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BOOK REVIEWS

THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT (Revised Edition). Four Volumes. By Samuel Williston. New York: Baker, Voorhis & Co. Pp. xxxii, 680; xi, 812; xii, 755; v, 1034. 1948. \$50.00.

The second edition of Samuel Williston's treatises on *The Law Governing Sales of Goods at Common Law and Under the Uniform Sales Act* was published in 1924. This text has been the standard work in the field ever since, as indeed was the first edition published in 1909 after Professor Williston had completed his work as the principal draftsman of the Uniform Sales Act under the auspices of the National Conference of the Commissioners on Uniform State Laws. Like Williston on *Contracts*, Williston on *Sales* has been cited by the courts in numberless opinions. Although he retired from active teaching at the Harvard Law School some time since, full of years and of the honors due him as one of the greatest teachers and legal scholars that America has produced, Professor Williston has not been content to enjoy his well earned rest in idleness, but has given us a Revised Edition of his treatise on the law of Sales.¹

In the new edition the text itself which was formerly contained in two bulky volumes, is divided among three volumes, making for more ease in handling. The third volume besides containing the balance of the text, includes the appendix. This is made up of the full texts of the Uniform Sales Act, the English Sale of Goods Act and the Uniform Conditional Sales Act with the Commissioners' Notes. These materials were also contained in the appendix to the Second Edition. Added to the appendix of the new edition is a synopsis of the statutory provisions in the several states regulating conditional sales.

One uniform act closely related to the law of sales is, rather surprisingly, omitted from the appendix. This is the Uniform Trust Receipts Act which has so far been adopted in twenty-one states. A brief synopsis of its salient provisions is given in the text, however, in Section 338c. Because of the growing use of trust receipt financing of dealer purchases and the consequent importance of the Act it is regrettable that its full text is not made available in this definitive work, along with the other statutes affecting the law of sales.

In addition to the three volumes of Professor Williston's text and the appendix containing the materials referred to above, the Revised Edition includes a fourth volume. This contains forms of sales contracts, examples of correspondence looking toward the consummation of such contracts, and other documents and writings which have been used in transactions which were subsequently the subject of litigation. This material appears to have been collected and organized by Edwin M. Bohm,

1. During the near quarter-century which has elapsed since Williston's Second Edition was published a number of law review articles and casebooks in the field of sales have been published, but not many texts. Professor Lattin of Western Reserve, in his casebook published in 1947, provides a checklist of more than 250 articles and law review case notes, classified according to subject matter. This list, however, is not intended to be exhaustive.

An excellent one volume text by Professor Lawrence Vold, appeared in 1931 as one of the Hornbook Series. John Barker Waite published a second edition of his 1921 text in *Sales* in 1938. Professor Waite's new edition was extensively revised and was written primarily to assist a lawyer who seeks information "as to the circumstances under which certain types of legal action can or can not be maintained," rather than from the doctrinal standpoint.

who signs the foreword to the fourth volume. These several types of forms, in most instances, have been drawn from cases cited in the footnotes to the text and are set out under the same section headings as are used in the text.

Section 336 of the text, for example, is headed "Distinction between conditional sales and leases," after which follows a discussion of this troublesome problem. Under the same section number and heading in Volume Four will be found several documents taken from the records of as many cases. The terms of one of the documents were construed by the court as evidencing a chattel mortgage rather than a lease; in another the document was construed to be a conditional sale rather than a lease; in a third the document was construed as a genuine lease. Keyed as they are to the sections of the text, the writings reproduced in the fourth volume furnish the reader with a portion of the records of the cases cited to the text and, in many instances, they furnish concrete illustrations of the points discussed in the text itself. Some of the "forms," however, are of dubious value.

Also in the fourth volume is included an extensive index to the forms, a table of the cases cited in the text and a comprehensive index to Professor Williston's discussion of the law. A new departure in the indexing of both the forms and the text is the indexing of the products which were the subject matter of many of the transactions which were before the courts in the cited cases, such as "lumber," "oil," "machines and machinery" and the like. All four volumes are furnished with receptacles on the inside of the back covers for pocketparts, from which it may be inferred that it is intended to publish such parts in the future in order to keep the work abreast of new developments.

The text itself, having been so soundly done in the edition which preceded the current one, did not require extensive rewriting. Nevertheless, there has been a line by line examination of the preceding text by the author, and revision has been made where it was needed. Here only a word or a single phrase has been changed; there a new sentence has been added. Again a new paragraph has been inserted in a section, or an entirely new section has been written. An equally thoroughgoing examination of the footnotes has been made. A very rough calculation indicates that, as compared with the preceding edition, something over a total of 3000 cases have been added. These include not only cases decided by our own courts, but also important English cases.

Williston on *Contracts* and Williston on *Sales* are monuments to the learning of a great legal scholar, who possesses the ability in an unique degree to express his learning in a clear and lucid style, worthy of the best literature, and, at the same time, to do this without any sacrifice of accuracy. Better books than these we shall never see.

GEORGE W. BACON†

MANDATES, DEPENDENCIES AND TRUSTEESHIP. By H. Duncan Hall. Washington: Carnegie Endowment for International Peace, 1949. Pp. xvi, 429. \$5.00.

Enormously detailed, but retaining always a clarity and refreshing perspective, this latest addition to the series of Carnegie Endowment studies in international law treats its subject, the mandate system and its successor, in scholarly and altogether commendable fashion.

The mandate system was, of course, the method for assuring international surveil-

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lance of the administration of certain ex-enemy territories, which was devised under the 1919 peace settlement. As the direct and closely related predecessor of the U.N.'s present trusteeship method, the old mandate system must be thoroughly understood if the present system is to be evaluated properly. Although an abundance of excellent material has been appearing for years on this subject, the present study has unique value in that its historical analysis and description bear so directly on the trusteeship which has followed. In clear and cogent fashion, Mr. Hall has so utilized his material that every detail of a system now obsolete is viewed in a light which invests it with the most direct contemporary significance. The result is a many-sided study which although scholarly, is never academic.

Mandates, Dependencies and Trusteeship is far more than a routine study of administration. It gains its stature from the fact that the systems are viewed as part of a total picture, in the political and historical context in which they belong. For once, an expert is sufficiently modest to say:

"A small segment of the great wheel of international affairs is studied here in some detail. Intensive studies of small fields are always liable to lose their sense of proportion. . . . International trusteeship has a certain intrinsic importance. But that can be overemphasized and has sometimes in the past been exaggerated and distorted."

He goes on to add that:

"A great deal of its significance lies not in trusteeship as such but in its relationship to, and in the light it throws upon, the political axis on which the whole wheel turns."

The author's rather novel method of approach is to view the two systems as phenomena caused by what he terms the "international frontier," itself a result of the state system and the balance of power. His statement of this theory, which has been written about and written around before but never presented as a system, is clear and interesting, although too complex to be more than roughly outlined here.

This "international frontier" is a continuous border formed by the areas where the vital interests, political, ideological, economic and scientific, of the super powers are in conflict. In the author's words, it is the "main line of structural weakness in the earth's political crust—the main fissure where wars break through," a "debatable no man's land." Characteristic of the zones of the "international frontier," the zones of "low political pressure," is a diminution or absence of sovereignty—the people can be characterized as relatively dependent. These points of friction have, it is the writer's thesis, over the last hundred years bred such characteristic and consanguinous phenomena as neutralization and demilitarization, spheres of interest, open-door regimes, buffer states, capitulations, minority regimes, international settlements, condominiums, and international mandates and trusteeships. The author's point of departure in his present analysis is that mandates and trusteeship are not *sui generis* as they have been heretofore regarded, but clearly and closely related in origin and purpose to the other forms of international regimes in the "international frontier." Mr. Hall considers as being of secondary importance what he calls the usual roles accorded mandates and trusteeships solely as products of humanitarianism and idealism and impresses the reviewer very favorably by his trenchant and realistic treatment of these phenomena as by-products of the modern state system—as factors in the balance of power.

The book proceeds to a specific study of mandates, their genesis under the Covenant of the League of Nations as a means of administering colonial areas formerly held by Germany and Turkey, and a very thoughtful and detailed study of other historical roots of the system besides the "international frontier." The principle of the "sacred trust," as first stated by Burke in 1788, which resulted in the conception of national trusteeship, the Western conceptions of the rule of law and colonial self-

government, and the principle of collective responsibility of the powers, all cited as bases of the mandate system, are treated in a manner that contributes tremendously to an understanding of the total picture. Examined as well are the details of the system's functioning, and the transition to the more elaborate United Nations trusteeship, and of course, the inevitable analogies that can be drawn between the two systems. Mr. Hall rebuts the generally current view that the mandate arrangement came into being as a compromise between American idealism and European annexationist frenzy, and here he makes a real contribution to thought on this subject, which has rarely penetrated as deeply as his theories of mandates' background do, and has usually confined itself to characterizing the mandate system as a political makeshift, more or less.

Mr. Hall also takes a stand contrary to the thought of many in his disapproval of the demilitarization aspects of the mandates, which he attacks as not founded on experience and utterly impractical. He is, consequently, highly approving of the present provisions that trust territories are to have a role in the upholding of international peace, and that some are even to be declared strategic areas, and placed under the Security Council.

As to his overall appraisal of the trusteeship system, the author is non-committal. Doubtless he feels it is far too early to predict, for he leaves unanswered the questions whether the more extensive powers of the Trusteeship Council, which is a body of states' officials acting as representatives, are likely to achieve more than those of the probably more impartial and independent Permanent Mandates Commission, where each member acted solely on his own, and whether the newer more coercive methods are likely to achieve more than the rather circumspect pressure of the Permanent Mandates Commission could.

The trusteeship system has been born into a far more turbulent world than its predecessor, a world whose temper is far more likely to favor coercion rather than suggestion and persuasion. What it can accomplish in this portentous climate cannot be more than guessed at, perhaps. The present study provides the student of world affairs with a rich background from which to draw his hypotheses. Complete with numerous relevant documents and a graphic map of the "international frontier," *Mandates, Dependencies and Trusteeship* brings one whole area, larger than the "small segment" its author modestly claims it to be, up into sharp focus and lends it a vital third dimension.

ADELE GABEL BERGREEN†

THE PRESS AND THE CONSTITUTION. By J. Edward Gerald. Minneapolis: The University of Minnesota Press, 1948. Pp. viii, 173. \$3.50.

Here is a book of wide compass and small size, complete but succinct, intended for the layman but equally, if not more, suitable for the lawyer, and, to add to its uniqueness written in the difficult field of modern constitutional law by a professor of journalism.

Mr. J. Edward Gerald, of the faculty of journalism at the University of Minnesota, presents and appraises the development of constitutional law as it affects the freedom of the press for the period 1931-1947. He takes as his markers the "Minnesota gag

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law" case,¹ decided in 1931 and the 1947 revision of the Wagner Act. His approach is historical and what he achieves is a compact summary of recent Supreme Court trends and their backgrounds over a wide area of civil liberties.

Since the book is not written primarily for the lawyer, the author saw fit to choose a simple but logical format for his discussion under the headings of contempt, picketing, the newspapers and social security legislation, taxation and regulation of the press, restraint of trade and censorship through the licensing of distribution. The recent changes in our constitutional law covering these topics are analyzed and commented upon in most salient and perceptive fashion.

In the period of 1931-1947, two areas of constitutional law have undergone not so much innovation as retrogression and, indeed, a desirable retrogression. Both a court's power to punish for constructive contempt as a result of a publication and the power of the Postmaster General virtually to censor publications by granting or withholding the second class mailing privilege have been diminished by decisions of the Supreme Court to a point where they were in the earlier days of the Republic when they constituted no threat to the freedom of the press.

In the well publicized *Esquire* case,² the Postmaster General was shorn of powers gradually accumulated over a period of 70 years which had finally reached a point where he felt able to reclassify and thereby, in effect, fine a magazine an estimated \$500,000.00 a year in extra postage costs because the magazine was not, in his opinion, rendering sufficient public service to deserve the "high privilege" of second class rates. The Supreme Court defined the second class rate as a subsidy rather than a high privilege and reinterpreted the classification powers of the Postmaster.

In the field of constructive contempt by publication, latter day restrictions were finally thrown into discard by a series of legal developments, the chief of which was the adaptation of the famous "clear and present danger" test as a criterion. Thus, only where a publication constitutes a substantive evil so serious that the court cannot conduct its business in the face of the attack, could the freedom of the press be abridged.

In the case of picketing, on the other hand, which Mr. Gerald includes in his study by virtue of the fact that the use of printed words or signs "links the picket with the pamphleteer," courts have made a tremendous step forward into uncharted territory, by making picketing, formerly a prima facie tort, an act of free speech protected by the First and Fourteenth Amendments and subject to restraint by the "clear and present danger" test, but only where there is a background of violence or no area of interdependent economic interest can be shown.

"The net effect . . . was to leave peaceful picketing its identification with freedom of speech and press for jurisdictional purposes and its identification with the law of tort for delineation of the limitations, which . . . are read into all liberties when conflicts must be settled between them. It is obvious that the court met a new problem with pragmatic improvisation and thereby created a new entity in the law. Picketing is *sui generis*."

On the other side of the fence, free speech for employers received clear definition in this period. The former NLRB curtailment of employers' potentially threatening utterances were modified to permit words not threatening or intimidating on their face unless there is a background of non-observance. This circumscription is now Section 8(c) of the Taft-Hartley Act.

Another liberty positively affirmed in the period under discussion was a freedom

1. *Near v. Minnesota*, 283 U.S. 697 (1931).

2. *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946).

of the press from punitive or unduly restrictive taxation. Emphasizing that since the press depends upon its own earnings to be independent and recognizing that there are other ways in which to impinge the freedom of the press than through prior censorship, the author examines the cases in which punitive taxes such as the Louisiana-imposed levies of the *Grosjean* case³ were disallowed and distinguishes several other varieties of taxes subsequently levied against the press that were adjudged valid. The author states in strong terms that close scrutiny of all taxes on publications is necessary if there are to be no subtle derogations of their freedom.

Also discussed at length are the numerous problems of Jehovah's Witnesses and the extent to which they may be charged fees for permits, and, in great detail, the continuing controversy in which the newspapers have been engaged with the federal government (which employs the commerce clause) to resist all attempts to control the business (as distinguished from the editorial) side of their activity.

The struggle of the press, with the NLRB, to be exempted from the license provision, with the application of the Fair Labor Standards Act of 1936, and with the whole problem of collective bargaining are analyzed from the standpoint of free speech and results in the author strongly voicing his fears as follows:

"In the short run, this may tend to weaken the control of the press as of any business—by those presently in charge of it and to hasten its adjustment to the policies fixed by majority government. In the long run, the device can be used by every majority government, and compulsions will be present to that end. The press will feel greatly increased internal as well as external pressure to join the political pack hunting at the moment, and its division of loyalty between politics and business will impair its traditions of independence.

"The facts seem to be that both action groups and standpatters look upon the press as an invaluable prize in the ceaseless struggle to obtain and hold majority control. When the two poles of existence, the political and the economic, happen to be held, as in the 1931-1947 period by opposing political forces, both the freedom and the security of the press are put in double jeopardy. The danger is that the opposing factions will be so anxious to control what the press says and how it says it that both political and economic independence, as originally established by the Revolution and the First Amendment, will be lost."

Mr. Gerald concludes, however, and the reviewer is in agreement with this, that the happenings of 1931-1947 as discussed in the book and in this review constituted a net gain to human liberty. The author is not overly complacent about the progress that has been made, however, and centers his prime bone of contention on government intervention in private affairs during the period studied. He repeatedly weighs the position of Morris Ernst that freedom is not a passive force but must be socially directed to carry out the First and Fourteenth Amendments against his own fears as to government restriction of any sort in this area. The author urges caution also with respect to the alteration of the "economic structure of the press to obtain social ends," as in the *Associated Press* case,⁴ albeit in this case, there was an affirmative intervention within a narrow area which led to a desirable result. The author also urges that, generally speaking, the trend be continued by American courts to disregard British common law which he feels has roots alien to ours with respect to the freedom of the press.

In summary, it is felt that this book has touched on all of the more important

3. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). This legislation was inspired by the late Huey P. Long as a result of attacks by the press against his political machine.

4. *Associated Press v. United States*, 326 U.S. 1 (1945).

facets of its subject within its relatively few pages and the author is to be commended for his admirable talent for being so succinct in his style. To have treated so large and complex a problem with such economy of language is an achievement. The author's penetrating case outlines and almost epigrammatic conclusions make the fruits of his research clear and readily understandable. The reviewer was also impressed by the author's bibliography which includes a collection of all the latest law review articles on the subject as well as all the important cases in the state and federal courts pertinent to the discussion.

MORRIS HARVEY BERGREEN†

LIBERTY AGAINST GOVERNMENT. By Edward S. Corwin. Baton Rouge: Louisiana State University Press, 1948. Pp. xiii, 210. \$3.00.

Professor Corwin is one of the wisest and most learned commentators on the subject of United States constitutional law and constitutional history. No student of these subjects can afford to miss anything which the Princeton savant writes on these subjects. His insights and his style are usually most rewarding.

The basic materials of this book have appeared in a series of well known and competent law review articles. A substantial part of the book comprises five articles from law reviews and reprinted in *Selected Essays on Constitutional Law*, published in 1938 by the Association of American Law Schools. However, as the author himself states: "The immediate occasion for the preparation of the present volume was an invitation by the Louisiana State University Press to expand into a book a lecture . . ." given in May of 1943 under the auspices of the Edward Douglas White Foundation. As a result, the original law review articles were extensively rewritten and revised.

Early in his book (page 6), Professor Corwin distinguishes between a "reformist conception of liberty" and a "juridical conception" thereof. While both have a common root and birth in the tensions and polarities of community life, eventually they grow to be antagonistic. The traditional juridical conception tends to develop into something essentially conservative and static. The reformist conception is dynamic, eternally impatient with things as they are, a zealous guardian of the fresh and vital aspirations toward the liberty which is always a seedling in the human heart.

This distinction is but one aspect or application of a larger distinction whose two currents are invariably present in every form of social life. Don Luigi Sturzo calls the one "organizational" and the other the "mystical" or "ideal":

"It appeared to us as a conflict, latent or open, between reality statically considered, and its 'becoming.' The reality manifested itself as the stable, social organization, the becoming of an urge to betterment through the pursuit of an ideal. The organization comes to be defended as a secure reality, appreciated and enjoyed by those who are at home in it and shrink from changes. For those who are intolerant of the existing organization and strive to modify it, the becoming process is conceived in terms of an ideal justice. . . .

"In normal times, these two currents might be represented, the one by authority, symbolizing organization in act, and the other by liberty, symbolizing the urge toward its becoming. . . . It seems more accurate to define the two terms of the sociological process as two currents, the one organizational, the other mystical.

"These two currents always pervade all the social forms; it is their course that

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brings to these movements and development, studding the stagnant waters of inertia and discouragement and urging men forward to the point of sacrifice. The word *mystical* instead of *ideals* is disliked by many; indeed, we do not care for it ourselves. But whereas the word, *ideals*, generally signifies something intellectual and rational, perceived of an idea, the word *mysticism* has a sense of faith, adherence, affection, and, at the same time, hints at something mysterious, like a higher force with compelling power. It is thus that we may speak of a mysticism of liberty in the 19th Century, as today of a mysticism of force."¹

On the other hand, St. Thomas Aquinas indicated the same distinction by differentiating between the fallible decisions or determinations of human prudence on the one hand and the certitudes of first principles of the practical intellect and of conclusions from those first principles, on the other hand.

Professor Corwin gives the following definition of liberty:

" . . . liberty signifies the absence of restraints imposed by other persons upon our own freedom of choice and action. . . ."

My difficulty with that definition is that it can hardly be differentiated from anarchy. Liberty thus defined must always be "against government." Such a definition of liberty reminds me of what Jacques Maritain called simply "freedom of choice":

"One may build social life on Freedom taken in the sense of freedom of choice and as an end in itself—a conception that one may call liberal or individualist. . . ."

"In this conception culture and society have for their essential office the preservation of something given: The free will of Man; in such a way that all possible acts of free choice may be available and that men may appear like so many little gods, with no other restriction on their freedom save that they are not to hinder a similar freedom on the part of their neighbor. Truth to tell, this political philosophy suffers from an unconscious burden of hypocrisy, for it ignores for the benefit of man in the abstract, all the heavy and severe burdens that lie on man in real life, the fact being that a limited number are enabled to enjoy this freedom only by suppression of the remainder of their fellows. The essential values of social life, social justice and the common good are forgotten. And the tragedy inevitable to Freedom taken as an end in itself is unfolded: The absolute right of each part to realize *its* choice tends naturally to dissolve the whole in anarchy and to make impossible any *realization* of freedom or any achievement of autonomy, within the order and through the instrumentality of social life. . . ."²

Recurrent acts of free choice can never really be ends in themselves. Our restless and unending changes of choice are a testimony that we are always trying to choose so well and so wisely as to escape having to choose again. Either this process of choosing ends eventually in the choice which makes all other choices unnecessary, or it ends in the futility and the despair of endless choices destined never to satisfy. In the final analysis it comes down to a question of ends and of means. If you elect or assume any end, especially the right end, ipso facto you limit the field of possible choices of means in the future.

We build *ourselves* out of our deliberate choices. Not to choose is itself a choice. That is why Aristotle says:

"We are ourselves somehow partly responsible for our states of character, and it is by being persons of a certain kind that we assume the end to be so and so."³

1. STURZO, *INNER LAWS OF SOCIETY* 246 (1944).

2. MARITAIN, *FREEDOM IN THE MODERN WORLD* 39 (1936).

3. 9 ARISTOTLE, *NICHOMACHEAN ETHICS* BOOK III, 5 (Tr. W. D. Ross 1925).

Liberty, as defined by Professor Corwin on page 7, tends to make the individual everything and the state nothing. Totalitarianism, on the other hand, drains the person of his dignity and significance in order to make of the state a terrible and omnivorous deity. The middle road between these two extremes is the path of virtue, which is always a golden mean between two extremes (vices)—a mean which is often very difficult to delineate. For that very reason, no one can ever say truthfully that the virtuous life is an easy life. The good life, at which sound social polity aims, can never be a comfortable status but must always be a constant and exacting effort. A large part of the effort consists in avoiding the extremes of a field of tension where weak-willed men are attracted to one or the other of two opposite poles.

The Founding Fathers had a limited faith in the people and they had a wholesome fear of government. But they did not have unbounded faith in the people. Nor did they have too much fear of government. There is all the difference in the world between the state of mind which produces a book like "Our Enemy the State"⁴ and the attitude expressed in the principle of subsidiary function:

"Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a great and higher association what lesser and subordinate organizations can do."⁵

I do not agree with Tom Paine when he wrote somewhere: "Government, like dress, is the badge of lost innocence." But I do believe that too much government is the badge of lost innocence. There is a sense in which Jefferson's phrase: "That government governs best which governs least" means anarchy. There is also a sense in which it states no more than the norm of reason expressed by the principle of subsidiary function.

In speaking of Roman and early origins of the problems involved in *Liberty Against Government*, Professor Corwin takes from Sophocles' *Antigone* the statement: "An unjust law is not a law."⁶ Moreover, he takes from Aristotle's *Politics* the conclusion "that a law is reason without passion, and hence is preferable to any individual." The tradition to which such quotations are congenial is really nothing more than the tradition of the natural law properly understood. That is a doctrine which has asserted itself with greater or less accuracy in all civilizations and in all cultures which have contributed to the making of our laws and our jurisprudence. It is true that some exponents of the natural law have rendered it a vast disservice by misunderstanding it and by propagating their misunderstanding. It is also true that natural law teaching suffered serious setbacks precisely because of understandable reactions against mistaken expositions of the true theory of natural law. Professor Corwin makes frequent references to this natural law doctrine, often without using the name "natural law" and sometimes, I suspect, without himself recognizing that the particular legal principle which he is explicating is nothing more than a restatement of natural law principles.

Perhaps in that "organizational" or static conception of liberty there were people who came to identify personal liberty with rights of property in too thoroughgoing a fashion. But I wonder whether the identification of the concept of liberty with that of property has the importance for constitutional law which Professor Corwin gives it. I even question whether the identification was as complete as he makes it. Certainly I do not believe that the identification was a conscious process.

4. NOCK, *OUR ENEMY THE STATE* (1935).

5. *TWO BASIC SOCIAL ENCYCLICALS* 139 (1943).

6. P. 13.

On the other hand, I think that it is dangerous to assume that undue regulation of property rights by government will leave personal liberty unaffected. In this connection, the warnings of Hilaire Belloc in *The Servile State* are appropos.⁷ The thesis of that book is stated in a quotation which constitutes its sub-title:

"If we do not restore the Institution of Property, we cannot escape restoring the Institution of Slavery; there is no third course."

To me it has always seemed natural that language like "due process of law," with its origin in the Magna Charta through Coke's transcription, should in the end have been construed as a "rule of reason." Both in the Latin original of the Magna Charta and in Coke's translation, the phrase was an imprint of the natural law doctrine upon the historical process which we denominate in summary fashion by the term "our constitutional origins."

An only rudimentary appreciation of the nature of man and of the nature of government would lead to the isolation of the chief function of government as guardian of the common good conceived as the good of the person considered as common to those forming the state. For that very reason, and because no one is wise enough to see or anticipate all future impacts of any doctrine of fixed rights, one can easily understand why vested rights, especially in the sense of property rights, would ultimately have to be qualified by some emergence of "police power" a la American constitutional law:

"What the appearance of this vastly important rubric signified was this: *That legislation affecting vested rights detrimentally must nevertheless be judged from the point of view of the assumption that the legislature intended thereby to promote the public interest, not to punish the holders of said vested rights*; and that in the absence of specific constitutional provisions to the contrary the public interest was ordinarily entitled to prevail against such vested rights."⁸

With such summary reasoning it is easy to agree. But what I find difficult is belief in the somewhat dialectical process described by Professor Corwin: one idea suggesting the other, to judges and to litigants' attorneys, until "due process" was eliminated from the due process clause, making that clause appear as if it finally read: "No state shall deprive any person of life, liberty or property."

In the long run it is something of an illusion to try to account for the rise of seminal principles in law or in philosophy merely by historical, sociological or economic factors or by a process of ideational heredity. There is no Mendelian or historical law of ideological succession. It is true that there is what men have called a "spirit of the times" which often gives character to the contingent and passing ingredients of jurisprudence and of philosophy. But all of this overstressed emphasis on historical, sociological and economic factors slights the role of reason in history. In every age there have been wise men who have looked behind and beyond the immediate experience and the data of history, sociology and economics. "Man by his very nature is a metaphysical animal," as Etienne Gilson reminds us.⁹ In explaining that statement, Gilson continues:

"In other words, the reason why man is a metaphysical animal must lie somewhere in the nature of rationality. . . . There is, in human reason, a natural aptness, and consequently a natural urge, to transcend from the limits of experience and to form transcendental notions by which the unity of knowledge may be completed."

The linkage of constitutional ideas can, in my opinion, be as well explained by a

7. BELLOC, *THE SERVILE STATE* (1927).

8. P. 88.

9. GILSON, *THE UNITY OF PHILOSOPHICAL EXPERIENCE* 307 (1937).

reference to the nature of man (who in each decade rethinks some of the recurrent, basic problems, arriving at substantially the same or similar conclusions) as by emphasis on an ineluctable historical process.

It is a tribute to Professor Corwin's erudition and acumen that the bypaths of thought and research which he stimulates are endless. His *aperçus* are frequently brilliant.

Though he starts with a very individualistic definition of liberty, he peers somberly and wonderingly into the future when even a more genuine liberty might be pushed against the wall:

"It is easy to imagine in the light shed by current ideologies that the demands upon the legislative power, national and state, might so multiply the path of "the common man" whose century this is said to be, that the notion of Liberty against Government and its implement, judicial review, would be gradually but inexorably crowded to the wall."¹⁰

That is one of the extremes from which only the middle road of virtue can keep us. The prudence of the lawmaker and the judge must be relied upon to build the sign posts on that road so that average men (who neglect to discriminate), fools (who cannot) and knaves (who will not) are not led into the *cults-de-sac* of anarchical individualism or totalitarian regimentation.

As a final gesture Professor Corwin asks a "great question":

" . . . can the 'common man' unaided by the uncommon man, keep civilization going—will he wish to make the effort?"

I think the answer is clear; unless the common man and the uncommon man have enough virtue to want to live the good life and enough strength of character to accomplish what they want in this respect civilization will reach one of these "times of trouble" which Toynbee describes.

GODFREY P. SCHMIDT†

CASES AND MATERIALS ON TAXATION (Second Edition). By Professor Paul W. Bruton. St. Paul: West Publishing Co., 1948. Pp. xxv, 976. \$9.00.

The Second Edition of *Cases and Materials on Taxation* by Professor Paul W. Bruton of the University of Pennsylvania is a valuable addition to the tax expert's library and an excellent teaching vehicle. The material in the book has been brought down to date by the inclusion of many important recent cases. A very practical appendix on "Procedure in Tax Matters" with a set of illustrative specimen federal forms adds to the value of the work. Yet, because rapid change is characteristic of the tax law, the work is already in a sense out of date. It does not contain the *Church* or *Spiegel* cases which may cause a completely new attitude toward the taxation of reversionary interests in trust estates. Nor does it have much material on the "marital deduction" under the gift tax or estate tax laws or the splitting of income under the income tax sections of the Internal Revenue Code. However, it seems that only week by week services can keep pace with the tax law.

The material is so arranged that it can be used in two courses. Part one can be used for a course on Estate and Gift Taxation, and Part two in the course on Income Taxation. The experience of most teachers of taxation indicates that it is very difficult to give proper coverage of Estate, Gift and Income Taxes in one course, covering

10. P. 182.

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only a single semester. Recognizing this difficulty, Professor Bruton's book is designed for teaching in two semesters. Of course, there are very few subjects which can be adequately taught in one law school semester and it is a rare teacher who is satisfied that due deference is given his subject when he is forced to compress it into a single term. However, we all recognize that study within the walls of an academic institution can not continue indefinitely. Our students must spend some part of their lives in living as well as in preparing for life and we must release them within a reasonable period for participation in business affairs. Schooling must be compressed within a reasonable period and taxation can be no exception. In most law schools it must be taught within a single semester, necessarily requiring that only the broad general principles of the subject be discussed. Hence, it might have been helpful if Bruton's book were designed to give the whole tax course in a single term. However, Professor Bruton's book makes it possible for those institutions which can give a full year to the course to have a fairly complete set of materials within the covers of this book for both courses.

The introductory material preceding the cases in the various sections of the book might have been enlarged. Students of taxation are usually well advanced in their law school courses. It should be unnecessary to require them to read cases merely for practice in case analysis. If the introductory material summarily stated the law of some of the cases that are set forth in full in the following sections (to which the material is introductory), a student would be able to assimilate the information involved more quickly. In other words in the field of taxes, teachers might well use a combination of the text book and the case book methods. Much of the learning in the law can be acquired by the student by reading text material and by dispensing with the necessity of his reading many of the cases that are now set forth at length in the volume.

WILLIAM R. WHITE†

PATENTING THE INVENTION. By V. Alexander Sher. Albany: Matthew Bender & Company, 1948. Pp. xxxii, 428. \$10.00.

To those who regard Patent Office procedure and practice as an esoteric ritual this book is commended as a brief, practical and introductory treatment of the subject. The newcomer to the field will find particularly useful the first three chapters relating to the statutory definitions of "invention" and "inventor," the contents of the patent application and the prosecution of the application before the Primary Examiner in the Patent Office. Where the author sets forth concepts peculiar to the patent field he is careful to employ simple clear prose devoid of the technical jargon commonly met in comparable undertakings.

Other subjects treated in short expositions include plant patents, design patents, disclaimers and reissues, public use proceedings, appeals, assignments, licenses and war regulations.¹ A substantial portion of the book is devoted to the declaration and conduct of interference proceedings.² Particularly well treated is the subject of motion practice incidental to the conduct of an interference proceeding.

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1. The title is somewhat inadequate since it obviously does not indicate that such subjects as assignments, licenses, certain of war regulation matters and others are treated.

2. To the uninitiated, interference proceedings are those conducted in the Patent Office to determine which of two or more claimants is the earliest inventor.

It is regrettable that the author saw fit to include as an appendix the Rules of Practice in the United States Patent Office, for since publication of the volume they have been renumbered and changed in many respects.³

Basically, the book is a compilation of the leading authorities relevant to problems most frequently encountered in patent soliciting. While the author makes no attempt to vigorously expound the principles of patent law or to enter uncertain or disputed areas, he concisely sets forth the accepted legal rules and administrative procedures which must be kept in mind while drawing a patent application. To these essentials he has added his distilled experience in the form of numerous practical suggestions and caveats. It is here that the author makes his most significant contributions to both newcomer and experienced practitioner alike. To the newcomer the book may replace in part the kindly assistance usually rendered by his seniors, enabling him independently to avoid the major pitfalls of patent prosecution. The senior may welcome the lightening of his burden of instruction and at the same time may profitably employ the volume as a ready initial reference source and as a check list.⁴

STANLEY WOLDER†

3. 619 O.G. Pat. Off. 273 (1949), 13 FED. REG. 9575 (1948). Likewise dated is the author's observation that the Patent Office does not print its Register of patent attorneys and agents. Notice of January 25, 1949, 619 O.G. Pat. Off. 259 (1949). The dual prosecution procedure described (p. 100) has been modified so that divisions other than the principal division will no longer issue separate office actions but will render a Patentability Report instead. Notice of November 10, 1948, 616 O.G. Pat. Off. 1120 (1948). The advisory action mentioned at p. 134 has been discontinued. Notice of April 26, 1948, 610 O.G. Pat. Off. 268 (1948).

4. The latter is especially true in connection with the chapters relating to interference proceedings.

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