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## Book Reviews

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## BOOK REVIEWS

OUTLINES OF REAL PROPERTY. By Herbert Thorndike Tiffany. Chicago: Callaghan & Company. 1929, xvi, 704.

The three volume edition of Tiffany's Treatise on Real Property published in 1920 is, without much question, the leading treatise on real property in this country. It has been remarkably well received. That edition succeeded the two volume first edition which was occasionally published in one volume and continued to be published in one volume after the second edition appeared, and was sometimes known as the student's edition.

The new book is entitled Outlines of Real Property, and contains some seven hundred pages exclusive of the introduction and the table of cases. In comparing it with the second edition, one finds that the outline is almost exactly the same, with chapter headings and section headings identical. Only a few of the section headings have been altered or omitted. The new book then, is very largely an abridgment of the second edition. The language is precisely the same for the most part, certain portions of the various sections being omitted in order to shorten the product.

At the beginning of each chapter there is a black letter statement of the general subject matter of the chapter after the fashion of the Hornbook series. There are very few, if any, cases cited in the new book which are later than the cases cited in the second edition. In other words, no particular attempt has been made to bring the case law up to the date of the book. The author has, however, made citations to the later articles in legal periodicals, and the periodical material is reasonably up to date, although by no means has an attempt been made to make it complete.

Somewhat more attention has been given to the subject of community property in this book than was given in the second edition, the second edition containing three and a half pages of matter, and this edition containing five pages, although in general the author has been cutting down instead of adding to the discussion of the other book.

Comparing this book with other similar volumes, one is inclined to think that the style is better and that it is perhaps more usable than most of the other books, such as, among others, Burdick's and Northrup's treatises. It is considerably more extended than Northrup's and is somewhat briefer than Burdick's book. For rapid review for students, it is probably the best book on the market at the present time.

ALVIN E. EVANS.

THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT.

By J. Allen Smith. New York. Henry Holt & Co. 1930, pp. xvii, 300.

This posthumous work by an outstanding scholar in the field of political science is a worthy successor to *The Spirit of American Government* written by the same author in 1907. Prof. J. Allen Smith was one of the intellectual leaders of the Progressive movement. His political philosophy, with its strong Jeffersonian sympathies has done much to support the cause of liberalism in the last three decades. His rare courage and his intellectual honesty have established for him an enviable position in the academic field.

In this work he criticises the deification of the Constitution and the sterile legalism of the conservative school. He is bitter in his denunciation of imperialism and of the Burgess theory of an unlimited state. His attitude toward the League of Nations will be branded by most political scientists as rank heresy. He refuses to be drugged by the stock argument of the "forward-looker" that it is "a step in the right direction." As a realist he sees the Geneva organization as "nothing more than an association of the victorious powers for the purpose of dictating" a vindictive peace. He criticises the orthodox college and high school texts on government for their aristocratic leanings and deplors the waning influence of the democratic ideas of the Declaration of Independence. At a time when the jury system is in disrepute he comes to the defense of this institution as a healthy check on governmental power. In the opinion of the reviewer, the weakest plank in Prof. Smith's liberal platform is the criticism of the judicial veto. While defending the conception of limited government, he denounces, what in the opinion of the reviewer is the most effective instrumentality for maintaining limited government, to-wit, the judicial enforcement of constitutional limitations. As a substitute for the judicial veto, Prof. Smith favors a reliance on the representative character of legislative bodies and the restraining influence of public opinion and the operation of checks and balances. J. Allen Smith was a confirmed believer in democracy. He was an unrepentant liberal, too strongly saturated with Jeffersonian ideals to approve the ways of our triumphant plutocracy. He was an outspoken critic of the Constitution because of its conservative leanings. He looked to the Declaration of Independence as the source of his political philosophy. A vigorous and stimulating teacher, he trained large numbers of young men, some of them of unusual ability, who have carried his liberal spirit to widely scattered academic posts. The present volume deserves a wide circulation.

FORREST REVERE BLACK.

**EFFICIENCY AND SCARCITY PROFITS.** By C. J. Foreman. Chicago: The University of Chicago Press. 1929. Pp. 343.

Efficiency and Scarcity Profits presents a legal and economic analysis of the residual surplus. In making the analysis the author emphasizes more clearly some of the concepts of the present theory by

pointing out the fallacies of the earlier writers in the field. The confusion of the early economist of the other distributable share of interest and of the expense of taxes with that of profits is presented. It is interesting to note that much of that confusion at the present time exists in Accounting Practice if not in theory. The discussion then proceeds with an excellent development of efficiency profits and the market surplus.

The discussion developing efficiency profits is highly pleasing. The central theme of the chapter is that the individual profits exist as a difference between income and costs. The profits of efficiency arise by virtue of expanding the profit bridge. This is done by lowering unit costs by various acts of dynamic efficiency. Before a discussion of the subject of efficiency profits proper, a chapter is devoted to the analysis of what acts the government and the courts deem dynamic efficiency. Among some of the limitations noted are that the acts must be those: (1) That require the highest order of the creative power of the inventor. (2) They must embody something more than merely assembling a process or a product. An examination of some of the vast number of cases cited is most entertaining. Among them we find a decision that the discovery of "safranine-azonaphthol," used in the making of dyestuffs, was an act of dynamic efficiency. On the other hand the mere application of a "cinder notch" long used upon a blast furnace in the smelting of iron ore, to a cupola furnace, for the smelting of pig iron is not an invention. The court observed that the application would occur to any practical man. It seems that the rather heavy, and theoretical analysis could have been made more entertaining, and less burdensome to the attention of the reader by the inclusion of some of the illustrative material. The reader is now forced to seek the original source from the citations. This failure in this particular does not exist thruout the volume.

Though the attempt of showing the interdependence of law and economics is undoubtedly quite an accomplishment in this young school of thought, it is quite baffling to the reader who is not of that school, whether he be economist or lawyer. The rather glib shortcut between the lawyer's concept of a "patentable invention" and the economist's concept of "efficiency;" of the lawyer's "contract in restraint of trade," "exclusive dealing contracts," "resale price maintenance contracts" and the economist's "scarcity profits" and "market surplus" is most confusing. One of the most natural consequences of this is the feeling of resentment that our pet categories of thought should have been so disturbed. That reaction is perhaps one of the highest tributes that can be paid the volume. After having worked with it awhile we find ourselves not altering our original plan particularly, except for making slight alterations here and there. If prior to the reading of the volume one should look upon the knowledge embodied within law and economics as separate and distinct, the reading will serve to reveal

several relations. Thereafter the subjects will be more or less tied together.

The treatment of Scarcity Profits is not quite as accurate as the treatment of efficiency profits. Though it is perhaps not possible to point out any glaring defect; the generalities, the faults of omission rather than commission are to be criticised. The description of the process by which the transfer of good will is effected is an example. One might well be justified in interpreting the author's statement as meaning that contracts in general restraint of trade (pp. 25, 26) are valid. A second criticism should be offered of the failure to emphasize that consolidations are not necessarily the vehicle of monopoly or scarcity profits. Almost throughout the volume, combinations are condemned as giving rise to the unearned gain. Other studies have established that consolidations excel when subjected to the test of efficiency. The test here applied is of a technological nature, e. g., the ratio of output to input. We should give to the consolidations the credit of efficiency profits—for a part at least of that appearing upon their statements.

The format of the book is excellent. The size, the table of cases, the index, all add to the convenience of using it.

COLVIN P. ROUSE.

College of Commerce,  
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**MOTOR CARRIER REGULATION IN THE UNITED STATES.** By John J. George. Spartansburg, S. C. Band & White, Publishers. 1929. Pp. xix. 266.

Professor George's Book, *Motor Carrier Regulation in the United States*, is a compilation, and a discussion of more than four hundred decisions, delivered by courts and commissions, on various phases of motor carrier regulation. He goes into great detail in presenting to the reader the different regulations in the states and makes many interesting comparisons of the existing laws.

In reading this book one unconsciously notes the difference between the development of motor regulation, which has taken place quite orderly, and the piratical free-booting which occurred during the great expansion in the railroad field. Here is an industry which has developed more, in comparison, within the last ten years, than any other industry in any other period of this country's history. And yet, it has been attended by regulation which has sought to prevent ruinous competition and insure to the traveling public a reasonable amount of service.

Thus far the regulation has been almost entirely in the hands of the state governments. Mr. George points out that California was the first to undertake the responsibilities attending the office of public regulation, and it has been followed by almost every other state in the Union, certainly every state which has a sufficient amount of

motor bus and motor truck operation to justify governmental supervision.

The book deals almost entirely with the legal aspects of the problem. The study of the cases seems rather exhaustive, but the statement of fact from the cases, or the explanation of their holding, is often too brief.

The major portion of the book concerns the granting of the certificates of public convenience and necessity, and the regulation of operations thereunder. In most states the legislatures have made these certificates indispensable to the right of operation, and in this manner the commissions which have been authorized to deal with the problems attending motor carrier regulation, are enabled to prevent many evils which would otherwise arise.

Commissions, in various parts of the country have refused permission to operate motor carriers chiefly for the reasons: (1) that the public was being adequately served; (2) that the traffic in the proposed district was not sufficient to justify operation; (3) that the applicant was not financially able to furnish proper and adequate service.

It is rather difficult to make a criticism and a just evaluation of the book. One appreciates that it is a work dealing with the legal phase of various problems, but unfortunately it is not prepared in a manner that is readily adaptable to an attorney's convenience, consequently it will be of little importance to those who would like a legal text book on this portion of the law.

Although a literary production is not expected when dealing with problems of this nature, it is to be regretted that coherence, sentence structure and a due regard for proper punctuation have not always been shown. These defects mar the book and it is obvious that a much better effect would have been made had the work been a little more carefully written. The impression is created, as one peruses the pages, that the author has assiduously gathered a stupendous amount of material, which is of much value to those interested in motor carrier regulation, but that he has, apparently, hurriedly compiled the book and unfortunately omitted to give us the full benefit of his study. It treats of a new subject and is a valuable contribution, despite minor defects, to aid in clarifying the perplexing problems arising out of the regulation of, and incident to, a new industry.

W. H. HANRATTY.

THE LABOR INJUNCTION. By Felix Frankfurter and Nathan Greene. The Macmillan Co., New York. 1930. Pp. 343.

This is undoubtedly the best piece of research that has been done in the field of the labor injunction. The main body of the work consists of five chapters. The first is entitled the "Allowable Area of Economic Conflict" and deals with the historical development of labor law. It was not until May 27, 1895, that the Supreme Court of the United States passed on the scope and validity of an injunction in a

labor controversy. The second chapter is concerned with the procedure and proof underlying labor injunctions. It is the opinion of the reviewer that the third chapter constitutes the greatest contribution. Here the authors consider the scope of labor injunctions and their enforcement. The Brandeis thesis is defended to the effect that the labor injunction is not ordinarily sought "to prevent property from being injured nor to protect the owner in its use, but to endow property with active militant power which would make it dominant over men." Chapter four is devoted to a review of legislative attempts to curb the scope of the injunctive power in labor disputes. Following the chapter of conclusions, there is a valuable appendix outlining the litigation history of reported federal labor injunction cases. This work is a valuable contribution in a field of the law that is growing daily in importance. No student of the industrial conflict can afford to be without it.

FORREST REVERE BLACK.

HANDBOOK OF THE LAW OF INSURANCE. By William R. Vance. St. Paul. West Publishing Company. 1930, xv, 1104.

Professor Vance, in the preface to the second edition of his book on insurance, truly says that this revision is substantially a rewriting. Much of the blackfaced type has been either completely altered or at least rephrased. While the language in many sections of the older book is to some extent retained, yet it is generally modified, extended and rephrased.

Of course it would be impossible to expect the author to cite, with any degree of completeness, the cases adjudicated since the original edition was brought out, more than a quarter of a century ago. Neither does the author attempt to cite any large portion of the periodical literature which has appeared on the subject of insurance in recent times. Due to his own modesty, or for some other reason, he does not seem to cite his own articles.

It is impossible in the brief space of a review to discuss the book as a whole. The reviewer will contrast two chapters in this book with the prior edition. On the subject "Warranties," while the new book gives a more extended treatment, there is not so much difference either in the length of the chapter or in the character of the treatment. In the chapter on "Waivers and Estoppels," however, the author has not only greatly extended it, but it is so completely rewritten that it bears no resemblance to its former self. The theories of the author on Waiver and Estoppel were first set out in 34 Yale Law Journal. While no reference has been made in the new book to 34 Yale Law Journal, yet the material of that article has been very largely incorporated, with slight changes. The six-fold situations involved in a discussion of Waiver which Professor Vance makes on pages 458 and 459, are, to the mind of this reviewer, the first clear analysis of the problem. Following the form of the article, he has illustrated each of these situations, and he discusses clearly, both in the article and in this

treatise on page 481, the problem of consideration in connection with waiver.

Estoppel has likewise been dealt with similarly to the method adopted in the article, and the whole chapter is believed to be one of the best ones in the book. There is no treatise with which this reviewer is familiar, which shows so clearly the confusion that has arisen over waiver and estoppel, or that makes similarly clear analyses. Other parts of the book are well done, but do not have the outstanding quality, in the opinion of this reviewer, that this chapter has.

Professor Vance feels obliged to use the Hohfeldian terminology, and explains it in the preface. Not only does he explain it, but he, in some measure at least, apologizes for it. For example, he feels called upon to explain the term "no right." The reviewer was not successful in finding that he had used the term "no right" in the body of the treatise however.

This book is a welcome addition to our literature on insurance and considering its compass, it is an outstanding contribution to the subject.

ALVIN E. EVANS.

**THE MAKERS OF THE UNWRITTEN CONSTITUTION.** The Fred Morgan Kirby Lectures delivered at Lafayette College, 1929. By William Bennett Munro. New York. The Macmillan Company. 1929. Pp. 156.

Professor Munro, in this series of lectures has turned his attention to the growth of the unwritten constitution. The introductory chapter explains the reasons why and the methods by which this great development has taken place. He says, "We can speak of the written Constitution as merely the taproot from which the tree of American nationalism has grown." The author singles out four great leaders in this development and attempts in separate chapters to evaluate their influence. Alexander Hamilton, who in Professor Munro's phrase "seized the right psychological moment to start Congress on its way to supremacy in the economic life of the nation," John Marshall, who "reinforced Hamilton's work by widening the implied powers of the national government and making the Supreme Court their guardian," Andrew Jackson, who "infused into the American political system a large part of the democracy which the framers of the original document did not intend it to possess," and Woodrow Wilson, who "demonstrated the latent powers of the Chief Executive and set Presidential leadership on a new plane." The book is interestingly written and although containing nothing new in fact or interpretation it serves a valuable purpose in emphasizing the growth and adaptation of our fundamental law.

FORREST REVERE BLACK.