted as appendices; and there is an index of sixty pages.

The chapters are cut from a uniform pattern. Each begins with the A.B.A. recommendations or their equivalent. This is followed by an introduction sketching their background and purpose, a point-by-point comparison of the existing situation with the suggested standards, and a summary by way of conclusion. Sixty-two maps, appearing in all chapters except that on Administrative Agencies, illustrate graphically the extent to which the standards have been accepted in the states. In general, white indicates states most nearly conforming and black those furthest away; so that a glance at any map gives a rough idea of progress made.

Only one map is wholly black—reflecting the fact that no state has yet adopted the recommendation that: "Any rule of evidence need not be enforced if the trial judge . . . finds that there is no *bona fide* dispute between the parties as to the . . . facts which the offered evidence tends to prove," etc. (As pointed out in the text, this picture is not so black as it seems, as much the same purpose is being accomplished, along with other desirable ends, by the trend toward use of the pretrial conference. The pretrial map shows much white.)

Otherwise, the blackest maps are those dealing with selection of judges, the judge's power to comment on the evidence, use of a deceased person's

statement in evidence, expert testimony, and traffic court costs and statistics. If shaded areas are considered, a distressing number of others are predominantly non-white.

Chief Justice Vanderbilt, in his general introduction, summarizes the process of preparation, which involved much work by many people in drafting and summarizing questionnaires and which necessarily relied heavily upon the cooperation of selected "reporters" in each state. As conceded in the introduction, this process inevitably produces some errors of fact or interpretation. Also, though a remarkable amount of detail is presented, a volume so inclusive yet compact necessarily omits some of the finer shadings of local practice. But these matters are inconsequential. The book as a whole is a gold mine.

Without reducing in the slightest the great credit due the numerous collaborators, much praise for the Chief Justice's editorship and authorship is clearly justified. The style is simple and non-technical, befitting his expressed anticipation that the book will be used as much by laymen as by lawyers. Whether or not this proves to be true, it is devoutly to be hoped that it reaches a large and representative audience. It should stimulate increased efforts for improvement of judicial administration. As indicated above, it graphically demonstrates that almost the entire job remains to be done in some areas. But it also offers encouragement by demonstrating to those whose patience is short and whose faith is weak that all is not static. For example, pretrial conference procedure has now been authorized by twenty-three states—all since 1938. And periodic revision of the maps will, if nothing else is done, offer some measure of progress—or its absence—in the future.

One can disagree with some of the recommendations, or agree with the editor that the recommendations should not remain static, and yet feel that for the foreseeable future conformity in general to these suggested minimum standards should remain the goal of the states. Once that is accepted, it is apparent that the book is a must for the lawyer, the law teacher, the law student, or the layman who wishes to know how far his state must travel and whether it is leading or trailing the pack.

Minimum Standards of Judicial Administration is unique in its content and its contribution. It is, therefore, particularly appropriate that the book is dedicated to John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit, "in recognition of his outstanding services over the years in the improvement of the administration of justice throughout the country."

Henry Brandis, Jr.†

AVAILABILITY FOR WORK. By Ralph Altman. Harvard University Press, Cambridge, 1950. Pp. xv, 346. \$4.50.

The unemployment compensation laws of each state and, in addition, Alaska, the District of Columbia, and Hawaii, require benefit claimants, as one of the conditions of their eligibility, to be available for work. Although the legislative program is now fourteen years old and benefits have been paid for twelve, there is still considerable distortion and misunder-

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standing of this subject.¹ A concept as protean and alogical as availability is in especial need of critical exposition.

To this task, Mr. Altman, Appeals Analyst of the Federal Bureau of Employment Security, has given painstaking industry in the preparation of what is apparently the first book on the subject.² It is not for the lay reader, and will be read mostly by those with a professional or technical interest in the subject matter. It represents an able and sincere effort to analyze and rationalize the problems of availability for work as they arise in the operation of unemployment compensation laws. Mr. Altman is, in the main, objective. He does not develop a principal thesis or point a moral. The factors which the author believes to comprise the availability concept are discussed by him with considerable completeness, both in the light of administrative and court adjudications, and also of his own viewpoint when these in his opinion leave something to be desired. He attempts to analyze the labor market and the labor force, the relative immobility of workers between occupations, industries and areas, the search for work and for workers, their ability to work, their restrictions as to wages, hours, and job location, and the special problems raised by students, seasonal and female workers and the self-employed. There is, unfortunately, no table of cases.

Availability for work is most easily defined as a readiness, willingness and ability to work. Availability may be brought into question by a claimant's removal to an area where employment opportunities are few, by domestic responsibilities which limit his or her ability to accept a job, by pregnancy or other physical limitations, by enrollment in a course at school, by imposed restrictions on acceptable jobs, by a lack of sufficient attempts to secure a job, etc. The requirement of availability may be more stringent in the cases of students, married women, and many claimants without dependents; here the need to work, and, by the same token, attachment to the labor market are frequently less apparent. Enumeration of all the conditions evidencing unavailability is as difficult as the enumeration of all the attitudes of the unemployed to the jobs they would or would not like to have.

The availability requirement, Mr. Altman points out, was not given much thought in the formulation of the unemployment compensation program. In practice, however, it has been the basis of more disqualifications and the subject of more appeals than any other cause of ineligibility under state unemployment compensation laws.³ There is, however, little uniformity in the bulk of the decided cases. Appeals to the courts are not many⁴ and have created as many problems as they purported to solve.⁵ The pro-

1. In addition to instances cited in the book (pp. 292-293), see also Stevenson, *Is Rainy-day Money a Give-away Show?*, *Nation's Business*, Nov. 29, 1949, p. 29 reprinted as *Chislors Endanger Our Unemployment Insurance Program*, *Readers Digest*, Dec. 1, 1949, p. 1; *Close the Loopholes* (editorial), *N.Y. World Telegram & Sun*, March 3, 1950, p. 28.

2. See also Freeman, *Able to Work and Available for Work*, 55 *YALE L.J.* 123 (1945); Freeman, *Active Search for Work*, 10 *OHIO ST. L.J.* 181 (1949); Altman (the author of the book reviewed) and Lewis, *Limited Availability for Shift Employment*, 22 *N.C. L. REV.* 189 (1944); *Issues Involved in Disputed Claims for Unemployment Benefits*, *SOCIAL SECURITY YEARBOOK* 31, 34-38 (1940).

3. P. 4. The situation is still the same. See *New York Times*, March 30, 1950, p. 52, col. 2.

4. Out of more than 2,000 availability cases decided from 1939 to 1949 by the New York Unemployment Insurance Appeal Board, six were appealed to the courts.

5. Compare *Matter of Salavarría*, 266 App. Div. 933, 43 N.Y. Supp. 2d 899 (1943) with *Matter of Anderson*, 276 App. Div. 804, 93 N.Y. Supp. 2d 225 (1949). Compare also *Matter of Leshner*, 268 App. Div. 582, 52 N.Y. Supp. 2d 587 (1945) and *Matter of Daly*, 271 App. Div. 1036, 68 N.Y. Supp. 2d 210 (1947) with *Matter of Loeb*, 269 App. Div. 917, 57 N.Y. Supp. 2d 460 (1945).

portion of unavailability disqualifications to all rulings of ineligibility varies appreciably over periods of time as well as between some states and others and as between specific claimant groups. Availability is interpreted in some decisions as a subjective willingness to work. For example, an individual barred from factory labor by valid domestic considerations and willing to perform homework but prevented from so doing by denial of a homework permit, is available.⁶ In the same jurisdiction the objective approach is met in other cases. A claimant who is willing to work but who restricts her employment to one meeting the standards of her last job—standards no longer obtainable—is unavailable.⁷ Why, then, invoke so inexact a concept as availability as one of the tests of benefit eligibility? The answer may well be a realistic reminder to those who insist on precision and order where there can be neither.⁸ The author writes: "It may be said that they [the cases] show availability to be a vague concept. The meaning of availability becomes real on a case-by-case basis only. Since this is true of most abstract terms, we need not be discouraged in the use of 'availability.' Instead our analysis should emphasize the importance of getting general agreement upon the result in specific fact situations."⁹

The current legislative trend in unemployment compensation laws is in favor of requiring benefit claimants to make an independent search for work.¹⁰ Mr. Altman criticizes such a mechanical approach to the problem, though he is, of course, opposed to having claimants collect "rocking chair money" while they rely on the employment offices to secure work for them. The first alternative penalizes the good worker who is a poor job hunter¹¹ and rewards the malingerer who applies for work where to his knowledge there is none. Furthermore, in depression times, the job hunt may become a futility as well as a source of demoralization. The second alternative imposes a task on the public employment offices which the latter are not geared to discharge.¹² Mr. Altman suggests a middle course; an individual job hunt should be required only in situations where it is the natural and reasonable thing to undertake. He points out, for example, that a worker laid off for a two week period can hardly be expected to scurry about in search of a temporary job for that time. Referring to the search for work when required, he says: "The assistance in such cases may take many forms. . . The claimant should be given *labor market information*—what is the job picture in his field in the particular locality and elsewhere. He should receive *job counseling*. He should be helped to an understanding not only of the other occupations open to him, but also of the other industries in which he may use the skills he already has. Long-run vocational guidance is definitely involved here. Most concretely and most important—*he should be helped in mapping out a definite plan for his job search*. The ordinary worker is not an expert job-hunter. Often he does not know where to look for work. He seldom knows how to sell his services. On both these counts

6. Matter of Smith, 267 App. Div. 468, 46 N.Y. Supp. 2d 774 (1944).

7. See Matter of Daly, *supra* note 5. The danger inherent in this approach is that it emphasizes availability of work, not of claimant.

8. See FRANK, LAW AND THE MODERN MIND (1930).

9. P. 250.

10. Required by the statutes of twenty-two states as of November 1949.

11. He cites (pp. 103-104) the case of an unemployed movie extra who foresook Central Casting and made her own work canvas of the studios. This claimant was held unavailable.

12. According to the author, there are no adequate studies showing how workers have been getting jobs since the inception of the benefit program. Prior studies indicated that the vast bulk of jobs were obtained by employers' recall, direct application to employers, and recommendation (p. 58).

he needs the expert help of the employment office" ¹³ (italics are Mr. Altman's).

Presumably, when a claimant fails to follow these counsels, he is to be ruled unavailable. But what of the claimant whose occupation has disappeared and whose working skills are not readily convertible to another occupation? Mr. Altman suggests that the correct procedure here is to offer suitable work to the claimant and disqualify him if he refuses it. The usual method of finding a job is to look for one, Mr. Altman points out; why not, therefore, issue a ruling of unavailability where there is no search for work, even though there is no refusal of an offer of work? The answer points to Mr. Altman's fundamental approach. The availability requirement is for him "a gross sieve, a first line of defense. As such it should do no more than eliminate those who are obviously not in the labor force. It is not designed to measure eligibility in fine gradations. The fine sieve is the work offer, the secondary line of defense." ¹⁴ To a hearing officer, this sounds unrealistic. Well over half of the cases involving disqualifications for refusal of employment raise the question of the prevailing wage for an occupation; an offer at less than the prevailing wage may be refused without disqualification. And rarely does a concept as vague and as difficult of application as a prevailing wage measure disqualification in fine gradations. ¹⁵

It is regrettable that Mr. Altman omits discussion of the problem of overpayment of benefits. A claimant files for benefits, for example, and is interviewed a number of weeks later at the insurance office. It then appears that, while he is ready and willing to work, he is unavailable for employment as a matter of law. (He may, for example, be ready and willing to undertake only shift employment which is no longer obtainable.) No misrepresentation or concealment of facts is involved. May the insurance office issue a disqualification for unavailability retroactive to the filing date, thereby creating a liability on claimant's part to refund the benefits paid to him? The court cases do not shed much light on the point. ¹⁶

Other defects of omission and of commission can be found. Mr. Altman surveys the cases involving unavailability arising from government restrictions. Thus, in wartime, employers were forbidden to hire a man who left an essential job without clearance from the War Manpower Commission; ¹⁷ also during the war, citizens of Japanese extraction were "relocated" away from their homes and to areas with limited employment possibilities. ¹⁸ The decisions are in conflict and Mr. Altman makes an unnecessary ¹⁹ and futile ²⁰ attempt to reconcile them. He dismisses as having "an insurance ring" those cases holding claimants unavailable who have worked full time and can now work on a part-time basis only. ²¹ He sug-

13. P. 116.

14. P. 113.

15. For a list of twenty factors to be considered in finding the prevailing wage, see ANNUAL REPORT OF N.Y. UNEMPLOYMENT INSURANCE APPEAL BOARD 4-5 (1945). "Most of the foregoing are not made available in specific cases."

16. See Matter of Salavarría and Matter of Anderson, *supra* note 5.

17. *E.g.*, *Mishaw v. Fairfield News*, 12 Conn. Supp. 318 (1944).

18. Pp. 123-124.

19. See note 9 *supra*.

20. He suggests (p. 135) that unemployment caused by "political" restrictions may bring about unavailability, but that unemployment caused by "socio-economic" restrictions should not. The cases, however, do not support his suggestion (see p. 136). The distinction between "political" and "socio-economic" restrictions can, moreover, be questioned. See LASSWELL, *POLITICS* (1936).

21. P. 184.

gests that claimants be presumed to be available, based on their prior working history and their registration at a public employment office; a better course would be to start with no presumption at all. There is no discussion of the problem which arises where there is a refusal of work within a period of unavailability. And there is insufficient reference to the extent of malingering among benefit claimants.

Appraised in totality, the volume represents a substantial contribution to the field. It subjects to critical examination many tacit assumptions. (Does the payment of benefits have any effect on the labor force or its mobility? Would it not be better to look more to prior attachment to the labor market measured by recent and continuous employment than to present attachment to the labor market as a condition of benefit eligibility? Should a claimant be ruled unavailable merely because he has moved from an active labor market to an area with fewer employment possibilities?) It restates the excellent cautions against imposing a legalistic burden of proof in such a non-adversary proceeding as a hearing on a claimant's claim for benefits. It surveys the many policy considerations implicit in a ruling of unavailability, considerations too frequently lost sight of by harrassed and overworked claims takers and hearing officers. These must forever be reminded that there is a forest as well as trees.

Sidney Schindler.†

THE LAW OF REAL PROPERTY (Volume 1). By Richard R. Powell. Matthew Bender & Co., Albany, 1949. Pp. vi, 792. \$16.50 (per vol.).

Although only the first volume of Professor Richard Powell's five-volume work has been published, it is safe to predict that his treatise will become, and remain for some time, a (if not "the") *magnum opus* in the field of real property. His long experience in research and teaching in this area and his work as Reporter on Property for the American Law Institute have made him exceptionally well qualified for the task of acquiring, organizing, and presenting the law of this vast field. The only substantial doubt which disturbs this reviewer is whether the vast energies poured into a project of this type might not have been channeled into other forms of research of greater value to the profession and society. Final judgment must await complete publication, but Volume I and Powell's stated objectives afford a basis for a tentative appraisal.

The functions which can be served by the law treatise are limited. It may afford leads to authorities not readily found in digests or elsewhere, but any work which serves no other purpose merits the scathing denunciation written by Zechariah Chafee, Jr., over thirty years ago: "We have a[n] . . . atomic theory of law books. . . . Headnotes arranged vertically make a digest. Headnotes arranged horizontally make a textbook. Textbooks arranged alphabetically make an encyclopedia. Every few years some investigator has to disintegrate one of these works into its constituent atoms, add some more headnotes from recent decisions, stir well, and give us the latest book on the subject."¹ A treatise may promote understanding of a field through its scheme of organization if it reveals significant relationships not otherwise apparent. However, the multi-volume work would seem less appropriate for achieving this purpose than a brief essay. More important,

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1. Chafee, Book Review, 30 HARV. L. REV. 300 (1917).

as long as the basic framework of organization is unrealistic, no amount of juggling within it will be of consequence. Unfortunately, writers of law treatises seem driven by an overwhelming urge to force a body of law into some symmetrical form which will give the appearance (usually false) of a functioning system. Chafee's plea is still worth making: "What we need to promote true growth in the law is a textbook which will discuss and endeavor to solve the problems of human life and social adjustment presented by a particular branch of law."²

In this excellent work, Professor Powell has not entirely succeeded in obviating the shortcomings of the traditional treatise. The major division headings are not the products of effort to state the major land problems with which our society must deal.³ Rather, these headings are intended to be the main structural bones in a "skeleton," the function of which is the "integration of the whole subject" so as to "reveal the close interdependent functionings of its parts" (pp. v, vi). This integration, states Powell, is the first guiding stress of the treatise. Other declared stresses are: "*second*, upon problems of current life with the perspective on those problems furnished by a constant inquiry as to the trends of evolution; and *third*, upon the tremendous importance of statutes in this field of law" (p. vi). Powell observes that an "opportunity and a need for statesmanship in this branch of law exist" (p. 3), but it does not appear that encouragement of such statesmanship is his major goal. He states simply that if he has succeeded "in communicating to the profession an awareness of the individual lawyer's responsibility for the quality of his inevitable addition to the ever changing fabric of the law," he will have added satisfaction (p. vi).

Nevertheless, this treatise exhibits a breadth seldom equaled by others. Owners of Volume I should not put it on the shelf to await future reference needs without first reading the introductory material on the social evolution of the institution of property and the sources of American law. After having been exposed to a convincing demonstration that the "reception of the common law" has been an amazingly complex affair, the reader is not likely thereafter to use the phrase except in a most carefully guarded manner. It may come as a surprise to those who have only a vague understanding of American legal history to learn that the "colonists, in almost every colony, spent their early decades under a sky unclouded by the common law" (p. 95). Regarding the institution of property, Powell stresses the constancy of change. Perhaps the most important inquiry one should make about the institution, he says, is with respect to "the extent to which its present manifestations promote the welfare of the society in which it functions" (p. 11). However, Powell's treatment of the methods of studying the institution is inadequate. He declares that historical method is the *only* reliable one. It involves (1) discovering the factors which produced the institution or some part of it and (2) determining whether those factors are present in modern society. Discrepancies indicate need for reform. An obvious defect of this method is that, no matter how painstaking the research, satisfactory historical evidence is frequently not obtainable. Powell does not explain what the observer is expected to do under those circumstances. A more direct and more promising approach has been stressed by

2. *Ibid.*

3. The publisher has inserted in Volume I a skeletonized table of contents for the entire treatise, which is divided into the following six main parts: Introduction, Capacity to hold and to deal with interests in land, Permissible interests in land, Relations between owners of permissible interests in land, Relations between owner of permissible interest in land and the community, Acquisition and transfer of permissible interests in land.

Professor Myres McDougal.⁴ Stated briefly, it involves (1) ascertainment of the values commonly held in our society and (2) determination of what institutional modifications are necessary to promote achievement of those values. Historical study is important, but is most certainly not the only reliable method of institutional analysis, and probably not even the best.

Little need be said about other portions of the Introduction, which also deals with the English background of land tenure and basic terminology. Hohfeldian terminology is embraced as a "tool," but is not to be "worshipped as a fetish" (p. 362). Except for an overworking of the adverb "normally," Volume I is a prime example of the application of high standards of legal writing.

The only subject handled in Volume I, in addition to the Introduction, is that of *capacity* to hold and deal with interests in land, which has been treated extensively. It focuses attention upon restrictions imposed by law upon certain classes of persons and entities. It is not concerned with restrictions imposed by private volition, such as the spendthrift trust or the restrictive covenant. Nor is it concerned with temporary incapacities such as duress or intoxication, although mental incompetency is afforded attention. Many subjects are developed here which are hardly touched upon in other real property treatises. Conspicuous among these are the capacity problems of Indians, non-business associations, fiduciaries and governmental instrumentalities.

The chief criticism to which this part of the book is subject is that concentration upon *capacity* as the unifying factor has tended to prevent adequate treatment of the problems involved. Much of the material consists of a tedious counting of states which have adopted various restrictions. There is a wealth of statutory references, but no substantial effort is made to explore the legislative process in this field. Limitations upon the land capacity of aliens are surveyed comprehensively, but there is no discussion of the consequences—social, economic, or international—of such restrictions. The forms statesmanship should assume in this area are left to conjecture. Considerations of space have necessitated treatment of the land capacities of married persons and business enterprises without thorough examination of the institutions of marriage and business. Government ownership of land is handled without reference to governmental controls falling short of the ownership concept, and there is no discussion of the functions government ownership of land serve, or should serve, in a capitalistic society. Government corporations are broken down into an elaborate sevenfold classification, but the consequences of these divisions are not explained. There is only fragmentary treatment of the problems of allocation of land ownership and control among the various levels of government—national, state and local.

Social policy is mentioned occasionally, but given only cursory attention. There is a plea, from which surely no one would dissent, for reduction of the property disabilities of convicts. In the material on mental incompetents, Professor Powell, relying heavily on a series of articles by Milton D. Green,⁵ points out that the rules of law "embody the evolved

4. The approach is elaborated in McDougal & Haber, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT* (1948); McDougal, *Municipal Land Policy and Control*, *PRACT. L.I.* (1946); McDougal & Lasswell, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943).

5. E.g., Green, *Fraud, Undue Influence, and Mental Incompetency—A Study in Related Concepts*, 43 *COL. L. REV.* 176 (1943); Green, *Public Policies Underlying the Law of Mental Incompetency*, 38 *MICH. L. REV.* 1189 (1940).

compromises between the two opposing pulls" of freedom of commercial transactions and protection of the weak against overreaching (pp. 466-467), but he makes no attempt at policy evaluation. It is stated that several "social policies are implicit" in statutes restricting the power of banks to hold land (p. 552). These are said to be maintenance of liquidity of bank assets and discouragement of land speculation by banks, and it is added that perhaps "also the ogre of mortmain is behind the curtain, along with a feeling that social welfare is served by having the capital and funds of banks flowing in the daily channels of commerce" (p. 553). But there is no attempt to appraise these policies or to determine to what extent existing statutory restrictions achieve them.

Within the limits which he has carefully imposed, Professor Powell has done a superb job. It is unfortunate that he has deemed it more important to organize the law of the field around an analytical outline than to select for emphasis and thoroughly explore a few of the land problems of our time thought by him to be especially important.

Corwin W. Johnson.†

A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES AND INCLUDING ALL RELATED TRADE REGULATORY LAWS (Volumes 1, 2, and 3). By Harry A. Toulmin, Jr. W. H. Anderson Co., 1949. \$150 (7 vols.) (\$125 pre-publication price).

A publication like this exposes a serious problem in the relations between law book publishers and book buyers. The people who are likely to spend \$150 for seven volumes on the anti-trust laws are either institutional law libraries or the big corporation law offices. The libraries must buy simply because the work is a pretentious one in a field where little has been written. The law offices buy because the purchase price represents for them a small item of deductible expense, with at least a remote possibility that a research clerk may turn up here a case he missed in the Federal Digest or the Commerce Clearing House Trade Regulation Service. Such an assured market must offer great temptations to lower editorial standards and rush any fat manuscript into print. In this instance the temptation seems to have prevailed, although any editor might have detected in the author's Foreword the cloudy style, the political bias, the turgid repetitions, and the unselfconscious self-contradictions that characterize the body of this expansive, but not great, work.

The "anti-trust laws are the most dangerous to our democracy that any nation has ever enacted in all our history," for they "leave open the door for enforcement by the rulers of this nation of their own particular brand of social philosophy." The "reactionary, socialistic and communistic extremes" can "enjoy a field day of judicial pronouncement under these laws." A few pages on, however, there is assurance that compliance with the anti-trust laws is largely a matter of phraseology of documents; a business man needs only the advice of a competent and well-informed anti-trust lawyer to accomplish his practical objectives legally.

Having dispassionately recorded his observations that anti-trust enforcement is leading in the "police state," and that the Supreme Court of the United States is becoming a mere branch of the executive, Mr. Toulmin, with scholarly detachment, "deems it inappropriate to express either

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acquiescence, compliance, or opposition to these philosophies." There has dawned upon him, however, the horrid realization that five is a majority of nine, with the consequence that interpretation of the law rests in the bosom of a mere handful of judges for whose economic views he can hardly vouch.

The intrepid reader, about to embark on these pages, can judge in advance the aptness of the authorities Mr. Toulmin will marshal in support of his theses. There is Jefferson, that well-known apostle of the liberty of business-men, to warn us against the people "who enjoy the security of perpetual employment at public expense" (the quotation is from Toulmin, not Jefferson). There is Lincoln, cited against the welfare state and the soak-the-rich schemes. There, by a masterpiece of misunderstanding of a man's total position, is Justice Douglas, arraigned in opposition to "the bright young subordinates" of the Anti-trust Division.

It is not surprising, therefore, to find a trade association case cited for a proposition about cooperatives,¹ a merger case on the problem of exclusive dealing,² TNEC Monograph 13 is adduced for the proposition that larger companies are more efficient, although that study actually demonstrated that the medium sized organization is generally more efficient than either the largest or the smallest units.³ The subtleties of a problem like justifying tying clauses on the ground of protection of the seller's goodwill are avoided by writing the text on the basis of the cases tending to support the justification, and burying in the footnotes the later cases adverse to the justification.⁴ The *Frankfort Distilleries* case is written up in such a way as to suggest that state laws authorizing resale price maintenance could be applied to interstate commerce despite the Sherman Act, without a hint that the dictum relied on was grounded upon the special situation of intoxicating liquor under the Twenty-first Amendment to the Federal Constitution.⁵ Elsewhere the patently erroneous opinion is volunteered that a federal law invalidating contracts binding an individual to refrain from interstate commerce would not be constitutional, since it would not be a regulation of interstate commerce.⁶

Of the seven volumes projected, the three already issued constitute Section A: The Statutes and Their Legislative History. Volume 1 deals with the Sherman Act, Volume 2 with "supplementary" legislation—the Clayton and Federal Trade Commission Acts, and Volume 3 with "collateral" legislation, a singular pot-pourri which will be sampled later in this review. Section B is to contain two volumes collectively designated "Application of the Anti-Trust Laws." Section C will be addressed to "Enforcement." Considering that the first three volumes purport to deal with interpretation of the statutes, one may anticipate more than a little duplication in the remaining volumes. This presentment is reinforced by the disorganization and duplication evident in the volumes already in print. These books are not as large as they seem, containing less than 500 pages each, with generous type and margins; yet space is wasted by scattering the discussion of a single topic through several volumes, always repeating

1. *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), footnote 87, p. 274, Vol. 1.

2. *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), footnote 28, p. 456, Vol. 1.

3. Footnote 16, p. 60, Vol. 1.

4. Section 15.13, Vol. 2.

5. *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945), Section 26.8, Vol. 3.

6. Section 13.39, Vol. 1.

the same generalities, and never getting very deeply into anything. The status of labor unions under the anti-trust laws makes a brief appearance in Volume 1 ("Labor organizations to some extent not defined remain subject to the Sherman Act," for example, is the entire text of Section 13.44, Labor Activities). The topic recurs in Volume 2 in a five page chapter that covers not only unions but agricultural and horticultural associations as well. Volume 3's account of the Norris-LaGuardia Act dabbles in the subject too, and has an appended resumé of leading labor cases without any attempt at synthesis. We are on notice, nevertheless, to look to Volume 5 for "Application to Labor, Commerce, and the Professions; Vertical and Horizontal Integration, Size and Markets; Consolidations and Mergers, etc."

The sequence of topics within each volume and chapter seems to have been determined largely by chance. Sometimes, as in accounts of legislative history, the topics seem to be taken up in the order in which long-forgotten senators made their speeches. Sometimes analysis proceeds in the order in which words occur in the text of a statute, *i.e.* by the laws of grammar. Too frequently the sequence of the section headings defies rationalization. Consider, for example, the logic of the following development in the chapter on treble-damage actions under the Sherman Act:

- 20.45 Survival of Action
- 20.46 Profits under Former Illegal Contract
- 20.47 Plaintiff in *Pari Delicto*
- 20.48 Refusal to Sell
- 20.49 Reference to Master
- 20.50 Effect of Combination to Enhance Prices
- 20.51 Injury by Boycott; Effort of Combiners to Better
Conditions
- 20.52 Action Against Common Carrier

When the author gets around to the same subject in a chapter of Volume 2, many of these section-headings reappear in a different and somewhat more intelligible order.

There was the germ of a good idea in the conception of Volume 3: Acts Collateral to the Federal Anti-Trust Laws. Public and professional attention has been centered so much on the Sherman and Clayton Acts that we have tended to lose sight of the fact that important areas of our economy are governed by special statutes which relax the rigid competitive requirements of the Anti-trust Laws. The student or practitioner who aspires to a complete understanding of the law of economic organization should familiarize himself with the special standards governing, for example, mergers and consolidations under the Interstate Commerce Act and the Civil Aeronautics Act, multiple-station ownership under the Federal Communications Act, export associations under the Webb-Pomerene Act, etc. In the same connection, it would be worth thinking about the restraints on competition sanctioned by legislation requiring certificates of public convenience and necessity to engage in certain lines of business, and legislation providing for administered prices rather than competitive price-fixing, as under the NIRA and the Guffey Coal Act.

But in Volume 3 this valuable conception is lost in a mountain of padding and irrelevancies. There are chapters on the Anti-Hog-Cholera Serum Act and the Wool Products Labelling Act. The Trading With the Enemy Act rates a chapter for no better reason than that the Alien Property Custodian once resisted a claim to seized property on the ground that

the claimant's title was acquired in a monopolistic transaction. Sometimes a "chapter" consists of nothing but a reprint of the statute, as in the case of Chapter 10 on the Federal Reserve Act. Many chapters add to the reproduced text of the legislation a few sentences euphemistically captioned "Construction," generally a repetition of the statutory language without quotation marks (See pages 97, 131, and 204 for examples). A section on "Constitutionality" is likely to strike right to the heart of the subject with a declaration that the statute either is or is not constitutional; sometimes we are told also that the statute should be construed consistently with the Constitution (See pages 104-105 and 380).

When the author does undertake to expound an important piece of relevant legislation, he does not confine himself to those matters bearing on competition and monopoly, but treats us also to shallow disquisitions on Congressional power to regulate interstate commerce, details of the administrative organization of the regulatory agency, and, in the case of the Interstate Commerce Act, a long list of "supplementary" acts including such fascinating unexplained entries as:

The Ash Pan Act of 1908.
 The Hoch Smith Resolution.
 The Urgent Deficiencies Appropriation Act of 1913.
 The National Industrial Recovery Act.
 The Civil Aeronautics Act.
 The National Housing Act.

Over all this chaos of print broods the grim foreboding of Mr. Toulmin that states' rights are vanishing. The only ray of hope in this dark federalized sky is the McCarran Act which undid the Supreme Court's decision that insurance companies were subject to the Sherman Act.⁷ With that precedent, the author says "It would seem logical . . . that the entire area of the anti-trust activities [except 'very clear' cases] should be left to the several States under their anti-trust laws. . . ."

Louis B. Schwartz.†

LIVING LAW OF DEMOCRATIC SOCIETY. By Jerome Hall. The Bobbs-Merrill Co., Indianapolis, 1949. Pp. 146. \$3.00.

This is a challenging book. In three chapters, significantly entitled Law and Legal Method, Law as Valuation, and Law as Cultural Fact, Professor Hall addresses himself to the central and perennial inquiry of jurisprudence: what is law? And more specifically: what is positive law in a democratic society? His answer, as he states in his Preface, "invites attack from certain specialists on the ground that what [he has] written is ideology, not science." Anticipating positivistic critics who postulate an antithesis between ideology (philosophy) and science, and conceding that his book should be judged by its scholarship, Professor Hall feels constrained to add (*anno domini* 1949): "But if scholarship also strengthens democracy, I see no reason to disparage it because of that."

In constructing his thesis, the author outlines a broad historical survey of the opinions of leading philosophers on the nature of law. Plato, Aristotle, the Stoics, Cicero, Augustine, Aquinas, Hobbes, Austin, Hume, Ben-

7. 59 STAT. 33 (1945), 15 U.S.C. §1011 (1946). The case was *United States v. Southeastern Underwriters*, 322 U.S. 533 (1944).

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them, Savigny, Duguit, Kelsen, Holmes, Pound, and others appear in his pages. Philosophical Skepticism, Positivism, Utilitarianism, and Pragmatism are analyzed and rejected. The essential conflict between the Historical, the Analytical, and the traditional Natural Law schools of jurisprudence is brought into focus. Professor Hall observes that "there is wide agreement among legal philosophers concerning the formal-power attributes of positive law. But if we take one short step beyond form and power, the sharpest disagreement is met" (p. 32). Nevertheless he opines that "from the beginnings of Western history in the city-states of the ancient Greeks, the major thrust of the greatest thinkers has been that law is more than might" (p. 8).

At the end of his second chapter, Law as Valuation, Professor Hall states his own conclusions as follows: "Positive law consists of propositions stated in the form of hypothetical-imperative judgments; the formal source and the enforcer of these bilateral rules is the maximum power center in the society; the rules of law stand highest in the hierarchy of norms in the sense that, in case of conflict with other norms, law prevails; the sanction of legal rules is enforced, ultimately, by physical power which operates unconditionally; the rules of law, by and large, implement interests inclusive of the entire society; the rules of law are coalescences of the ideas, signified by the rules, with value; and this attribute is divisible into (a) conformity to ethical principles and (b) self-rule—the distinctive quality of the law of democratic society" (p. 100).

In his final chapter, Law as Cultural Fact, the author expands his definition of positive law to include, not merely power-norms (form) and ethical validity plus self-rule (value), but also the complex cultural circumstance implied by the rules of law (fact). "What the legal theorist observes is human conduct directed toward various goals under institutional pressure to avoid the commission of proscribed social harms. The legal institution can be distinguished (not separated) from other institutions. It can be analyzed and systematized as a static structure in terms of certain propositions. But in its totality, law is a distinctive coalescence of form, value, and fact" (p. 131).

As a corollary to his thesis, which the reviewer frankly fails to follow, Professor Hall concludes: "Non-law becomes definitely determinable. Thus many, perhaps most, rules governing the involved aspects of corporate activity and tax liability, rules of procedure, technical rules concerning the interpretation of statutes and instruments, obsolete rules, and ethically invalid rules—all of these and many other rules fall outside the scope of the criteria of selection. Whatever they may be, they are not positive law in the restricted sense of the term" (p. 142).

The author takes both the positivists and the Natural Law philosophers to task; the former for ignoring the factual and the value attributes of positive law, the latter for ignoring the empirical side of law. Yet, in adjudicating the principal claims to the use of the term "law," Professor Hall concludes: "On the basis of both the history of jurisprudence and of legal history, especially of customary law, the Natural Law schools have the better claim, and positivists should speak only of power norms" (p. 138).

In an age predominantly skeptical and positivistic, this bouquet to the Natural Law schools is refreshing. Yet, if scholasticism (medieval or modern) is to be numbered among "the Natural Law schools," this reviewer candidly confesses that he has searched Professor Hall's book in vain for an accurate reflection of scholastic *philosophy*. References to "traditionalism" (p. 42), "traditional theory" (p. 45), "traditional psychology"

(p. 57), and the "traditional theory" (pp. 81-83) either do not mean scholastic philosophy, or distort scholastic philosophy, or hopelessly confuse scholastic philosophy with scholastic *theology*.

To indicate the basis of my criticism as briefly as possible, I shall confine myself to the last-named pages 81 to 83. (1) Scholastic *philosophy* does not postulate "problem-solving by authority," Mr. Justice Holmes to the contrary notwithstanding. What or who would that authority be? (2) Neither scholastic philosophy nor theology "suggest the simplicity of ethical problems;" the history of scholastic casuistry should dispel this notion. (3) The "conception of God as a commander," in a discussion of the nature of human positive law, is a naïve over-simplification of the scholastic conception. (4) Scholastic philosophy constructs no "dogmas;" and scholastic theology, dealing with many dogmas, knows no "dogma which, at most, concedes only the role of discoverer to man." Scholasticism insists that man is the *maker* of positive human law; and that most of the law so made is determined by men freely choosing between objectively indifferent norms. (5) When Professor Hall speaks of a "sound secular theory transcending dogmatic limitations" as opposed to "theological Natural Law theory" he seems by the latter phrase to mean *revealed* theology, which deals with dogma, and which is *not* a part of scholastic philosophy. But if he means the *natural* theology which *is* a part of scholastic philosophy, it would be decidedly helpful (and scholarly) if he would mention some of the dogmatic limitations. (6) Moreover, if by "secular theory" he merely prescind from revealed theology, he does what every scholastic philosopher does. But if he excludes natural theology as well, then it seems to me that logic should lead him eventually to exclude ethical validity and cultural fact from his definition of positive law—because the common sense of peoples, as a general cultural fact, places the deity (however rudely considered) as the source of ethical values.

Despite the above criticisms, and despite a certain obscurity of expression (which is probably the cause of some of my complaints), I believe that Professor Hall has succeeded in his announced aim "to make a contribution to legal philosophy." At least he has stimulated the reviewer to a pleasurable desire to sit down with him some day to discuss our differences personally.

William J. Kenealy, S.J.†

CASES AND MATERIALS ON FEDERAL COURTS (2d ed.). By Charles T. McCormick and James H. Chadbourn. The Foundation Press, Brooklyn, 1950. Pp. xxix, 921. \$8.00.

This is a new edition of an excellent case book first published in 1946. The changes in the subject since that time are striking. They include revisions of the Federal Rules of Civil Procedure, important decisions of the Supreme Court of the United States, the complete rewriting by Congress of Title 28 USC, and some even later amendments to that rewrite. The editors have taken account of these developments, including the most recent.¹ Unless the heavens fall this new edition ought to remain current for a considerable time.

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1. *E.g.*, National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949); *Ex parte* Collett, 337 U.S. 55 (1949); United States v. National City Lines, 337 U.S. 78 (1949); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. 530 (1949); Pub. L. No. 72, 81st Cong., 1st Sess. (May 24, 1949).

The collection is not limited to jurisdiction. It deals with *Erie R. R. v. Tompkins*² and its aftermath (c. VIII), with the relations between State and Federal Courts (c. VII), and with procedure both in the district courts and on appeal. The treatment of the Federal Rules of Civil Procedure is substantially expanded, but remains faithful to the principle of selection stated in the earlier edition:

Many questions of practice and procedure are common to both State and Federal courts; others are peculiar to the Federal courts as a result of their limited jurisdiction and restrictions on venue. To the extent that the Rules concern the former, the Editors believe they should be treated in general procedural courses. Emphasis is therefore placed on the application and operation of the Rules in those special situations which are characteristic of the Federal courts alone.

Certainly this is right. But it is a hard rule to apply, for the cases keep disclosing such "special situations" in unexpected places.

Perhaps the most disturbing group of cases under the Federal Rules are those that seem to say that when a procedural question has "substantial importance" to the parties, it becomes "substantive," and so is governed by *Erie* rather than the Rules. *Ragan v. Merchants Transfer and Warehouse Co.*³ is only the most recent of these cases. It holds that an action is "commenced" in a United States District Court in Kansas when the summons is served, as provided in the Kansas statute, not when the complaint is filed, as provided in Rule 3. If this is so, then what provision of the Rules means what it says?

We all know that it is hard to tell substance from procedure. We all know that procedure is important to the parties, and may determine the results of cases. But the fact remains that Congress and the Court together have enacted what purports to be a set of rules to govern "the procedure in the United States District Courts in all suits of a civil nature. . . ." ⁴ If these rules are to be laid aside in favor of State law in all cases where they have "substantial importance" to results, where are we? Dean Gavit's question remains unanswered: If Congress and the Supreme Court cannot regulate procedure in the courts of the United States, who can? ⁵

This is not the editors' fault, naturally. It is no criticism of their book that some of the decisions they are obligated to report make nonsense. But it does suggest how hard it is for anyone to make secure predictions even in those technical areas of jurisdiction, venue, practice, and procedure, which ought to be as plain as day.

I could say many things about this book, all good. No one can go through it without learning a great deal about the subject. The allocation among topics, and between statute, rule, decision, and text within the topics, seems to me most judicious.

I am embarrassed to report this, for the editors have included some pages of my own, and I should therefore not review their book unless I find a place to cuss it. But I can find no such place. It is clearly the best modern casebook on the Federal courts of which I know.

Charles Bunn.†

2. 304 U.S. 64 (1938).

3. 337 U.S. 530 (1949).

4. FED. R. CIV. P. 1.

5. Gavit, *States' Rights and Federal Procedure*, 25 IND. L.J. 1 (1949).

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