There are two customary reasons for opening up an ancient controversy.¹ One is the discovery of new materials; the other is a fresh interpretation. Professor Mason’s book cannot be justified on either ground. Apparently it was his intention to refurbish a somewhat tarnished halo.

There is no evidence, internal or bibliographic, that Professor Mason consulted: (1) the Agriculture files in the National Archives, (2) the Taft papers in the Library of Congress, or (3) the Ballinger papers in the Department of the Interior, although all of these materials are available to scholars.

The book is little more than a rehash of the sensational story—familiar to the readers of Collier’s Weekly thirty years ago—of how Gifford Pinchot, with the aid of others, succeeded in ruining Taft’s Secretary of the Interior, Richard A. Ballinger, and incidentally, in wrecking Taft’s Administration. The affair represented the perfect flowering of yellow journalism. Today more and more people are coming to the view that, as I have pointed out elsewhere,² Ballinger was the victim of a vicious conspiracy.

In passing, Professor Mason attempts a fumigation of Pinchot and Glavis, but his main purpose seems to be to exonerate former Justice Brandeis from charges that have never been made against him. The most that has been alleged against Brandeis was that he was probably misinformed as to the facts by the none too scrupulous Pinchot and the overzealous Glavis. Professor Mason has done the former Justice a disservice in explaining where no explanations have been called for.

In his heading of the fourth chapter, Partisans and Patriots in Search of a Villain, the author unwittingly gives away his whole case. The side that he espouses is snow white; the other is ebony black. It is somewhat embarrassing to have to make the point that a scholar is at least expected to pretend to weigh the evidence and not be guilty of doctrinaire bias which serves neither truth nor justice.

An example of Professor Mason’s prejudice is his amazing ridicule (pp. 65, 83 and 182) of Ballinger for refusing, as Secretary of the Interior, to pass upon cases in which he had been involved as a lawyer. It seems to be necessary

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¹ The Ballinger-Pinchot controversy was the cause célèbre of the Taft administration. Arising out of charges brought by conservationist Gifford Pinchot against Taft’s Secretary of the Interior, Richard Ballinger, in connection with some allegedly fraudulent Alaska coal field claims, this affair was dramatically spotlighted in the press and in Congressional halls for over a year. [Ed.]

to apprise Professor Mason of the fact that, in taking the very proper action that he did, Ballinger was merely showing himself to be responsive to elementary legal ethics. Professor Mason scoffingly denounces as “prostitution of law” the insistence, not only by Ballinger but by two of the ablest lawyers of the time—namely, President Taft and Attorney General Wickersham—that the Secretary of the Interior was bound by the oath that he took to administer his office in accordance with the law (p. 189). To this scholar “the law” served Ballinger merely as an excuse for “bureaucratic intransigence.” In full cry against Ballinger as nothing short of a corruptionist and malfeasant in public office, he unwittingly throws away his case, when he says (p. 94): “Neither Glavis nor Pinchot charged corruption; what their case against Ballinger and his subordinates boiled down to was nothing more than conduct indicating unfitness to hold, rather than criminality in, an office of public trust.” However conclusive and overwhelming the proof brought to support this somewhat nebulous charge . . .

In the author's view, if everything that Pinchot's victim, Ballinger, did, or failed to do, was contemptible, maleficient perhaps, or even criminal, everything that Gifford Pinchot did showed the nobility of his character. Under cross-examination on the witness stand, Pinchot admitted that he had lied in a letter that he had written to President Taft. To Professor Mason, this was merely “impulsive enthusiasm” (p. 74). What a mistake Ananias made in not more carefully choosing his biographer! Also, according to Professor Mason, Pinchot's conspiracy against an honest and innocent public official was “fortunate for conservationists” (p. 74).

Unfortunately, Professor Mason's “impulsive enthusiast,” “upon cross-examination . . . was forced to confess 'mistakes'; to admit that, on salient points in his direct assertion, he lacked the support of any personal knowledge whatever” (pp. 115-116). Despite this damaging admission, Professor Mason comes to the strange conclusion that: “The artful closing argument of his counsel [George Wharton Pepper] was a fitting climax to Pinchot's complete vindication” (p. 116).

It would be difficult to reconcile the foregoing quotations from Bureaucracy Convicts Itself with the thesis the author sets out to establish. Perhaps George Wharton Pepper, counsel for Pinchot, summed it up better than most when he said, “Of all the difficult and disagreeable duties I have ever performed this was the most arduous and nerve-racking” (p. 117).

We hear the purring of the proverbial cat that has just escaped from the bag when Professor Mason admits, in substance, that the charges against Ballinger, as published by Glavis in Collier's Weekly, were so nebulous that it was necessary to “bolster” that publication in order to protect it from a threatened million-dollar libel suit (p. 94). Convinced that Ballinger was certain to win such a suit, the editor of Collier’s Weekly and his friends, including Pinchot, held an emergency council of war and decided to engage the services of Louis D. Brandeis. Mr. Brandeis, whose fee was paid by Collier's Weekly, theoretically was engaged to represent Glavis before the Congressional investigating committee. If Glavis could prove his charges against Ballinger, then Collier’s
weekly would be protected against a libel suit. Or, even if Glavis could not make out a legal case, as he fell far short of doing in the final test, Ballinger might be so successfully “smeared” by the press that he would not feel like proceeding further.

Accordingly, the Ballinger investigation was not conducted by the prosecution for the purpose of convincing the Congressional committee of Ballinger’s guilt except in so far as that might be an incidental result. This would have been difficult in any event in view of the political complexion of that committee, although it is impossible to concur in Professor Mason’s implied charge that the regular Republican majority was any less partisan or politically-minded than the Democratic minority.

Professor Mason again makes a singular admission when he writes (p. 191) “Brandeis actively participated in this ‘objectionable’ press campaign, both during and after the investigation. He held conferences almost daily with newspapermen, noting for them the high points of the proceedings. The editors of Collier’s consulted him frequently, followed his advice implicitly as to topics to be singled out for publicity, and sent him their editorial proofs for correction and approval.”

Professor Mason speaks of Glavis’ “simple and unshakable testimony” (p. 101). The truth is that, under cross-examination, Glavis—who was the chief witness against Ballinger—had to admit that he had no real case against the Secretary of the Interior, whom he and Pinchot were out to destroy. I quote from the official record of the hearing:

“Mr. Vertrees [counsel for Ballinger]: So you wish to say to this committee that as the result of your investigations, you have observed nowhere a corrupt motive as to any of these officers; you state that, do you?

“Mr. Glavis: Well, yes, sir; there was no evidence of it.

“Mr. Vertrees: You say no corrupt conduct on the part of any of them, but the most you wish to be understood as saying . . . was simply that you did not think the affairs of the Government, that is those conducted by the Interior Office, were in safe hands?

“Mr. Glavis: Yes, sir.”

Professor Mason reluctantly admits (p. 181) that “while Ballinger may not have been technically guilty of any offense, or consciously unfaithful in his trust, the circumstances surrounding . . .”

The “circumstances surrounding” had nothing whatever to do with any act of omission or commission on the part of Ballinger as Secretary of the Interior. Those “circumstances surrounding” relate to the predated “Summary and Report” by Attorney General Wickersham and the suppressed memorandum by Assistant Attorney General Lawler. It was these two purely tactical episodes that the Pinchot cabal fanned into burning issues with which to destroy the reputation of a public official who was innocent of malfeasance, and even of nonfeasance.

The predating of written instruments is not even a novelty either in government or in the practice of the law. Besides, Ballinger had nothing to do with

this predating. He may not even have known of it. And as for the Lawler memorandum, which also was prepared by the direct order of President Taft—that, too, had nothing to do with Ballinger's guilt or innocence. It was merely Lawler's opinion of the manner in which Ballinger had conducted himself as Secretary of the Interior. Moreover, President Taft did not even adopt this memorandum as his own. As Professor Mason says (p. 164), "The President adopted only a few paragraphs of it, notably those in which Mr. Lawler, writing as if he were President, heaped praise on his chief, Secretary Ballinger."

And again (p. 167), "Lawler did not, it seems, set forth the case in all particulars entirely as Taft wished."

Yet, under the vigorous onslaughts of Mr. Brandeis, Ballinger was convicted in public opinion because President Taft asked his Attorney General to prepare and predate a written memorandum embodying an oral report already made to him, and because, again at the instance of the President, Assistant Attorney General Lawler prepared a memorandum of which "the President adopted only a few paragraphs . . ."

The Lawler memorandum should not have been suppressed. But even this improper act could not be attributed, even indirectly, to Ballinger. The Lawler report should have been presented to the investigating committee with all of the other papers pertinent to the inquiry; but unhappily, the suppression of the Lawler memorandum was not the only suppression. The public did not know, and so far as appears affirmatively from the record, no member of the investigating committee knew, that it was Collier's Weekly that had retained Brandeis, at a fee of $25,000; that while Brandeis' appearance had been entered for Glavis, he was in fact the attorney for a magazine that needed all of the help his brilliance could render in order to ward off the possibility of a smashing attack for libel. As already shown, the editors of Collier's Weekly "consulted Brandeis frequently, followed his advice implicitly, and submitted to him their editorial proofs for correction and approval" (p. 191).

Among other "Patriots in Search of a Villain" (p. 99), Professor Mason enumerates the ineffable Kerby who, as one of Secretary Ballinger's stenographers, had taken down and transcribed the Lawler memorandum. Whatever views one may hold as to the violation of the highly confidential relationship that exists between a public official and his secretary, one can but marvel at the lyrical language employed by Professor Mason in introducing Kerby to his readers (p. 160):

"As a Sunday-school superintendent, his sensitive conscience (sic!) troubled him . . . A newspaper syndicate wanted the story, and the interested newspapermen told him his patriotic duty (sic!) demanded that he devulge the facts. At last . . . cautious patriot Kerby prepared and gave out, on promise of a job from a newspaper syndicate, a long statement for the press." 5

A wise colored man once said that there are three sides to every question: my side, your side, and the truth. This reviewer, despite slurs on the part of Professor Mason, is not interested in the Ballinger side, nor the Pinchot side, nor the Taft side. He is aware of no obligation to join a cabal to suppress the

5. Italics supplied.
real truth of the Ballinger-Pinchot episode merely because he battled at Armageddon in 1912 side by side with the man who, it later turned out, was the chief conspirator against a public official who was innocent of any crime other than that of disagreement with Pinchot. This reviewer is interested in the truth.

Professor Mason's book does not fall within this category. It is a work of propaganda, simple but not pure. Its real thesis seems to be that, although Ballinger was not guilty as charged, one who ventures now to correct a grievous wrong, violates the principle of the old school tie.

HAROLD L. ICKES†


For the life of the Supreme Court and its function in our government, the New Deal presented an extraordinary combination of circumstances and a mortal challenge. In 1932 the people voted for a new government pledged to a new conception of its responsibilities and energetic action to lift the country from the overwhelming depression into which it had sunk. But the Supreme Court was neither party nor privy to this bargain. Both the legislative and the executive branches of the government were turned over to the new personnel which had made the pledge. But there was no change in the composition of the Supreme Court. The new government fell to its task and enacted a body of legislation unprecedented in both its volume and its reach into the economic and social life of the people. The slogan was “action now” — experimentation with promising solutions at the inevitable risk of error, rather than continuing certain failure and waiting for a miracle. But in the Supreme Court was a group of four Justices, thinking, speaking and voting as one, able men of courage and strength of character, strong-minded and strong-willed, who had moulded their own lives and had risen to high station by their own hard effort and who knew of only one prescription for the success of a nation, as of an individual. They saw in the Constitution a consecration of the way of economic life and of government which they believed accounted for their own and the nation’s prosperity; they regarded themselves as the ultimate defenders of that way; and they would tolerate no experiment which they thought threatened it. Concentrating their power, they engaged the government as it approached with first one piece of legislation, then another and another.

In “The Struggle For Judicial Supremacy,” the United States Attorney General tells the story of these engagements and their sequels. With the skill of an excellent Solicitor General he describes briefly and dramatically the New Deal cases in the Supreme Court. He does not pretend to be entirely neutral as to the wisdom or policy of the legislation involved. But his object is not the promotion of conviction as to those policies. He describes the

† Secretary of the Interior.
legislation — its social and economic background, the evils aimed at, the pressures for governmental action and the effects of the Court's adverse decisions — "only to show the field in which the Court was substituting its judgment for that of the Congress and the manner in which judicial review governed our society or economy, as well as its mere effect on legal doctrine." And he points out not only what the Justices did but also the nasty way in which they did it: for example, the "denunciatory fervor" and "sanguinary simile" in the opinion in Jones v. Securities & Exchange Commission, and the design detected in the opinion in Humphrey's Executor v. United States "to give the impression that the President had flouted the Constitution, rather than that the Court had simply changed its mind within the past ten years."1

Some day some one will tell the rest of the fascinating story. The maneuvers of private counsel in the lower courts and the incredible behavior of some of the inferior federal judges need more than the few telling pages devoted to them in this book. The Supreme Court is the ultimate judicial authority but the lower courts also speak authoritatively; and their power to interfere with governmental policy is great. Reform in the Supreme Court may be largely defeated if the lower courts are left untouched. The Attorney General could also write a thrilling volume on the almost fantastic labors of government lawyers prior to the court decisions: their killing exertions to write legislation with an eye not only to the public need and political factors but also the Court's past and possible future attitudes; their intricate maneuvers to avoid, hasten or delay judicial test, and the complicated appraisals of risks and advantages, choice of case and speculation about specific judges; their anxious scrutiny of every phrase emanating from the Supreme Tribunal and the hope or despondency which it produced. And the Attorney General only whets the appetite for more when he says: "I shall not trace the play of politics, ambition, animosities and personalities which featured the . . . battle [over the Court reorganization plan]. The struggle did little to clarify the underlying issues of Judicial Supremacy, for both sides evaded it. . . . Both the merits and defects of the plan were . . . exaggerated a thousand fold, and the debate touched some low levels on both sides."2

Though the New Deal's encounter with the Supreme Court may have been extraordinary, Mr. Jackson does not regard it as unique. On the contrary, he views it as a recurring battle in the constant struggle for judicial supremacy, which is itself part of the deeper conflict between "the power of the voters" and "the economic power of property." Accordingly, he traces the history of that struggle through leading Supreme Court cases prior to the New Deal. He believes that, "from the very nature of its functions," the Supreme Court has been "deep in power politics" since its establishment. It has undertaken

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1. "The decision could easily have forestalled this by recognizing the President's reliance on the opinion of Chief Justice Taft [in Myers v. United States, 272 U.S. 52 (1926)]. But the decision contained no such gracious acknowledgment" (p.109). The Attorney General commits an almost similar lapse in failing to mention that in the Myers case Chief Justice Taft was speaking only for a majority of a sharply divided Court and that a minority was strongly of the opinion that even the postmaster there involved was removed illegally.

2. P.189.
to allocate power between state and nation, between legislative and executive organs, between government and private groups — to resolve "struggles for power that in Europe call out regiments of troops" and with us "call out battalions of lawyers." Mr. Jackson sees "basic inconsistency between popular government and judicial supremacy," inconsistency which every contest with the Supreme Court in the past, as well as the most recent one, "has ended in evading" rather than reconciling. Therefore, he would "underwrite no futures even now." In general outlook, the present Supreme Court is "the most liberal of any court of last resort in the land." But the Court has "renounced no power and has been subjected to no new limitation. The effect of the attack was exemplary and disciplinary and perhaps temporary."

The Court, says Mr. Jackson, "was intended to be, and by its inherent nature always will prove to be, over the years a relatively conservative institution," opposing the dynamic party of change. This results from several pressures. The Justices are drawn only from the legal profession whose "entire philosophy, interest and training . . . tend toward conservatism. Its method of thinking, accepted by no other profession, cultivates a supreme respect for the past, and its order." The tendency is aggravated by the "official tradition of social and intellectual isolation" with which the judges live. By their tenure and method of selection, the judges are not responsible to popular will and are not subject even to the pressure of party organization to subdue individual preference. Because of the life tenure of its judges, the Court is "almost never a really contemporary institution." Judges hold over from one administration to another regardless of the revolutions that elections may otherwise produce. "And the search for Justices of enduring liberalism has usually ended in disappointment."

But the Attorney General does "not join those who seek to deflate the whole judicial process." He recognizes that the cases which he discusses constitute but one part, and a small part, of "a stream of judicial duties acceptably, if not always brilliantly, performed." He prefers the battalions of lawyers to the regiments of troops, and values "the role that the judiciary performs in the peaceful ordering of our society." Some arbiter, he thinks, is "almost indispensable when power is distributed among many states and the nation and is also balanced between different branches . . . and when written and fundamental limitations on all governmental agencies, such as the Bill of Rights, are set up for protection of the citizen." He therefore suggests no fundamental change in, or limitations upon, the power of the Supreme Court. On the contrary: "With us, what is wanted is not innovation, but a return to the spirit with which our early judges viewed the function of judicial review of legislation — the conviction that it is an awesome thing to strike down an act of the legislature approved by the Chief Executive, and that power so uncontrolled is not to be used save where the occasion is clear beyond fair debate."3

So the Attorney General brings us back to the problems of personnel and judicial standards. He does not suggest, as also did not the President's Court proposal, destruction of the Court or the imposition of limitations on its

3. P. 323.
powers. If there is inconsistency between the principles of popular government and judicial review of legislation, it may be just another instance of the many situations in which we want and attain seemingly inconsistent ends. That ours is a "government by lawsuit," as Mr. Jackson says, is not due just to the Supreme Court's power to pass on the constitutionality of legislation, and the characterization would be only a little less apt if that power were withdrawn. The importance of the spirit with which the judicial function is viewed can hardly, therefore, be exaggerated.

The spirit of austere self-restraint is indeed difficult to achieve. For human judges accustomed and required to consider the purpose, wisdom and desirability of legal solutions in their conceded fields of law-making — common law and enforcement of general statutory standards such as "reasonable" — such self-renunciation and avoidance of the most interesting comes hard. The desired spirit is not peculiar to liberals or conservatives. It is a trait of mind and character, fostered by traditional standards, which can unite both in unanimous judgment. "Liberal" judges looking for the "liberal" position without restraint of such standards may sin in the same way as "conservatives." Nor is the spirit rarer in the legal profession than in others. Nor, indeed, is it clear that the legal profession is more predominantly conservative than others. Lawyers must be aware of the tentative nature of judgment; they study the past and the precedents not merely to imitate but to understand and distinguish. Some lawyers are found in the vanguard of all reform movements; some of the severest criticisms of the judicial process have been made by lawyers; and the very decisions of which Mr. Jackson disapproves have been as strongly condemned by Justices of the Supreme Court. If "the search for Justices of enduring liberalism has usually ended in disappointment," it has been largely because the search was seldom prosecuted and the characteristic seldom made an indispensable condition of appointment.

But, to be sure, candidates are rare who possess the qualifications requisite for a Supreme Court Justice — humility and self-restraint in constitutional adjudication (except when civil liberties are involved) and, in the application of statutes and other law, learning, wisdom, breadth of information and understanding, versatility, statesmanship, and yet another kind of self-restraint. The lot of such a Justice — as, indeed, the lot of the Court while its function remains in dispute — is not a happy one. It would be so much easier to follow his predilections or to choose his side and stay with it to its great delight. But, in the long run, his contribution to the public welfare through the development of judicial standards which can transcend personal predilection, loyalty or ambition may be much the greater.

Harry Shulman

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4. "The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interference with free speech and free assembly, and for a perfectly cogent reason." P. 285.

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Are men the prisoners or the creators of their age? As the clay of their personality is molded and baked do they come forth with such imprint of the fingers of the Zeitgeist that they can be put on a shelf and catalogued like specimens—here is Athenian, here Renaissance, here Victorian? The puzzle is eternal because sometimes the specimens won't fit the catalogue and often we are not sure how to draw the catalogue itself. What was the Zeitgeist of Holmes and Pollock? Expanding or disintegrating capitalism? The decline or the renascence of the arts? The enslavement or the liberation of the masses? Pick your labels as you will and then try to place them on these men. It can't be done. Of course, there are plenty of traits which will enable you to say, "late Nineteenth, early Twentieth Century". But there are so many others which will seem to you to be Periclean, Elizabethan, Voltairean. Perhaps we must place them in a special category which one might call that of the "classic men", who illumine their own age because, like a lens, they bring to a focus the rays of light sent out by the ages before.

The sense of timelessness about these two classic men is the more acute since they are not figures in old books, but men who lately lived with us, and who now talk from the page in our own idiom about events and ideas which we ourselves have experienced. It is a peculiar bit of luck which has preserved a unique series of letters now presented in a model of the editorial skill and intelligence of Mark Howe. The study of the anatomy of personality could hardly find a better text than the record of fifty-eight years of intimate communion, and the lessons of the text are fascinating.

Lesson number one is the coincidence of similarity and dissimilarity between the two men. Both are passionately devoted to the method and tradition of the common law, omnivorous searchers in the treasure of the past, yet taking keen delight in the superficial enjoyments of the moment—riding a bicycle, playing solitaire, reading mystery stories and P. G. Wodehouse. In politics and economics both were (to use a confusing yet expressive label) Tory Liberals, distrustful of socialism and legislative improvement (Holmes: "I think the crowd now has substantially all there is, that the luxuries of the few are a drop in the bucket, and that unless you make war on moderate comfort there is no general economic question." And again Holmes: "I don't disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence." Pollock: "... the Labour Party with its frank and blatant policy of plunder as a bait to the Have-nots"), yet with deep instinct and concern for individual freedom. This attitude is one which those who find social reform and civil liberties indissolubly linked find hard to understand. The ability to divide them is brilliantly illustrated by Holmes: "I, who probably take the extremist view in favor of free speech, in which, in the abstract, I have no very enthusiastic belief, though I hope I would die for it ..." And in commenting on Gitlow v. New York: "My last performance during the term ... was a dissent ... in favor of the rights of an anarchist
(so-called) to talk drool in favor of the proletarian dictatorship. But the prevailing notion of free speech seems to be that you may say what you choose if you don't shock me."

Despite these superficial traits of similarity, the net resultant of personality is sharply different. Holmes is gayer (this at 54: "You may say what you like about American women—and I won't be unpatriotic—but English women are brought up, it seems to me, to realize that it is an object to be charming, that man is a dangerous animal—or ought to be—and that a sexless bonhomie is not the ideal relation." And this at 78: "I don't know what it is about the Washington weather but I have a brown plush mouth there all the time as if I had been on a spree but without having had the fun"), humbler, yet more skeptical. Pollock was more learned, so very, very learned. He studied Persian and Russian and seemed to know everything about everything. He was a witty man (read his wonderful letter on being ill) and well rounded (in a single letter he boils down the law of trade combinations for the use of the Labour Commission, lectures on Anglo-Saxon law, founds a fencing club, writes a book on the early history of mountaineering and joins an association of real property lawyers). But through it all there is a subtle impression of stuffiness and even of conceit. Those who didn't know enough could expect little mercy from his judgment: Austin "did not know enough law" and "this is why he has a reputation among half-educated publicists"; Carlyle's "plunge into the middle ages—which I believe he knew nothing—in Past and Present was, if I remember right, more free from blunders than might have been expected"; Remy de Gourmont didn't know much about mediaeval Latin; Renan was "rather out of his depth" in the history of ethics. Pollock's devotion to historical learning betrays him, more than once, into a humorless pedanticism: People in London say Harold Laski is a Communist, "which I can hardly believe considering his historical learning"; . . . "The element of truth in Socialism is to my mind something the Common Law knew long before any modern Socialists were born . . . Our lady the Common Law is a very wise old lady though she still has something to learn in telling what she knows."

It is remarkable that nowhere do we find Holmes exhibiting the slightest trace of irritation at these traits in his friend. Indeed, hardly ever is there substantial disagreement between the two. When it happens, the divergence of opinion is so illuminative of vital essence that one wishes that it had occurred more often. Thus, Holmes found Brooks Adams' Law of Civilization and Decay "about the most (immediately) interesting history I ever read . . . It hardly strikes me as science but rather as a somewhat grotesque world poem, or symphony in blue and gray, but the story of the modern world is told so strikingly that while you read you believe it." The very quality which attracted Holmes repelled Pollock. He thought the book "clever, as the book of a smart young man full of one idea is clever," but, a typical Pollockism, one of Adams' central points "is very funny to anyone who knows any mediaeval history or literature." Divergence is more sharply etched in judgment on Theodore Roosevelt. When Pollock finished reading Howland's biography it made him "think even more highly of Roosevelt than we did, and worse of some
other people . . . If only he could have been your war President: he had something of a blind spot for the legal point of view and the distinction between legal and political justice, but that would not have mattered for the war.” Holmes was so much more discerning, neither as much taken in by Roosevelt’s strenuousness nor as disapproving of his disrespect for the law; but then, of course, he knew his subject better and had cause for personal pique. It is worth quoting in full:

“Oh course I pretty well made up my package about him a good while ago, and I don’t think I was too much disturbed by what you admit to and what was formulated by a Senator in his day thus: ‘What the boys like about Roosevelt is that he doesn’t care a damn for the law.’ It broke up our incipient friendship, however, as he looked on my dissent to the Northern Securities case as a political departure (or, I suspect, more truly, couldn’t forgive anyone who stood in his way). We talked freely later but it was never the same after that, and if he had not been restrained by his friends, I am told that he would have made a fool of himself and would have excluded me from the White House—and as in his case about the law, so in mine about that, I never cared a damn whether I went there or not. He was very likeable, a big figure, a rather ordinary intellect, with extraordinary gifts, a shrewd and I think pretty unscrupulous politician. He played all his cards—if not more. R.I.P.”

If these little snippets of conversation convey a notion of topical sparkle and many-sided thinking and doing, the impression must be recognized as of secondary importance beside the sense of timelessness breathing out from the whole of the letters. Nothing conveys this sense better than the absence of development, especially striking in the case of Holmes. The man is in his late thirties when the book opens, in his early nineties when it closes. Yet there is so little change, so little of the movement of ideas and activities which we think of as growth of personality. Astounding paradox, this is no sign of weakness, but of overwhelming strength. It is as if he had achieved so early in life a high plateau on which his spirit could dwell through nearly six decades and always be above ordinary mortals wearily climbing up from below. The distrust of absolutes, which we sometimes think a hallmark of contemporary jurisprudence, appears in the very earliest letters with a reference to Langdell as representing “the powers of darkness. He is all for logic and hates any reference to anything outside of it . . .” Years later: “My intellectual furniture consists of an assortment of general propositions which grow fewer and more general as I grow older. I always say that the chief end of man is to frame them and no general proposition is worth a damn.” And then at the very end of life, after passing ninety: “I can imagine a book on the law, getting rid of all talk of duties and rights—beginning with the definition of law in the lawyer’s sense as a statement of the circumstances in which the public force will be brought to bear upon a man through the Courts, and expounding rights as the hypostasis of a prophesy.”

As with philosophy so with life. At the beginning is the judgment: “If a man get a year’s life out of a year he can ask no more.” And no more is ever
asked, for "life is like an artichoke; each day, week, month, year, gives you one little bit which you nibble off—but precious little compared with what you throw away." So that approaching eighty Holmes could say: "I was repining at the thought of my slow progress—how few new ideas I had or picked up—when it occurred to me to think of the total of life and how the greater part was wholly absorbed in living and continuing life . . . And I bid myself accept the common lot . . . in short realize life as an end in itself. Functioning is all there is—only our keenest pleasure is in what we call the higher sort. I wonder if cosmically an idea is any more important than the bowels."

The lives of the classic men always call forth an envious nostalgia. "There were giants in those days." Now we have only epigones. But these giants were with us only the other day; perhaps there are others to come. Or has their day passed? Is the future for the warrior alone or is there still place for contemplation and the forging of ideas rather than guns? Yet Holmes was a warrior as well as a philosopher; a warrior who "loathed war"; a philosopher who believed nonetheless that force is the ultima ratio and the only remedy "between two groups that want to make inconsistent kinds of world."

A. H. Feller†


The past decade has seen an enormous growth in the magnitude and importance of the insurance business. This is evidenced not only by an increase in company assets and insurance in force, but also by the introduction and expanding use of many new and varied forms of insurance. The emphasis has been shifting from fire to casualty lines, with new types of life underwriting also coming into prominence. There has been renewed stress on state control and supervision of insurance companies, while recent federal investigation points toward probable federal control of some kind in the near future. This combination of facts necessarily results in more insurance litigation, making a knowledge and understanding of insurance law ever more important to the attorney, whether acting as counsellor, advocate or legislator.

Into this setting comes the third edition of the late Professor Vance's casebook. To serve as an effective teaching tool, an insurance casebook should be up-to-date, take cognizance of current social and economic conditions, and stimulate the student's interest in further study. Professor Vance's book satisfies all of these requirements. It is surprisingly modern, even for a new casebook. Of the approximately two hundred and sixty cases included in the body of the book, more than seventy-five per cent were decided since 1930, and more than twenty-five per cent during 1938 and 1939. In addition, the scope of the book is nationwide, for decisions are taken from courts in

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some four-fifths of the states, from all ten of the circuit courts of appeal, and — a sizeable number — from the United States Supreme Court. Furthermore, there has been a marked attempt to fit the cases into the socio-economic pattern, so that the student will not overlook the important influence of this pattern upon the business and law of insurance. The footnotes are meaty with a wealth of stimulating problems and questions and with citations to and excerpts from statutes, law review articles and decisions; text material is interspersed throughout the book.

The organization in the third edition is fundamentally the same as in the second. The problems develop logically as they ordinarily appear in connection with the insurance contract. After treating the Scope and Function of Insurance at some length, and Insurable Interest rather briefly, the author proceeds seriatim to consider Making the Contract, Premiums, Ascertainment and Control of Risk, Waiver and Estoppel, Rights Arising under Life Policies, Rights and Remedies of Creditors of Insured and Remedial Procedures. There is an abridgement of the material on Ascertainment and Control of Risk, especially with respect to warranties which are today probably of more academic than practical importance. Rights and Remedies of Creditors of Insured and Remedial Procedures are expanded into new chapters. The latter contains a section on Declaratory Judgments—a subject which has recently become important for parties to an insurance contract. The last six chapters consider the construction of various kinds of insurance contracts, with Group Insurance and Liability Insurance assuming new importance and Marine Insurance omitted. The forms in the Appendix remain the same except the "Standard Form of Lloyd's Marine Policy" is displaced by "A Form of Automobile Liability Policy." A helpful addition is the use of headnotes as an introduction to the chapters. These indicate the purpose in presenting the material to follow, briefly explain its content, direct the attention to particularly significant cases and stress the social import of the material. A Table of Legal Periodicals at the front of the book is also certain to prove useful.

A few minor criticisms may be noted. As in the second edition, historical material is largely eliminated. Although not highly important to the insurance law of today, it might be advantageous to summarize—by text material or a few relevant cases—the background of the present law. Again, there is a noticeable paucity of material on state regulation, now more important than ever. Inclusion of such cases as German Alliance Insurance Company v. Lewis, National Union Fire Insurance Company v. Wanberg, O'Gorman and Young, Inc. v. Hartford Fire Insurance Company, and Osborn v. Ozlin would at least indicate the scope of such influence.

In spite of some reduction in size, the casebook still appears too extensive for a three-hour semester course, which exceeds the time allotment in most law schools. This difficulty has been partially obviated by a table of suggested omissions which will prove extremely valuable where a shorter course is given. The expediency of devoting as much as one-third of the material to construction problems may be questioned. The controversies are so dependent upon the varied fact situations that many of them might better be covered
by textual discussion or footnote treatment. The more important, such as the incontestable clause and liability insurance, could still be stressed by separate consideration.

On the whole, this edition appears to be a distinct improvement over its predecessor. To one who has not yet had the opportunity to put the book to the test of classroom use, the cases appear to be well selected and accompanied by more than adequate footnotes. There is presented a considerable amount of valuable statutory and textual material, as well as numerous excerpts of so-called “non-legal” character. There are even extracts from daily newspapers, discussing current insurance problems. This abundance of material should arouse the student’s interest in the increasing importance of insurance.

No one was better qualified than Professor Vance to compile a casebook on the law of insurance. His many years of thorough study of the subject and his numerous significant contributions to the field command the respect of insurance men and the legal profession alike. This third and last of his editions is another outstanding contribution, and marks the summation of a long and distinguished career.

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Dr. Levin’s study of the relations of the Social-Democratic party (the Mensheviks and Bolsheviks were then precariously united) with the Russian Duma of 1907 is especially pertinent today, and should find a wide circle of readers outside students of Russian history. For it presents a phenomenon of political life which was then exceptional, but which has arisen frequently to bewilder and bedevil post-1918 Europe,—that of a parliament struggling to survive despite the presence within it of parties hostile to any parliamentary system of representation and eager to prove it unworkable and to replace it by authoritarian rule. Approached in this light, Dr. Levin’s detailed and thoughtful account of the second Duma offers a valuable case-study of the role of parliament in a country which was lacking in developed parliamentary traditions and was beset by social problems of long standing and immense complexity.

The author was soundly guided in selecting the second Duma for his study. With the ebbing of the revolutionary movement of 1905-1906, whether the newly convened Duma would survive and become a permanent and essential part of the Russian governmental structure was a very acute question. The change in sentiment from the first to the second Duma could best be measured by the new tactics adopted by the most parliamentary of the Russian parties, the Kadets, who had become anxious to perpetuate and strengthen

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the Duma instead of using it merely as a rallying-point against the autocracy. The attempt of this bourgeois liberal party to unite the entire opposition against the Government and at the same time to "envelop" the Government by making useful contributions to the country's progress through formulating a progressive legislative policy, foundered in large measure on the attitude of the Social Democrats: their contempt for the Duma and their insistence on using it solely as a forum for mass revolutionary agitation. The upshot of the weeks' long struggle over the second Duma was Stolypin's drastic revision of the election law, which assured the Government of a more amenable assembly, but which conversely left the masses disillusioned with the Duma as an effective arena of struggle. Dr. Levin has given a thorough and enlightening account of the ensuing three-way duel between the reaction, the Kadets, and the revolutionary Left, in which the two extremes joined, unwittingly, to devour the center.

The strong point of Dr. Levin's study lies in his careful, day-to-day documentation of the brief life of the second Duma, based on a full use of parliamentary and newspaper reports and of memoirs. This very strength bears, however, a germ of weakness. During most of the book the author is so completely immersed in the details of the parliamentary struggles that he is in danger of attaching too much importance to transitory tactics. In his well-knit conclusion, however, he unravels with sound judgment the main threads of his elaborate design.

In addition, the author in dealing with the problems of 1907 is perhaps too conscious of the dénouement of 1917. This inclines him to be too much aware of the "illusion" of the Kadets, and too little of the "illusion" of the Social Democrats. The illusion of the Kadets lay in their firm belief that Russia could be and ought to be guided towards a genuinely parliamentary regime without provoking a revolutionary cataclysm—a belief which had certain grounds of probability in 1907 and was not proved to be an illusion until 1917. The delusion of the Social Democrats, especially of the Bolshevik wing of the party, lay in 1907 in their conviction that a new mass revolution like that of 1905 was already on its way and that any idea of moderating revolutionary agitation in order to safeguard the existence of the Duma against the reactionary forces should therefore be abandoned. This conviction, which was justified ten years later under entirely different circumstances, was an illusion in 1907. In the body of this study, though not in its conclusion, the "illusion" of the Social Democrats is made much less evident than that of the Kadets, although, of the two, the former was the more important in determining the fate of the Duma in 1907.

Another weakness in an otherwise remarkably sound study arises from the deliberate focusing of attention on the Social Democrats. At certain points in the account this emphasis tends to obscure the fact that the Kadets were far more active and influential than the Social Democrats in shaping the role of the newly created parliament. Disproportionate emphasis upon one party could have been avoided if the study had aimed to describe the second Duma as such, for then each party would have received a degree of attention determined by its effective role within the representative assembly. On the other hand, a study
of the Social-Democratic party alone would have brought into better focus
the party’s activities both within and without the Duma. While the method
chosen by the author has its own advantages, it may lead an unprepared reader
to attach a disproportionate importance to the role of the Social Democrats in
the Duma and to the place of the Duma in the policy of the Social-Democratic
party.

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