Book Reviews

RESTATEMENT OF THE LAW OF AGENCY. St. Paul: American Law Institute Publishers. 1933. Vol. I, pp. xxxiv, 1-636; Vol. II, pp. xxviii, 637-1390.

WITH the publication of the Restatement of Agency, the American Law Institute passes its second milestone. In the evaluation of such a work the reviewer essays a perplexing task. Indubitably, the product of a Mechem and a Seavey, assisted by the galaxy of helpers employed in this endeavor, will be thorough, precise, authentic. To say so with multiplied words is to paint the lily. As for the importance of the Restatement project and its significance for the legal profession, these have been proclaimed from every housetop for the last ten years. Hence unless one wishes to sit in the seat of the scornful, or at least to question the desirability of the objectives set and the means adopted, there is little that may be said with profit. I shall content myself with comment upon a few heads which seem to me of special interest.

In the first place, as compared with the Contracts Restatement, conservatism and a desire not to state the law too far in advance of the present cases are strikingly apparent. In Contracts, promissory estoppel[1] and advanced ideas about protecting the offeree who has begun performance under an offer to a unilateral contract[2] found acceptance. In Agency, on the other hand, there is a marked tendency to state the law in accordance with conventional formulae, even in situations where there exist authorities supporting a different view. Thus the traditional common-law rule that the agent's authority terminates upon the principal's death, regardless of notice, is set forth with no mention of competing lines of authority.[3] In undisclosed principal transactions, the election by judgment rule is adopted in respect to the third person's right to pursue both principal and agent, despite the existence of practically as many cases of equal dignity in support of the satisfaction rule.[4] The opportunity to restate the duty of an agent to return things received by him on behalf of an undisclosed principal on rescission of the transaction in accordance with general quasi-contract principles, yields to the weight of decided cases in the particular field.[5]

This necessity of election between adherence to the weight of decided cases and proclamation of what is regarded as the more preferable rule is the result of putting the Restatement in the form of a series of dogmatic assertions in black-letter type. The choice is not an easy one. In theory the Restatement is an outline of the existing law. It is restatement, not legislation. Too wide a departure from the numerical weight of authority may raise a proper doubt as to its authenticity. On the other hand, the natural tendency of judges and lawyers to rely upon a compendium of legal principles emanating from so respectable a source creates the danger that too con-

1. CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 90.

2. *Id.* § 45.

3. AGENCY RESTATEMENT (Am. L. Inst. 1933) § 120.

4. *Id.* §§ 210, 337. For a discussion of the desirability of this position see Merrill, *Election Between Agent and Undisclosed Principal: Shall We Follow the Restatement?* (1933) 12 NEB. L. BULL. 100.

5. AGENCY RESTATEMENT (Am. L. Inst. 1933) § 341. For a statement of the reasons leading to the casting of the section in this form see Comment to § 564, AGENCY RESTATEMENT, Draft T. No. 6 (Am. L. Inst. 1931) 193.

servative an exposition may check wholesome development. Mr. Mechem's original plan of stating the existence of competing rules might have avoided this danger.[6] As it is, the safeguard against undue reaction and ultra-progressivism seems to lie in the state annotations and in critical comment upon and evaluation of the Restatement's canons dealing with the more controversial points. If the state annotator's work is properly done, it will be possible to determine with a minimum of effort not only the extent to which the local law departs from the Restatement but also the reasons underlying the variation. Critical comment upon the Restatement rulings on disputed matters, particularly with reference to their expedience from the standpoint of social engineering, will be of immeasurable value to courts in determining whether they shall follow the American Law Institute's position. We need many of them, and quickly, both in Contracts and in Agency.[7]

Many, captivated by the notion of uniformity in the law, to whom the ordering and unifying function seems the chief end of the Restatements, may not agree with the notion that there should be such an examination of bases, with the concurrent tendency to perpetuate or to evolve variant rules in different jurisdictions.[8] But to me it seems that uniformity comes at too high a price when it is obtained at the sacrifice of what is deemed to be the better rule and I should regard it as little short of catastrophic should there develop a tendency to crush the search for the preferable formula in the dead clasp of the Restatements. Fortunately, the American Law Institute itself does not conceive of its task as involving the attempt to root out competing doctrines in this manner, and there is every reason to believe that judges will not invest it with any such infallibility.

But while the Restatement of Agency is marked by a tendency to stand by the ancient landmarks of the law, in matters of terminology and of analysis it is characterized by a highly progressive trend. In the definition of authority and of apparent authority in terms of power,[9] a step is taken that should clear away much of the doubt and confusion which has clung to the judicial use of these two nomes. If judges and teachers pave the way by themselves accurately employing this terminology, we may expect its use to become common within a comparatively short time with a resultant gain in clarity and accuracy in the presentation of matters to the courts and in the analysis of cases by the practitioner.

Possibly one of the greatest shocks to the bulk of the profession will come from reading the definition of master, servant and independent contractor.[10] Under it all agents are either servants or independent contractors, though of course not all independent contractors are agents. The instinctive reaction of most lawyers will be to cry out in protest against this statement. Upon reflection, however, it becomes more and more apparent that here again the Restatement brings us a definition which really defines in place of the somewhat slipshod ones in previous use. Barring the situations in which the term is used by a statute in some special sense, it seems impossible to think of a case in which this test does not give us the proper result.

Perhaps one of the most valuable features of the Restatement is the analysis of

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6. Sir Frederick Pollock has commented on this in a review of the Contracts Restatement in Book Review (1933) 47 HARV. L. REV. 363.

7. See for further comment upon the need for such writing, Clark, *The Restatement of the Law of Contracts* (1933) 42 YALE L. J. 643, 664-667.

8. See Franklin, *Review of Contracts Restatement* (1933) 8 TUL. L. REV. 149, 150.

9. AGENCY RESTATEMENT (Am. L. Inst. 1933) §§ 6-8.

10. *Id.* § 2.

the concept of notice.[11] Professor Seavey first developed this in an article some years ago.[12] His present analysis varies somewhat in terminology and is based upon a division of notice into knowledge on the one hand and notification on the other. Such a division clears up much of the apparent confusion existing in regard to the subject of notice through an agent, and in fact with respect to notice generally.[13] It may be that a further classification into absolute notice, including all notification and some knowledge, and what for want of a better term may be dubbed cognitive notice would be of some advantage in explaining the difference between cases like *United States National Bank v. Forstedt*[14] on the one hand and *Irvine v. Grady*[15] on the other, and in forestalling such manifestly unjust results as lurk in the decision in *New England Trust Co. v. Bright*.[16] Of this I hope to have more to say on another occasion.

To sum up: We have in this Restatement a work which, adequately supplemented by state annotations and critical evaluations, will be of great service alike to judges and lawyers. As with all other tools, its value depends chiefly on how we use it. We must not make of it an idol, upon whose altar we sacrifice the hope of improvement and development in the law. In so doing we should dishonor the eminent scholars who have labored upon it and frustrate their hopes. Let us employ it as the means by which to better our law and its administration in this particular field.

University of Nebraska College of Law. MAURICE H. MERRILL.

CASES ON THE LAW OF AGENCY. By Roscoe T. Steffen. St. Paul: West Publishing Co. 1933. pp. xxix, 836.

IN the preparation of this casebook the author drastically departed from the accepted treatment accorded to Agency by such outstanding authorities as Goddard, Keedy, Mechem and Seavey. Steffen's principal thesis is, to quote from his Preface, that "the center of gravity in the Agency field has long since shifted to the problems of the business organization; the Agency of the 'horse era' has become too 'dehydrated' to survive in present-day competition." In the Introduction this thought is amplified: "The striking development in recent years has been the rise of the vast organizations of 'agents,' in the broad sense, employed in modern business, ranging from chairman of the board of directors on down to the janitor's helper or the office boy. As might be expected from this change of setting many of the agency principles developed for an earlier day do not apply. . . . Not less important to note at the outset is the profound change in the type of 'principal' to be dealt with today. . . . But most transactions today are conducted on behalf of the corporation, the business trust or the partnership. . . . Recognition of this, however, does not render wholly obsolete the earlier learning, but it does entail a considerable shift in emphasis."

The book is divided into three parts: (1) "The Employment Relation," in which one finds sections devoted to such topics, inter alia, as the Tenure of Officers and Directors, Negative Covenants and Trade Secrets, Management Responsibility for

11. *Id.* § 9.
12. See Seavey, *Notice Through an Agent* (1916) 65 U. OF PA. L. REV. 1.
13. The term is borrowed from Professor Seavey. See Seavey, *supra* note 12, at 2.
14. 64 Neb. 855, 90 N. W. 919 (1902).
15. 85 Tex. 120, 19 S. W. 1028 (1892).
16. 274 Mass. 407, 174 N. E. 469 (1931).

Losses, The Personal Injury Risks, and Workmen's Compensation; (2) "Conduct of Business by Representatives," which is the most conventional subdivision of the book, although even here there appear sections on such matters as Transactions Requiring Directors' Action, "Ultra Vires" Corporate Transactions, and Promoters and Unauthorized Agents as Parties; (3) "The 'Principal'—Forms of Association—Limited Liability," in which most of the cases deal with various forms of partnership responsibility, with membership associations, with joint stock associations and business trusts, with de facto corporations, and with parent and subsidiary corporations.

Steffen's insistence that the modern agent is, in most instances, a representative of a group, whether it be an incorporated or an unincorporated association, and that accordingly the comparatively simple individualistic illustrations of a past generation no longer portray the realities of representative activity, is unquestionably sound. Moreover, his casebook has been prepared with extreme care and skill; the introductory note to each section and the footnotes to each principal case are excellent aids to an understanding of the problems posited. Consequently, to those believing that law schools should continue to present a separate course in Agency,[1] this volume will have a tremendous appeal, for it not only furnishes material for developing all of the major doctrines of Agency law as conventionally taught, but also projects this process into a modern, realistic setting.

University of Pennsylvania Law School. ALEXANDER HAMILTON FREY.

CROSS-EXAMINATION AND SUMMATION. By Jules H. Barr and Simon Balicer. New York: Modern Law Publishers. 1933. pp. 622, xii.

THIS is not a mere work on advocacy. If it were, it would, of course, contain the highly entertaining material to be found in Wellman, Donovan, and others who have made like efforts. There is nothing more delightful than a reading of the artistic accomplishments of a skilled trial lawyer. The book deals, however, with something different. It is intended, apparently, as an introduction, primarily, to the orderly conduct of a trial, for the use of the apprentice. It is what might be called a practical book, which points out to the beginner the various stages in the trial of cases and summarizes some of the rules of evidence and practice for his guidance. It deals, in the main, with cross-examination and summation from this viewpoint and contains a number of model summations. These are designed to illustrate a sound method of handling specific situations, such as comment on the failure to call an important witness, observations on a witness who is a minor or ex-convict, and similar matters of common experience. The summations cover 24 distinct types of cases, including one which involved liability for a dog bite.

A young lawyer who has assisted at a few trials will probably have acquired enough knowledge of the routine to be able to take the supposedly cold plunge without a guide book. The authors recognize that cross-examination can be learned only by practice and not by rule. Nevertheless, considerable space is devoted to teaching cross-examination by an exposition of methods relating to such operations

1. For reasons set forth in an article entitled *Some Thoughts on Law Teaching and the Social Sciences,* (1934) 82 U OF PA. L. REV. 463, I am disinclined to agree that a separate course in Agency should be offered. Hence I should tend to regard Steffen's scholarly product somewhat as a work of supererogation, did I not feel that it will admirably serve the interim period which is inevitable before any program such as I there advocate can be achieved.

as pinning down evasive witnesses, exposing the professional witness, establishing bias or hostility, and destroying credibility. As no one can boast that he has learned the art of cross-examination from a book, the work is necessarily submitted to the younger members of the profession under a considerable handicap.

As an exposition of the law on matters relating to evidence and trial practice, the book is necessarily inadequate. Nor does it attain academic perfection. Expounders of the law will quarrel with some of the rule of thumb statements—for example, on presumptions of fact. The treatment of testimony by a witness as to taste, color, smell, and so forth, as opinion evidence, is, of course, unsound, for any student in a good law school today knows that such evidence is not received as expert testimony, but as evidence of the observation of a fact. To the extent that the authors have perpetuated such inaccuracies, the book cannot, of course, be approved as a model of erudition. But in the rough and tumble of ordinary trial experience perhaps an over-encouragement of scholarly refinements should not be indulged.

This short cut to the study of evidence can evoke little enthusiasm. All that the work actually gives on trial practice may be summed up in a few pages. No useful book has ever been written on the art of trying a case. Entertaining works, with literary excellence, have been produced on the subject, but this does not claim to be one of them.

New York City. GEORGE Z. MEDALIE.

PLEBISCITES SINCE THE WORLD WAR: with a Collection of Official Documents. By Sarah Wambaugh. Washington: Carnegie Endowment for International Peace. 1933. Vol. I, pp. xxix, 603; Vol. II, pp. xiv, 614.

IT has become fashionable to dismiss Wilsonian idealism as war propaganda and to condemn even innovations in the Peace Settlement, such as the Mandates System and the League of Nations, as hypocritical disguises to mask the sinister designs of the victors for dominion and profit. One may readily grant that the peacemakers were responsible for much injustice and folly. Nevertheless it remains true that, had it not been for Wilson and for the ideals to which he gave expression, the embittered and vengeful victors would have imposed a far more vindictive peace, a peace like that of Brest-Litovsk which the law of the jungle would not have considered unjust to a beaten foe. As it was, the insistence of Wilson and, less consistently or disinterestedly, of Lloyd George prevented the transference of certain disputed regions without the prior consent of the people concerned. Furthermore, it is to be remembered that in at least five cases the appeal to the self-determination of the people resulted in the restoration of all or part of the disputed areas to the defeated power.

The two substantial volumes under review contain a careful, exhaustive and well-documented account of the plebiscites held in the former Danish province of Schleswig; in Allenstein and Marienwerder and in Upper Silesia to determine the Polish-German border; in the Austrian Klagenfurt Basin which the Jugoslavs coveted; and in the small district of Sopron claimed by Austria and Hungary. With equal industry and objectivity Professor Wambaugh analyzes the preparations for the forthcoming plebiscite in the Saar Territory; the rival claims of the Poles and Czechs to Teschen and the neighboring counties of Orava and Spisz; the claims of the Poles and Lithuanians to Vilna; and the claims of Chile and Peru to Tacna-Arica where plebiscites were attempted but abandoned. More briefly, and properly so, are treated such partisan "consultations" as took place in Eupen and Malmédy, Mosul and several other regions. An introductory chapter gives an historical sum-

mary of the appeals to self-determination during the war and of the peace negotiations. Two final chapters summarizing and comparing the post-war plebiscites, and analyzing the criticisms levelled against the ideal of self-determination and indicating the essential requirements for an impartial plebiscite, followed by an excellent bibliography, conclude the first volume. Volume II contains the texts of the official documents.

Students of the problem of nationalism, particularly of such constructive phases as self-determination, autonomy and the like, will be grateful to Professor Wambaugh for so mature and definitive a study and for making available the pertinent documents. It must not be supposed, however, that this is merely a dry compilation of resolutions, regulations for voting, and statistical material. The general reader with serious interests and imagination will find much profit in the description of the character and history of the various regions, their value and resources, the racial and cultural affiliation of the people and the attempts at compulsory assimilation by the ruling nationalities. The election campaigns, too, involving as they did attempted corruption, fraud and intimidation, as well as more subtle forms of propaganda, will divert, though they can hardly startle or instruct the American reader who is acquainted with the antics of the political machines of our large cities.

The layman, as well as the specialist, will agree with the author that the plebiscite is preferable to conquest or arbitrary decision by the Great Powers as a guide for revising national boundaries. Everyone will likewise sympathize with the author's desire to perfect the plebiscite so as to render it an effective tool for ascertaining the genuine wishes of the inhabitants of disputed regions. Yet not a few of Professor Wambaugh's readers will be impressed with the imperfections of the plebiscite. Under the best of circumstances agitation is encouraged, national feeling inflamed, and old and suppressed hatreds revived and brought to the surface, so that intimidation and violence during the campaign and revenge after the decision become almost unavoidable. Besides, economic and strategic considerations and the intermixture of populations render it well-nigh impossible to draw a boundary strictly in accord with national feeling. Minorities will, therefore, remain on both sides of the border and will require protection by international guarantee, if oppression and animosity are to be reduced to a minimum. One is, therefore, tempted to draw the conclusion that the plebiscite should be employed only where a rectification of the frontier becomes absolutely unavoidable. Otherwise a solution of the national problem in heterogeneous regions would appear to require the creation of multi-national states in which a broad national autonomy would be vouchsafed each nationality.

Professor Wambaugh's scholarly volumes should greatly help to dispel the widespread superstition that current historical developments cannot be treated adequately by contemporaries. It is true that much of the vast literature relating to post-war history—the impressions, reflections, evaluations, surveys and compilations for classroom use—has an air of impermanence about it. But that is due not so much to the contemporaneous character of the subject-matter as to the fact that so many writers are poorly equipped for their work. The present author has studied the question of plebiscites for nearly two decades; she served with the Secretariat of the League of Nations; she was technical adviser to the Peruvian Government for the plebiscite in Tacna-Arica; she visited the disputed regions, read the documents, discussed the question with members of the plebiscite commissions, with the partisan national leaders and with men and women "who had merely taken part in the voting." Professor Wambaugh possesses an enviable linguistic equipment and a calm impartiality which remains unruffled even in the face of the trying disingenuousness of the Chilean partisans in Tacna-Arica. An author with the ability, objectivity and preparation of Professor Wambaugh would produce a definitive work whether the material dealt with the twelfth century or the twentieth.

The College of the City of New York. OSCAR I. JANOWSKY.

ORGANIZATION AND ETHICS OF BENCH AND BAR. By Frederick C. Hicks. Rochester: Lawyers Co-operative Publishing Co. 1932. pp. x, 606.

THIS book, ranging over a wide diversity of subject-matter, was a welcome addition to a field which had never been properly covered in a single volume. It contains materials on almost every subject with which the bar is chiefly concerned to-day. Starting with a description of the English and American system of courts, it goes into the instrumentalities of law reform, suggested methods of selecting judges, the incorporated bar, systems of admission and their legality, supervision and discipline of the bar, unauthorized practice, and finally, including more than half the book, problems of legal ethics. Following most of the chapters is an exhaustive list of from a dozen to twenty appropriate supplementary readings which are of great worth for reference purposes. This material alone makes the book an important addition to the library of every judge and bar association official who wants to keep informed of current movements in the field of law reform. The American Bar Association canons of professional and judicial ethics are given in the appendix.

Professor Hicks has, out of his own classroom experience, provided an admirable source book for a course dealing with the ideals and practices of the legal profession that answers in a very satisfactory manner the demand made by the legal profession that the law schools undertake the training of their students in the traditions and ethics of the bar. The crowded curriculum of the modern law school has led to a neglect of this fundamental side of legal education, which the displaced apprenticeship system taught by personal contact. It is sought to excuse this neglect by pointing out that it is not feasible to train the mature law student in moral precepts. Be it said, however, to the credit of our leading law schools, that they have realized that this was a problem to be met, and that they are working out what seems to be a satisfactory solution. Eighty-four per cent of the law schools of the country now offer some variety of a course dealing with professional ethics.

By linking such a study with surveys of legal reform, biographies of famous jurists, the history and traditions of the bar, more interesting subject-matter and increased intellectual content are gained. While the resolution passed by the American Bar Association in 1929 recommended only the teaching of professional ethics, the National Conference of Bar Examiners at its 1932 meeting in Washington went farther and urged historical studies as "conducive to a sound understanding and appreciation of the profession" and as tending toward "high standards of professional conduct." It recommended that an inquiry be made to determine if applicants possess "a fair knowledge of the history, background, traditions and functions of the legal profession and its standards of professional conduct." While Professor Hicks' book does not deal directly with the history of the profession, his lists of supplementary readings give valuable sources for this study, and the book as a whole is almost a direct answer to this prayer for a wider knowledge on the part of the student of the profession he is about to enter.

Although the book is designed as the basis of a law school course, its chapters on the advantages of English procedure, on judicial councils and unified courts, and on the selection of judges, contain a great deal of information which many of our practitioners do not possess, and which all of them will find interesting. Furthermore the cases on ethics, besides making absorbing reading, bring out in clear relief questions of legal etiquette and the more doubtful of those instances where public policy and moral issues are involved. The reader is not bored with discussions of the obvious. Both lawyers and laymen will find the treatment of lay encroachments well worth attention. And the chapters on professional charges and contingent fees are good reading for anyone having to do with lawyers.

The only adverse criticism the writer has to offer of this book is that too much reliance is placed upon the case material. Not enough facts are given concerning the actual progress of the movements discussed in the section dealing with law reform and the organization of the bar. There is, for example, no adequate treatment of the unauthorized practice of law which is creating such a ferment in our bar everywhere at the present time. Nine cases are given dealing with particular instances of lay encroachments, but there is nowhere any indication as to how seriously this problem is being taken or what efforts, other than prosecution, are being made to solve it. Some of the material referred to under the heading of "Supplementary Reading" might have been included with profit. Of course, the *Stock Yards Bank* case,[1] quoted at length, is an excellent choice. Similarly inadequate seems the treatment of the development of judicial councils and the integrated bar movement, which are both extremely important in the field of law reform. Grievance committee procedure and disbarment machinery might have been better brought out by the use of text material.

It is realized that Professor Hicks intended this book for use in connection with his class on the subject; probably the materials above referred to are fully developed in the classroom. It is an exceedingly useful and interesting document as it stands, and deserves to be classed as a worthy pioneer in an important field of law school work.

Denver, Colorado. WILL SHAFROTH.

CASES AND OTHER AUTHORITIES ON THE LEGAL PROFESSION AND ITS ETHICS. By George P. Costigan, Jr. St. Paul: West Publishing Company. 1933. pp. xxiv, 768.

CASES AND OTHER MATERIALS ON THE AMERICAN BAR AND ITS ETHICS. By Herschel Whitfield Arant. Chicago: Callaghan & Company. 1933. pp. xiii, 687.

THE editors of these volumes assume that it is possible, by instructing the mind, to mould the character of an adult student so as to influence his behavior during his forthcoming professional life. Judged upon the basis of this assumption, as, in the first instance they ought to be judged, each book represents an excellent selection of the material available in the field of legal ethics.

Compilations of adequate case material in that field are not numerous. It is important, on any theory, to have such material available in the orderly and comprehensive manner in which these books present it, since to make any system of ethics effective it has always been necessary to provide means for stressing and promulgating its dogma in order that an accepted orthodoxy may gain recognition. For a similar reason source books for secular as well as for religious ideals lose nothing by being explicit; knowledge, while no guarantor of wisdom or righteousness, prompts them better than does ignorance.

The editors have rightly assumed that the sincere beginner will want to know the rules to which he will be expected to conform and also the scale of punishments against which their infraction is measured. If he studies either of these volumes he will learn what they are. He will find the canons annotated and examples of the ways in which the courts have enforced them. He will find illustrated the great concepts with which he should be familiar: the theory of the courts' power over the bar; the distinction between the practice of law and business; an attorney's relation to the court, as its officer; to his client, as his fiduciary; to his opponent, as an honorable antagonist; and to the public, as its servant. The bulk of each book

1. People v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901 (1931).

is devoted to a thorough canvassing of these major divisions. It is hard to conceive of a practical problem in every-day conduct which has been left unconsidered.

In his preface Professor Costigan asserts that unethical conduct is largely grounded in sheer ignorance, and infers that the remedy is to enforce enlightenment. Dean Arant concurs, at least to the extent that instruction should remove any equity in such a defense. The truth of the point is still speculative, because, for want of genuinely objective analyses, we know so little about the psychological reactions and the impressionability, in this field, of the material being worked upon—the student himself. On this issue the educators and the leaders of the profession alike have stood at one extreme. Practically all their efforts in behalf of ethics in its utilitarian aspects, have been greatly over-intellectualized, and have ignored the true quasi-emotional nature of the problem. At the other extreme the cynics dismiss all ethical instruction with the gibe that though one may thus improve the manners of honest men, he risks, at the same time, making otherwise dull rascals shrewd. Conceding something to the cynics, the dilemma they pose has, nevertheless, been rendered academic by the compelling necessity for action of some kind in the face of sharply declining professional standards, a necessity which justifies any well-considered effort, regardless of its final evaluation. Unfortunately, we have no way of computing the number of plastic souls neither unalterably honest nor rascally. It is to their particular needs that we must design our prophylactic methods. Unless we wish their ethics to be conditioned on implanted fears (penology's own device, and one much employed for masses generally), we must strive to develop in them courage and a quick sense of fair play. Such qualities are difficult to engraft when natively absent. For this reason one might view with hesitant approval the exhaustive detail of these casebooks, unless that feature be intended to afford a discipline for the mind similar to the mental discipline inherent in the study of common law pleading. Close study of five hundred pages of judicial exposition of ethical principles is hard to justify except on the ground that the rationale of the case is often difficult of statement, or that the factual minutiae of legal ethics itself is amazingly complex. More probable than esoteric difficulties is a humanitarian dislike on the part of the courts to chastise their professional brethren; examples of intricate exposition, when they do so publicly, are apt to be simply defense mechanisms which the learner mistakes for exercises in logic. There are, of course, many close questions in legal ethics, particularly those concerning adverse interests and loyalties, an understanding of which improves discrimination; but they do not predominate. There are, too, certain problems which are hard because they are new, such as those presented by the *Cannon* case[1] and the *Stock Yards Bank* case,[2] but such really lie in the field of political philosophy rather than in that of legal ethics. The danger of implying that legal ethics is factually complex, or that its application is frighteningly difficult is, of course, a real one. Exhaustive catechisms may help a little those who will never have a sense of proportion, but the morally strong see issues simply. Dogma is necessarily factual in outline, but if that aspect is allowed an over-emphasis, the well-disposed and suggestible neophyte in whom we are concerned may be found to emerge with a collection of misunderstood and rather impotent inhibitions, instead of a maturing moral sense.

No tradition exists as to how legal ethics should be taught (save borrowed techniques). We have no "control" of our pedagogical data, and comparative data we lack. Our system of legal instruction, however, is based on casebooks and our innovations are safer when calibrated to it. A casebook necessarily states problems in the forms in which they arose and were solved, even though those forms were determined by a social philosophy no longer sound in every limb. The fact, however, that it seems to be the only philosophy which the profession understands how to apply,

or of which it comprehends the mechanics, is of practical importance to both the student and his teacher. The same practical consideration is a sufficient reason why a casebook, as such, is not, and should not be expected to be, a philosophic emendation or an evangelistic tract.

A discussion of the question of whether, if we ever expect to accomplish anything by teaching ethics at a law school, we shall have to widen the scope of the course, greatly enlarge its material and change the basic approach, is not of much assistance in considering the books here reviewed. They should remain of prime value in any such enlarged endeavor. By negative implication they may be charged with the suggestion that the material they embrace is all that any student need be made acquainted with, and until different compilations make their appearance such suggestion may, as a practical matter, influence the development of the subject. If, however, the more utilitarian programs gain adherents they probably will not lack printed exposition. In fact, neither of these volumes adheres exclusively to doctrinal matter. Professor Costigan would have the student acquaint himself with the history of the English bar and appreciate the antiquity of many an ethical precept. Dean Arant minimizes this feature but includes considerable material on the present conformation and problems of the bar in this country. This general inquiry, passed over by Professor Costigan, is finely handled in Dean Arant's book under the heading "Significant Events in the Movement for Better Standards in the Practice of the Law." Dean Arant also believes that "the range of the subject should be much wider than has heretofore been recognized."

Can the beginner, presumptively inert, be so energized that he will take part in the "Movement for Better Standards"? If so, will they improve, and will he himself become a better man because he took part in them? An affirmative answer calls for the illumination of group concepts in the minds of the young, to whom no word is now whispered that the categorical imperative may be phrased otherwise than in the singular (still a quaint preoccupation of the canons themselves). The profession is struggling with more than the immediate effects of widely spread unethical behavior. It is trying to analyze causes, many of which are remote and subtle, some purely economic, and some entwined with deep new social trends and functional realignments. If we wish to equip the coming generation to grapple with problems which baffle us it seems reasonable to think we ought to implement them early with a knowledge of the facts, the backgrounds, and the issues as we understand them. Such an effort will call for much research, and some self-dissatisfaction, and will doubtless produce familiar material very differently emphasized and much augmented. Perhaps a course so designed could not be called one in legal ethics. But it could not fail to widen horizons and heighten an understanding of ethics itself. And he whom we succeed in teaching that through the proffer of his time and energies for the realization of the collective ideals of his profession come most certainly honor and success, will probably never seriously alarm us by his own unethical conduct.

Such a plea may seem to involve a denial of the whole Kantian philosophy upon which depends our confidence in the utility of instruction in legal ethics. Quite the contrary. It may be admitted that there is no substitute for the study of ethics. But the trouble is that legal ethics, as taught, includes no analysis of motivation, values, or teleology. It is not designed to insure fundamental orientation. For the most part, it expounds a ritual of conduct, relying on the supposition that the law student comes equipped with an understanding of ethics before he commences the study of legal ethics. Our recent experience with volume indicates that we annually accept for instruction thousands of whom this is in no sense true. Until we look at them objectively, we shall not greatly aid the profession in its present distress.

Buffalo, New York. PHILIP J. WICKSER.

CASES AND OTHER MATERIALS ON THE LAW OF INSURANCE. By Edwin W. Patterson. Chicago: Commerce Clearing House, Inc. 1932. pp. xviii, 840.

PROFESSOR PATTERSON'S book is divided into five chapters. The first chapter on the insurance carrier sets forth the principal attributes of the different types of insurance organization such as fraternal, reciprocal, mutual, and stock, and the extent of legislative control thereof. The second chapter on the interests protected by insurance is divided into three parts, the first distinguishing insurance from other types of risk-shifting devices, the second setting forth the interests protected by property insurance, and the third the interests protected by life and accident insurance. The third chapter on the selection and control of risks is devoted to a description of the event against which insurance is effected, warranties, representations and concealment. The fourth chapter Professor Patterson calls "The Distribution of Insurance Coverage and Service" and puts in it cases describing the process by which insurance contracts are made, waiver, estoppel and election. Chapter five is on the adjustment of claims and is subdivided into parts dealing separately with the adjustment of claims in fire, life and liability insurance. Then there is an exceedingly elaborate set of appendices including mortality tables, and various policy forms and riders for all types of insurance.

This is a new plan of organization. Whether it is an advance over other schemes can be demonstrated only by use. But whether better or worse for pedagogical purposes, the new cluster-points and shifts in emphasis make possible new contrasts and comparisons which are sure to be valuable. Professor Patterson's genius for organization and for scholarly research has borne its best fruit in Chapter I on the different types of insurance carrier and state supervision of insurance. This chapter contains much material not heretofore found in casebooks. The very vital influence of statutory enactment on the development of insurance law cannot be overlooked. This chapter fills that need in impressive fashion.

In the reviewer's judgment the most serious objection to the plan of the book is the exclusion from Chapter II of the material on the character and extent of the interest of the regularly constituted beneficiary or assignee under different types of life policies. The section of this chapter which covers the interests protected by *property* insurance very properly deals with the interests of mortgagees, vendees, bailors, assignees, and other third parties. Why should not the section covering interests protected by *life* insurance deal with third party interests in life policies? True, the chapter in question concerns itself with beneficiaries and assignees in so far as the problem of insurable interest is involved (the *Warnock v. Davis* problem) but the larger problems of the character of the interest of the beneficiary or assignee and of the conflict between their interests and those of the representatives of the insured under different types of policies are almost untouched; yet do not these problems fall exactly within the scope of the section, viz., interests protected by life insurance? Professor Patterson has chosen to put this very important material in his last chapter on "Adjustment of Claims." Why it should go there is a puzzle. Any other material in the book might as appropriately have gone there. "Adjustment of Claims" hardly suggests such matters as the insured's powers of assignment and of renaming a beneficiary or the respective interests of assignees and beneficiaries. The same criticism applies, but with less force, to the inclusion in this chapter of the material on the incontestable clause. This clause involves the matter of barring defenses based upon facts occurring prior to the insured's death. Why should this matter be allocated to a chapter primarily concerned with problems arising after loss? The chapter title seems entirely appropriate to cover certain problems arising in fire and liability insurance (as, for example, matters of notice,

proof of loss, appraisals, the insured's cooperation with the insurer, and the insurer's control of settlement and litigation), but seems a complete misdescription of the life insurance material included therein. In the reviewer's judgment, this strained classification but illustrates the type of difficulty arising from over-generalizations involved in considering property and personal insurance together. Separate chapters with distinctive titles would have avoided the difficulty.

Professor Patterson gives little or no attention to the matter of the rights of creditors (other than assignees) against life insurance policies of different types, or to that of the extent to which insurance proceeds are subject to inheritance or succession taxes. These matters the reviewer believes are of great importance, not for their bearing on the law of taxation or of creditors' rights generally, but because of the light they throw upon the respective interests of the insured, the beneficiary and the assignee in the insurance contract. Without this material the picture seems inadequate. The note on page 305 pointing out that by statute in many states the proceeds of life insurance are under certain circumstances exempt from the claims of creditors can mean but little to a student who is furnished no material showing under what circumstances and to what extent insurance proceeds are subject to the claims of creditors *without* an exemption statute. The cases preceding the note in question deal with a creditor who is a beneficiary or an assignee, to which situation the exemption statutes have no application. There is danger that the note will mislead the unwary.

It is believed that Professor Patterson's predisposition to novel terminology has drawn him into an unfortunate choice of words for his title to Chapter IV, "The Distribution of Insurance Coverage and Service." From a mere reading of the title not many lawyers or economists could guess the chapter's content—the making of the contract, waiver, estoppel and election. However useful the term "distribution" may be for describing the forces which have to do with the division of the products of industry, the word is inappropriate and misleading when applied to a particular legal operation involved in that economic process. Since the system of insurance as a whole is one of the forces which has to do with the distribution of wealth, the entire subject of insurance law, or any aspect of it, could be treated under the head of distribution. For example, the contents of Professor Patterson's first chapter on the different types of organization that "dispense" insurance might as appropriately be placed under this heading as the contents of the chapter in question. If the word is here used in a narrower sense of "sale" or the placing of the "commodity" upon the market, the error would seem to be that the contract of insurance is not a device for *distribution* of coverage, but a device for the *creation* of coverage. Coverage cannot be distributed until it is produced. The insurance contract creates insurance coverage where there was none before. A title more apt for this chapter might therefore be "The 'Production' of Insurance Coverage." Though there are resemblances, after all an insurance policy is not a bushel of wheat, and the process involved in effecting it is essentially dissimilar to the operation involved in marketing grain.

But these criticisms have to do with comparatively unimportant matters. No schematic formulation can take on "logical" perfection. It is good or bad, depending upon the use to which it is to be put, upon what is to be emphasized, upon what developments or trends are to be shown; and upon such matters agreement is impossible. These few remarks come simply to this: The reviewer, for reasons incapable of a priori expression, would prefer to have the job done differently in certain particulars.

Much can be said in commendation of the book. It contains carefully selected and skillfully edited cases, stimulating problems and queries at the end of almost

every case, an interpolation at appropriate places of pertinent and valuable economic information, references to much (but not all) of the valuable legal periodical material, and occasional interesting and useful historical notes on particular phases of insurance, such as the incontestable clause, the disability provision, mutual insurance companies, and insurance corporations in the United States. Of such stuff are good casebooks made.

It was expected by all who were acquainted with Professor Patterson's previous contributions to insurance law that his casebook would be a first class piece of work. They have not been disappointed.

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