Book Reviews

RECORDS OF THE SUFFOLK COUNTY COURT, 1671-1680. Volumes 29 and 30. Boston: Publications of the Colonial Society of Massachusetts. 1933. pp. xciv, 1233.

DURING the past year two notable contributions have been made to the hitherto much too neglected field of American colonial legal history. Under the auspices of the American Historical Association Judge Bond brought out the Proceedings of the Maryland Court of Appeals, and now Professors Chafee and Morison make available for us these Massachusetts documents of a full generation or more earlier.

Though some court records of this general nature have long been accessible in printed form, they have been slighted by most of those who have written on the subject of colonial law in favor of the seemingly more definite bodies of written laws, statutes and enactments, which also have, in large measure, been for a long time in print. The insufficiency and misleading character of this latter sort of material when used alone has been either overlooked or unrecognized by most of the writers. As the late Professor Tout has said of the medieval English statutes, these colonial codes are "too often the mere enunciations of an ideal."[1] The idealistic, even Utopian, forces operating in the English colonization of America are well enough known. That this idealism may have so influenced both the spirit and the content of colonial codes of law as to have made them impracticable is more than a possibility; some of the laws which were on the books may have been as unworkable as the ideal Assizes of Jerusalem or much of our own legislation of the prohibition period. Yet, almost without exception, the writers on colonial history have taken the statements in the colonial laws at their face value, apparently oblivious to the importance of the question of the enforcement or the non-enforcement of any particular provision, or of the interpretation given to the wording of it by the courts. In the matter of legal history, historians, and even lawyers largely, seem to forget that the law under which the people of any particular time or place live must be sought for, in the last analysis, not in what the written laws, or even the courts, *say*, but in what the courts *do*.

In these two volumes of Suffolk County Court Records we have a perfectly clear picture of what the court is doing in the decade that ends approximately the first fifty years of the colony's existence. The picture is made so complete by a wealth of collateral documentary material, that it would be hard to conceive of a more real and welcome contribution to our knowledge of colonial legal history. Though comparatively little progress has actually been made in the study of that history, there have already developed two schools of thought on the question of the exact extent to which the colonists were knowingly and intentionally using English law. Both sides admit that in the eighteenth century, at least for the generation before the revolution, colonial law in all its fundamental aspects was substantially and soundly English. In regard to the seventeenth century opinion has been divided. Some writers have asserted that in these earlier days the colonists consciously and deliberately developed a law of their own which was different from English law, and that they took over the latter law only after the practice and the administration of law came into the hands of lawyers who had been trained in England. To others it seems clear that from the beginning the colonists used, and thought they were using, English law.

1. 3 POLITICAL HISTORY OF ENGLAND (1905) 378.

These two volumes of records strongly support the latter view; they show that this county court, within the specified time limits, was using English law to the best of its knowledge and ability.

That knowledge was none too great, especially in regard to details, presumably because the district was devoid of lawyers. As Mr. Chafee says in his excellent introduction, "the practice of the law was far from being recognized as a profession or even a reputable calling."[2] The only man of legal training in early Boston who might have given the community the benefit of his technical knowledge as a practicing lawyer "was practically frozen out by the refusal of the courts to allow him to practice." In place of the professional lawyer and the modern attorney at law, there appeared a character much more ancient than either of these in the history of English court procedure, one to whom our earliest legal treatise devotes a whole book[3]—the *attornatus* of the old plea rolls, a person for whom we have no exact modern equivalent, but who may be described as an attorney in fact for purposes of litigation. If merely for the reason that he represents his principal in court we call him an attorney at law, we must be very careful not to give a modern connotation to that term. He was an important factor in court proceedings; it was legal for the litigant whom he represented to pay him for his services; he could, and did, bring an action in his own name instead of in the name of his principal; as in the case of his English prototype, certain prescribed ceremonies were necessary to constitute him an attorney. For the most part and normally, a man's attorneys, like his foes, were then of his own household. A litigant who could not himself appear would usually appoint his wife or son or brother or father or some other relative, or a close friend, to represent him in court. The business agent in the colony of a merchant in England would often act as the merchant's attorney in the colonial court as a part of his regular duties.

On the other hand we find a number of men who are acting as common attorneys —men who for pay will represent any litigant in court. In this very limited sense they are professional, but still they are not attorneys at law in our modern sense of the word; they do nothing, and can do nothing, which the wife or son or brother who acts as attorney may not do. From these county rolls (and from such records of the higher Court of Assistants as the reviewer has been able to consult), it is quite clear that none of these attorneys does enough legal business to make a living from that source alone. Even those who appear most frequently figure in so few cases over this long ten year period that it is manifest that they must have had some other means of livelihood. Their legal work is incidental. Ultimately these men and the class of agent which they represent will give way to the professional lawyer, not because it was necessary for the attorney to be a lawyer, but because the trained lawyer naturally made the best attorney. The men who appear in the Suffolk County records at this time most emphatically are not professional lawyers. They are not lawyers of any kind unless we wish to dignify by that name laymen who have picked up a smattering of legal knowledge through contact with courts and litigation—just as today in certain parts of rural New England there are town clerks and judges of probate who are not lawyers, and who are not thought of as lawyers, but who have a limited working knowledge of real property law and testamentary law from the very exigencies of their positions. Professor Chafee does wish to call these lay attorneys lawyers. Perhaps it is difficult for any one who has done as much as he to help make Suffolk County populous with lawyers at the present day to think of the same region as being a total vacuum in regard to lawyers

2. p. xxiii.

3. GLANVILL, DE LEGIBUS Lib. xi.

in the 1670's. At any rate he would believe that "despite the absence of any recognized bar and of any systematic professional training, the Bay Colony probably contained many a man who might have been described, like Benjamin Mussey, as a 'Subtle Lawyer'."[4] To him they "correspond to the lawyers of today." When we read what the index calls the "disbarment" of Peter Goulding, we are inclined to agree that some of them did, in certain respects, correspond to some of the worst lawyers of today. There are a number of points of analogy: "Peter Goulding, convict of antedating Writings and stirring up persons to goe to law, and buiing of Debts to Vexe others with Suites. The Court Sentanceth him to bee disinabled for pleading in any Court as an Attourny or Assigne (except in his owne case) and that hee doe not undertake to draw up any writings for others without allowance of Authority."[5] But the fact remains that Peter Goulding was not a lawyer, but a layman without any professional or technical training in law. Yet it was he and others like him who were drawing up legal writings, pleading, and doing delegated legal work in general. (Note, in passing, that the English distinction between attorney and pleader does not obtain in this Massachusetts court.) The magistrates, "except for the training derived from their experience in official duties, were as innocent of legal education as the attorneys."[6] This being the personnel of the court, we must not expect too much of either its knowledge or its ability. Its records contained in these two volumes must necessarily seem crude and untechnical in many respects when compared with English records of a similar kind or with the later colonial law reports written by trained lawyers.

It must be admitted, too, that there is in these volumes, in regard to both substantive law and procedure, not a little which is not entirely consonant with the English common law. It is a fact which at first sight would seem to support the contentions of those who argue that the early colonists were using a law of their own that was not English, especially as the same general situation existed in the other colonies. But the fact by itself is worthless as a proof of a non-English element in colonial law. All the distinct and separate parts of the earlier England from which the colonists came likewise had local laws, again in regard to both substantive law and procedure, which were not in agreement with the common law. For in the England of pre-colonial times the common law was not a law that took in all England to the exclusion of all other law, but it was only a part of the non-statutory law under which the great mass of Englishmen lived.[7] Throughout England the common law was impinged upon, modified and even annulled, by local law. In a way the situation was analogous to that which obtained in the case of the manors —in their broad fundamentals all manors were alike, but in the matter of the innumerable details which most directly affected the every day lives of the men on the manors, the custom of each individual manor determined what should or should not be done. Almost from the beginning our legal literature states and restates the fact—which all our courses and text books on common-law actions consistently refused to recognize—that local law was just as much an integral part of the living law of England as the statutes or the common law. Glanvill, after repeatedly pointing out the necessity of recognizing the validity of local law, even when it differed from the law of the king's court, in one place flatly refuses to discuss the customs

4. p. xxv.

5. p. 186.

6. p. xxvii.

7. See Schechter, *Popular Law and Common Law in Medieval England* (1928) 28 COL. L. REV. 269.

of the county courts touching a few pleas which he has just mentioned, because of the conflicting customs of these counties, each of which has its own law on the subject.[8] At the very beginning of his treatise, Bracton, in words which would have been perfectly true until comparatively recent times, says, "In England there are many and different customary laws according to the diversity of places. For the English have many things by custom which they do not have by the law of the land (*ex lege*), as in different counties, cities, boroughs and towns, where it will always be necessary to enquire what the custom of the place is, and how they who allege the custom use it."[9] Throughout his great work he time and time again points out, always as a matter of plain fact, how local law and custom override the common law.

These facts are most fully substantiated by the cases themselves. Thus, for example, there may be a certain local law in regard to a marsh which even the great common-law action of novel disseisin will have to take into account;[10] an act or judgment to be legal must be "according to the custom and the law of the marsh."[11] A custom of Cornwall may be pleaded not only in the local court, but in the king's court before the itinerant justices.[12] The king's justices can not take the usual murder fine when one is found slain in Malvern Forest, "and this by ancient custom."[13] Inextricably connected with the murder fine was the presentment of Englishery; one might well suppose that this practice at least would be uniform in all England. Actually the practice varied greatly in the different counties; in five of them, and in the district beyond the Severn, there was no presentment of Englishery.[14] Instances of this kind could be cited ad infinitum. The best lawyers in England would plead these local laws in support of their cases in the king's court; "the law of the ancient demesne in the court of Cokam" might be just as potent as the common law in determining an issue in the court of Common Pleas.[15] Even in the great court of Exchequer Chamber most of the discussion in a lengthy case could center around the question of the validity of a certain custom, a validity that was not to be determined by the mere fact as to whether or not the particular local law was opposed to the common law—"there are many customs observed in this country which are more opposed to the common law than this is"; "these customs are good, and yet they are contrary to common law."[16]

This local law and custom was still an important factor in the general administration of law in England at the time when the English colonization of America began. Unfortunately there is very little printed material dealing with the subject for this particular date. For the earlier period enough has already appeared to give us a good idea of the extent and scope of these local laws, most of which, like the colonial laws, were put in writing. They are so extensive, so far reaching in so many directions, that the local laws of the colonies sink into comparative insignificance in comparison with them. Any one who is well acquainted with the contents of the four volumes of the *Munimenta Gildhallae Londoniensis* and with Bateson's two volumes of *Borough Customs*—to mention only the two largest of the repositories of printed source material on this subject—will have difficulty in regarding the laws

8. GLANVILL, DE LEGIBUS Lib. xii. c. 23.
9. BRACTON fol. 1.
10. SELECT CIVIL PLEAS (Seld. Soc.) no. 98.
11. 6 CURIA REGIS ROLLS 1.
12. SELECT PLEAS OF THE CROWN (Seld. Soc.) no. 3.
13. *Ibid.* no. 128.
14. 11 SOMERSET RECORD SOCIETY lxxvii-lxxx.
15. Y. B. 11-12 Edw. III. 328. (Rolls Series).
16. SELECT CASES IN EXCHEQUER CHAMBER (51 Seld. Soc.) 114-132.

of the colonies as non-English. The colonists merely did what their English ancestors for hundreds of years before them had been doing—the very English thing of every community developing as much local law of the kind it wanted as its purse and its privileges would allow. The fact that the various colonies had laws which differed from the common law and from the laws of the other colonies does not make them unique in the world of English law. But they would have been unique if their law had been only English common law with no admixture of conflicting local law.

Inasmuch as in England itself we find the courts adapting themselves to local customs inherently repugnant to the common law rule relating to the same matters—as gavelkind and borough English, for example—we should be prepared to find the same sort of thing in the colonies. On our Suffolk County rolls there are a good many grand larceny cases. The crime is not treated as it would have been treated by common law. It is not, as in England, a capital offence, but the thief is held to threefold restitution. Now this penalty is quite in line with our oldest set of laws. Yet no one would for one moment maintain that the Massachusetts law was English because it agreed with Ethelbert's law, or that the makers of it had been influenced by the Kentish king's dooms. Just as readily might one claim for it a Roman origin because it was similar to the Roman law which demanded a fourfold restitution from the manifest thief. It was English because it was an accepted local custom in a community dominated by English law, which found acceptable even such a local law of theft as that mentioned by Nedeham in the case before the court of Exchequer Chamber already referred to: "In the Isle of Man there is a certain custom that if a man steals a horse he shall not be hanged, but he shall pay a fine for it and shall go quit, inasmuch as the owner can have the horse back, because it can not be eaten. But if he steals a hen or a capon, etc. he shall be hanged for that, because it shall be presumed that he took it to eat, and therefore the owner shall never have them back again, and this custom is good."

In England the amount of divergence of the local custom from the common law was seemingly a matter of little concern; the one essential thing was that the privilege of using the local law should be recognized. According to Chief Justice Prisot the real test to be applied to a local law was that of reasonableness: "I think that a thing can not lie in custom unless that same thing can be within reason, and if it can be within reason, notwithstanding that it may not be in accordance with the common law, yet it may quite well lie in custom."[17] By this test, how many of the colonial laws were non-English? It is clear that the English character of the colonial laws is not to be determined merely on the basis of whether or not a number of these laws are in agreement with the common law. Actually we need not greatly concern ourselves with particular laws of any given colony if only we can be sure that the fundamental law of that colony was based on English law. On that point there is no question in the case of Suffolk County. These records of its county court prove conclusively that the broad foundation on which the administration of law in that court rested was English in nomenclature, rules and procedure.

The terminology is characteristically English. All the usual technical words appear in settings and with a significance that leave no doubt as to their source. The very English special verdict, that salvation of the troubled jury, is met with frequently; we even find that other technicality of the jury system, the double jury of attaint. A large part of the court's business is connected with the very practical matters of trade, contracts, transfers of realty, testamentary affairs, and the administration and settling of estates. The treatment and legal aspects of things of this sort are, in

17. *Id.* at 127.

spite of some minor irregularities, clearly and basically English. The effect of English influence is just as marked in many situations of lesser legal importance. Thus, inter alia, the finder must "cry" lost property which he has found.[18] As in Bracton's time, the man who is proved unoathworthy loses his law.[19] The man who borrows a horse to ride four miles and rides him all the way to Boston, where he sells him, is apprehended by "hue-en-cry" in the good old English way.[20] Even more medieval English in its wording is the story of the constable complained of "for not prosecuting of a hue-en-cry," but "letting it fall in his hands."[21] The husband must pay for his wife's necessaries.[22] Men "purge themselves by oath," as for centuries they had done in England, though here with a local variation in the procedure.[23] The spirit of the Assize of Clarendon is certainly present in the jury that finds John Starkey "suspitiously guilty."[24] Suspicion alone is a sufficient ground on which to base an indictment.[25] Numerous cases of branding found in these records bring to mind the similar practice introduced into the procedure connected with the claim of benefit of clergy by the statute of 18 Elizabeth.[26] The inspection of a woman's body to ascertain whether or not she is pregnant, a procedure which regularly would be initiated by the writ *de ventre inspiciendo,* and one in operation from before the time of Bracton until after the time of Blackstone,[27] is several times mentioned in these records.[28] As in English law from medieval times, the penalty of the pregnant woman who is to suffer corporal punishment is respited till after the birth of her child.[29] In an action for wrongful death, the result is as it would have been in England until after the passage of Lord Campbell's Act.[30]

The forms of action are English. We find Debt (for both money and chattels), Replevin, Trespass, an action for assault and battery, but most of all the Action on the Case. Maitland has described Case as the great residuary action.[31] In Suffolk County it is the residuary action par excellence. Not only is it used in cases of negligence, slander, nuisance, undertakings (assumpsits), but for almost every other variety of circumstance as well. Behind many of these unusual cases the basic principle seems to be that of nonfeasance. There is Case for non-performance of a contract, "for breach of promise upon a bargain," for breach of a covenant, for not observing the terms of a lease. Case is brought against a keeper who allows a prisoner to escape; it is the action used to obtain redress for false arrest. Not only do we find Case used where Covenant would normally apply, but it is used in place of Account and Ejectment. This perhaps is not so much to be wondered at after all. Both of these actions at common law are highly technical, Account because of its double character—the judgment that there be an accounting followed by the

18. pp. 782-83, 847, 847-48, 916.
19. p. 786; BRACTON fol. 185.
20. p. 913.
21. p. 956.
22. p. 694-95.
23. pp. 181, 491, 559, 1013, 1066.
24. p. 258.
25. pp. 521, 524, 808, 844, 1067, 1100.
26. pp. 88, 91, 235, 548, 557, 1163.
27. BRACTON fol. 69b; BRACTON'S NOTE BOOK pl. 137; 1 BL. COMM. 456.
28. pp. 91, 185-86, 189, 690.
29. pp. 233, 424, 521.
30. pp. lx, 166.
31. MAITLAND, EQUITY AND THE FORMS OF ACTIONS (1909) 361.

actual accounting before auditors,—and Ejectment because of the employment of the fiction of the casual ejector. In one case at least Trespass, "an action of review upon a trespass," is brought, instead of Case, for a three foot encroachment upon land, which the plaintiff recovers.[32] This may possibly be an actual case of Ejectment whose identity is obscured by the way in which the clerk has enrolled the action. In one of the actions in Case involving an accounting, three men are appointed by the court "to Auditt the Acompts."[33] Here, again, an obscurity in the enrollment may possibly be hiding an accounting before auditors. Mr. Chafee would lay much at the door of the untutored and untechnical clerks who made up the records: "The clerks, . . . on looking at the writ would merely get a pretty good notion of the nature of the claim. Once in a while some such word as 'debt,' 'trespass,' or 'slander' would catch their eyes and be set down in the record as the form of action, but ordinarily these clerks would describe the action as 'case' and let it go at that."[34] This is at least a plausible explanation, and one in keeping with the statements as to the legal knowledge and ability of the personnel of the court which have been made above. It makes quite understandable why we should have a surgeon bringing Case to recover money due him for professional services, while on the very next page we find a cooper bringing Debt to recover money owing him for work done.[35]

There is no separate Court of Chancery in this colony, though there is, by statute, a slight exercise of equity jurisdiction by the law court. This subject of Equity is discussed in detail in the introduction.[36]

The presence of biblicism and Scriptural law is very little in evidence in these records. Much has been written on the effect of the Mosaic law upon the legal situation in the New England colonies. Undoubtedly the influence of that law as an active legal force in their civilization has been greatly overstated. King Alfred's laws contain whole chapters of Old Testament law taken verbatim from the original, but the law of his day was little, if at all, affected thereby. In the colonies the result would seem to have been almost the same. The inclusion of Biblical law in the laws of colonial New England was in itself the manifestation of a trend that was almost as evident in England as in the colonies. This particular phase of Calvinistic influence was, as Professor Goebel has already shown, noticeable in both places.[37]

These Suffolk County records are just as valuable for the student of economic, social and cultural history as they are for the legal historian. Among other things we get a vivid impression of the importance of the colony's sea trade; the vessels were small, but carried an almost unbelievable amount of mixed cargo. The colonists still speak of "the wampum value" of things; some of them utter pewter counterfeit money, and others forge notes. Widows and other indigent women operate something analogous to the tea shops of our own motor age and dispense coffee, chocolate and bottled cider. There are a good many "cook shops" and plenty of taverns. Some of these taverns get their owners into trouble because the bars are kept open on Sunday, which begins on Saturday evening and ends on the next evening. There is much brawling and fighting and an excessive amount of drunken-

32. p. 287.
33. p. 5.
34. p. xli.
35. pp. 648-49, 650.
36. pp. l-lvi.
37. Goebel, *King's Law and Local Custom* (1931) 31 COL. L. REV. 416, 423, n. 14.

ness, Madeira wine, rum, brandy, beer and cider being responsible. Incidentally, one Henry Tyte is a common drunkard. An unexpected amount of night life shows up in the records, singing, dancing, riotous carousing—even married women are found "drinking and danceing" and sitting in the laps of men who are not their husbands. Much tobacco is used, but smoking in public is forbidden. A considerable number of Indians, already debased by contact with the white man, hang around the settlements, do a little petty thieving, seek oblivion in cellars where cider or rum is stored. Negro slaves are not uncommon, but are far outnumbered by indented white servants. Both the slaves and the servants are unruly elements in the community; the latter most often try to run away from their masters. Quite the most striking thing of all is the existence of something we do not ordinarily associate with Puritanism, a widespread and excessive sexual irregularity. This apparently affects all classes; it is hardly connected with prostitution, of which there is very little. There is at least one case of incest, and another having to do with the use of aphrodisiacs. Amazingly frequent are the cases in which married people confess to having committed fornication before marriage. Whatever else Puritanism may or may not have been, in Suffolk County it most certainly was no effective antidote for the biological urge.

"A number of documents have been printed simply because they record the common speech of the day." Briefly we may pick out Collonell,[38] which, as in Milton's sonnet, "Captain or Colonel, or Knight in Arms," is a word of three syllables. As in Elizabethan England, bin and ben occur. Our modern clerk is either clarke or clerke. A pronunciation still maintained in modern England is found in numerous Leiftenants and Leftenants.

All in all the reviewer considers these volumes two of the most interesting books on American colonial history that it has ever been his pleasure to study.

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WHAT ELECTRICITY COSTS. Edited by Morris Llewellyn Cooke. New York: The New Republic. 1933. pp. 275.

THE VALUATION AND REGULATION OF PUBLIC UTILITIES. By John H. Gray and Jack Levin. New York: Harper & Brothers. 1933. pp. 143.

PUBLIC UTILITY RATE STRUCTURES. By L. R. Nash. New York: McGraw-Hill Book Co. 1933. pp. 379.

PUBLIC UTILITIES AND THE PEOPLE. By William A. Prendergast. New York: D. Appleton-Century Co. 1933. pp. 366.

PROBLEMS IN PUBLIC UTILITY ECONOMICS AND MANAGEMENT. By C. O. Ruggles. New York: McGraw-Hill Book Co. 1933. pp. 737.

THE contemporary importance of the various problems in utility regulation is reflected in the recently published books and monographs concerning our public utilities. During the past year, the principles controlling the designing of rate schedules—the determination and allocation of unit costs in relation to the service rendered specific classes of utility consumers—has been in the forefront of discussion. Increasing interest in the unit costs of serving particular classes of consumers is

38. p. 156.

in part a product of the depression; with the decline in the gross and net earnings of utility companies, all hope of securing lower rates for domestic consumers depends upon an analysis of the costs of rendering residence service and a showing that the rates charged for such service are in excess of the costs. The differences between electric rates for residence and power consumers have been sufficient in themselves to cause complaints, but whether or not the charge of discrimination against the small user of electric service is justified cannot be determined in the present state of utility cost accounting. Cooke's *What Electricity Costs* and Nash's *Public Utility Rate Structures* are both addressed to this problem of adjusting the revenue from each class of the utility's consumers to the costs of serving that class.

Mr. Nash[1] is writing for the utility official or student whose special interest is in the principles controlling the designing of rate schedules, and his work constitutes the only available handbook in this complex and technical field. Following an introductory consideration of the characteristics of public utilities and the basic classifications and forms of utility rates, there are five chapters devoted to an analysis of the evolution and distinctive characteristics of the rate forms used by each of the more important utilities—electric, gas, local transportation, communication and water. For each utility, the various forms of rate schedules under which each class of consumers may take service are presented and the respective advantages and defects of each appraised. The technical features of the problem are presented; thus, the chapter on electric rates includes a consideration of the definition and measurement of demand, power factor corrections, and load density. Regarding rural electrification programs, the author favors a plan under which rural customers would pay in advance for the investment required to serve them in excess of that required for urban service, rather than have a higher level of charges to cover the company's investment. Should the rural extension become profitable, as presumably it would, the customers' advances would be refunded; in the meantime, as a device to encourage an early consumption of power for farm operations, the rural consumer would "be permitted to borrow against such refund for the purchase of large power-consuming equipment." (p. 72) The author notes with approval "an increasing emphasis upon those cost elements which are independent of energy consumption and a corresponding reduction in energy charge" . . . not only "for greater consistency with cost" . . . but for "protection of the power companies against future developments." (pp. 72-73)

Mr. Nash's most important contributions are to be found in the last half of the volume. His thorough exploration of promotional rates is particularly significant for he, in common with other leaders in the industry, regards the adoption of promotional rates as the only successful approach toward lower rates for domestic consumers. The primary purpose of promotional rates, the development of a greater volume of business, is realized through the imposition of a high initial charge—sufficient to cover customer and readiness-to-serve costs and independent of the volume of the commodity used—combined with a low energy charge. Promotional rates are usually confined to residential and rural schedules since industrial and commercial consumption cannot generally be stimulated by offering lower rates for larger consumption. Even though there may be some hesitation in subscribing

1. Mr. Nash is public utility consultant with Stone & Webster, Inc. In addition to his long practical experience, he has written extensively, being the author of *The Economics of Public Utilities* and of numerous articles on managerial and regulatory problems.

to the author's statement that fifty per cent of all residential consumers are unprofitable and while there may be some doubt as to the appropriate level of the initial charge in any promotional rate form, one can agree with his conclusion as an admonition to the leaders of the industry: "The extent to which such reductions [in residential rates] are permissible . . . does not depend wholly upon past experience as to residential service costs but largely upon the lower level of costs which more intensive development of the service will bring about." (p. 178)

An admirable chapter on "Rate Design and Plotting" is the only satisfactory and comprehensive discussion of this problem that has come to the reviewer's attention.

The chapter on "Cost Analysis" is in many ways disappointing. The possibility of allocating costs to particular classes of consumers is rejected on the ground that no simple method giving stable results is possible: the technique and defects of various methods of assigning production costs are outlined; no separate consideration of transmission costs is given; and the absence of suitable yardsticks is said to preclude any such allocation of distribution costs. In lieu of a direct allocation of costs to each class of service, Mr. Nash proposes a "functional analysis"—"the division of all costs of service into three groups relating to demand, commodity, and customers, and the determination of the unit cost of each group." (p. 240) Any undistributed elements of cost would be distributed among the three groups in proportion to the amounts originally distributed to each group. It is claimed that the functional analysis can be applied to the cost of service for individual customers and for classes of service, and that unlike the method of direct allocation to classes the functional method is not invalidated by changes in volume or character of service.

What Electricity Costs, a symposium edited by Morris Llewellyn Cooke, is in some respects the most significant book of the year on public utility regulation. The papers included were presented at a meeting of the Institute of Public Engineering called under the auspices of the Power Authority of the State of New York and the public service commissions of the District of Columbia, New York and Pennsylvania. The meetings were attended by public officials, engineers, accountants, representatives of the utilities, and students of public utility problems. The purpose of the conference was to analyze the problems of cost determination and of the development of cost standards for electric service in order to give intelligent consideration to the frequently repeated complaints of electric consumers, "That the costs are too high, that total charges are too high, and that an unjustly large part of these charges is laid upon one class of consumers; namely, residence consumers." (p. 15) The discussions centered around distribution costs—that is, the cost of service from the low tension side of the substation to the customer's meter—because such costs constitute "the major portion and the least understood portion of the total outlay" for electric service. The total national bill for electric service is said to be $2,000,000,000, only half of which is accounted for by the known costs for generating and transmitting current.

As is to be expected, the quality of the papers composing Mr. Cooke's symposium varies greatly, but each makes some contribution to an understanding of the problem. The most important paper is doubtless that of Mr. Clayton W. Pike, "Distribution Cost of Electric Energy with Special Reference to Residence and Rural Consumers," in which an attempt is made to develop a definite procedure and formula to give effect to all the elements of cost entering into the distribution of current to domestic consumers. From a consideration of all the papers four major conclusions are inescapable: (1) That the present uniform classifications of accounts are inadequate for the purposes of cost finding; (2) That cost standards can be developed and made

the basis for comparisons between different utilities; (3) That the development of such cost standards will require the coöperation of accountants, engineers, company officials, and public service commissions; (4) That the development of standards for distribution costs and the comparisons based thereon may be expected to produce important economies. As a question of practical procedure, it may be observed that the commissions might provide a most effective stimulus to the development of cost finding by ordering reductions in domestic rates whenever the utility is unable to sustain the burden of proving the reasonableness of such rates in relation to the cost of rendering residential service.

Public Utilities and the People, by William A. Prendergast, former chairman of the Public Service Commission of New York,[2] is apparently intended for the general reader. Its chief significance lies in the fact that it is a sincere exposition of the views of one long associated with state utility regulation. It is, for the most part, a conventional discussion of contemporary utility "issues," and the discussion is frequently reduced to a simple consideration of the validity of the criticisms currently levied against the utilities and their regulation. While the conclusion is reached that there is nothing that can reasonably be called a "power trust," the existence of holding company abuses is recognized and attributed to the absence of regulation, and as a remedy, strict regulation of holding companies by state, supplemented by Federal, authority is said to be essential. The present value method of rate regulation is favored not only on the ground that such is required by the decisions of the Supreme Court[3] but also because it represents the wise regulatory policy and assures justice to utility investors and consumers. It is suggested that the inconveniences and expenses of frequent revaluations may be avoided by readjustments based upon indices of prices. The more prevalent types of rate schedules are described and appraised according as they satisfy two prerequisites: that each class of consumers should pay its own way and that the schedule of rates should be designed to encourage larger consumption. Since the "electric industry is not making too much money . . . on all its services," the conclusion is reached that lower rates to domestic consumers can be secured only with larger consumptions based upon the adoption of promotional rates.

In answer to the contention that state regulation of utilities has "broken down," it is urged that regulation has been successful in accomplishing its purposes within the limits set by inadequate statutory powers and insufficient appropriations, that commissions must function as impartial fact-finding and quasi-judicial bodies, that the importance of judicial review as an interference with commission regulation has been grossly exaggerated; and the conclusion is reached that the interests of utility customers are competently defended.

It is in the discussion of public ownership that Mr. Prendergast's opinions and conclusions are most questionable. Thus, in discussing the Ontario Hydro-Electric Power Commission, quotations unfavorable to the project are taken from a pamphlet by Samuel S. Wyer published by the Smithsonian Institute and from a report on "Electricity in Rural Districts" by Professor E. A. Stewart of the University of

2. It should, perhaps, be noted that since leaving the Public Service Commission, Mr. Prendergast has served as vice-president of three New York utility companies—the Long Island Lighting Company, the Queens Borough Gas and Electric Company and the Kings County Lighting Company—at a combined salary of $75,000 per year. N. Y. Times, June 24, 1933.

3. The validity of this assumption is considered in connection with the next title.

Minnesota. But no mention is made of the fact that the discredited Wyer report was later withdrawn by the Smithsonian Institute and the plates destroyed; nor is there any mention of two items of interest respecting the Stewart study—that it was financed in part by funds contributed by the power companies, and that the engineers of the Commission did *not* say Stewart's data was correct but, on the contrary, replied that many of his figures were incorrect and many of his statements were not in accord with the facts. In conclusion, Mr. Prendergast is against all public ownership and operation in the electric field for many reasons: that rates are not and would not be lower; that consumers are unduly favored as compared with the general public when public plants fail to charge enough to pay fair dividends on their investment; that any saving to consumers in securing capital at lower costs would be offset by the losses of investors deprived of an opportunity to invest in utility securities; that lack of efficiency and economy is characteristic of publicly operated projects. Is is unfair to remark that these reasons would convince only those who want to be convinced?

The Valuation and Regulation of Public Utilities, by J. H. Gray and J. Levin,[4] is published as an introductory study for the general reader. The book consists of two quite distinct parts: first, a survey of the problems confronting the Interstate Commerce Commission and the principles it has developed in the valuation of the steam railroads, which is very excellent within the limitation of conciseness imposed by the size of the volume; and second, a critique of the legal institutions which have rendered public utility regulation quite ineffective.

The authors find the source of all the obstacles to effective regulation in the Federal courts' development of judicial review of the reasonableness of rates fixed by state authority and the determination of "reasonableness" on the basis of the present fair value of the utility's property. The original doctrines of the Supreme Court in the *Slaughter House Cases,* that the Fourteenth Amendment was not available to invalidate regulations enacted under the police power of the state; and in *Munn v. Illinois,* that the Court would concern itself with the single question of whether the state possessed the power to regulate rates charged by grain elevators and would not consider the reasonableness of the specific rates established, should, according to the views herein expressed, have been followed by the later members of the Court. The steps by which the doctrine of judicial review was substituted for the doctrine of state legislative sovereignty is carefully traced: the recognition of a corporation as a "person" within the meaning of the Fourteenth Amendment; the allowance of diversity of citizenship of corporate stockholders as a basis for federal jurisdiction; the assimilation of the mere fixing of a rate for a public service to the taking of the possession and use of property by the government; the combination of the "just compensation" of the Fifth Amendment with the "due process" of the Fourteenth Amendment into a single principle limiting state action; the assumption that legislative and judicial "due process" were identical; and finally, the testing of the constitutional adequacy of state-prescribed rates according to a "reasonable return" on the "present fair value" of the utility's property. The results are said to be wholly unfortunate: all regulation is based on court-made law; there is the delay and expense of endless litigation; a confusion of court decisions and statutory laws abound; regulation by expert commissions is nullified through the

4. Mr. Gray is a former analyst and examiner in the Bureau of Valuation of the Interstate Commerce Commission. Mr. Levin is a former valuation expert for the Public Utility Commission of the District of Columbia.

manner of federal judicial review which does not bind the courts to the findings of fact developed by the commission, but requires a complete rehearing before a relatively inexpert special master.

Much of what these authors say regarding the ineffectiveness of utility regulation deserves to be shouted from the house-tops. One may, however, question whether the Supreme Court is the only villain in the piece. It may be that judicial review of the findings of our regulatory commissions need never have been evolved; unwisely severe regulation would ultimately have forced a correction of abuses through a "flight of capital" from the utilities of that particular state. Many who are not "friends of the utilities" are, nevertheless, convinced that some degree of judicial review is desirable. Throughout the argument, the authors fail to note that the Supreme Court in its decisions has recognized the distinction between its functions in testing the confiscatory character of rates prescribed by state authority and the wholly different function of the state commissions in establishing reasonable rates.[5] The state commissions were, and are, under no necessity to follow the *Smyth v. Ames* procedure in the regulation of utility rates; if they have done so, the responsibility must rest with the commissions and the legislatures, both of which have always been free to adopt the prudent investment, or any other effective method of regulation. The suggestion that Congress enact legislation making the findings of fact of the state commissions binding upon the Federal courts in exercising judicial review, is one worthy of wide support since it would eliminate the worst feature of judicial review as presently practiced, the rehearing of cases before special masters.

Problems in Public Utility Economics and Management, by C. O. Ruggles,[6] is a Harvard casebook designed for classes in public utility management, and as such the viewpoint presented is that of the utility corporation rather than that of the consuming public or regulatory authority. The volume includes some 120 cases, somewhat more than half of which have been prepared from commission and court decisions. The cases have been largely rewritten in the language of the author with relatively brief and infrequent quotations from the commissions and courts; and while the basic facts out of which each case developed are fully presented, the procedure by which the regulatory bodies arrived at their decisions is usually not revealed.

Professor Ruggles' choice of problems is well balanced, and good judgment is apparent in the selection of the cases developing each problem. The volume deals with seven major groups of problems: the economic characteristics of public utilities; production problems of public utilities; management, organization, and finance; wholesale marketing of public utility service; retail marketing of public utility service; valuation, rate making, and fair return; regulation and management. While minor criticisms of the choice of case materials may be pointless since no two people would ever agree on a list of 120 cases, it may be noted that certain important cases are omitted and some significant problems are neglected. Thus *Tyson & Brothers v. Banton* and *Ribnik v. McBride* are missing from the chapter on the Economic Characteristics of Public Utilities. Secondly, the relation of dividend policies and depreciation practices to the financial management of the utility is barely mentioned. Again, in the section on valuation, it would be profitable to include a case, possibly one of the Interstate Commerce Commission's valuation decisions, illustrating in detail the

5. See Barnes, *Federal Courts and State Regulation of Utility Rates* (1934) 43 YALE L. J. 417.

6. Mr. Ruggles is professor of public utility management in the Graduate School of Business Administration at Harvard University.

problems involved in building up the inventory and cost estimates. Finally, in presenting the marketing problems peculiar to utilities, it would seem appropriate to give some attention to the technique of cost analysis and the designing of rate schedules.

What progress is being made in the solution of the various problems of public utility regulation to which these volumes are addressed? With the unanimous agreement of all disinterested students, and the acquiescence of the more intelligent leaders of the industry, that regulation of holding companies is essential and that, to be effective, the Federal government must assume at least a limited responsibility, the satisfactory control of holding companies and intercorporate relations awaits only the development of sufficient public pressure to overcome the powerfully organized lobbies of the utility interests. With a recognition that our commissions have never been equipped with adequate statutory powers and sufficient financial resources, it becomes apparent that there has been no "break down" in regulation, but that the legislatures are chiefly at fault in not having supplied these indispensable means to effective control. That perennial problem—the basis upon which utility earnings should be regulated—remains unsolved, but the difficulty here is not to be found in immutable constitutional principles, but rather in a confusion of the functions of courts and commissions and in the failure of legislatures and commissions to evolve satisfactory procedures adapted to the commissions' particular administrative task of determining "reasonable" rates. The attempt to allocate costs among the various classes of utility consumers raises difficult engineering and accounting problems which will be resolved only after extensive study and research, but even here, the past year has seen the problem defined and its importance recognized. Thus, in utility regulation, as in the field of economics and law generally, our existing problems are not due primarily to any inability in fixing goals and outlining appropriate means thereto, but rather to our inertia in embodying our theoretical solutions in effective action.

Yale University. IRSTON R. BARNES.

TRAITE THEORIQUE ET PRATIQUE DES TRUSTS. By Pierre Lepaulle. Paris: Rousseau et Cie. 1932. pp. vii, 462.

THE present review is written by a German law teacher on a French book dealing with the peculiarly Anglo-American legal concept of trust. M. Lepaulle has succeeded in presenting to his European readers a picture of Anglo-American trust law that not only is clear and transparent but also presents its particular features in a lucid and trustworthy manner. The result is a harmoniously organized whole which may surprise many an American lawyer accustomed to the case method.

However, the author has not merely set forth in a clear fashion the prevailing trust doctrines; he has also erected a new theory. Both traditional theories, that which explains the trust as "divided ownership" as well as that which explains it as an obligatory relationship between trustee and beneficiary, are rejected. Neither is sufficiently comprehensive to embrace all possible trust situations, particularly the charitable trust without a beneficiary, and the trust without an actual trustee. The author believes that his definition solves the difficulty. For M. Lepaulle, a trust is "a legal institution consisting of a fund, independent of any legal subject, and whose unity is constituted by an affectation, which is free within the limits of the actual law and of public policy." It follows that the rights of the beneficiary

are directed not against the trustee, but against the trust; similarly, the trustee is under duties not to the beneficiary, but to the trust.

Contrary to first impression, M. Lepaulle does not mean to personify the trust fund, to establish it as a juristic person capable of having rights and duties. Rather, the attempt is to avoid a subjective statement of rights and duties. The res is an independent fund, a fund which is not the property of anyone, a "purpose fund" (Zweckvermögen) whose legal destinies are determined by law and by the "affectation" given to it by the settlor.

Such a conception of a property without an owner is as unfamiliar to French as it is to English readers. M. Lepaulle finds himself obliged to explain and to justify it. For this purpose he refers to certain theories developed in the late nineteenth century school of the German Pandecticts. But he overlooks an important point: These deductions of Ihering, Windscheid, and Bekker are concerned with another set of problems, with *"general* jurisprudence" and not with dogmatic science of any *positive* system of law or with dogmatic comparative law. What they wish to do is to develop the *general* conceptions of "right," "legal personality," "legal subject," "legal object." They start from the premise that the concepts of "right," of "legal personality," of "patrimony," which are all interconnected, are nothing but short, abbreviating, comprehensive terms for a number of connected rules of objective law. On this assumption the result is reached that a right is a "situation, created by law, in which certain goods are destined or certain persons bound for a certain purpose," and a "patrimony" is regarded as the "sum of goods, destined and held together by law for a certain purpose." Thus, one may completely lay aside the concepts of "subjective right" and of "holdership of right" (Rechtsinhaberschaft) and reach instead the concept of a pure "purpose fund" (Zweckvermögen).

Such a reduction of the concepts used by our systems of positive law is thoroughly possible, and it is also possible to express every single rule of law in such terms. However, the conceptual system so fashioned is much more complicated and much less comprehensible than the traditional terminology. Neither Anglo-American, nor French, nor—as may be added here—German positive law knows a conception of an "ownerless property." Admittedly, in all these systems situations sometimes occur in which it may be impossible to say who is, at a particular moment, the "owner" of a certain fund, as for example in the case of *hereditas jacens,* or of the "piece of land derelicted by the last owner" (German Civil Code § 928), or of a trust with no actual trustee. But in all the systems concerned, these situations are regarded as abnormal, they can only arise momentarily, and everywhere jurists are eager to find constructions which will bring these abnormal situations into the conceptual world of right and legal subject (which may be achieved by either establishing such funds as juristic persons, or, through legal fiction, relating the accession of the incoming new owner back to a moment prior to that of his actual entrance).

M. Lepaulle's newly invented doctrine seems to be particularly unfortunate as an explanation of the Anglo-American trust. In its beginnings as well as in present-day theory and practice, the trust fund was and is always and invariably regarded as being in the legal ownership of the trustee, and not as an "ownerless fund." M. Lepaulle rejects this traditional doctrine because it does not, in his opinion, explain that the res cannot be seized by the trustee's creditors and that it does not belong, at the death of the trustee, to the general mass of his estate. But, in order to explain these phenomena, there is available a simpler and more familiar construction. The res is a "special fund," a "special property" (Sondervermögen)

belonging to the trustee, but subject to other legal rules than is his general property. And while the term "affectation" of the trust res appears more useful, yet this conception of "affected property" is in no way necessarily connected with the theory of an "ownerless fund." It may be used just as well in connection with the prevailing conception of "separate property" (Sondervermögen) as distinguished from "general property." By "affectation" M. Lepaulle defines the objectivated purpose as it is given to the res in the case of the express trust by the one-sided will of the settlor, and in the case of the constructive trust by the law. It provides the terms for a clear explanation of cy-pres and of the duties of the trustee.

Not only is M. Lepaulle striving for an explanation of Anglo-American trust law but he is also greatly concerned with the possibilities of using the trust idea in French law in order to achieve the flexibility and wide uses of the Anglo-American system. But in believing that the adoption of his theory would endow the French law with advantages of Anglo-American trust theory, he ignores the distinction between a sociological concept and a legal device. Indeed, in French as well as in German social life, numerous situations occur wherein a certain fund is "affected" for a certain purpose. But, in order to enter the sphere of law, these situations must be framed in the shape of one of the technical devices recognized by positive law. French law employs the devices of juristic personality (fondation d'utilité publique) or of a charge upon a gift (fondation indirecte). Comparably, Anglo-American law gives the beneficiary rights against the administrator of the fund who is regarded as the legal owner, and secures the beneficiary's position by rights in rem, or better, ad rem. This last device is similar, as M. Lepaulle notes, to the French privilège of a droit de suite in the beneficiary against purchasers other than holders in good faith, coupled with a right of reclamation against the other creditors of the "owner" of the res. An Anglo-American beneficiary's position is still stronger, since his rights also extend to objects acquired by the trustee in consideration for the res. These relations between the parties concerned and their reference to the res form the foundations of the trust as a legal, as distinguished from a sociological concept.

Any effort, however, to endow either of the two Continental countries with the advantages of the Anglo-American trust must proceed with other technical devices; the absence of law and equity prevents the use of the Anglo-American means. The nearest approach would be to transfer the right forming the trust res, or as German doctrine expresses it, the "holdership of the right" (Rechtsinhaberschaft), to the trustee, who must exercise it not to his own advantage but to that of the beneficiary. This is the most ancient form of the Roman "fiducia," scarcely mentioned at all by M. Lepaulle. The other way is to separate the "holdership of the right" from the power to dispose over it; the right is vested in the beneficiary, but he cannot dispose of it. The power of disposing is vested in the trustee, in order that he may make use of it to the exclusive interest of the beneficiary.

By neither of these methods can there be produced a legal situation absolutely identical with that of the Anglo-American trust. The first method, the fiducia, gives the trustee too much, the beneficiary too little. The res is nothing but a part of the trustee's estate; the beneficiary has nothing but obligatory claims against the trustee without any droit de suite, without any protection against the trustee's personal crediors, and without any possibilities of reaching such objects as the trustee may have acquired in exchange for the trust res. Those difficulties may be removed only in the same way as Anglo-American law does it, by singling out the res from the trustee's general estate and by establishing it as his "separate fund" (Sonder-

vermögen). The law of Germany has made some important steps in this direction, but if the trustee wrongfully alienates the object to a third person who has no actual knowledge of the cestui's right, even if he may have what Anglo-American terminology calls "constructive notice," the cestui has no droit de suite. Further, if the trustee has not acquired the res directly from the beneficiary himself, the latter may not prevent its seizure by the trustee's creditors.

The second method is barred in French law as well as in German law by explicit statutory rules of the respective codes. In both laws, there exist legal institutions which for the protection of certain persons make use of the device of a separation of "holdership of right" and "disposing power," e.g., guardianship, parental power, bankruptcy, and receivership. Yet both systems prohibit the creation of such a situation by the free legal will and act of private parties. The holder of a right may by agency enable *another* person to make valid dispositions of that right, but he may not deprive himself of the power to dispose of his own rights. In Germany this is explicitly provided by Section 137 of the Civil Code. In France, the same result seems to follow—unfortunately M. Lepaulle does not deal with this fundamental problem—from Article 543 of the French Civil Code. In both laws the so-called principle of the "closed number of real rights" excludes the creation of limitations of disposition which would work in rem. And both systems have their well-founded reasons for so doing.

M. Lepaulle is an enthusiastic admirer of the trust. In explaining the almost unlimited possibilities of the Anglo-American trust device and in comparing it with the different legal institutions French law has for reaching some of the same social and economic results, he states in every single case the superiority of the flexible, elastic Anglo-American trust. However, in his enthusiasm M. Lepaulle overlooks one of the most essential differences between the legal systems of Anglo-American and Continental European countries. Anglo-American countries are the classical territories of the greatest liberty of individuals in shaping their legal relations; Continental laws, much more dominated by the state, have generally confined the idea of an unlimited "liberty of contract" to the field of "contract law" (in Continental terminology, the law of obligations). In the other fields of private law—law of things, of family relations, of succession—they follow another maxim; for certain recognized social needs and aims they create certain fixed legal institutions, restricted in number. Parties may alter details and particular points—sometimes to a very considerable degree—but they have to accept each of these institutions essentially as the law has shaped it. Such legal institutions are built up by various kinds of legal techniques, such as legal personality (as in corporations, associations, foundations, societies and partnerships, separation of "right holdership" from "disposing power," charge, universal succession and substitution, fiducia, right in re aliena, et cetera. For all these purposes, and for many others too, the common law can employ the one technical means of the trust which, by a skilled lawyer, may be moulded into the greatest variety of forms.

It must be remembered that this philosophy of utmost liberty for the individual, for which the trust is an admirable instrument, never prevailed so extensively or deeply in Continental Europe. The more rigid control of private life found in the Codes represents the interest of the community in the clarity of its legal system and in the protection of the interdependence of its members. If the law is to fulfill its task of giving rules of conduct for all the members of the community, then it must not be allowed to become so complicated that the private citizen will no longer be able to live and to conduct his affairs without the perpetual assistance

and guidance of the lawyer or to acquire property without fear of legal traps and dangers. Title insurance has never become necessary on the Continent. Anglo-American laws are better adapted to meet all the peculiar wishes and, as M. Lepaulle admires, even the dreams of private individuals. Continental systems, on the other hand, may be more rigid, they may not enable their citizens to endow their sometimes fantastic oddities with the binding force of the law, sometimes—though certainly extremely seldom—they may even set serious obstacles in the way of perfectly legitimate purposes; but, they are relatively simpler, clearer, and less complicated. And there is another danger inherent in that admirable flexibility and adaptability of the trust, the possibility of its being used for illegitimate purposes, for defrauding the law, for circumventing protective measures with which the law has surrounded many of its established institutions.

Certainly, a legal system may go too far in such protective devices. The French Civil Code of 1804, the work of an autocratic emperor and so near in time to the absolute monarchy of the Bourbons, goes very far in the paternal protection of the citizen. M. Lepaulle is undoubtedly correct in attacking certain of these protections as too rigid, as antiquated and out of date. The German Civil Code, a hundred years younger, has found a balance of the interests of individual liberty and of state protectionism more nearly in accord with prevailing public opinion. But the remedy for such antiquated narrowness is not to sweep all away by introducing a comprehensive legal institution of unlimited application, derived from a legal system based upon other traditions.

There is, finally, one further consideration. M. Lepaulle criticizes the doctrine of constructive trust; he is not so inclined to urge its introduction into French law, on the ground that the beneficiary creditor is unduly favored, especially where there is no notice to others. However, in the great majority of cases where Anglo-American law creates constructive trusts, the creditor is favored in actual French law in quite a similar manner. If *A* has transferred an object to *B* and the transfer is made in pursuance of an invalid legal act (the typical situation in Anglo-American constructive trust cases), the French doctrine of *causa* deprives *B* of any rights in the object. The legal ownership remains with *A*; he is entitled as against *B*—to use the Romanistic term—not only to an obligatory claim of *condictio* but to a real action of *rei vincidatio*. In effect, *A* has a droit de suite and a right of reclamation against *B's* other creditors, he is in almost the same privileged position as a constructive trustee. Hence, the need of the constructive trust does not exist for French law; it possesses it already, although under another technical name, it is true, and with certain differences in detail. I mention this because it clearly indicates the necessary methods in comparative law. It is not sufficient to state that a certain technical device of one system does not exist in another. What is wanted is a detailed comparison of the practical solutions of actual problems and situations.

M. Lepaulle's book thus gives rise to objections and doubts. And yet, or perhaps precisely therefore, it is an important book. Where it describes the actual Anglo-American trust law, it is quite excellent; it contributes suggestions of real value for the treatment of trusts in the conflict of laws; it furnishes a survey on the taxation of trusts and similar phenomena in England, the United States, and France, that will be most useful to legal practitioners. It is a remarkable contribution to comparative law, and its beautiful style affords the reader an esthetic pleasure.

Columbia Law School. MAX RHEINSTEIN.

WITNESSES IN COURT. By Henry W. Taft, New York: The Macmillan Co. 1934. pp. 98.

THE charming ease and flow of discourse with which the author has graced this brief volume removes it completely from the class of those outlined writings which attempt to state the rules of trial practice. Yet experience and skill in actual practice lend substance to each sentence. The author is ever master of his point, and writes to inspire the layman with confidence in his own ability to recount his version of an incident. For it is precisely in the popular terrors of the courtroom, and in the cautiously suspicious rules of evidence, that many of the difficulties which hinder accurate testimony lie.

None of the present-day legal notions towards personal testimony is truly valid. The chief source of these notions, that the court must guard against the self-interest of the witness, seems utterly unrealistic. Witnesses will have interests, and the attempt of the rules to safeguard against them merely forces witnesses to elaborate rehearsal before trial, accentuating their bias. It would be far wiser to recognize interests and to allow the full play of conflicting versions. Furthermore, the hostile prejudice of the court room impugning the veracity of ordinary observation and memory hardly aids the witness who wishes to tell his story. Lawyers acting on this same principle stifle the possibility of a full picture on direct, and obscure and garble what might have been to their own benefit, on cross examination. The judge, moreover, believing that lawyers are proper adversaries for interested witnesses, fails to offer the restraint and dignified assurances which would inspire a witness with sufficient confidence to report what he had heard or seen. So much the author states with a finished clarity, and illustrates with excellently recounted anecdotes.

He then disposes of the now famous Münsterberg tests, on the simple ground that the professor in his tests completely ignored the ordinary weight which the law has attached to experienced observation. Taking the advance made by Lord Brougham's act as his exemplar, Mr. Taft repeats the suggested reforms he has urged before. The rules of evidence should be broadened to allow hearsay, save where direct testimony is available; the trial court given greater discretion. To save the long delays and useless parade of witnesses, he proposes that the judge be furnished with a syllabus of what counsel intends to offer by each witness, and on those preliminary reports the trial could be charted in advance.

Apart from reforms of rules, there are persuasive suggestions that the judges take a larger part in aiding the free telling of testimony. Lawyers are urged to remember that witnesses are intelligent and capable of recounting a story; witnesses are inspired with confidence in their own abilities. There are, of course, witnesses who will, despite the fairness of legal rules, present difficulties—the Egotist, the Over-Zealous Witness, the Quick Tempered Witness, the Subtle Witness, the Hostile Witness, and Women.

This book may be treasonous to the lawyer who feels that it is a good thing to intimidate, frighten and confuse a witness, but Mr. Taft assures us that the more successful lawyer would not complain of his proposals. Certainly the course of justice needs the truth, the whole truth and nothing but the truth.