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# Book Reviews

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holder or officer of a corporation in its service is 'in the service of another' within the meaning of the statute, since the corporation is a legal entity distinct from any of its stockholders or officers." This would seem to indicate that by carrying the fiction of corporate entity into the field of workmen's compensation, Massachusetts has created a presumption that corporation officers are employees within the meaning of the statute. The facts of the case emphasize the extent of the departure from the result usually attained, since it was shown that the claimant, who was treasurer and owned nearly half the issued stock, had voluntarily assumed the duties of a workman. Thus the case is directly contradictory to the *Carville* case on the facts.

While the jurisdictional question raised in the principal case will not recur frequently, the decision as to the employee status of a corporation executive has importance as the first judicial pronouncement in the state determining the right of such executives to recover under the statute. The court, citing with approval In re *Haynes, supra,* adopted the "nature of the duties" test. The use of the control and supervision test, the traditional common law requirement for the employer-employee relationship,, is more logically consistent with the statutory definition of "employee" as a person under a contract of hire. However, the "duties" test allows the court a greater latitude in permitting recovery to officers of small corporations, conceivably within the intent of the legislature, while still withholding recovery from officers of larger corporations, to whom, as the dissenting justice remarked, the compensation would mean little more than "pocket money." It should be noted that in some of the states which originally adopted the control and supervision test, the strict rule originally adopted has often been modified. As pointed out in In re *Haynes, supra,* this liberal approach to the question of a corporation executive's right to recover under the several Workmen's Compensation Acts is also desirable in the light of the policy consideration of fostering and promoting small corporate enterprise.

*William M. Dickson*

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## BOOK REVIEWS

CONGRESS MAKES A LAW: The Story Behind the Employment Act of 1946. By Stephen Kemp Bailey.[1] New York City: Columbia University Press, 1950. Pp. xii, 282. $3.75.—In his classic study on congressional government, Woodrow Wilson observed sixty-five years ago that "Authority [in Congress] is perplexingly subdivided and distributed, and responsibility has to be hunted down in out-of-the-way corners"; because of this, "the means of working for the fruits of

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good government are not readily found." [2] That this also constitutes the major theme of a *current* work on congressional government would seem less a tribute to Wilson's prescience than to the property of inertia which inheres in political and other social institutions. In Wilson's work, the theme appears virtually in postulational form. In Stephen Kemp Bailey's *Congress Makes a Law,* the "postulate" is subjected to a critical examination in the crucible of experience. Selected for the test was the highly controversial Employment Act of 1946 [3] — a most fortunate choice, because the impact of the forces that it unleashed set into motion, and thus exposed for study, virtually all of the important parts of the machinery of congressional government. Hardly a phase of this machinery escaped the scrutinizing eye of the author. From the planning stage, through the periods of gestation and birth—each step in the genesis of the Employment Act of 1946 was detailed with admirable precision and clarity. When the official hearings, reports and debates did not suffice as source materials, no effort seemed to be spared in tracking down the information by correspondence and interviews. When to all of this is added the rare virtue of an engaging style, one should have no hesitance in regarding this little volume as one of the most illuminating studies of congressional government yet to appear in print.

To those who conceive of legislation as a tidy bit of routinized business, a reading of *Congress Makes a Law* should suggest that there is an untidy side to the process — a side that must not be overlooked. The story of the Employment Act of 1946 makes dramatically clear how difficult it often is to predict whether a legislative proposal will ever come to life, and if it does, in what shape it will finally emerge; it suggests how fortuitous are the creative and abortive forces that are at play in the process. Too often one thinks of these "forces" exclusively in terms of pressure groups, that is, the organized functional interests that have a particular stake in the passage, modification, or defeat of a legislative proposal. One of the chief contributions of the present study is the light shed upon the influence that can be wielded by a determined, aggressive group of staff members employed on the legislative committee to which a proposal is sent after its "second reading" on the floor. Indeed, the title of the book could well have been: *Congress Makes a Law, or The Saga of the Staff in Room 15A.* "15A" is the number of the Senate room which housed the staff of the committee considering the Full Employment Bill. From these quarters there emerged an incredible number of plans for galvanizing functional groups into action — action in *favor* of the passage of the measure; there came successive drafts of Bills with "appeasement

[2] WILSON, CONGRESSIONAL GOVERNMENT 331 (1885).

[3] 60 STAT. 23, 15 U. S. C. § 1021 (1946), as amended, 62 STAT. 16, 15 U. S. C. § 1024 (b) (Supp. 1948).

clauses" to deflect or pacify the ruffled feelings of the opposition; speeches and articles were drafted in profusion and fed to interested proponents of the measure; "proper" witnesses were contacted and selected for appearances at the hearing stage; agenda were prepared; parliamentary strategy was mapped; political deals were arranged; competition was eased between members of Congress vying for a share of the "full employment" limelight; the timing of the skirmishes on and off the floor was planned with an eye towards obtaining the maximum yield from the forces that were marshalled behind the Bill. All in all, the staff members constituted the nerve and brain center from which emanated legislative plans for achieving full employment, and through which was sought the ultimate marriage between final plan and political acquiescence. The conclusion is inescapable that whoever captures control of a legislative committee and, through it, the appointment and control of the staff, has a tremendously powerful weapon at his command. No wonder committee chairmanships and positions of seniority are eyed with such political relish!

The experiences under the Employment Act of 1946 propel the author to the view that the committee system in Congress has an inordinate amount of power in the shaping of national policies. Yet, despite the furious pace in Room 15A, despite the tremendous energies that were expended by those who manipulated the powers of the committee for partisan ends, the Full Employment Act of 1946 emerged a mere toothless shadow of its original self — which suggests, of course, that the methods of fighting in the legislative arena are legion, and that the capture of one major fortress, however advantageous, does not necessarily mean that the battle is won. Indeed, the methods are so varied, and the power so diffuse, as to make it impossible in many instances to identify those upon whom the responsibility for the defeat or passage of a legislative proposal can be pinned. The author bemoans this defect in our system, flirts with the idea of increasing responsibility by increasing the powers of the President and the national political parties, but leaves it entirely to the reader's imagination to determine for himself whether it really can be done.

*Julius Cohen**

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HANDBOOK ON THE LAW OF SURETYSHIP. By Laurence P. Simpson.[1] St. Paul: West Publishing Co., 1950. Pp. xiv, 569. $7.00.—In clarity, conciseness and arrangement of material, this is one of the best texts in the Hornbook Series. It supersedes Dean Arant's volume on Surety-

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ship [2] published in the same series nearly twenty years ago, and admirably covers the gap of the two decades. Professor Simpson's text, in this reviewer's opinion, is written with greater clarity than its predecessor. While much of the earlier volume reappears intact in the present text, the latter is much more than a mere revision. Arant's thesis that the courts should adopt the test of variation of the surety's risk as the measure of the surety's discharge, which was an interesting, if not somewhat contentious feature of the earlier volume, has been dropped. Professor Simpson's view that the test is rather the infringement of the surety's rights is more in accord with the cases. This accounts in part for the more expanded development of the chapter on Surety's Rights (from fifty pages in Arant to one hundred pages in Simpson).

A student text to be of real value should avoid equally the extremes of tendentious assertion of the writer's own convictions as to what the law should be and the "paste pot and shears" compilations drawn from head-notes and digests. Not all of the hornbook authors have been so successful as Simpson in finding the golden mean. As an illustration: Professor Simpson in his casebook on Suretyship,[3] published in 1942, stated in the Preface that:

> The rapid progress . . . in development of the differentiation between the rules applicable to the accommodation and the paid surety, if it has materialized at all, can best be described as glacial. Here and there, however, as brought out in the included cases, a court formerly committed to the strictissimi juris doctrine has advanced a cautious toe into the cold water of liberalization, limiting the discharge of the paid surety to the extent of injury shown.

In the present hornbook, the carefully phrased black-letter of section 30 rests content with stating the glacial movement thus far. The temptation to pontificate presently over the future is successfully resisted.

Chapters on Official and Judicial Bonds, lacking in the earlier text of Dean Arant, have been added and greatly increase the practical value of the new volume. Larger type and double instead of single columns for the footnotes make for ease in reading. The table of cases is increased and reflects well the developing case law of the past twenty years. A table of citations to the *Restatement* proves helpful.

In these days when law school curricula show "strange sounding names" in increasing numbers, crowding the old "fundamental" courses into narrow quarters or relegating them to "outside reading" or

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2 ARANT, HANDBOOK OF THE LAW OF SURETYSHIP AND GUARANTY (1931).

3 SIMPSON, CASES AND MATERIALS ON THE LAW OF SURETYSHIP (1942).

"seminars," Professor Simpson's text is surely to be welcomed by students and teachers alike. In addition, it has demonstrated again the integrity of the Suretyship course. This reviewer who has used with satisfaction and pleasure Professor Simpson's casebook gladly recommends the author's new text.

*Edward F. Barrett**

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THE FEDERAL INCOME TAX: A Guide to the Law. By Joyce Stanley and Richard Kilcullen.[1] New York City: The Tax Club Press, 1948. Pp. xv, 334. $6.00.—For the student and practitioner, this little book affords the means of obtaining a sound general knowledge of the salient provisions of existing law relating to the federal income tax. It is a guide, not a treatise or even a hornbook in the usual sense. One who has some familiarity with the subject matter can read the book with profit in a few hours. He would gain thereby a clear view of the arrangement of Chapter 1 of the Internal Revenue Code as well as of the relationship of these statutory provisions to one another. He would also be put in a position to grasp the significance of many of the provisions with which he had previously only a bowing acquaintance.

It is doubtful that much sustenance would be derived from the book without some previous knowledge on the reader's part of the basic material involved, that is, the Internal Revenue Code itself, the income tax regulations (Regulations 111), and certain important decisions of the courts. The authors state that the book is designed to be read with the Internal Revenue Code and that, to a lesser extent, the pertinent provisions of the regulations should be read along with the text material. If a novice in the field of federal income taxation were to follow the procedure indicated, he would undoubtedly find this guide to the law of great assistance in indicating what are the important provisions of Chapter 1 of the Code, and in stating for him, in more readily understandable language, some of the mysteries concealed in the statutory verbiage.

This reviewer cannot resist expressing at this point his considered opinion, which, it is safe to say, is shared by most of those who have had to contend with tax statutes for any length of time, that a serious effort should be made to draft such statutes in readily intelligible language. One obvious improvement would be the elimination of the many unwieldy sentences and the substitution therefor of a series of shorter sentences. More space would be taken up, to be sure, but, it is submitted, more sense would be expressed.

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The material in this guide to the law is presented in accordance with the order used in the Code. The authors justify this arrangement by the noteworthy statements that the lawyer must know the Code and its organization if he is to have any sound knowledge of tax law, and that a good workable knowledge of the Code can only be obtained through a section-by-section study.

Only the basic provisions of the Code relating to the income tax are discussed by the authors. Some of those not discussed, however, are of general importance, such as sections 58, 59 and 60, relating to the estimated tax, but the authors account for the omission in this instance by the statement that the problems involved in those sections, although at times extremely detailed, are not difficult to understand. Accordingly, the reader is sent to the statute, which the authors assume he has before him. Other sections are not discussed, such as section 123 (relating to commodity credit loans), section 124 (relating to amortization deductions), and section 125 (relating to amortizable bond premiums), for the reason that such provisions are not of general importance. The authors have by such judicious omissions been able to keep their treatment within proper bounds for a clear understanding of the basic provisions of the Code concerned with the income tax. They have placed emphasis where it belongs, and no exception is taken to the selections of topics as set forth in their book. They have, for example, managed to discuss personal holding companies at considerable length, considering the size of the volume, even though the personal holding provisions of the Code are in Chapter 2 rather than in Chapter 1 thereof. It should also be noted that they have not overlooked the important principles developed in the cases. As the authors state, certain important court decisions have become a part of the basic structure of the tax law.

This guide to the law deserves to be well known. After involvement in the details of tax practice or tax literature, it is, as Randolph E. Paul says in his introduction, very refreshing to take up a book such as this.

*Roger P. Peters**

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LAW AND TACTICS IN JURY TRIALS: The Art of Jury Persuasion, Tested Court Procedures. By Francis X. Busch.[1] Indianapolis: The Bobbs-Merrill Co., Inc., 1949. Pp. xxvii, 1147. $17.50. — In his prefatory remarks to this most recent study of trial court procedure and jury persuasion, Mr. Busch points out that, "In no branch of the law does actual experience play as great a part as in the development of a trial lawyer." A young lawyer's first few experiences in drafting instruments, for example, may inspire him with confidence in his

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ability to tackle another such job. However, the trial of half dozen jury cases will not usually advance the trial lawyer very far "along the road to fame as an acknowledged first-rate advocate. Such acknowledgment comes only after years of practice. . . ." Mr. Busch, in his Preface, further states:

> It is impossible adequately to set down the results of such an experience. Perhaps it is possible to combine a treatise on the general requirements of trial procedure with some practical considerations entering into the art of advocacy before juries and, by such a combination, present something of value to the lawyer and law student interested in jury trial practice. It is the hope of the author that this work may be found to be such a combination.

Thus does the author indicate the onus of this book. The resulting work of over 1100 pages is a singular combination of an annotated statement of legal concepts by which jury trials are governed and a very practical statement of the techniques by which they are won, with examples and comment. To fuse the styles necessary to these very divergent aims is difficult and could only be accomplished so well by one who, as Mr. Busch, has been both teacher and practicing lawyer, both scholar and warrior "in the bull pen."

The better half of the book is that written by the warrior. It is the more interesting half, too — and the more informative. In this portion the author gives us the general principles of his trial technique in every phase of the trial: the impaneling of the jury, the opening statement, the direct examination, the cross-examination and so on through the steps of the jury trial to the verdict. Following the statement of general tactical principles applicable to each phase, the author then shows the application of the principles in copious examples followed by comments illustrating how the principles have been used. There are liberal examples to demonstrate all of the general principles stated in the text. By this very technique the author reveals his prowess in "the art of persuasion." It is an excellent device to get across to the reader the result of the author's experience. It is tantamount to having the author take us with him into the courtroom, allowing us to watch him perform his difficult tasks after being told his problems and how he will meet them.

One could have only a single criticism of this portion of the book: it could well have been even more comprehensive. For example, although every writer on the subject, and Mr. Busch is no exception, reiterates again and again that trials are won or lost by the work done outside the courtroom and particularly the work on the facts, there are only twenty-two pages devoted to the problems and techniques of preparation of the facts, allowing but three pages to "interviewing witnesses," and but one page to "provisions of discovery." By contrast, 133 pages are devoted to discussion and examples of brilliant cross-examinations. Like many other similar books, very little is said about how the lawyer prepared himself for that brilliant

cross-examination. The reader can only imagine the wonderful story the author could tell about his experiences in interviewing and dealing with witnesses before trial, in exploiting fully the methods of discovery and in developing the many other stratagems which make his work in court appear both effortless and brilliant. How exceedingly helpful to the less experienced would have been a study of the relationships with several witnesses of various types, from the first contact to the completion of their respective testimony.

The purely "law" portions of the work are accurate, informative and readable. These portions are in the nature of a source book of the law governing trials by jury, including a history of the jury institution. While this part of the book is a compact, very usable reference for the student, it is doubtful if the practicing lawyer would find it quite so helpful. Since the law governing jury trials is largely statutory, and differs from state to state, and even between courts within the same state, the practicing trial lawyer must necessarily turn to the code and court rules of his state on any procedural question, and not to a single-volume work so broad in nature.

In general, it may be said that Mr. Busch has produced a thoroughly excellent book. At its best, the book ranks with the finest on trial techniques. At its weakest, it must still be recognized as a reliable source, and perhaps the most convenient quick source, of the law of trial by jury.

*Thomas M. Scanlon**

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RELIGION AND EDUCATION UNDER THE CONSTITUTION. By J. M. O'Neill.[1] New York City: Harper & Brothers, 1949. Pp. xii, 338. $4.00. — "If what the American people have deliberately put into the Constitution is to be disregarded by the Supreme Court, and its exact opposite . . . is to be enforced simply because the new doctrine fits the 'zeal' and the 'prepossessions' of the men who happen to be on the Court at any given time, then the Constitution ceases to be living law and becomes only an outmoded historical curiosity." [2] In this book the author does an excellent job of proving that the Supreme Court did so disregard the Constitution in the language of its decision in the *Everson* case [3] and "enforce its exact opposite" in the *McCollum* case.[4] In the indicated cases, taken together, the Court reached two brand new and very far reaching conclusions. The first was that the

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1 Chairman, Department of Speech, Brooklyn College.

2 Text, at 49-50.

3 Everson v. Board of Education, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

4 McCollum v. Board of Education, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

Fourteenth Amendment had made the First Amendment applicable in all of its terms to the States. This being so, no State may make any law respecting "an establishment of religion." The second conclusion was that the provision against "establishment" requires a "wall of separation," not only between Church and State, but between *Religion* and *Government,* in all states of the Union.

Professor O'Neill is not satisfied merely to criticize these revolutionary conclusions of the Court as badly mistaken constitutional constructions. He attacks them as deliberate distortions of the very materials upon which the Justices pretended to rely in their defense of both propositions.

The author's documentation is impressive. Recalling that the Fourteenth Amendment became a part of the United States Constitution in 1868, he points out that "between 1870 and 1888 no less than eleven different formulations of proposed amendments to put into the Constitution of the United States restrictions on the freedom of the states in such domestic concerns as religion and education, were introduced into Congress . . . [which] repudiated every one of the proposals." [5] He then makes the obvious point that if the then existing Fourteenth Amendment had been intended to bring into being against the states all of the restrictions directed against Congress by the First Amendment (as the Supreme Court Justices in the indicated cases declared), then the eleven proposals of constitutional amendments were all quite pointless. Remembering that the Congressmen of 1870 to 1888 were of the same generation that proposed and adopted the Fourteenth Amendment, it is surprising now to learn that they knew less about the scope of that Amendment than the Supreme Court Justices thought they did in 1947 and 1948.

The author subjects each separate judicial opinion rendered in both the *Everson* and *McCollum* cases to critical and devastating analysis. He concludes that the only possible theory of constitutional validity for the *McCollum* decision is bound up with Justice Black's dictum in his dissent in *Adamson v. California* [6] that the Fourteenth Amendment applies the entire Federal Bill of Rights completely to the States. This theory, as Professor O'Neill points out, has never been accepted by the majority of the Court; however, "since none of the Justices in that [*McCollum*] case argued or defended their positions in terms of accurately cited history or constitutional law, there is no way of knowing that the Justices were even aware that they were assuming a theory of application of the Fourteenth Amendment which had been consistently denied by the Court since 1873 and explicitly repudiated in *Adamson v. California* in June of 1947." [7]

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[5] Text, at 43.

[6] 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947).

[7] Text, at 161.

On the question of what constitutes a religious "establishment," the author makes the conclusions of the Justices seem even more tortured. Nevertheless, while most of the language of all the opinions was devoted to this question, the preliminary and casually accepted determination of the Court that the First Amendment is now in all of its terms a part of the Fourteenth Amendment is so obviously at variance with the unbroken historic position of the Supreme Court that the strained and repetitious arguments on the matter of "establishment" appear painfully anti-climactic. After making a mistake of the magnitude involved in its first unfortunate "assumption," the Court might just as easily and with similar justification have assumed its second point without citation or argument.

When the vexed questions involved in the *Everson* and *McCollum* decisions reach the Supreme Court again — as indeed they sooner or later must, in such matters as continued tax exemption for church property — we predict that Professor O'Neill's book will be indispensible reading for the attorneys on both sides.

*Clarence Manion**

## BOOKS RECEIVED

CASE OF GENERAL YAMASHITA, THE: A Memorandum. By Brigadier General Courtney Whitney. Tokyo, Japan: General Headquarters Supreme Commander for the Allied Powers, Government Section, 1950. Pp. 82.

CASES AND MATERIALS ON FEDERAL COURTS. By Charles T. McCormick and James H. Chadbourn. Brooklyn: The Foundation Press, Inc., 1950. Pp. xxix, 921. $8.00.

CASES AND MATERIALS ON FEDERAL TAXATION. By Roswell Magill. Brooklyn: The Foundation Press, Inc., 1950. Pp. xv, 546. $7.00.

CASES ON THE LAW OF BUSINESS ORGANIZATION: Agency and Employment Relations, Including an Introduction to Partnership Liability. By Alfred F. Conard. Brooklyn: The Foundation Press, Inc., 1950. Pp. xxvi, 661. $7.00.

CASES ON THE LAW OF TRUSTS. Second Edition. By George G. Bogert. Brooklyn: The Foundation Press, Inc., 1950. Pp. l, 1041. $7.50.

*CONGRESS MAKES A LAW: The Story behind the Employment Act of 1946. By Stephen Kemp Bailey. New York City: Columbia University Press, 1950. Pp. xii, 282. $3.75.

*FEDERAL INCOME TAX, THE: A Guide to the Law. By Joyce Stanley and Richard Kilcullen. New York City: The Tax Club Press, 1948. Pp. xv, 344. $6.00.

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*Reviewed in this issue.

*HANDBOOK ON THE LAW OF SURETYSHIP. By Laurence P. Simpson. St. Paul: West Publishing Co., 1950. Pp. xiv, 569. $7.00.

HUMAN RIGHTS: Comments and Interpretations. A Symposium Edited by UNESCO with an Introduction by Jacques Maritain. New York City: Columbia University Press, 1949, Pp. 288. $3.75.

INTERNATIONAL PROTECTION OF THE HUMAN RIGHTS OF MINORITIES. New York City: Consultative Council of Jewish Organizations, 1950. Pp. 38.

IT'S LIBEL OR CONTEMPT IF YOU PRINT IT: A Practical Book on Libel, Contempt, and Kindred Topics for Lawyers, and for Students and Workers in the Newspaper Field. By Leon R. Yankwich. Los Angeles: Parker & Company, 1950. Pp. xvi, 612. $12.50.

JURISPRUDENCE OF INTERESTS. Translated and Edited by M. Magdalena Schoch. Cambridge, Massachusetts: Harvard University Press, 1948. Pp. xxxii, 328. $5.00.

*LAW AND TACTICS IN JURY TRIALS: The Art of Jury Persuasion, Tested Court Procedures. By Francis X. Busch. Indianapolis: The Bobbs-Merrill Co., Inc., 1949. Pp. xxvii, 1147. $17.50.

LAWYERS' TAX MANUAL: Procedure, Transactions, Forms. By Alfred S. Pellard. New York City: Clark Boardman Company Ltd., 1949. Pp. xxiii, 582. $12.00.

LIVING LAW OF DEMOCRATIC SOCIETY. By Jerome Hall. Indianapolis: The Bobbs-Merrill Company, Inc., 1949. Pp. 146. $2.50.

MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION: A Survey of the Extent to which the Standards of the American Bar Association for Improving the Administration of Justice Have Been Accepted Throughout the Country. Edited by Arthur T. Vanderbilt. New York City: The Law Center of New York University for the National Conference of Judicial Councils, 1949. Pp. xxxii, 752. $7.50.

PARTNERSHIP. By Ludwig Teller. New York City: Harmon Publications, 1949. Pp. xvii, 197. $5.00.

*RELIGION AND EDUCATION UNDER THE CONSTITUTION. By J. M. O'Neill. New York City: Harper & Brothers, 1949. Pp. xii, 338. $4.00.

SENSE OF INJUSTICE, THE: An Anthropocentric View of Law. By Edmond N. Cahn. New York City: New York University Press, 1949. Pp. 186. $3.50.

TAX PLANNING FOR ESTATES. By William J. Bowe. Nashville: Vanderbilt University Press, 1949. Pp. 93. $2.00.

*Reviewed in this issue.