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Book Reviews

BOOK REVIEWS

THE INSTITUTION OF PROPERTY. By C. Reinold Noyes. New York: Longmans, Green & Co. 1936. pp. xiv, 645. $7.50.

The aim of this book appears to be to explain to economists all the elements expressed by the term "Property", as that term is understood today in law and in business.

The method of the book is historical. The author traces the idea of Property from the pre-historical days of Rome, through the historical period, republican and imperial, passes over to England and follows the development of the idea of Property from 1066 down to the present day, crosses the Atlantic and exhibits the various uses of the term, Property, in American law from the foundation of the Colonies down to the New Deal. It was a vast undertaking and has been well executed.

His Chapter V might be denominated: "Words and Phrases Judicially Defined." In this chapter he shows how the American courts have used "Property," "Possession," and "Ownership" as almost synonymous terms. In chapters VI and VII he shows the various interests that are regarded by the courts as property rights.

For the student of Jurisprudence the book is valuable as a development of the specific elements involved in the generic idea of "Ownership." A writer on Jurisprudence, like Salmond, brings out in a single chapter on "Ownership" all the generic elements developed in this book. What the author here does is to give the historical background, and to specify in detail the various types of right which are recognized in law as property.

It is to be regretted that the publisher failed to furnish the facts of the "Who's Who" of the author. There is not a word on the title page or on the jacket to indicate who he is. Inquiry at the editorial department of the publisher elicited the information merely that he is an "economist" practicing in New York. He is certainly a most extraordinary economist. He is an economist who has a thorough grasp of law, Roman, Common and Statute, who knows several modern languages, as well as Latin and Greek, who has had access to all the classical texts of the law, and to all the classical writers on the texts, and who can appreciate the significance of both text and comment.

JOHN X. PYNE, S.J.†

A TREATISE ON THE LAW OF CONTRACTS. By Samuel Williston. Revised Edition. Volume I. New York: Baker, Voorhis & Co. 1936. pp. xix, 926. $85.00 per set of 8 volumes.

The great majority of text books on law are "almost worthless if not positively harmful."[1] This devastating statement, made by one of our leading legal authorities, is founded upon the criticism that so many of such books fail to start from clear and definite concepts analyzed into simple and invariable elements. Although sweeping generalizations like that above are often exaggerations it is too often true that the writers of text books are satisfied merely to digest a series of decided cases under an appropriate heading and to lay down a pat rule without inquiry into fundamental principles and without evaluation of the decisions, either as to their soundness in logic or their service to a workaday world.

†Regent, Fordham University, School of Law. Author, THE MIND (1925).

1. Corbin, Book Review (1920) 29 YALE L. J. 942.

Students in law schools which use the case system of instruction often wonder why reference to text books is so infrequent. It is because the study of the average text book fails to ground the student upon the general principles from which he can reason to the right result in particular cases.[2] Even under the case system of teaching there is a constant struggle to divert the students from the "give us a rule for every case" state of mind to the consideration of the fundamental concept developed by the selected group of cases assigned for study.

Williston's Treatise on Contracts, however, is a text book which can be recommended enthusiastically to students studying under any system of legal instruction. It is one of the best law books ever written, not only from the standpoint of substantive content but also from the standpoint of style. The first edition has become the classic legal work of our times, a gold mine full of rich ore to be worked by the student, teacher, practitioner and judge. It was so excellent that when the Revised Edition was recently announced, (in which Prof. Thompson of Cornell was to collaborate with Prof. Williston), there were some who wondered whether or not much revision was necessary except to the end of bringing case citations up to date.

During the decade which has elapsed since the publication of the original treatise Prof. Williston has completed his work on the Restatement of the Law of Contracts. His contact in this work with the keen minds who were his advisors naturally has deepened and ripened his exhaustive knowledge of his subject and this is reflected in the Revised Edition, although it speaks volumes for the soundness of the original work that it has not been found necessary to revise many of the conclusions advanced there and there defended with such "sweet reasonableness." The Restatement itself is integrated with the text of the later work which has, in effect, become a commentary upon the restatement as well as an exposition of the case law as it is or ought to be.[3]

The footnotes have been greatly improved by the citation of numerous law review articles. Even in a work so comprehensive as this all points cannot be thoroughly explained and annotated but by reference to the articles cited the student or the practitioner can investigate every corner of the problem in which he is interested. The growing practice of citing the law reviews in texts and casebooks is gradually making their contributions to legal science available. A mine of valuable material has been buried away in the bound volumes of the law reviews both in the way of leading articles and in the way of student case notes and comments. In many instances the authors of this work have included references to case notes upon important decisions, which notes may be read with profit by any lawyer, or judge for that matter, who proposes to cite the cases commented upon in his brief or opinion.[4]

The footnotes, of course, have been brought up to date by the inclusion of the important cases decided both in England and America in the last fifteen years. When these cases do not square with sound principle they are criticised as was the custom of the author in the original edition. Prof. Williston has always paid a decent respect to *stare decisis* but he is not a slave to it; always he searches for the principle, the reason and justice of the thing. On the other hand he does not

2. A lawyer of my acquaintance who has had more than twenty years of successful legal practice told me that whenever he needs to get to the bottom of a new problem he goes to a case book rather than to a text book, except when the problem is in Contracts. Then he goes to WILLISTON.

3. Professor Thompson, the co-author of the Revised Treatise, was a member of the committee which collaborated with Professor Williston in drafting the Restatement.

4. See CARDOZO, *Introduction,* SELECTED READING OF THE LAW OF CONTRACTS (1931).

worship logic for logic's sake nor does he elevate logic above justice. If a sound principle is evidently misapplied the author does not employ Von Jhering's hairsplitting machine[5] in an attempt to justify the decision—"These decisions cannot be supported," he says, with reasons.[6] More often than not the student will agree with the pronouncement. If an established rule, which may have originated in the days of a rough and tumble society, does not square with the reasonable expectations of the modern business community, with its ethics more nearly, however haltingly, approaching the Sermon on the Mount rather than those of the bear-pit, the author advocates the viewpoint of the modern man. He recognizes that positive law should be for the service of man, not his tyrant. Since it is the fashion now to bestow labels upon the writers in the law this reviewer would say that, as to philosophy, Prof. Williston is a disciple of principle who can also regard realities—a realistic conceptualist, shall we say, with his feet upon the ground and a heart in his breast.

The authors of the Revised Edition appear to be committed to the general conception of a contract as a bargain concluded between two or more parties by which they manifest a mutual intention to exchange promises or to exchange a promise for a performance.[7] This was the concept Prof. Williston expounded in the earlier work and it seems to explain most satisfactorily the case law as it has matured. This bargain concept in some of its applications, however, leads to results which conflict with the common sense of justice. When such an undesirable result will follow rigid adherence to the concept the authors candidly concede it and advocate for such classes of cases an exceptional doctrine which will bring the law into line with the feeling of the community. An example is the doctrine of promissory estoppel[8] which has been discussed so much in recent years and the related problem presented when one who has offered a promise for an act withdraws his offer after part performance by the offeree.[9]

The latter problem arises in connection with offers looking toward the formation of a unilateral contract. Fairness dictates that a man has the right to fix the limits of the bargain he is willing to make and in these cases the offeror tenders his promise in exchange for an act. He very clearly assents to perform his promise only in exchange for a completed act. Until he gets what he bargained for therefore, it would be unjust to compel him to perform his promise. If before the act is completed, the offeror withdraws his assent there is not then and cannot be thereafter the manifestation of mutual assent which a bargain requires and in logic no contract arises. If the logical view is applied the offeror is free to withdraw his offer anytime before the offeree's act is completed. Yet case after case can be put in which the most severe hardship will be imposed upon an offeree who has nearly completed performance when the offer is withdrawn.

The authors of the Revised Edition discuss the various theories that have been advanced to get over the injustice of strict adherence to the bargain concept and adopt the one that "if the consideration requested in the offer of a unilateral contract will necessarily take time and expense for its performance, the offer contains by implication a subordinate offer to keep the main offer open for a reasonable time in consideration of the beginning of performance of the offeree."[10] It is not said

5. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809.

6. 1 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (rev. ed. 1936) 356.

7. *Id.* §§ 1A, 2A, 18, 25, 100.

8. *Id.* § 138-140.

9. *Id.* § 60-60AA.

10. *Id.* at 170.

whether or not the implication is one of fact, *i.e.*, that the offeror is manifesting an assent to keep the offer open in exchange for the beginning of performance by the offeree, or whether the implication is to be implied by law in order to accomplish justice, like the implied in law conditions applied to the performance of contracts. It seems doubtful that the offeror in such cases is manifesting any intention to conclude such a collateral contract. The truth probably is that his attention is not directed to the point at all and that he has no intention one way or the other. On the other hand, were his attention directed to the point and if he were actuated by just motives, he would agree that the offer should not be withdrawn after detrimental performance by the offeree was under way and he would agree not to do so.[11] It is submitted that the implied collateral contract is to be implied by law and is not a bargain actually concluded between the parties.

The authors state that "as a matter of positive decision the right of the offeror to revoke his offer even after part performance by the offeree has the support of a few American cases",[12] citing *Petterson v. Pattberg*[13] as the leading case for that strictly logical view. Although the language and spirit of Judge Kellog's opinion for the majority indicates that such is, indeed, his view, it is submitted that the point was not actually before the court on the facts of the case. The act of the offeree which the offeror bargained for was the act of pre-payment of a mortgage debt, an act that did not require any length of time to perform, an act which would be completed the very moment it was begun. Before the offeree even commenced the act of payment the offeror withdrew his offer so it was not a case in which the offer was revoked after part performance. True, the offeree had drawn the cash from the bank and had approached the offeror's house with the purpose of making payment and had rung the doorbell. But these were acts of preparation and the authors warn us that even detrimental action taken by way of preparation to enter upon performance is not enough to create the collateral contract to keep the offer open.[14] The offeree also announced: "I have come to pay the mortgage". Neither was this any part of the act of payment according to the majority of the court. A good deal can be said for the argument that, as business men would look at such an offer, the act really bargained for was an offer by the offeree to make the payment, being prepared to do so on the spot. Such were the facts before the offeror revoked and hence the offer was completely accepted. The reviewer believes that Judge Lehman's dissenting opinion in the case, dealing with this view of the facts, is much sounder. The authors of the Revised Edition put it this way: "It is a necessary implication from the offer that the offeror promises to accept a tender of performance in consideration of the offeree's making such a tender."[15] That seems true and the implication in this instance is one of fact, not law. However that may be, it is submitted that the court did not squarely decide that an offer may be withdrawn after *part* performance of the act requested. If that is so then the question is still an open one in New York and the way is clear for the court, when the occasion arises, to adopt the rule proposed in the Restatement and supported by the authors of the Revised Edition; a rule that seems to bring about a just result.[16]

An aspect of this same problem that does not seem to have been much discussed is the injustice that may be imposed upon an *offeror* who takes detrimental action upon the faith that he is going to receive complete performance from the offeree

11. Compare COSTIGAN, THE PERFORMANCE OF CONTRACTS (1927) 9, n. 23.
12. 1 WILLISTON, *op cit. supra* note 6, at 167
13. 248 N. Y. 86, 161 N. E. 428 (1928).
14. 1 WILLISTON, *op. cit. supra* note 6, at 171.
15. *Id.* at 174.
16. RESTATEMENT, CONTRACTS (1932) § 45.

who has commenced performance only to have the offeree quit before completion. "After the offeree has begun to perform under such an [unilateral] offer he may unquestionably stop performance halfway if he concludes that after all he does not care to enter into the contract . . ."[17] Suppose that, before transatlantic flights by airships became commonplace, a promoter of the spectacular wired Dr. Eckner: "If you will sail the Graf Zeppelin from Germany to the Yankee Stadium in New York I will pay you $50,000." The Graf then starts for New York, after notice to the promoter, whereupon he closes a contract for the use of the Yankee Stadium, expends considerable money for publicity and prepares to sell tickets of admission. Halfway across the Atlantic Dr. Eckner decides to turn back, which he does. Under the law he would be under no liability to the promoter, yet as much hardship has been inflicted upon the latter as would have been inflicted upon Dr. Eckner had the promoter radioed him in mid-Atlantic that the offer was withdrawn. Neither the Restatement nor the authors of the Revised Edition propose any rule to meet this situation.

It may be said that when an offeror offers his promise in exchange for an act that he can foresee that the offeree may take detrimental action in reliance upon the offer by commencing performance and that the converse is not so likely. But there are situations in which the offeree should foresee that the offeror, who sees his offeree in the course of performance, reasonably expects performance to be completed and that he will take detrimental action upon the expectation. In a Pennsylvania case the difficulty was dismissed with the dictum that "it is his (the offeror's) folly not to guard against it by exacting a mutual engagement. . . ."[18] But of course the same answer could be and has been made in the cases when the offeror withdraws his offer to the consternation of the offeree who has partly performed. If business men were trained in the niceties of the law probably they would guard against these contingences by exacting a mutual engagement. But offers continue to be made in the unilateral form and these problems must be dealt with. Why, then, should only hardship upon the offeree be provided against?

Some courts, as the authors point out "have thought it possible to turn the transaction into a bilateral contract by a beginning of performance on the part of the offeree."[19] These have been cases, usually, in which the offeror withdrew and "what obligations the offeree assumes by beginning to perform are, however, not considered." In an English case, Earl, C. J., said: "But the moment the coach builder has prepared the materials he would probably be found *by the jury* to have contracted."[20] The jury, in other words, having the viewpoint and instinct of the layman, to whom the matter is a practical one, would say that having commenced performance the offeree has indicated assent to the offer, has accepted it and that both parties are then bound. Some lawyers treat the cases which propose to turn such transactions into a bilateral contract with some scorn and contend that to do so would impose upon the parties a different kind of a contract than they meant to make but this solution seems no more artificial than the one which imposes upon the offeror a collateral contract to keep his offer open and such a solution protects both parties. It may be noted that there are a number of cases which have held that when the offeror requests a promise of specified action, (*i.e.*, proposes a bilateral contract), but the offeree performs or tenders the act instead of making the promise, a contract is created.[21] In such cases there is

17. 1 WILLISTON, *op. cit. supra* note 6, at 167.

18. Clark v. Russel, 3 Watts (Pa.) 213, 217 (1834).

19. 1 WILLISTON, *op. cit. supra* note 6, at 169.

20. Offord v. Davies, 12 C. B. (N. S.) 748 (italics inserted).

21. 1 WILLISTON, *op. cit. supra* note 6, § 78A. In another connection the authors say: "An offeree who has unjustifiably led the offeror to suppose he had acquired a contractual right should not be allowed to assert an actual intent at variance with the meaning of his

no hesitation about turning a proposed bilateral contract into a unilateral one although if strict adherence to logic prevails no contract has been created. Under the strict view *one* bird in the bush is worth more than one in the hand.

The authors of the Revised Edition have divided the material which formally appeared in the chapter on "Consideration" into two chapters headed "Consideration" and "Promises Requiring Neither Mutual Assent Nor Consideration." Under the latter heading the doctrine of promissory estoppel is considered at some length as well as the enforceability of promises made to pay obligations which have been discharged or barred by operation of law and like cases. It seems desirable to recognize that these promises are not supported by consideration rather than to attempt to harmonize the results reached by the courts with the orthodox concept of consideration.

The doctrine of consideration has been dealt with in the main as it was in the original edition. The current work, however, contains a considerably enlarged discussion of the so-called "mutuality cases." The authors assert that the statement that there must be mutuality "is likely to cause confusion and however limited is at best an unnecessary way of stating that there must be valid consideration."[22] The problem has been met with rather frequently in recent years in connection with transactions by which a buyer agrees to buy all his requirements from the other party or a seller agrees to sell all his output to the buyer. Oftentimes the problem is one of interpretation, especially in cases where the buyer agrees to buy all that he shall require of a certain product which the seller offers to sell to him. Sometimes these agreements are interpreted to mean that the buyer agrees to take only such goods as he may capriciously desire. If that is the true interpretation then there is no consideration for the seller's promise as the buyer does not bind himself to anything. Sometimes such agreements are interpreted to mean that the buyer agrees to buy from the offeror all such goods as he shall need.

The New York courts in two well known cases appear to lay down the rule that if the agreement "gives the buyer or seller an option to take or produce no goods (it) is invalid, although he agrees that if he should buy or produce any goods of the kind in question he would buy them from or sell them to the promisee."[23] These cases are criticized by the authors on the ground that there is in fact sufficient consideration[24] and the criticism seems sound. It is true that the jobber in the *Schlegel* case and the Supply Company in the *Nassau* case had no established requirements and might never have but they necessarily promised to buy from no one except the promisor should they have occasion to buy at all. Hence they suffered legal detriment.[25]

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words or acts." *Id.* § 67A. Also in cases involving conditions, such as the giving of an architect's certificate and the satisfaction of the promisor, the courts have seemed willing to impose upon the parties a contract different in terms from that which the parties evinced an intention to make in order to accomplish justice. Nolan v. Whitney, 88 N. Y. 648 (1882) and perhaps Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709 (1886).

22. 1 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (rev. ed. 1936) § 141.

23. The cases are Schlegel Mfg. Co. v. Peter Cooper's Glue Factory, 231 N. Y. 459, 132 N. E. 148, 24 A. L. R. 1348 (1921) and Nassau Supply Co., Inc. v. Ice Service Co., Inc. 252 N. Y. 277, 169 N. E. 383 (1929). The quotation is from *op. cit. supra* note 22, at 356.

24. WILLISTON, *op. cit. supra* note 22, at 355.

25. The result in the Schlegel case might be upheld on the ground that the offeree's endorsement of the word "Accepted" on the seller's offer to sell to the buyer all his "requirements" meant only that the offeree authenticated the terms, *i.e.*, that he understood the terms and that they were agreeable to him. See *op. cit. supra* note 22, § 73A. But the

The technical doctrine of consideration, which is peculiar to the common law, has always been under attack, either openly or covertly. Strict adherence to the doctrine not infrequently brings about hardship and there appears to be a growing sentiment to modify the classic rule. "If this sentiment", write the authors, "should find general expression, it may fairly be argued that the fundamental basis of simple contracts historically was action in justifiable reliance on a promise—rather than the more modern notion of purchase of a promise for a price, and that it is a consistent development from this early basis to define sufficient consideration as any legal benefit to the promisor or legal detriment to the promisee[26] given or suffered by the latter in reasonable reliance on the promise." The authors do not commit themselves to such a sweeping change but do advocate a cautious enlargement of the field of enforceable promises to include those which "have led the promisee to incur any substantial detriment on the faith of them, not only when the promisor intended, but also when he should reasonably have expected such detriment would be incurred, though he did not request it as an exchange for his promise."[27] This is a proposition with which probably the lay members of the community would agree and which in fact they seem to suppose is the law until they are sadly disillusioned. The law of contracts originated from just such a concept; it accords with the natural sense of justice and it is to be hoped that it will again become the law.

The Revised Edition closes with chapters on the formation of formal contracts, the capacity of parties and the contracts of agents and fiduciaries. The growth of the law in these fields is indicated and, in the last chapter, the presentation has been collated with the Restatement of the Law of Agency.[28]

The object of the revisors was to keep the treatise abreast of the case law of Contracts as it has developed in the last sixteen years, to reconsider and give more intensive treatment to those questions which such developments and which criticism and discussion have indicated to be desirable and to add such new material as was required in order to present a complete exposition of the subject.[29] Those objects have been fulfilled and Williston's Treatise on the Law of Contracts continues to be the best law book of our times.

GEORGE W. BACON†

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decision does not appear to be grounded upon that interpretation but upon the theory that the offeree's promise was illusory. The result in the case may also be justified upon the ground that his endorsement in the context of the offer meant merely, "I will buy from you all I choose to take" and not "all I shall need or buy from anyone." This would seem, however, to be a strained interpretation of the word "requirements." In the Nassau case the negative undertaking to buy from no one else than the defendant is a necessary implication from the affirmative promise to buy all needs up to one hundred tons.

26. WILLISTON, *op. cit. supra* note 22, at 502. That this sentiment is finding expression is manifest from the numerous articles marshalled by the authors in support of RESTATEMENT, CONTRACTS (1932) § 90 set down in *op. cit. supra* note 22, at 503, n. 1. Lord Wright in a recent article goes further and thinks that the doctrine of consideration is a "mere encumbrance" which should be excised from the common law. Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?* (1936) 49 HARV. L. REV. 1225.

27. WILLISTON, *op. cit. supra* note 22, at 502.

28. Volumes II and III of the Revised Edition have also been published and several additional volumes are promised for the near future.

29. WILLISTON, *op. cit. supra* note 22, *Introd.* iii.

† Professor of Law, Fordham University, School of Law.

LOCAL DEMOCRACY AND CRIME CONTROL. By A. C. Millspaugh. Washington, D. C.: Brookings Institution. (1936). pp. xii, 263. $2.00.

The title of this little volume is possibly unintentionally misleading. It is concerned with the organization and structure of local government in relation to crime control rather than with the relation of democracy *per se* to the crime problem. The author does not overemphasize the significance of governmental organization in meeting the crime problem nor does he exaggerate the benefits to be derived from reorganization. He frankly concedes that the most serious shortcomings of American crime control are in our law, our organization and our procedure. He freely concedes that "the central problems no doubt have to do with personnel and with public attitudes". These, however, are not within the scope of the present study. Dr. Millspaugh is concerned with the overlapping functions and responsibilities of county, municipal, town and state agencies of law enforcement. Theoretically the officers of all of these agencies are engaged in the enforcement of state law. The local agencies are independent of each other and almost equally independent of the state itself. It would be possible but certainly difficult to integrate the sheriffs of the various counties of a state into a satisfactory police force. A dozen of our states have sidestepped the difficulties of such a solution to the problem by creating state police forces. Governor Lehman proposed that New York go further and create a department of justice. Local self-government or localized democracy has considerable emotional support. Dr. Millspaugh is candidly "doubtful whether the concept of local self-government deserves any large place in a realistic political science." He finds little concrete evidence of its utility. Efforts to improve local crime control through county consolidation and other regional adjustments are handicapped by local pride and politics, and accomplish little if these obstacles be surmounted. As a result our states are more and more seeking to equalize service and taxation by extending state financial aid and, frequently as the price of such aid, state administration assistance.

Authorities are recognizing that rural police work to be effective must be a state function. Crime is organized and motorized and the broad concrete state highways are open for it. Unorganized local peace officers cannot cope with it. There is little recognition of this problem in our cities but even they will have to recognize that crime is a state concern, if not, indeed, an interstate or national problem. Such state control of municipal police forces as we have had (and still have in few cities) has been so tainted with partisan politics as to make one hesitate at anything as extreme as the assumption of all police work by the state. Dr. Millspaugh subscribes to the views of Dean Roscoe Pound and Professor Raymond Moley that prosecution must be brought under the centralized control of a state director, probably the attorney general. This, too, might well begin with supervision rather than complete absorption. Certainly there is far less risk in centralized prosecution than in the creation of an all-powerful army of state police.

This little volume is an introduction to the problem rather than an exhaustive examination of present tendencies. Its aim is not so much to reorient our thinking as to initiate some thinking as to tendencies, already gaining momentum.

JOSEPH D. MCGOLDRICK.†

A TREATISE ON THE LAW OF PERSONAL PROPERTY. By Ray A. Brown. Chicago: Callaghan & Co. 1936. pp. lxxx, 722. $4.50.

The author states that "the purpose of the present work is to be critical; not merely to present the bare rules of the law, but also to consider the fundamental

† Professor of Public Law, Columbia University.

principles and policies which lie back of them."[1] Professor Brown has accomplished his dual objective of setting forth the legal principles and of weighing their soundness and utility. Throughout his treatise he does not hesitate to criticise or to defend the stated rules of law and the cogency of his comment adds considerable value to his work. While interspersing his criticism with the statement of the law, he never fails to distinguish between them; his realistic arguments are sharply separated from current doctrine—a distinction not always observed since the arrival of the "functional approach".

The text, he tells us, "is designed primarily for student use".[2] It is believed that his book will admirably serve the stated purpose. Professor Brown follows the traditional order generally adopted in case books on personal property, a feature which will make the text more readily accessible to student readers. His book begins with an introductory chapter on the nature of property. Then follows a development of the law of original acquisition, lost articles, adverse possession, acquisition of title by judgment and satisfaction of judgment, accession, confusion, gifts, sales, bailments, liens, pledges, fixtures and emblements.

An outstanding topic, gauged by the extent of treatment, is the law of bailments. More than one half of the text is devoted to the various types of bailments, including pledges and liens. Yet this breadth of treatment is warranted in view of the importance and the complexity of the involved problems. Delete all questions of possession and bailment from the law of personal property, as the subject is developed in the current case books, and a very small residuum of personal property law remains.

Turning to the matter of physical control by the bailee as a requisite of bailment, Brown discusses the relationship which exists between a safe deposit company and its customers who deposit valuables in the boxes rented from the company.[3] While Brown cites and quotes from *Lockwood v. Manhattan Storage & Warehouse Company*,[4] to support the view that the safe deposit company is a bailee, he fails to refer to *Carples v. Cumberland Coal and Iron Company*[5] which questions the view that the safe deposit company is a full fledged bailee. While it is doubtless true that the weight of authority supports the contention that a safe deposit company is virtually a bailee of property deposited in safe deposit boxes,[6] a strong argument against the soundness of this rule may be made. Why should the safe deposit company be responsible as bailee when it has no opportunity to check, handle or ascertain the contents of the safe deposit box? The secrecy attendant upon the placement or removal of valuables by the customer reenforces the contention that the safe deposit company should not be charged as a bailee. Brown says:

"Where the only question is as to the duty of care owed by the safe deposit company it is of little concern whether the relationship between the parties be denominated a bailment or something else for in any event the contract between the company and the depositor undoubtedly would imply that the former should exercise care over the depositor's goods as a bailee."[7]

This is an over simplification of the problem. True, the safe deposit company agrees to exercise care, but what degree of care? If the safe deposit company is a bailee its

1. Preface V.
2. Preface VI.
3. Pp. 230-234.
4. 28 App. Div. 68, 50 N. Y. Supp. 974 (1st Dep't 1898).
5. 240 N. Y. 187, 148 N. E. 185 (1925).
6. P. 231.
7. P 232.

duties are, and should be, quite distinct from those which would be imposed if a strict bailment is absent.[8] And rightly so. Why impose upon a safe deposit company without knowledge or control of the contents of a safe deposit box the same degree of care which obtains when such knowledge or control is present? Analogies drawn from other rules in the law of bailments may be invoked to support this contention. If a bailor conceals the nature and value of the thing bailed, the bailee is generally discharged from liability.[9] May we not suggest that the same lack of knowledge exists in the safe deposit situation with a resultant lessening of liability? Again, the consequences of declaring that a safe deposit company is a bailee will be reflected in problems relating to the burden of proof.[10] Surely it cannot be argued that a safe deposit company has the same duty of explaining away the loss of property never physically entrusted to its care which confronts the ordinary bailee.

Special mention should be made of the chapters concerning gifts[11] which subject is fully and ably covered. Diminishing emphasis upon formal delivery[12] and current attacks upon consideration[13] make the topic peculiarly volatile, a situation which the author constantly stresses.[14]

Professor Brown has brought together many novel developments in personal property law such as the liability of operators of automobile parking lots,[15] trust receipt transactions,[16] possession of intoxicating liquor[17] and the effect upon gifts of the statutory abolition of the seal.[18] This emphasis upon present day problems materially enhances the value of the treatise for student and lawyer. Perhaps the "forfeiture" cases[19] deserve a place in the chapters discussing acquisition of title without the consent of the owner.[20] Certainly this tendency of government to take property (even from innocent owners) under the police power and without compensation is an important and debatable topic which should be set forth. The fact that it impinges upon constitutional law does not destroy its pertinent relation to personal property.

Apart from any minor defects, Professor Brown has presented to the student and practitioner a scholarly, systematic and readable text which will be of material value to the legal profession.

WALTER B. KENNEDY†

CASES AND MATERIALS ON AN INTRODUCTION TO LAW AND THE JUDICIAL PROCESS. By Bernard C. Gavit. Chicago: Callaghan & Co. 1936. pp. xxi, 633. $5.00.

In keeping with the purpose expressed in the title, Dean Gavit has collected in this

8. Armstrong v. Sisti, 242 N. Y. 440, 152 N. E. 254 (1926).
9. Pp. 233-234.
10. Pp. 321-336.
11. Cc. VII-VIII.
12. Pp. 107-113.
13. Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?* (1936) 49 HARV. L. REV. 1225.
14. Pp. 86, 93, 103, 165.
15. P. 238.
16. P. 272.
17. P. 241.
18. P. 111.
19. Goldsmith-Grant Co. v. United States, 254 U. S. 505 (1921); Samuels v. McCurdy, 267 U. S. 188 (1925); Gonch v. Republican Storage Co., Inc., 245 N. Y. 272, 157 N. E. 136 (1927).
20. Cc. IV-V.

†Professor of Law, Fordham University, School of Law.

book much valuable material for the student beginning his course in a law school. The first 82 pages are in part the work of the author himself. Having informed himself thoroughly about the subject, he states the results in his own words. This part of the work is in the text-book style, though the student might like to learn a little more about the sources of the author's information. The rest of the book is made up largely of extracts from books about the law, and from judicial opinions, in case-book form.

The author evidently made up his mind that he wanted a blend of text-book and case-book. What value shall we set upon his accomplishment? The evaluation will have to be determined by the end in view. Are the materials selected suited to attain this end? Has the proper method of presentation been adopted? Since the end in view is to introduce the law student to certain fundamental facts and concepts of the law, the method adopted should be such that when the student has completed the course he will carry away with him, as his own property, these facts and concepts.

To the present reviewer it seems that the end in view might be more securely and more easily attained by the text-book than by the bulky case-book method. The concepts which the author presents are not found in isolated cases. They are imbedded in every opinion of the court. The cases in any case-book will illustrate these concepts. The specific terms in which the author expresses the concept may not be found in every opinion. But the concept is there, nevertheless; *e.g.*, concepts such as are expressed by "Liberty", "Power", "Disability", "Immunity", *etc.* Even if the lingo of the law were a principal object in view, it would be more realistic to become so familiar with the concept that it will be recognized as soon as seen, no matter in what verbal garb it may be clothed. But the author evidently felt that the Judge, as the Law Student's Pope, must place his imprimatur on the author's creed. And so the Judge, endlessly, in solemn tones, recites the words which the author wishes him to utter.

The index is decidedly modern. Though there are long extracts in the book from Blackstone, Jerome Frank and Dean Hutchins, yet the names of these writers do not appear in the index.

JOHN X. PYNE, S.J.†

LEGISLATIVE PROBLEMS. By Robert Luce. Boston: Houghton Mifflin Co. 1935. pp. 762. $6.00.

This is the final volume of a million word treatise on the Science of Legislation comprising four volumes: "Legislative Procedure"; "Legislative Assemblies"; "Legislative Principles"; and this book, called "Legislative Problems", which covers, in a general way, all that was written in the three previous books. The author Robert Luce is not only a profound student of political science, but, unlike many others who have written books on government, has had extensive practical experience as a member of the Massachusetts State Legislature for nine years, as its Lieutenant Governor, and as a member of the Congress of the United States for sixteen years. This long practical experience, especially in Legislative halls, is one of the chief reasons why this book is so valuable.

Many men with dogmatic ideas regarding the business of government, and more specifically, the business of legislation, upon being elected to public office, have, after serving either in the Legislature or the Congress, found it necessary to revise their opinions considerably.

The most outstanding feature of the book is that it is written from an unbiased

†Regent, Fordham University, School of Law. Author, THE MIND (1925).

and impartial standpoint. It is not apparent from a reading of the book what the political or party affiliations of the author are. This distinguishes it from practically every other book of like nature published today, most of which are written to uphold or propagandise a certain philosophy of political thought.

The author, in discussing the several problems, reviews each one exhaustively by giving a complete history of the origin of the problem together with the treatment of it at various stages of the history of our country. He extensively quotes men who were the acknowledged leaders of their times, and authorities on both sides of the controversy. After giving the pros and cons in each instance, the author states what he believes to be the present solution of the problem.

In discussing the separation of powers, the author takes up one of the most pressing questions of the day. Our country was founded on the principle that the government was to be divided into three departments: the legislative, the executive, and the judicial. Today more than at any other time this principle of government is being attacked. The author quotes a paragraph from an address made by Ogden L. Mills before the Academy of Political Science, in which Mr. Mills said: "The separation of powers was imposed upon us when conditions were entirely different from our present conditions. It was accepted under an erroneous impression of the English Constitution which we were following. There is no valid argument in favor of it at present except conservatism or stagnation. Why should we not give it up? Is there any reason why the greatest State in the Union should not set the example of surrendering this outworn and useless formalism? Where are the defenders of this separation of powers? Who brings forward any reason why it should survive?"

Congressman Luce takes up this challenge and explains that the framers of our Constitution were not following the English Constitution but were developing their own institutions and that conditions of our day are no different than they were then as concerns the vital element—human nature—and men are as prone today as ever to grasp all the power they can. He adopts as his answer a paragraph from Washington's Farewell Address which reads: "The spirit of encroachment tends to consolidate the powers of all the departments in one and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position."

The author proves by historical facts that the separation of powers was the result of the experience of the framers of our Constitution. The conflicts between the Colonial Governors sent from England and the Legislatures of the various colonies showed the necessity of putting curbs on the executive branch of the government. On the other hand, the able men of that time knew too well the necessity of also putting curbs on the legislative branch. At the outset there was little thought of a judiciary, as there was not enough work to warrant a judiciary. The author gives a very interesting description of how the early colonial legislatures performed judicial functions and amply proves that a legislative assembly is the worst forum for the administration of justice.

A part of the book that will prove most interesting to members of the legal profession, is the discussion of legislative powers vested in the judiciary. This involves the interpretation of statutes by the judiciary. The claim is made that judges themselves often legislate by putting a different construction on laws than was intended by the legislature. On the other hand judges claim that statutes are loosely and carelessly drawn.

The author states that the real difficulty is that a court in deciding a particular question must oftentimes interpret a statute which was never intended by the legislature to apply to such a question; in other words, the court must seek not to

find what the legislature intended—which is readily apparent from the wording of the statute—but to guess what it would have intended had it considered the question before the court. In reply to the criticism that statutes are carelessly drawn the author states it is his belief that it is impossible to frame a statute to provide for all contingencies that might arise.

The necessity for a cheaper and quicker system of interpretation of statutes than the present medium of judicial interpretation through lawsuits, is treated fully by the author. Although he admits the evil, Congressman Luce doubts very much that any of the solutions thus far proposed would be workable. It would seem that the interpretation of statutes as to specific questions should be left to the judiciary, and not transferred to an administrative agency as has been suggested.

An interesting point is raised in regard to whether the duty is imposed upon the President of determining whether a bill is constitutional before signing it. Exception is taken by the author to the statement made by President Franklin D. Roosevelt relative to the Guffey Coal Bill, in which he said: "The situation is so urgent and the benefits of the legislation so evident that all doubt should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality." The author says: "My own belief is that when doubt is serious, duty and conscience demand refusal. They cannot be honorably avoided by shifting responsibility. Otherwise why the oath?" After all, since under our system the only means of determining the constitutionality of a measure is by application to the courts, why is this not proper when there is doubt and "the situation is so urgent and the benefits of the legislation so evident?"

In treating of the Judges and the Organic Law, the declaring of an act of Congress unconstitutional under the General Welfare Clause is discussed. The two extremes of thought mentioned by Congressman Luce are these: one, the power to reverse the judgment of the court by the legislature; and the other, that the justices are more capable of determining what the people want or should want, and their decisions should be final. The author advocates a middle course. He believes "a reasonable compromise should be to let the Legislature revise the decision of the Court by a two-thirds vote in successive sessions, with opportunity for a referendum". In regard to "social legislation", when the determination of its constitutionality rests on the Welfare Clause and when the wisdom of the proposed measure is involved, there seems ample justification for the employment of some method by the electorate of overruling a decision of the courts.

The advisability of having the constitutionality of a measure determined before it becomes effective is admirably treated by the author. He believes that the Legislature should have the right to ask the courts for an advisory opinion as to the constitutionality of a measure, before it is enacted. He says "I had reached the conclusion that the advisory opinion has more to be said in its favor than against, that it is a helpful institution which ought to be developed to a much wider range of usefulness." There is ample precedent for such a step. It is pointed out that prior to 1821 New York had a Court of Revision which was made up of the Governor, the Chancellor, and the Judges of the Supreme Court, which was successful in preventing the enactment of unconstitutional laws. The present need for some tribunal to determine the constitutionality of laws before they become effective is obvious. The lawyers of today are indeed in a sorry plight when attempting to advise their clients on the constitutionality of the bills that annually come out of the legislative hopper.

Although the framers of our Constitution performed a truly remarkable task in defining the duties and powers of each department of government, there are some functions which do not clearly belong to any one of the three exclusively. In the

chapter on "Overlappings", the powers of impeachment, appointment and removal of judges and the making of treaties, are covered.

The domination of the legislative by the executive branch of government is heard on every side. As stated by the author in discussing the relation between the President and Congress, and between the Governors and Legislatures of the various states, at the present time the executive function is supreme. This supremacy is nothing new. The pendulum has swung back and forth during our history. Congress was controlled more by Jefferson and Jackson in their time than probably at any time before or since. The author believes that the present swing began with McKinley, of whom he says: "The glove of velvet so concealed the hand of steel, it was all done so graciously, so blandly, that the public hardly knew what was going on." Likewise with Governors and State Legislatures. Today most legislation is so-called "program" legislation even to the extent that the bills are prepared by the executive. The difference between recommending measures and coercing the legislators into accepting them is ably set forth by the author.

Of particular interest to lawyers and those who aspire to the bar are the chapters on "Purpose and Scope of Lawmaking" and "Volume as Result and Effect". Lawyers are continually complaining that too many laws are being made; that lawyers are hardly finished digesting the laws of one session before the next session rolls around and the laws are changed again. Who is responsible for so many laws? Congressman Luce believes that the public is largely responsible, and not legislators; that, "lawmakers rarely create; they respond."

The author concludes his gigantic work with the plea to youth to take a greater interest in government and with the statement that "in its frame and in its working our government is the best that man has yet devised. It can be bettered. Its machinery should be adjusted to new conditions. Here lies the opportunity, the duty, of legislators."

This book should be read by every thinking man who is interested in the structure and working processes of the government under which he lives.

DANIEL FLYNN.†

INVENTION AND THE LAW. By Harry Aubrey Toulmin, Jr. New York: Prentice-Hall, Inc. 1936. pp. xx, 399. $5.00.

Mr. Toulmin, in Invention and The Law, has given to the Bench and Bar an excellent handbook. That fact alone would constitute an important contribution to the literature of patent law. In his preface Mr. Toulmin modestly describes his book as an attempt merely "to break the ground" toward the building of an orderly consideration of the many and complex problems surrounding the determination of what is and what is not patentable invention. He has here collected in a single volume a summary of the findings of the courts in a fairly brief, but, none the less, complete form and has thus filled a long felt want. This book is more than a mere tool for the busy patent practitioner.

Without in the least departing from the primary aim of the author, Invention and The Law furnishes the reader with an historical background of the development of the law of patents in the United States and presents within its covers a complete picture of our patent structure.

The rules of law deal with what is *patentable* invention as distinguished from invention in the abstract. Patentable invention, the author points out, is usually the practical issue before those who refer to a book of this kind. Mr. Toulmin has

† Member of the New York State Assembly and of the New York Bar.

separated the *pro* and *contra* views of the courts on similar subjects into chapters three and four. In his opinion, the rules are harmonious in most instances even though apparently conflicting. The author does not attempt to reconcile what would appear to be conflicting rules. Such was not the purpose of his book nor could one reasonably expect to find such detailed treatment in a work of this kind. The author makes a suggestion that one who has to take a particular position on the question of what is and what is not patentable invention can find in the respective chapters (three and four) cases for and against his position. One would do well to read *both* chapters carefully.

In his Foreword to Mr. Toulmin's book, former Judge Arthur C. Denison reminds us that the courts are the final judge of what is and what is not patentable invention. Mr. Denison states:

"Ever since the Supreme Court, exploring the statute, first discovered that a machine, to be patentable, must be more than new and more than useful, the analytical chemists of this intellectual art have been trying to isolate that 'subtle something' which serves as the catalyst whereby skill becomes genius—and with indifferent success. Though many instances seem (to defeated counsel) to justify the famous test—said to have been first stated by Mr. Causten Browne—'If it is so simple that the judge can understand it, then it is not invention', yet this test can hardly be recommended for general use. In the judicial endeavors to this end, judges constantly, even the most eminent and even in the Supreme Court, have labored to state a formula, and have devised one quite satisfactory for the case at hand; just as constantly, the next case, even before the same judge, has proved refractory to that test. The reason why the problem is not amenable to fixed standards has been most happily stated by Judge Learned Hand, in saying that efficient comparisons cannot be made in a realm 'where there are no absolutes'. In less cryptic words, the reason is that the question of invention or not is like the verdict of a jury. Sometimes the undisputed facts inevitably lead to one conclusion only, as a matter of law; more often, even undisputed primary facts justify varying inferential conclusions, to be drawn by different minds; neither conclusion is without substantial support; neither conclusion is demonstrably wrong."

The author points out that the heated controversies resulting in patent litigation are due not so much to artistic temperament and argumentative characteristics popularly associated with inventors, as to the difficulty of determining what *is* and what *is not* invention. "For invention," says Mr. Toulmin, "is like religion in that it is largely a matter of faith and often a matter difficult of concrete proof. However, unlike religion, invention controversies usually end up in Federal courts, where they are settled according to certain rules and principles."

Carrying the author's analogy a bit further, it is the guess of this reviewer that many a Federal District Judge wishes that the controversy would end in heaven rather than in his court (or perhaps more pointedly, the Appellate Courts). Witness, for example, the opening remarks of the court in a most interesting opinion written in the year 1934:

"The customary patent case and the customary feeling of futility. That feeling comes from our almost perpetual disagreement with the Patent Office. Because of this continuity in difference, we have held this decision as long as we could without delaying the losing party's opportunity for a hearing in the court above. Either this court or the Patent Office has maintained a high average of error."[1]

One of the most important observations made by the author deals with the tendency of the Bench and Bar alike to judge the merit of an invention in retrospect. Mr.

1. Clark, D. J., in Irving Chute Co., Inc. v. Switlik Parachute & Equipment Co., 7 F. Supp. 401, 402 (D. N. J. 1934).

Toulmin aptly states, "Laymen, and, particularly, lay judges, without experience in science and mechanics, frequently make the fundamental mistake of judging of the merit of the invention in retrospect—by the length of the step taken and not by the success of the final step. The true test of the invention is not the degree of the step, but the importance, industrially, of the final effort that pushes open the door of the past to the invention of the future. No greater danger is encountered than in the mental attitude of one, fully educated in all the advantages of the invention, who then looks backward and appraises the invention by subtracting the vast store of the prior art from the final accomplishment. Such a one finds from his retrospective view only a little, simple, obvious thing, and judges the invention upon the basis of its littleness, simplicity, and obviousness. The invention should be judged from the point of view of the state of the prior art at the time and place at which the inventor stood when he took the final step and completed the long chain of circumstances and events that resulted in the ultimate combination or ultimate step in the process constituting the invention."

Considering that this book is not a detailed treatise, it is none the less remarkably comprehensive as regards the citation of authorities; it is of greatest value to the patent trial lawyer but it deserves attention also from all who may be interested in the subject of patentable invention.

SYLVESTER J. LIDDY.†

NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW. Four Volumes. New York: Columbia Press. 1935-1936. VOLUME I. The Origins. By Philip Jessup and Francis Deak. pp. xiv, 294. $3.75. VOLUME II. The Napoleonic Period. By W. Alsion Phillips and Arthur H. Reade. pp. 339. $3.75. VOLUME III. The World War Period. By Edgar Turlington, pp. 267. $3.75. VOLUME IV. Today and Tomorrow. By Philip C. Jessup. pp. 237. $2.75.

VOLUME I. Within the year this nation has made a complete about-face on the policy of the government toward neutrality. It had abandoned all intent of protecting American goods, ships, and persons engaged in commerce between this country and a belligerent nation, and completely shied away from the old "freedom of the seas" doctrine which involved us in the War of 1812 and the World War of 1917. That doctrine had been one of Wilson's Fourteen Points, although to many persons it seemed to be abandoned when he envisaged a league of nations which should assist an invaded state and apply "sanctions" against an aggressor nation. There have however been wars since 1920, and nothing has been done. Those who thought that the League with its sanctions would spell the end of any neutrality at all, and would require all nations to take sides, said that the League had abolished neutrality. Now, it seems, the American government is on the verge of having a change of heart. Equally anxious to enact legislation which will "keep us out of war" the present administration seems to insist that we shall never abandon any of the principles of international law as it existed in 1914. To avoid a war by entanglement with international concerted action, we would eschew the league. To avoid war by argument with one or the other of the belligerents, we would relinquish neutral "rights." And now we propose to re-assert those rights in principle.

It is important therefore to understand what those neutral rights are and how they have grown. A witness before the committee of Congress considering the new bill said that the matter should not be rushed. Several persons should give years of study to the problem before evolving a new policy upon such an important

† Member of the New York Bar.

point, which would affect so many people in a moment of national crisis. This is exactly what has been done in the production of this work. A committee of the Columbia University faculty, aided by outside funds, under the auspices of the institution's Council for Research in the Social Sciences, has sought materials abroad and at home, secured aid from other professors at Columbia and elsewhere, and is now in the process of publishing. If this work is not a major contribution to such a pressing problem, then it may safely be asserted that progressive universities have no reason for existing. Such persons as James W. Angell, Joseph P. Chamberlain, Charles Cheney Hyde, and James T. Shotwell have planned and directed the study, in accordance with the Columbia policy that the intellectual resources of the University should be put at the disposal of pressing public policy.

A lawyer will perhaps be disappointed with this volume. Rich as it is in citations and brief summaries of important instances bearing upon the law of neutrality, he will find it historical. And history has a way of being contradictory. International law, probably much more than any other law, is the result of slow growth, slowly accumulating custom and practice, one view and interpretation slowly through the centuries taking precedence over a contrary view. This is the view we get in this volume on "origins" and the mere lawyer will find nothing clear-cut or final in the way of practice, principle, or precept on the various phases of neutrality in the face of international war.

However, the volume is none the less valuable, and it must be said that Professors Jessup and Deak have done a remarkable piece of work. Moore's Digest seems scant and limited in comparison with the pages here which cover the same topics. The authors are not concerned with mere commentators and publicists, but have built up their sequences from veritable facts, documents from French and British courts, diplomatic correspondence, and proclamations.

It takes a volume of this character to deflate many a superficial writer on such subjects. Others may state a general principle glibly with one or two references to source material. Others may lean heavily on other treatises and do little delving toward original documents, multiplying their citations to a thin skin of great breadth but little depth. Not these authors. As the dignity of the university to which they belong and the reputation of the professors who directed and aided them—professors of some repute already in their field—would indicate, they have produced a work that will be a convenient analysis and summary and a classic on the subject.

International law, it is too often assumed, is a set of principles based upon "the law of nature and of nations" evolved thoughtfully from philosophical grounds and slowly adopted as nations approached civilized manners in their mutual dealings. In this field, at least, we can now be sure that nothing of the sort is true. Laws covering neutrality grew from practice. Their principles were item by item hardly won by virtue of special treaty concessions by single nations. In the beginning, when wars were judged as "just" or "unjust" one could always aid in a "just" war, as I suppose one might aid today by adopting "sanctions" against an aggressor. The law concerning contraband grew from concessions made to secure favor, not on broad legal principles. It was not easy "to draw a line between alliance, non-participation, and neutrality." Nations seemed to follow their own interests. They enforced rules concerning enemy ships in neutral ports, largely to protect their own trade and the profits of those ports. They secure the recognition of some neutral "rights" by the simple process of providing armed convoys, where a belligerent must accept the *ipse dixit* or fight. They relied upon treaties, and treaties were often at variance, in accordance with national interests as against the different nations. For instance, in the middle of the 16th century the French gave the rule "free ships, free goods" to the Hansa towns but not to the Dutch. "Similarly, according to treaties with England,

pitch and tar might be contraband on a Dutch vessel but free on a Swedish ship." Only in regard to the formalities of visit and search and the limitations regarding breach of blockade did there seem to be much settled definition by the middle of the 18th century. Otherwise varying interests too often governed practice. Frederick the Great insisted on his right to trade irrespective of war conditions, and threatened to default on the Silesian Loan unless his demands were granted. It was once considered wise to permit neutral nations to use Dutch (belligerent) ships and crews, for that would keep Dutch seamen occupied and not drive them into the Dutch navy and increase enemy naval strength.

All of this sounds very confusing. The fact of the matter is that it was confusing. Nations altered their policies in accordance with their interests, even of the moment, when treaty obligations did not forbid, and those treaty obligations were assumed with a view to the advancement of specific interests and not the advancement of nice principles of theoretical law.

You might imagine that in an age when wars were largely fought by professional armies, when Prussia was making a treaty with the United States which would permit trade of all sorts to continue even through a war, and when Frederick William was boasting that his (mercenary) army could fight its wars and his farmer and merchant be undisturbed in their normal activities, that there might have grown up a general tendency to free trade from war-time interruption and danger. But you would not imagine it long if you recalled that these were the days of profit-seeking privateers. As Professors Jessup and Deak make amply plain, there was economic pressure against an enemy as well as action against shipment to him of articles used or useful in war. The perennial arguments about "continuous voyage" were well under way. Contraband and conditional contraband were listed and discussed.

One finds it difficult to speak finally of such a first volume of a four-volume series on the same continuing subject. It is possible at this time, however, to say that this fruit of thorough and scholarly research indicates fully that nations are governed by their own national interest when war stalks the face of the world, that such interests are various and result in varying practices, and that recent attempts to rationalize upon the subject of neutrality must run risks of deep involvement unless based upon sure knowledge.

I recall a remark of Frank Moore Colby that "a *new* thinker, examined closely, usually proves to be a man who had not taken the trouble to inform himself as to what other people have already thought." The remark comes to mind often in these days when I hear many a person express opinions on a neutrality policy. To such I should like to hand an announcement of this work, in the hope that they might inform themselves before being so glib in proclaiming what the United States should announce as its new policy of neutrality.

VOLUME II. Continuing the remarkable series of volumes, the books before us represent the conclusion of a major project of Columbia University, commenced some years ago. Scholars at that institution have ever been aware that one of the prime functions of a great university is to bring the facts of the past to bear upon the conditions of the present so that current action might profit by accumulated experience of ages, thoroughly assimilated and rationally digested. We are reminded of two tales, possibly apocryphal, concerning Columbia's great scholar and teacher in the field of international law. It is said that upon one occasion, reading in the daily press of certain "instructions" issued regarding the arming of merchant vessels of our neutral country during a maritime war, he took the next train to Washington, said to the President: "You mustn't do that!", showed the almost inevitable belligerent complications which would result, and secured the prompt and proper recall of the offensive instructions. Upon another occasion, a student suggested an inter-

pretation of doctrine based upon an analysis of facts originally made by a "popular" historian and biographer and the famous jurist remarked: "If that be true, then the years I have spent in the study of history have been utterly wasted."

Persons of the mental capacity of John Bassett Moore are few and far between. Possibly only once in the history of even a great university will such a one be on the faculty. But under the direction of a group of its professors to give breadth of view, a set of competent specialist authorities may cooperate to replace the capacity of the one great mind whose digests of international law and arbitrations bear witness to the completeness of his learning and the acumen of his analysis. Such organization has produced the present work, timely beyond measure, when citizens and statesmen are considering what will be the role of a neutral United States during the future World War which many observers fear will before long be upon the land and waters of the earth.

"Trade is like water," says Professor Phillips in the third volume.[1] "If its course is obstructed, it seeks another channel; if the obstruction is not impervious, it creeps through every crevice." Trade is the basic problem of neutrality. It is easy to say that we wish to avoid events which will entangle us in European troubles, to hold with Jefferson that "the war among others shall be for us as though it did not exist."[2] It might even be possible to repress human emotions in this most emotional American nation, to prevent policy being swayed by the sentimental attachment of folk only two or less generations removed from Continental or insular sympathies, to hold in check the righteous who feel that there "ought to be no neutrals"[3] whenever a country places itself "by repeated violations of the public law of Europe outside of this law."[4] But the narrative of Professor Phillips' second volume indicates beyond question that the real problem will be the problem of trade. During the Continental War, American shipping profited,[5] but American shipping involved us in the conflict. Even the Embargo and the non-intercourse acts did not prevent. It is true that the "slowness and uncertainty of communications" during the Napoleonic period, to which the author constantly refers,[6] complicated discussions; but we must wonder if present celerity in news publication will not act as a strong stimulus to passion. The entire Napoleonic period, Professor Phillips shows, was a life and death struggle between the British Isles for economic existence against the Emperor proponent of the Continental System. Napoleon may have conquered by land; but the war of the sea, by bill of lading as well as by smoking cannon, still went on. As Grenville pointed out in 1793, when wars are waged by conscripted nations in arms with the "whole laboring class" engaged in the struggle instead of merely a small professional army, we must have new conceptions of contraband.

This struggle was waged as much by Orders in Council with regard to trade, enforced by the British Navy, as by the red-coated troopers of Wellington in Spain and France. Such a struggle, viewed in retrospect through the history of the World War, with this emphasis on trade which we do not gain from the average history book, should furnish us with new facts to understand the implications of American industry (notice that I do not merely say "trade") in future struggles. Mr. Reade's analysis of the effects of the wars on neutral trade and commerce, largely statistical, shows to anyone who believes that history of the past is of any use in predicting the future,

1. P. 128.
2. P. 40.
3. P. 9.
4. iv.
5. P. 157.
6. Pp. 59, 185, 206.

that any future great war will have positive effects upon American trade and industry, and so upon every member of America.

VOLUME III. Edgar Turlington's, the third volume, starts with a political and diplomatic narrative of belligerent measures taken to control trade to hostile territory, even by the interrupted voyage, tells of the legalistic neutrals' protests, and of the partial results achieved thereby, but places its principal emphasis on the nature and extent of economic control. Neutrals may have made their profits in time of war, but they suffered their difficulties too. In most cases on the Continent to prevent themselves being starved as a result of the doctrine of continuous voyage, they controlled their own trade so it would serve their own local ends and also conform to the desires of the particular belligerent which in the particular instance might hold the whip hand, not with regard necessarily to law, but with regard to crippling by non-cooperation a neutral which might depend upon the export or import of particular commodities. Associations or commissions were formed to adjust matters with the interfering belligerent. It became a matter of expediency rather than of law. Licenses depended not upon law or equity but upon the good political faith of a foreign nation.

All of this took place because it was held that a "war of famine" was "a natural and legitimate method of bringing pressure to bear upon an enemy country."[7] There were losses to the neutrals, as the mass of well digested data shows, but, as other data also well shows, these losses were to a large extent compensated for by extra profits and higher freights.[8] These losses, it was believed at the time, were only proper, however great,[9] because it was argued that none should be neutral in the face of general peril and "all must bear the burden" in some degree or other.[10] What with the exercise of neutral bargaining powers, black lists, bunker control to direct shipping, along with the complete old-fashionedness of old rules as to blockade and contraband,[11] the author does not even raise the question as to absolute rights of neutrals, the right of an innocent third party not to be struck by basically illegal restrictions imposed to strike in retaliation against one or the other of the belligerent parties. When nationality ceases to be determined by the ancient rule of commercial domicile, by nationality of ownership, but even now by the taint of association with enemies, the lawyer might as well have folded up his lawbooks and gone to confer with the diplomat on the one hand and the practical, compromising business man on the other.

Such, from a lawyer's standpoint, is the sad tale of neutrality during the World War period. But the reader is not quite satisfied with the Turlington volume, excellent as it is within its limits. He feels that the full history of the World War period is not told until there has been included in it the results—even to eventual payments—of the sessions of various mixed commissions or of diplomatic adjustments made after the war. The French Spoliation claims, as John Bassett Moore liked to point out, were actually paid, even though the payment was nearly a century late. The Alabama claims were paid. To the economist and the trader the facts of the present are vital. To the lawyer, the story is not told until the last case and claim be closed.

VOLUME IV. In the fourth and final volume of the general title, Professor Jessup of Columbia attempts to "draw all the threads together" and give a picture of the problem of neutrality "Today and Tomorrow." In so doing his manner is courteous in the extreme to the authors whose previous volumes he has edited, even to the extent

7. Pp. 41, 42.
8. P. 113.
9. P. 33.
10. P. 6.
11. P. 11.

of citing their texts for historical instances, instead of the original sources. The latter procedure would have been more satisfying to the scholarly reader, who would thus be saved the double trouble of looking up two references. But the Jessup procedure is the more gracious and the more becoming a gentlemanly scholar. It emphasizes emphatically the deference of a writer, already an authority in this field in his own right, to the work of colleagues and fellow workers; so we shall let it pass.

Such an air as this tends to make us accept with equal graciousness Professor Jessup's analysis of current conditions. Similar conditions and circumstances, even similar arguments and counter arguments recur from age to age. We are thus able to learn that when one of the belligerents be a strong naval power engaged in an exhausting war it will inevitably become involved with neutrals. Neutral trade will suffer, but it will also find opportunities for profit.[12] Commercial folk will, thinking more of profits than of peace, very likely influence their governments to argue for neutral "rights" which will be answered by "bad belligerent logic" and forceful belligerent measures, held in check only by the potential strength behind neutral pressure. There are several answers to this recurring imbroglio which has led many nations into war, and the United States into war twice.

Mere protest is of no avail. "In the case of the United States, . . . no controlling national interest demands a continuance of the policy of protesting against every belligerent interference with neutral American shipping."[13] No previous agreement regarding a contraband list will be any more likely to prevail than did the Declaration of London, for "the whole idea of a contraband list is essentially illogical."[14] The idea of economic sanctions under the League of Nations, based upon the Covenant and upon the Kellogg-Briand Anti-War pacts, would bring us back to the Napoleonic dream of a day when there would be no neutrals; but is impossible so long as powerful and productive nations like Russia, Japan, Germany, and the United States remain outside of the League. On the other hand "it is erroneous and dangerous to assume" that the Act of August 31, 1935 or the Pittman-McReynolds bill "solves our troubles as a neutral." Although planning technical impartial neutrality and disclaiming support for American trade in belligerent waters and belligerent goods, it "takes no affirmative step toward any kind of international cooperation."[15] Only through such cooperation in the past have neutrals attained respect for their views. Such cooperation would have to be adjusted to classes of goods and circumstances of the moment. Mere general phrases cannot settle the problem. The plan must go the whole way and in detail.

"On the conclusion of any war, general staffs begin at once to study the lessons of that struggle. With a view to any potential condition of belligerency of their own countries, every avenue is explored to its end. Plans are developed for the mobilization, not only of man power, but of industry and shipping. They proceed on the theory that when war comes it must find them prepared for every emergency. . . . Perhaps neutrality can also be organized."[16] This organization and preparation, Professor Jessup believes, must come from international cooperation in accordance with the conditions of the moment. Neutrality, he feels, can be best assured if the Government is left a certain amount of discretion. He therefore disagrees with those who criticize recent proposals on account of that very discretionary power, although he recognizes as fully as they, the great danger of public pressure, popular excitement,

12. P. 23.
13. P. 57.
14. P. 62.
15. P. 147.
16. Pp. 157, 159.

sudden passions aroused by tragic events. It would be too much to ask him to solve the neutrality problem for us in its entirety. If he did, he might be accused of being merely another "brain truster" directing the program of the administration. Other able writers in this country have somewhat variant ideas. But we can say two special things in closing: Professor Jessup's able editorship and able summary of this series and the bibliography which he prints of current discussions on this topic from other capable hands, indicate encouragingly that this problem of neutrality is being studied by a "general staff" of able publicists, howbeit unofficial. Secondly, we subscribe fully to his closing line of argument. "Neutrality," he says, "should cease to be a road to war. . . . The country as a whole draws no lasting economic advantage from neutrality. There is much current talk about legislation which would take the profits out of war. Such legislation might be unnecessary if we take the profits out of neutrality. In time of neutrality we must take the losses which can not be avoided, hoping thereby to escape the greater losses which follow in the wake of war."

ELBRIDGE COLBY†

† Department of Military Science, University of Vermont.