BOOK REVIEWS

REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES. PART IV. COMMITTEES FOR THE HOLDERS OF MUNICIPAL AND QUASI-MUNICIPAL OBLIGATIONS. Washington: Government Printing Office, 1936. Pp. vi, 125.

THE Report of the Securities and Exchange Commission on Municipal Bond Protective Committees is worthy of serious consideration by all lawyers and businessmen, as well as by those actually engaged in municipal debt adjustment. For our present purposes, we shall regard the former as laymen, the latter as specialists. To the laymen it furnishes elementary information regarding the problems involved in municipal debt adjustment as well as indicating the possibilities of abuse by committees of the powers given them under many deposit agreements. While such information is not of particular value to the specialists, because it is only part of that which is assumed to be the common equipment of their group, the Report does nevertheless give to the specialists the benefit of a rather hostile criticism by highly intelligent and honest laymen of a machine built up by specialists for the protection of bondholders—the creditors' committee acting under a deposit agreement. The Commission in its Report advises the layman of the pitfalls for the bondholder contained in the deposit agreement and of the ways in which a committee may abuse its powers. It advises the specialist that a mechanism which the specialist believes to work in most cases for the best interests of the bondholders has, in the opinion of the Commission, been so often misused as to require re-examination and perhaps reconstruction.[1]

Broadly speaking, the Report points out that the principal difficulties in reaching a fair and equitable adjustment of municipal debt arise in answering two problems: what is to be done when a minority of those having a property interest in a matter will not agree with the majority but persist in quarreling, and, second, how can a great number of principals confer upon a common agent adequate powers to represent and protect the principals and at the same time so restrict those powers that he can do no harm if he is dishonest or incompetent?

The Report is organized in two parts. First, the Commission reports on the judicial remedies looking toward financial readjustment now available to bondholders and to municipalities, and the limitations and defects of such judicial remedies. Then, it considers the extra-judicial mechanism built up by bankers and lawyers for the protection of bondholders—the creditors'

1. The Report does not deal with the recent instances such as those of the City of Detroit and the State of Arkansas, where refundings have been satisfactorily accomplished through the medium of bondholders' committees and deposit agreements, nor with the recent instances such as those of the cities of Jersey City and Camden, N. J., Yonkers, N. Y. and Greensboro, High Point and Raleigh, N. C., where refundings have been worked out with the assistance of municipal bond dealers but without the aid of the formal committee and deposit agreement.

committee acting under a deposit agreement—calling attention to its failure to supplement fully the limited and defective judicial remedies and emphasizing its susceptibility to abuse if unregulated. Our discussion of the Report will be divided in a like manner.

Present-day Judicial Remedies and Their Shortcomings

In this Report the Commission points out that a very large amount of municipal bonds are in default;[2] that it is generally agreed that for the most part these defaults have been occasioned by a genuine inability to meet claims for debt service as they mature rather than by outright "repudiation" sentiment;[3] that the history of municipal defaults in the past century proved the futility in such cases of any attempt by the creditors to solve the situation by litigation alone;[4] that, barring the exceptional case of outright repudiation, litigation by the bondholders is only ancillary to extra-judicial negotiations for a refunding, and indeed one of its main purposes is to exert pressure on the municipal officers to agree to a speedy settlement and refunding;[5] and that, even if a preponderating majority in amount of the creditors and the municipality agree upon a refunding, and even if such a refunding is fair and reasonable, there is no method of making such a refunding binding upon a non-assenting minority.[6] It recognizes that municipal attorneys, investment bankers and public officials are confronted with an unfamiliar situation, for the handling of which no time-tested judicial machinery exists, and it accordingly believes that there remains "almost an untouched, and certainly an unsolved, problem for legislative aid and inventiveness."[7] State legislation designed to meet the problem, particularly those statutes which authorize a refunding when consented to by a substantial majority of the creditors and by the municipality and approved by a state court, is said to be constitutionally questionable[8] in view of the treatment of the "obligation of contracts" clause in *Sturges v. Crowinshield*[9] and the statements made in *Ogden v. Saunders* with reference to position of non-resident creditors.[10] The Commission finally passes to the consideration of sections of the National Bankruptcy Act dealing with insolvent municipalities (Sections 78–80) and while concluding that these provisions have been of benefit, it suggests amendments to carry out and make more effective their general purpose.[11]

We believe that the emphasis placed by the Report in this summary of the existing judicial remedies available to bondholders and municipalities is undue in two respects: first, in regard to the power of a small minority

2. §I, p. 1.
3. §III, p. 16.
4. §III, p. 16.
5. §III, A, pp. 16–26, particularly p. 26.
6. §III, C, pp. 27–30.
7. §II, p. 13.
8. §VII, A, pp. 113–116.
9. 4 Wheat. 122 (U.S. 1819).
10. 12 Wheat. 213 (U.S. 1827).
11. §VII, B, pp. 116–123.

to prevent the consummation of any adjustment, no matter how reasonable and how satisfactory it may be to the municipality and to the majority of the bondholders, and, second, in regard to the desirability of resolving the situation by federal legislation enacted in pursuance of the bankruptcy power.

Since the issuance of the Report, the Supreme Court has held Sections 77–80 of the National Bankruptcy Act, which purported to exercise the bankruptcy power in the case of municipalities, constitutionally invalid.[12] So much reliance was placed in the Report on the existence of congressional power[13] so to legislate that we are now left without a guide as to how the ends which the Commission deemed desirable are to be attained. However, the real difficulties in dealing with municipal debt adjustment are factual—not constitutional—for, where a substantial majority agree upon a fair refunding, a way is usually found to bring in the dissenters. While there is no way of telling how much the mere presence of the municipal provisions in the National Bankruptcy Act contributed to the substantially unanimous agreements of creditors by means of which many recent municipal refundings have been consummated, it is surely premature to assert that the only solution of the question of the irreconcilable minority lies in federal or state legislation. In the past courts have generally found a judicial solution for problems which seemed insoluble, even if the solution was merely to permit the parties to exhaust themselves through too successful litigation. Pyrrhic victories are not unknown to the law.

Since there is, however, undoubtedly room for improvement in the existing situation, let us now turn to the defects pointed out by the Report. The Commission seems to have reached the conclusion, in which we concur, that there are two principal defects in the existing judicial procedure: the first, that the law is defective in that it has thus far provided no omnibus proceeding in which the rights of all creditors may be asserted and adjudicated, and the taxing power of the municipality enforced for their benefit; the second (already referred to) that the present judicial machinery is incomplete in that it provides no method for giving binding force over all creditors to the fair and reasonable refunding which is the only practical solution in most cases of bona fide default. The substance of the difference between the conclusions of the Commission and our views lies in the great importance which the Commission attaches to the absence of power to coerce the dissenters as compared with the absence of an omnibus proceeding. In our opinion the absence of an omnibus proceeding is in practice the more serious weakness. If such an omnibus proceeding were afforded, all the issues in the case would be brought to the surface. In its absence, many important and relevant problems are often concealed because the character of the litigation

12. Ashton v. Cameron County Water Improvement District No. 1, 56 Sup. Ct. 892 (1936) (Mandate stayed pending motion for reargument).

13. In its Report the Commission says: "In view of the fact that the problem of amendment of Sections 78–80 of the Bankruptcy Act and the problem of effecting adequate control over protective committees in this field are not mutually independent, more specific legislative recommendations must await determination of that fundamental constitutional issue." §VII, p. 124.

may be controlled either by an individual's desire to secure a preference over others who have equal rights, or by a committee's desire to force all bondholders to be represented by that particular committee.[14]

The Commission agrees that the first thing to be done is to provide a judicial proceeding in which all may be heard and all protected. Thus the Report emphasizes the use of litigation as ancillary to negotiations for a refunding. And, in connection with the late Federal Municipal Bankruptcy Act, it indicates its belief in the necessity for permitting the enforcement in one action of remedies for all creditors, in accordance with its evident opinion that individual proceedings should be stayed, stating:[15]

> "Inasmuch as a stay of litigation is involved it would seem that the court should be expressly authorized to make such orders in the bankruptcy proceeding from time to time as may be necessary to protect the interests of creditors thus debarred from bringing independent actions at law or in equity. For unless the court is empowered in its discretion to order at least as much as the creditors might themselves obtain by litigation in the absence of a stay there is real danger that filing under the act might be abused by debtor taxing districts as a mere shield for delay."

The Commission thus favors an omnibus proceeding to settle the rights of all creditors, but solely as part of a general procedure for readjusting municipal debts under a statute enacted in pursuance of the federal bankruptcy power.

Provision can, however, be made for an omnibus proceeding without resorting to constitutionally doubtful legislation. There are indications that the courts may work out what will be in substance an omnibus proceeding. For many years the federal courts have exercised discretion in the issuance of writs of mandamus to avoid the levy of taxes which they considered detrimental to the creditors as well as to the municipalities and which, if imposed, might result in warfare between the taxpayers and the bondholders. The existence of this discretionary power has been recently reasserted.[16] It furnishes the necessary formula for avoiding unduly harassing litigation in the federal courts detrimental to the public and to other bondholders, and until there is proof to the contrary, we see no reason to believe that most state courts will not exercise a similar discretion. Thus, both state and federal tribunals may well come to the point where in the exercise of their discretion they will withhold aid to the claimant unless he consents that all other creditors be similarly aided, and will withhold protection to the municipality unless it does everything possible for the claimant and all other creditors. Moreover, provision for an omnibus proceeding might be made in a state statute; we are not yet convinced that such a statute would be per se unconstitutional.

While the Federal Municipal Bankruptcy Act did not provide an omnibus proceeding to enforce the taxing power, it did offer a means of foreclosing the dissenters and was therefore approved by the Commission, but we are

14. §V, p. 102.

15. §VII, p. 123.

16. City of Asbury Park v. Christmas, 78 F. (2d) 1003, (C. C. A. 3d, 1935), *cert. denied*, 296 U. S. 624 (1936), (1936) 45 YALE L. J. 702.

not at all sure that it would have been better for the bondholders, for the municipalities and for the community if the Supreme Court had held it valid. Although such a holding would have answered the particular problem which the Commission deems so important, at the same time it would have presented a new series of problems, the solution of which might be quite as unsatisfactory both to the bondholders and to the municipalities as is the present incompleteness of judicial procedure. Muddling through with the judicial resources now available may involve less trouble for all parties than some untried statutory scheme.

The Creditors' Committee and the Deposit Agreement

The bulk of the Report is concerned with creditors' committees and deposit agreements. It contains a valuable collection of facts, with each reader being left, on the whole, to infer his own conclusions. It is difficult to discover what the Commission approves and what it disapproves, and, when it indicates that it does not approve, it is difficult to tell what it proposes as a change for the better. In fact, we have concluded that its pronouncement that "regulation of the personnel and practices of protective committees in connection with municipal debt readjustment is absolutely essential"[17] is to be taken as the sum total of its opinions and recommendations. If we are right in this, the Report raises but does not answer the political, social, economic and factual problems which may be thus posed: what are the boundaries of effectiveness in theory and in practice which limit the desirability of having public agencies to supervise or to supplant protective committees in guarding the interests of creditors of municipalities?

The implications involved in this question are too broad and too important to be adequately considered in a review of the Commission's Report. It suggests many problems which future developments in the financial world may answer. It remains to be seen what the objectives of administrative control of business activities should be, and how detailed such control can become without losing effectiveness, or becoming destructive. We shall, therefore, merely attempt to bring out into the open some of the questions adumbrated by the facts marshalled in the Report and by its recommendation of governmental regulation. The Report reflects certain basic attitudes or premises which characterize the whole study. One of these (discussed above) is the belief that federal legislation is necessary for, and will be successful in, accomplishing effective reorganization of defaulting municipalities. Another is the conviction that administrative control, apparently to be exercised by the Securities and Exchange Commission, is needed to protect creditors against the dangers and abuses of deposit agreements.

The creditors' committee acting under a deposit agreement was developed as a device to meet the problem (a) of effectively enforcing, against the debtor, the rights belonging to many creditors whose rights were equal, and (b) of effectively enforcing, against the minority of the creditors and the debtor, the wishes of a preponderating majority for the reorganization

17. §VIII, p. 125.

of the properties. This device has been used and developed principally in connection with receiverships and particularly in connection with equity receiverships of private corporations in the federal courts. It has met an economic need. Broadly speaking, it has served the purposes of the creditors well and cheaply—certainly better and more cheaply than if every creditor acted for himself and were separately represented. The creditors' committees necessarily made use of the equity receivership power of the federal courts to make their reorganizations effective, and the federal courts thus brought into the situation have extended their protecting arm over the minority. Creditors faced with the problem of municipal financial reorganization naturally turned to the committee-and-deposit device well known in the reorganization of private corporate debtors. But in a municipal insolvency there was no judicial proceeding like the equity receivership where the rights of all could be enforced and protected by a court. The municipal creditors' committee therefore lacked that element of court cooperation which had contributed so much to the confidence with which creditors of a private corporation were accustomed to entrust their interests to a committee acting in an equity receivership.

In view of this lack of judicial assistance in municipal reorganizations, we agree with the Commission that the existing situation can be improved, but, as we have indicated, it is difficult to discover in detail exactly what the Commission does recommend by way of reform. In its Report the Commission says in substance: the committee's powers will usually be found broad enough to enable it to act in almost every conceivable way without consulting the depositors; by a more or less irrevocable transfer a trust title as well as full control over the securities is vested in the committee; the depositor has no choice but to enlist for the duration of the war.[18] Well, what of it? Can anything ever be accomplished without the power to act? Is there any practical difference between a trust and an agency? Does the Commission believe that each depositor should be allowed to withdraw at any time? If so, on what terms? If the Commission means to suggest that a committee can practically disregard the wishes of a majority in amount of the depositors, we think that it is dealing in pure theory. It certainly cites no case in which a committee has actually disregarded the wishes of a great majority of its depositors. If it merely meant that a majority in amount (or some other percentage) of the depositors should be allowed to terminate the agreement, or to remove any member of the committee, why did it not say so?[19]

Parts of the Commission's Report indicate that above all it is disturbed by the extensive powers and immunities given to the committees, particularly in view of what the Commission considers the surrender of all control by the depositors "for the duration of the war". We suspect that the Commission knows as well as its readers that these powers are not really so broad or so free from judicial control as the literal language of the Report

18. §IV, A, p. 39.

19. It is striking that the Commission in its Report cites no testimony of any depositor who feels that he has been injured by any act or omission of a committee.

would indicate.[20] Be that as it may, it would seem as though these objections of the Commission could be met quite simply by remodelling deposit agreements so as to give to the depositors rights (substantially like those of stockholders) to call meetings, to elect the members of the committee, etc. While such changes in the deposit agreement might meet the approval of the Commission, we think, however, that the Report evidences a way of thinking that points to a reform more fundamental than a change in habits of drafting deposit agreements: that is, that the creditors' committees' obligations be deemed to be controlled by a law of status rather than by the terms of an individual contract. The Commission apparently believes that in all cases, irrespective of the terms of the particular deposit agreement, the committee should owe certain fixed fiduciary duties to depositors.[21]

In pursuance of what we deem its basic premise, the Commission points to the powers and immunities, ostensibly conferred upon creditors' committees by many deposit agreements, as horrible examples of attempts to free agents from their proper responsibilities to their principals, and then asserts that at some point society begins to have an interest in the rules of conduct and powers of agents (or trustees) which cannot be modified by private contract. In this the Commission is clearly right and some way can and will be found to protect this social interest. Plans can be devised to give effective power to various agencies and at the same time curb their capacity for harm. Whether it is desirable that this interest of society and creditors in enforcing such a curb upon the powers of creditors' committees should be enforced by more and more governmental control through state or national commissions is, however, open to question.

The Commission has not told us much when it has let us know only that it advocates some form of regulation. Only the most irreconcilable Bourbon would insist upon complete freedom of action for creditors' committees. The question is, what kind of regulation should there be and how much of it?

Would it be enough to require complete publicity as to the deposit agreement, the expenditures and other proceedings of the committees thereunder? Is it sufficient to move from contract to status either by enforcing by law a standardization of the form of the deposit agreement (just as state laws enforce the form of insurance policies) or by adopting laws fastening upon creditors' committees and perhaps upon others certain fixed liabilities, irrespective of any contract made between the parties (just as recent New York laws do in defining certain powers of fiduciaries and the restrictions thereon, irrespective of the provisions of the instruments under which the fiduciaries act)? Or must every move of the committees be subjected to personal and unpredictable commission-control? Does the Commission propose that the law be amended so as to permit public officials to protect the investor and society against dishonest committees, or does it propose that the law be amended so as better to enable the investor to do it for himself?

20. §V, p. 64.

21. *Cf.* Nichol v. Sensenbrenner, 220 Wis. 165, 263 N. W. 650 (1936), (1936) 46 YALE L. J. 143.

Whatever may be our views either in regard to the distribution of national and state powers with respect to these problems, or in regard to the relative merits of commission-action as opposed to investor-action, many of us will agree that the powers of agents and trustees and the rules controlling them are a matter of public interest and that the Commission's Report renders a useful service in bringing that point to the surface. Some of us will regret that the Commission did not consider a little more sympathetically the difficulties and problems of those who are compelled actually to attempt municipal debt adjustment and that it did not consider more fully the real and practical limitations upon beneficial governmental administration and control where municipal debt adjustment is being attempted.

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UNCOMMON LAW. By A. P. Herbert. New York: Doubleday, Doran & Co., 1936. Pp. xvii, 298. $2.00.

WHEN Mr. Bumble declared that "the law is a ass," he achieved immortality not through the profundity of the remark but because, without any grammatical inhibitions, he had given satisfactory expression to a sentiment entertained by millions of his fellows who do not share the beadle's freedom from linguistic restraint. Mr. A. P. Herbert, known to all devotees of *Punch* as "A.P.H.," is in entire agreement with Mr. Bumble, but in order to match the beadle's famous phrase he has found it necessary to publish several quite sizable books of which *The Uncommon Law* is the latest. This volume, like its predecessors, *Misleading Cases* and *More Misleading Cases,* is a collection of pretended reports of farcical law cases that have appeared from time to time in *Punch.* Now A. P. H., in addition to being a humorist, is quite a person. As a member of Parliament, representing Oxford University, he has contributed much to the enlightenment and joy of the House of Commons—as when he answered an impassioned attack of a Glasgow Laborite upon Sir Oswald Mosley's Blackshirts by the brief imprecation, "A plague upon both your blouses!" So in a letter to his electors he said, "I am for peace with honour; but not war without armaments." His literary and social standing is sufficiently attested by the introductions, not one but two, written by Lord Atkin, Lord of Appeal in Ordinary, and by Lord Chief Justice Hewart.

Mr. Herbert was trained for the law, and actually called to the bar in the Inner Temple, but never practiced, being led off into the gayer and more attractive field of literature. But his legal training, though it could not make a lawyer of him, strongly affected his literary bent. His novels, of which he has written a goodly number, as well as his many humorous skits, are deeply tinged with legal learning and near learning.

The case parodies in this volume are for the most part satires upon lawyers and judges and the structure of the law itself, somewhat resembling the

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Tutt and Mr. Tutt stories of Arthur Train, but done with a lighter touch, in the style current in *Punch* for a hundred years. But the implication of the title that it is the Common Law that excites A.P.H.'s ire and wrings his withers, if any, is not borne out. The Court of Probate and Divorce affords a favorite target for his shafts, while the stupidity and ignorance of Parliament and the futility of its legislation draw an unceasing fire of gay and humorously sarcastic comment. Thus in one of his pseudo-appeals he has the Lord Chancellor say, "If we are prepared to amend the Common Law, most of which is still sensible, what is to be our attitude to Modern Statute Law, most of which is not? Nearly all the laws recently enacted by Parliament are vexatious and foolish." Evidently A.P.H. has no very high opinion of his Parliamentary colleagues, for on the same appeal the Lord Chancellor is made to describe them as "The queer and cowardly rabble who are elected to Parliament." Probably the author loves jesting more than political preferment.

However, the Common Law does not escape his witty but always genial and gay criticisms. He makes merry over the silly persistence of the rule that the whale is a "royal fish," the tail, however, belonging to the Queen, to provide Her Majesty with "whale-bone for her royal purposes." He heaps ridicule upon the Common Law distinction between libel and slander, and makes the rule that the Crown is not liable for the torts of Crown servants appear as absurd as it really is. To make the Common Law doctrine of liability for enticement seem entirely ridiculous, and also to show his opinion of women out of place and out of hand, he introduces a Lady Chancellor, who, after first ordering the removal of the wool sack as an unsightly, unsanitary and uncomfortable bit of furniture, declares, "This appeal . . . calls for a little clear feminine thinking and plain feminine speech . . . . I shall never be heard to say, as inferior judges are so often compelled to say, 'It is absurd, but it is the law!' What is absurd shall not in This House *be the law.* The whole doctrine of enticement as applied to wives and husbands, is antiquated nonsense."

But it is the multitude of statutory regulations hedging in the once free Englishman on every side, that excites our author to witty recklessness. Being himself a popular writer with a corresponding income, he feels himself pinched by the revenue laws and the statutes governing copyrights. He is also much annoyed by motor cars and the hideous disharmony of their honking horns. In jeering at these monstrous incidents of modern life he creates as his protagonist Mr. Albert Haddock, a prosperous and ingenious author, with a distinct zest for litigation. Mr. Haddock is made to sue more fantastic claims and set up more unprecedented defenses to ridiculous actions than any other known litigant, in books or out of them. This litigious person gives occasion to A.P.H.'s judges to declare that honking of motor horns is an enjoinable nuisance; that the motor car is the same as a wild beast, and so subject to the rule in Rylands v. Fletcher, L. R. 3 H. L. 330; that a motor car traversing a flooded street is governed not by the rules of the road, but by those of the sea; that the term "high-brow" is libelous; that G. Bernard Shaw is a "skittish old gentleman" obviously unable "to furnish useful information on any subject whatever;" that the Magna Carta, which

most Englishmen regard as the foundation of such few liberties as are still left to them, is no longer in force; that all the members of the Cabinet are liable to prison sentence inasmuch as all had promised to procure employment for the unemployed voters, contrary to the Corrupt Practices Act, in such case made and provided; and to perform many other judicial feats equally fantastic and amusing. It is even declared that the Income Tax, for which our author has no good word, is a tax on virtue, since a happily married couple having separate incomes, may, by securing a divorce and thereafter living in sin, materially reduce their tax liability.

The author in his preface to *Misleading Cases* told us that "these frolics in jurisprudence" are "shyly intended not only to amuse but to amend." They are delightfully witty and hilariously amusing, but as the reader lays down the volume there comes to him the memory of John Trumbull's couplet:

"No man e'er felt the halter draw
With good opinion of the law".

rather than any vision of law reform.

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CONSTITUTIONAL LAW OF THE UNITED STATES. By Hugh Evander Willis.[1] Bloomington: The Principia Press, 1936. Pp. viii, 1198. $10.00.

THE writing of a comprehensive text on constitutional law is a stupendous undertaking. It is true that there are not here, as in private law subjects, conflicting decisions by different courts of equal authority. But this simplifying factor falls far short of compensating for the complexities peculiar to constitutional law. History, politics, economics, and psychology are doubtless aids to the understanding of private law. They are the very stuff of which constitutional law is made, more important for its understanding than even decisions and doctrines. Yet decisions and doctrines are of tremendous importance in constitutional law. In terms of them, arguments are made and opinions written. Moreover, they close many routes toward desired legislative ends. Recent cases make it probable that they close all routes to some ends. In marshalling decisions and doctrines, the task of the constitutional law writer is more complex and more difficult than that of the private law writer. Lawyerlike thinking of the deepest and closest sort is required for the culling out of those decisions and doctrines which are moribund and for the synthesizing of those which are likely to live. And in this thinking, constant account must be taken of political, social, economic, and psychological factors. There must be constant awareness of changing climates of opinion with respect to the proper spheres not only of each governmental organ but of government itself.

Professor Willis is aware of the hugeness of his undertaking. He is of the cognoscenti. Time and again he tells us that the Supreme Court justices,

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not the framers, have given us our Constitution. His is the first comprehensive text which stresses this fact. As he sees it, the Supreme Court's function is the weighing of social interests. The justices delimit social control and personal liberty. They determine which of conflicting interests shall prevail. Professor Willis recounts and evaluates what they have done. He goes further. He outlines and evaluates the New Deal. He offers solutions for the problems of insufficient purchasing power, a too heavy debt structure, and unemployment.

The book is decorated, rather than permeated by the author's historico-sociological approach. Chapters originally written as disconnected articles have not been rewritten so as to become parts of an organized whole. In the midst of technical discussions, one encounters unexplained, unexpanded half or quarter truths such as: "The social interest protected by bankruptcy laws is the social interest in the individual life."[2] Professor Willis has read widely in current social and economic writings. He builds his text in large part upon the countless law review articles and notes which he cites. But he seems to the reviewer to have failed to digest them thoroughly or to incorporate them in an organized way into his text. Psychological factors, especially emotional attachments to traditional institutions and symbols, are very inadequately treated. Perhaps it is impossible for any one man to reappraise and restate from the historico-sociological point of view the whole of constitutional history and constitutional law. Perhaps Professor Willis may deserve praise for his temerity rather than censure for what seem to the reviewer the shortcomings of his attempt.[3]

In dealing with decisions and doctrines, Professor Willis also builds on law review notes and articles. Seldom does he offer fresh thought of his own on difficult problems. The niceties of doctrine are rarely explored.[4]

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2. P. 408.

3. Occasional minor inaccuracies occur:

E.g., pp. 647–648: "The supremacy of the common law over acts of Parliament was established for a short time by Dr. Bonham's Case [(1610) 8 Co. Rep. 113b, 118a], but this overthrow of parliamentary supremacy was disavowed in England by the case of Lee v. Bude, etc., Ry. [(1871) L. R. 6 P. C. 576, 582]. And ever since this decision the doctrine of parliamentary supremacy has obtained in England."

Again, p. 380: "Congress has not yet levied direct taxes . . . " See Veazie Bank v. Fenno, 8 Wall. 533, 542 (U.S. 1869) for the direct taxes levied and apportioned among the states by Congress in 1798, 1813, 1815, 1816, and 1861.

4. The reviewer is occasionally unable to follow Professor Willis's reasoning. E.g., at pp. 497–498 it is concluded that "the Supreme Court must give to freedom of speech and of the press in the First Amendment the same meaning that it gives it under the due process clause of the Fourteenth Amendment". This conclusion is thought to result from the following reasoning: " . . . since it has adopted the liberal method of interpretation in the case of the due process clause of the Fourteenth Amendment and has applied the same method of interpretation to the due process clause of the Fifth Amendment, and since it has made the due process clause of the Fourteenth Amendment include freedom of speech and of the press, it must follow that the due process clause of the Fifth Amendment includes it."

Occasionally obvious grounds of decision are overlooked[5] and at times an incomplete comprehension of the intricacies of doctrine is displayed.[6]

The book, then, is no masterpiece. But it should be useful. A seventy-six page index and a sixty-two page case list make available the myriad cases cited and discussed. The reader is given an invaluable lead to more detailed discussion of his problems by the frequent citations of law review notes and articles (a double column list of which covers thirty pages. Prodigious must have been the labor involved in collecting and collating these cases and notes and articles. In availing themselves of the fruits of this labor, doubtless many lawyers will learn for the first time, from Professor Willis' pages, something of the true nature of the judicial process in constitutional cases.

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CARTEL PROBLEMS. By Karl Pribram. Washington: The Brookings Institution, 1935. Pp. x, 287. $2.50.

THIS little volume more than fulfills the modest claims made for it, namely: "It differs from most earlier studies in certain important respects. It adds little to the descriptive analysis of cartels, or to the elaboration of the special circumstances which have led to local variations in the development of the cartel movement. Rather it cuts through national differentiating circumstances in the attempt to establish certain widely applicable generalizations concerning the character of the movement as a whole. This line of approach has involved a larger degree of resort to abstract reasoning than is common to general surveys of cartel problems."[1]

It is true that the author has not undertaken to make a new first hand investigation and to collect new data from the field; but he has done a better and more useful work in surveying thoroughly and thoughtfully the secondary sources, the vast, rather inchoate literature of description and discussion of the subject, in reducing it to comprehensible form, and in illuminating its significance by his competent analysis and comment. Nor does he treat the subject merely as a closet philosopher, for after his services in the universities of Vienna and of Frankfort-on-the-Main, and for seven years as chief of the Statistical Section of the International Labor office in Geneva, "he brings to bear upon the cartel movement a long observation of European economic affairs," as Dr. E. G. Nourse remarks in the "Director's Preface."

The book gives in broad perspective a readable, penetrating and much needed analysis of the data at hand, which should do much to dissipate the

5. E.g., it is stated on p. 808, in the course of a discussion of exemptions from taxation, that "The United States Supreme Court has also for some singular reason held that the salaries of United States judges are exempt from taxation." No reference is made to the provision of U. S. Const., Art. III, § 1, that the salaries of judges "shall not be diminished during their continuance in office," upon which the Court based its holdings.

6. E.g., in the treatment of state taxation of corporations engaged in interstate commerce (p. 808) and in the chapter on corporations (c. XXX).

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1. P. 1.

hazy ideas so widely entertained on the subject. It would be vain to attempt in a brief review to epitomize adequately a monograph which is itself a compressed statement of wide and prolonged studies of a large subject. The author betrays no evidence of having begun with a thesis to support, but proceeding in a judicial spirit he does arrive at some pretty definite and damning conclusions, as the reader will find. Cartels are in their nature essentially monopolies; they have all of the wasteful features of monopoly; they foster scarcity rather than plenty; they practice manifold forms of discrimination in domestic and in export trade (in "dumping"); their chief aim is to enable each industry in periods of depression to reduce or escape the "risk" which is the normal burden of each competitive enterprise, and they thereby shift the burden unfairly to other classes of the community; they are not elements of rational planning in any true sense; they do not stabilize industry as a whole, but rather by freezing some prices they aggravate the evils of a depression period for all non-cartellized industry; and a scheme of universal cartels could only make things still worse, etc., etc. Those economists who have been inclined to take the superficial view held in certain business circles that something like the cartel is the specific for the ills of capitalism may well ponder this, perhaps the most important conclusion of the author's study: "It is impossible to regard cartelization of itself as a development capable of improving any of the serious defects of the economic system. It represents merely the defensive gestures of private groups attempting to protect themselves from the effects of economic instability."[2]

"Self-regulation of industry", the cartel ideal, which the NRA ambiguously tried to realize, is therefore quite out of the author's picture of desirable policies. The remaining alternatives are, "relatively full maintenance of free competition" and "planned economy controlled by a central governmental authority." Recognizing, as he evidently does, the very grave problems which a totalitarian state of monopoly must involve, the author rather vaguely implies a preference for the maintenance of "the competitive system", if it is not fated to be damned by insuperable difficulties. But he sees great danger in "the general trend of economic conditions", the chief feature of which is the recurrence of prolonged business depressions—a thought that looms large throughout the book. The author avoids prophesying which of the two policies, competition or controlled monoply, will survive, and takes the more cautious course of dispassionately forecasting in America a period of "economic travail" with "mixed developments, showing traces of each of the three tendencies just noted". As the reviewer understands it, this is not what the author would prefer, were he in a position to choose, but it is what he thinks is likely to happen in the interplay of irrational compromises by which history is made. In any event, although the critical reader will have occasion at a number of points to raise here a query or there a dissent, altogether he will find in this little monograph a work of scholarship and wisdom.

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2. P. 233.

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