REVIEWS

DES CONTRATS D'APRÈS LA RÉCENTE CODIFICATION PRIVÉE FAITE AUX ETATS-UNIS. By Gilbert Madray. Paris: Libraire Générale de Droit et de Jurisprudence, 1936. 8.° 310 pp.

"IN THE history of legal institutions, the Restatement of Contracts will constitute not only a step towards the unification of the law of the United States but also a contribution to the international unification of law." This sentence of the concluding paragraph of M. Madray's book points to a by-product, and certainly not an unimportant one, of the great work undertaken by the American Law Institute. At present, there is hardly a legal system less known abroad than that of the United States. Spread over tens of thousands of volumes of reports and statutes, and different in every one of the forty-eight states, it is a secret science even to the majority of the growing number of European scholars of comparative law. For the first time, the Restatement will render the law of the United States available to foreign lawyers who are eagerly waiting for an access to this vast body of law of a country where creative activity in the law is probably greater today than in any other part of the world.

To American readers, Professor Madray's book will prove that the unrest pervading American law is not restricted to this country, and will demonstrate the eagerness of Europeans to utilize world-wide experiences and ideas for the solution of world-wide problems. It will also indicate to them how American law appears to a foreigner who derives his knowledge thereof almost exclusively from the Restatement. And they will probably be less astonished to see that in some respects the picture is almost comically distorted than to find that it is mostly quite correct and accurate. M. Madray's book bears testimony to the skill of the restaters.

The first two hundred pages survey those topics of the Restatement which appear to the author to be remarkable either because of their intrinsic importance or because of their bearing on current discussions in France. In a good many places he praises the solutions of the Restatement as superior to those of the law of France. While in French law assignment of debts, for instance, is treated under the head of sales, American law treats it, like German law, as a transaction *sui generis*.[1] Obviously, the treatment of an assignment made as a gift is facilitated by such an approach. Under the provisions of the Code Napoleon, now more than one hundred and thirty years old, third party beneficiary contracts are a constant source of trouble to French lawyers. The author finds that the provisions of the Restatement satisfy present-day needs more adequately. Voidability of a contract because of undue influence is unknown as such in French law and can be achieved by other devices only in rare instances; it is praised by M. Madray as an institution tending to promote a desirable convergence of law and ethics. The French Code does not contain any provision determining the moment when

1. RESTATEMENT, CONTRACTS (1932) c. 7.

a contract becomes binding, and the courts did not succeed in establishing a generally accepted solution of this important problem. Until recently, the Court of Cassation declared the determination of this moment to be a question of fact, left to the sovereign discretion of the trial courts. In 1932, that Court finally declared itself in favor of the so-called "system of expedition," according to which a contract becomes binding when the acceptance is expedited by the offeree.[2] M. Madray rejoices in finding the same solution in the Restatement, and leads the attention of French lawyers to the elaborate provisions concerning questions of detail.

Yet his treatment of this last problem reveals that M. Madray has not always penetrated through surface appearances. He writes: "The advantages presented by such a solution [i.e., by the "system of expedition"] are incontestable: it allows a gain of time in the conclusion of bargains, and it avoids the difficulty of evidence which presents itself when it must be proved, under the 'system of information,' that the offeror has obtained actual knowledge of the acceptance." The author overlooks the fact that this difficulty is avoided likewise in the "system of reception," which was adopted by the German Code and under which the bargain is struck as soon as the acceptance has come into the hands of the offeror so that he can obtain actual knowledge thereof. This latter system avoids the difficulties which arise under the system of expedition when the letter of acceptance is lost in the mail or does not reach the offeror within the period indicated by him. In a recent article Professor Nussbaum has suggested that the theory of expedition has its proper place in the common law where, because an offer is not binding, the acceptor's interests require that the binding force of the contract takes place at the earliest possible moment. It is not required, however, in a legal system which has no difficulties in depriving an offeror of the power of revoking at any moment his offer.[3] M. Madray himself points out quite properly how much easier it is to treat an offer as binding in French law than under the Restatement.

There are other points where he believes that American law could profit from studying French law, *e.g.,* in its treatment of contracts concluded with oneself,[4] its detailed case law with respect to contractual clauses limiting or excluding the liability of carriers, utilities, and other persons. He overlooks, however, the elaborate American rules on this problem, which, it is true, are not to be found in the Restatement of Contracts. M. Madray's belief that the French system of *astreintes* is capable of wider application and greater flexibility than the American remedy of specific performance seems, likewise, to be based on the erroneous notion that the chancellor's decrees are enforced specifically and directly, and not, as the French *astreintes,* indirectly through the threat of punishment. If M. Madray were familiar with the German Code of Civil Procedure, he would find that the maximum scope

2. Decision of March 21, 1932, D. 1933. 1. 65.

3. Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine* (1936) 36 COL. L. REV. 920.

4. RESTATEMENT, CONTRACTS (1932) § 15, Comment (a).

of applicability and flexibility of specific performance is achieved when the methods of direct and indirect enforcement are combined.[5]

In spite of such and similar misunderstandings, M. Madray's work contains enough suggestions to render it worth while reading to Americans, especially its second part, entitled "The Spirit of the Restatement," where the author deals with three problems of acute present interest to French lawyers: the relation between intention and declaration of a contracting party; the relation between law and ethics; and the role of the judge.

Bent on discovering general truths and principles, the German Pandectists of the 19th century and their predecessors, the natural law scholars, asked what created the binding force of a contract, the "intentions" of the contracting parties, or their "declarations." Taking up this controversy, the restaters of the American law of contracts declare themselves emphatically in favor of the latter view. Our author demonstrates that they were not able to carry out this so-called "objective" theory consistently, and that under the Restatement rules the courts are ordered to regard the actual intentions of the parties in so many crucial points that in reality the restaters' system appears to be based on the "subjective" theory, which is regarded as the only true one in prevailing French doctrine. M. Madray states a whole list of sections of the Restatement where one role or another is ascribed to the "intention" of the parties, *e.g.*, in the determination of whether or not an act of execution constitutes an acceptance of an offer to a unilateral contract, or whether or not an offer is accepted by mere silence, or whether a scroll or other mark constitutes a seal, or whether a certain conduct is an offer or a mere proposition. He calls attention to Section 504, according to which the true intention of the parties is the aim sought in rectification of a contract, and he sees the "triumph of the internal will over the declared intention" in Section 507, Comment (a), where it is stated that a court may order a contract to be performed in accordance with the real will of the parties, as if it were rectified, even without a preceding decree of rectification. He finds an expression of the subjective theory, also, in Section 526, Comment (b), where a contract is declared to be illegal because of usury when the parties have hidden behind the subterfuge of "costs" or "commission" the excessive rate of interest on which they have really agreed.

However, this and other instances of "simulated" agreements have little to do with the problem of the relation between intention and declaration.

5. There are a good many other points where M. Madray's judgment is influenced by his lack of familiarity with the background of the Restatement of Contracts, as, for example, his critique of the American terminology with respect to the distinction between damages for corporeal and non-corporeal harm. He takes it for granted that this distinction corresponds to the French distinction between *dommage matériel* and *dommage moral*, which is due to the fact that in French law, as a general principle, compensation is granted only for such consequences of a wrongful act as affect the plaintiff's assets in money or money's value, while damages for pain and suffering appear as an exception. There is no doubt whatever in American law that the victim of a wrongful act is entitled to damages for pain and suffering where such pain and suffering are caused by a bodily impact. Difficulties do not arise except where mental pain and suffering are caused, without a bodily impact.

The parties have simply made two different declarations, and the real intentions of the parties come into play only insofar as that declaration prevails which is conformable to the intention of the parties, while the law discards the other declaration which is meant to be no more than a pretext for the deception of third parties or of the authorities of the state. But even beyond such doubts, in reading M. Madray's discussion one cannot avoid feeling that both the restaters and their critic overestimate the importance of the controversy between the objective and the subjective theory. The binding force of a contract is, of course, "created" neither by the "intention" of the parties nor by their "declarations," but by the legal order. The legal order alone—this expression can, of course, be further analysed as meaning the complex phenomenon of the wills of those individuals who establish and enforce the so-called rules of law—"creates" legal relations. It orders that under certain circumstances certain individuals shall have certain rights and duties. In our type of civilization one of the most important circumstances assumed by the legal order as an occasion for creating rights and duties is the will of the individuals immediately concerned. Within limits, the law disposes that individuals shall be bound by such duties as they voluntarily undertake to be bound by, and that other individuals shall have corresponding "rights." Thus the "intention" of the parties undoubtedly appears as the immediate source of all those rights and duties which "arise" from "contracts" and other voluntary transactions. Intentions are unknowable, however, unless they are declared, and words as well as any other symbols are imperfect means of conveying meanings. On its face, no declaration is absolutely unambiguous, and nobody hearing another's declaration can ever be certain whether he has really understood the meaning "meant" by the declarant. This phenomenon confronts the legal order with the problem of determining which one of several possible meanings of a declaration shall prevail, the meaning meant by the declarant, or the meaning understood by the declaree, or some other meaning, perhaps the meaning understood by certain third persons, judges, for instance, or members of a jury. This problem cannot be solved by any method of scientific discovery, but can be answered only by considerations of policy and expediency. And it is answered differently in different legal systems. While French law is inclined to protect the expectations of a declarant, English and American law tend more towards protecting the expectations of the declaree, and German law attempts to find a compromise.[6] These differences of policy may be expressed by the antithesis between objective and subjective theory. But those terms become dangerously misleading, when they are taken as expressions of general truths or principles instead of guiding maxims of legal policy.

In his chapter on "Contract and Ethics," M. Madray touches on a problem of fundamental importance in the evolution of law in general. Always and everywhere the law necessarily tends to express and enforce the prevailing ethical ideals of the time and place. By their very nature, as rules of conscience, however, ethical rules must be infinitely flexible, while rules of law

6. See this reviewer's statement in 5 WILLISTON ON CONTRACTS (2d ed. 1937) § 1600e.

must have at least a minimum amount of generality, certainty, and predictability. Every law of the world is a compromise between the conflicting ideals of stability and flexibility, and legal history may be looked upon as a history of fluctuations towards one or the other pole. There are periods when the ideal of ethical flexibility prevails and others where the law tends to become rigid and inflexible. Max Weber has shown that the capitalistic system needs for its existence a law of great stability, certainty, and predictability. It is based on long-range calculations and investment, and the willingness to invest is increased by the existence of a legal system where debts and other contracts are promptly and rigidly enforced. Our own times witness a world-wide reaction against the capitalistic spirit; it finds expression in such radical movements as communism or national-socialism, but also in the "legal romanticism"[7] of countries like France which have not repudiated the capitalistic system as such. In the United States, farmers and other small middle-class elements have always mitigated the influence of big business and influenced legal developments in the interests of debtors. No wonder, therefore, that M. Madray finds in American law a good many expressions of those tendencies which, resulting in mitigating the rigor of the formal law and in producing a greater convergence of legal rules and ethical commands, have also found increasing weight and attention in postwar developments of France. Without being aware of the deeper connections and problems involved, he states these similarities as an encouragement to his French colleagues to proceed on those paths of legal idealism.

Any attempt to give legal expression to ethical ideals must necessarily result in rules of law expressed in elastic, flexible terms. To a considerable extent, clear-cut formulations of narrow legal rules must yield to expressions of standards the application of which leaves much room to the creative activity of the law-enforcing agencies. This necessary connection is overlooked by M. Madray. Though fervently approving of the increasing influence on the law of the "règle morale," he disapproves of recent developments in French law granting to the courts certain powers to adapt contractual relations to changing economic conditions. When he finds in the Restatement such an indefinite concept as that of "impossibility in a business sense," he holds it before his French colleagues as a warning example of the horrible consequences to which such tendencies might lead. Never should French lawyers give up the clear-cut formulations of their Code for such indefinite expressions as "reasonable," "material," "honestly," of which the Restatement abounds and which give such a dangerously wide play to judicial arbitrariness. In dealing with American law, M. Madray is apparently unaware of the existence of the jury, which could not fulfill its very purpose of keeping the law in accordance with popular ethical ideals if the law, instead of using "indefinite" standards, were expressed throughout in narrow rules and formulas. In dealing with his own law, his dislike for attempts to protect debtors against the disastrous consequences of the economic crises of the War and the depression causes him to overlook the wide field of discretion left to the

7. Term invented by Professor Julien Bonnecase in LA PENSÉE JURIDIQUE FRANÇAISE DEPUIS 1804 A L'HEURE PRÉSENTE (1933).

courts by a good many of the provisions of the Code Napoleon, for example, in the field of torts, by articles 1382, 1383 of the Code Napoleon. Even in the field of contracts, French law places broad discretionary powers in the hands of the courts. The determination of so fundamental a question, for instance, as whether one party's breach of contract is so material as to entitle the other party to withdraw from the contract, is entirely left to the discretion of the trial courts, which find no guidance whatever in the provisions of the Code[8] and very little in the case law of the Court of Cassation. The trial courts are entirely free in granting or denying a term of grace to a defaulting debtor, or in distinguishing the proximate from the remote consequences of a breach of contract.[9] Neither in America, nor in England, Germany, Austria, Switzerland, or Italy are trial courts so free from control by their supreme courts as they are in France. It is true, the French ordinary courts[10] have resisted attempts to enlarge the concept of "impossibility of performance" for the purpose of granting relief to promisors whose duties have become more burdensome as a result of unforeseen changes in the economic situation of the country, but French law is more lenient than others to defaulting debtors in general, and can protect them quite efficiently by other means. In no event, however, does this phenomenon justify the assertion that the rules of French law are generally expressed in terms more definite than those used in the Restatement.

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CASES AND MATERIALS ON THE CONFLICT OF LAWS. By Ernest G. Lorenzen. Fourth Edition. St. Paul: West Publishing Co., 1937. Pp. xxxvi, 1138. $6.00.

THIS, in a word, is the most comprehensive and exhaustive collection of cases and related materials describing the doctrines as to the conflicts of laws, as applied in the courts of the United States, which has thus far appeared. It is, one might add, not a work to be produced *uno ictu,* but rather the last epitome of the cumulative study and experience of one who has long been recognized as an authority in this complex and increasingly significant phase of law. It succeeds three earlier editions of 1909, 1924, and 1932, each of which had an enviable success. It follows no less than three competing and meritorious casebooks which have appeared during the past three years. Like them, it reflects the increasing volume of decisions, law-review notes, articles, and treatises dealing with the varied problems of conflicts of laws by which the legal literature of this country has been recently enriched. To take adequate account of these developments has required, as the author intimates in the preface, a thorough-going revision, which substantially ad-

8. Art. 1184.

9. Art. 1151.

10. The French administrative courts are steering a different course.

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vances beyond the third edition in the scope and refinement of the subject matter as well as the supplementary materials included. It is something of an achievement to have done this with comprehensive adequacy and at the same time within substantially the same compass as the preceding edition.

As the author remarks in the preface, the arrangement of materials is basically similar to that in the third edition. The two changes made are relatively minor. The topic "domicil" has been restored to its former location as an introductory theme; the cases on commercial arbitration are relegated to the last chapter. In content, however, there is substantial revision. The first chapter includes for the first time, a brief, instructive resumé of the history and general outlines of the subject; the materials in the second chapter on jurisdiction are classified under additional headings: "Things subject to jurisdiction;" "Acts to be done in another State or affecting property therein;" "Limitations upon exercise of jurisdiction." Similarly, the fourth chapter, dealing primarily with torts, develops a series of cases involving the distinction between "substance and procedure," while in the eighth chapter, relating to business organizations, there are specific headings assigned to "Internal affairs," "Reorganization," and "Multiple incorporation." One other change, which involves a partial return to an earlier conception of the scope of the subject when it included materials on tax jurisdiction, is the inclusion of a relatively brief section on "Inheritance taxation" in the chapter concerning decedent's estates.

In addition to these additions to, and refinements of, the content various additional types of materials, not found in previous editions, are incorporated. These include, to quote from the preface:

> "2. Introductory notes to each chapter and section, for the purpose of giving students some idea of the problems to be dealt with and a better insight into the characteristic features of Anglo-American Conflict of Laws. 3. Excerpts from law reviews, statutory provisions, and textnotes. 4. Dissenting opinions, or the gist of their reasoning. 5. Provisions of the Restatement of the Conflict of Laws by the American Law Institute, which have been incorporated in detail with reference to all parts of the subject."

Meanwhile, the useful footnotes on foreign law have been either incorporated in the opening statements of each chapter or left intact. It is to be added that, by rigorous editing of opinions and giving summaries of cases, the number of cases to which the student's attention is directed has been, despite these additions, increased rather than diminished. These additions take account of the completion of the Restatement of the Law of Conflict of Laws and, more especially, reflect the changing mode in casebook techniques, a matter which perhaps deserves a word.

To go back to what some might deem the beginnings of proper legal instruction, there was once a time when it was commonly believed that law is composed of general principles, relatively few and simple, which are historically revealed in precedent. There were two facets to this conception: the first, that, to discover the legal principle, it is essential to seek its origin, *petere fontes,* to recall the maxim which Langdell borrowed from Gaius; the second, that the sole authoritative sources for such inquiry are the precedents pre-

served in the law reports. In other words, the law library, consisting essentially of the reports and the auxiliary apparatus, was conceived as the equivalent of the laboratory of physical science.

Inevitably, out of this conception came the casebook, needed not merely in the interests of library economy to save expensive books from excessive handling and to enable large classes to read the same cases simultaneously, but also in the interests of economy in instruction to indicate the accepted lines of inquiry by reproducing strategic mile-posts in the path of precedent and indicating the by-paths in footnotes. In the course of time, as the method acquired a tradition and the contours of courses became crystallized by the contents of their casebooks, we may suppose that a third facet, naturally enough and quite subconsciously, fixed itself upon the casebook technique, the conception, namely, that the casebook should provide an adequate representation of the subject matter defined by a course. Thus, the casebook, which was originally a sort of laboratory manual, providing selected source of materials in terms of which the analytical experiments requisite to expose the legal principles concerned could be conveniently conducted in class, also became a curious sort of self-contained textbook, which for the practical purposes of legal instruction tended to supersede the original laboratory.

This historical vignette will serve to underscore certain salient features of the contemporary casebook. First, the historical representation of source materials disappeared long since, disappeared under the overwhelming mass of more recent precedents, became irrelevant when casebooks ceased to be *media* for instruction in historical method, when they turned into textbooks composed of anthologies of statements of law. Second, the more recent discovery that law is a practical and not a purely theoretical science, after an appropriate lag, is being reflected in the casebooks. We observe today that law is created by legislation and that the life process of legal doctrine is powerfully influenced by legal literature. Some venturesome souls, not so few as a decade ago, talk about law as a balancing of interests, as an expression of organized social effort to attain ill defined objectives. Law, once conceived as principle, now envisaged as also a problem or a process, has suffered a transition which is being gradually translated into contemporary pedagogy. It is natural, if not necessary, that a change in the conception of law should be reflected in the notions as to legal instruction and its primary tool—the casebook.

No one could be less disposed than the reviewer to quarrel with this evolution which seeks to direct the attention of the law student to legislation, contemporary criticism, and comparative law as well as to the diversities appearing in legal doctrine, as grist for his mill. But, from an instructional point of view, there are dangers and sacrifices. Casebooks, by and large, lost their historical perspective sometime since; at the present juncture they are endeavoring to absorb considerable bodies of new types of material, a process which involves both strenuous editing of the strictly judicial materials and a heavy increase in actual substance. Aside from the apparent risk of superficiality in this process, it has not yet projected into the newly assembled riches a basic analysis commanding general support. In no field is the problem more difficult than in the conflict of laws. The present volume appears to the re-

viewer an unusually well-balanced solution of the problem in terms of present criteria. It points towards the *ultima Thule* on the path along which the technique of casebooks appears to be drifting. But it is worth bearing in mind that even the *ultima Thule* may be transitional.

After this exordium, a candid reviewer may perhaps be permitted to suggest a few reservations in detail. Obviously, the brevity of a review does not permit exhaustive examination of many points; consequently, a reference to a few points of difference will not be misunderstood to convey, contrary to what has been suggested above, a general implication. And first with respect to domicil as an introductory topic, which Professor Lorenzen has imported, it would seem, by request.

Upon this mode of introduction to the subject, certain suggestions obtrude. As conceived in the present volume, the subject "domicil" not only comprises (a) the relatively simple rules guiding the determination of domicil by courts, and (b) the difficult question of double jurisdiction arising from the independent determination of domicil in separate courts under the rule that the *lex fori* controls, but also the abstruse and fundamental problems as to (c) qualifications and (d) renvoi. On this, it may be remarked, in the first place, that the first item, the so-called rules as to domicil, if of much pedagogical significance, give a quite incomplete picture of the topic analytically involved, namely, the criteria for the localization of persons, things, and events for the purposes of the subject. Logically, such a topic would involve in addition the consideration of such things as residence, nationality, place of contract, etc. —matters as a rule either judiciously omitted or more conveniently treated in conjunction with the specific subject matter. On the other hand, the problems as to conflict of jurisdiction, qualification, and renvoi are more or less fundamental and, from an analytical point of view, are not improperly employed to strike the first chord. Whether, however, in view of their general implications and difficulty, they should be developed at the outset in a casebook before the student has, as it were, more or less oriented his thinking in the field, is another question, the answer to which will much depend upon the method employed by the individual instructor and as to which the reviewer's experience has been somewhat discouraging.

A second question is suggested by the relegation of the chapter on commercial arbitration to the end of the casebook. The subject matter is concerned with the exercise of judicial jurisdiction and might follow the second chapter, to which it is more or less germane.

A third comment may be ventured upon the introductory notes, which, in line with the modern trend in casebook design, give emphasis to the contemporary totalitarian conception of the casebook as a sort of epitomized library in its field. In general, these notes will be found suggestive to the teacher and will perhaps help to shed light upon the path of the pupil who has not yet learned to carry his own candle. But the medium is so compact as to be somewhat treacherous: *vide,* for instance, the statement on page 304 that "The rule that the law of the place of the wrong governs liability for torts is recognized everywhere," which, forsooth, is followed on the next page by *Phillips v. Eyre.* Now, it is true that certain language in this celebrated case may be taken to support the proposition, but it is also to be remarked that

the two rules there laid down suggest that, if the "wrong" is the creature of the law of the place, the liability is not.

But these are minor matters in an outstanding contribution to the study of Anglo-American conflicts of laws which deserves, if possible, to enlarge the recognition accorded to the previous editions.

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A STUDY OF LAW ADMINISTRATION IN CONNECTICUT. By Charles E. Clark and Harry Shulman. New Haven: Yale University Press, 1937. Pp. xii, 239. $3.00.

THIS VOLUME summarizes the results of an investigation begun at the Yale School of Law in 1926. By narrowing the scope of the investigation to one court (the Superior Court for New Haven County sitting at New Haven and Waterbury), it has been possible to make a thorough analysis of the conduct of judicial business. The study covers a sufficient number of cases and a sufficient period of time to support conclusions resulting therefrom. The narrow geographic scope of the investigation also made it possible to base conclusions upon individual research. A thorough study of the work of a single court gives a better basis for valid conclusions than would a less thorough study of all courts in the state.

When this study was first begun, it was necessary to take the initiative in the effort to obtain a full picture of the day-by-day activities of trial courts through the collection of judicial statistics. Although the results of this investigation are now published in full for the first time, the investigation itself and the partial reports thereof heretofore published have done much to stimulate similar investigations elsewhere. From the standpoint of the law school such investigations are important; for instruction in the law school places, perhaps of necessity, too much emphasis on reported decisions and too little upon the judicial organization through which the great body of cases are disposed of without appeal to a court of review. The small percentage of appealed and reported cases determines to a large extent the procedure and legal principles applicable in the trial court; but the trial court is the more important part of our judicial organization. The authors properly say that: "The judicial proceedings studied by lawyer and student are, in effect, quite removed from the day-by-day activities of the trial court and are not participated in by the overwhelming number of those who go to law to settle their disputes."[1] The improvement of judicial organization and procedure must center upon the trial courts, and no change for the better can be made without a knowledge of the work of the trial courts. It is for this reason that studies such as the present are of distinct practical importance. Although the volume here under review gives some attention to appeals from trial courts, its chief value is in its discussion of the work of trial courts.

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1. P. 2.

After a brief introduction, the study presents in Chapter II a general picture of trial court work, with a discussion of the jury in Chapter III. The greater part of the volume is devoted to special types of cases, with separate chapters on mortgage foreclosures, divorce, automobile negligence, and criminal cases. The brief concluding chapter is disappointing, in that it does not present a summary of conclusions stated elsewhere in the volume, nor indicate other conclusions which might properly have been drawn from the materials presented. The conclusions as to jury trial[2] might well have been expanded with some further discussion of other possible methods of dealing with automobile accident litigation. The use of auditors by Massachusetts in motor vehicle tort cases is of interest in this connection. Perhaps a complete answer to this criticism is the fact the volume does not purport to consider these matters fully. Throughout the volume there are references to the non-contentious character of many cases presented to the courts, but there is no indication as to how such cases can best be handled without interference with or delay in the trial of cases. The authors properly say that the addition of new judges cannot be relied upon to relieve congestion and to avoid delay in the courts, but that it is necessary to know the causes of the congestion and delay,[3] yet they do not draw specific conclusions from the information they present as to the causes of congestion and delay. Here again it may be replied that the purpose of the study is to report facts, not to draw conclusions. And the reviewer should perhaps be satisfied that the present investigation presents material information which may serve as the basis for improved judicial organization and administration, and that it has stimulated similar investigations in other states and with respect to the federal courts. The volume has, for these reasons, an interest which exceeds the bounds of the State of Connecticut. It is to be hoped that its publication will stimulate other studies of a similar character.

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CITY GOVERNMENT. By Daniel W. Hoan. New York: Harcourt, Brace and Co., 1936. Pp. 365. $2.50.

MAYOR Hoan presents an interesting story of progress made by an American city. While the book describes many involved and technical problems of municipal government, the author tells them in a most stimulating manner. The book is easy reading because of the personal touch and the way in which facts are set forth. The closing paragraph of the first chapter might well be posted at the entrance of every City Hall in this country:

> "Local government, next to family life itself, is, therefore, the very foundation of our nation. It concerns us every second of our

2. Pp. 79–80.

3. P. 35.

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> lives. It dominates not only our local interests, but our national interests as well. Without good local government our wealth, our homes, our liberties, and our lives are endangered. Can any thinking citizen disclaim an interest in local government or deny its importance?"

In the first paragraph of the chapter, "More Municipal Service," the sentence, "A municipality is no longer a mere policeman, but a public servant that must be responsive to the immediate, fast-changing, and rapidly-increasing needs of the citizenry," describes the new city government pioneered by Mayor Hoan and followed by a great many mayors of municipal government throughout the country. In this chapter he tells about schools, the condemnation racket, the opposition to necessary municipal functions, garbage collection and disposal, and public health, closing with this excellent thought: "It is a simple matter to demonstrate to the average worker that he and his family are better off in a city furnishing good schools, ample playgrounds, fine parks, clean streets, good natatoria, and excellent public health service."

Mayor Hoan courageously states in his discussion on "Taxes, Economy, and Graft" that the cost of municipal government is bound to increase, but skilfully proves his case that efficient municipal government is a good investment and that increased cost for local government brings back greater returns than many other investments made by property owners and taxpayers. He devastates the argument that high local taxes are destructive of property values and hits hard at high interest rates, commissions and charges of mortgages on real property.

His chapter, "What Forces Want Clean Government?," will find a responsive chord in any person who has fought dirty politics and has had the desire of administering a city without the benefit of politicians. He points out the specialized field of municipal government and the necessity of actual experience in addition to administrative ability. From my own experience I would say that his discussion on "Progressive Political Organization" would seem a bit optimistic in the face of what many of us have gone through. But Dan Hoan is a most optimistic person, a persistent progressive, a patient preacher, and an excellent executive.

Mayor Hoan was one of the few who predicted the crash of 1929. He tells about it in discussing unemployment and relief. While a small group of us in Congress was seeking to hammer home the then-impending collapse and seeking to provide in advance, Mayor Hoan was sounding the warning all over the country. He was instrumental in first calling together a group of mayors and later prevailed upon Mayor Frank Murphy of Detroit, now Governor of Michigan, to call the first Conference of Mayors. He is one of the charter members, if not *the* charter member, of the United States Conference of Mayors. He headed the delegation which warned President Hoover of the necessity of providing for the unemployed. The alarming statements made by Mayor Hoan on that occasion seemed pessimistic and destructive and were characterized by some as calamity howling and disloyal. Subsequent events proved the understating of his statements, the accuracy of his prophecy, and the modesty of the demands then made.

The book is instructive as well as interesting and should be read by everyone interested in municipal government. It should be within the reach of every Mayor in this country to read at times when he becomes discouraged or unhappy because of opposition, selfish or political. Mayor Hoan has made many useful contributions to municipal government. He has demonstrated the possibility of efficiently, economically, and intelligently administering an American city. He has been Mayor longer than anyone now holding that office in this country. In addition to this seniority, he is in fact the Dean of American Mayors.

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New York, N. Y.

SOCIAL SECURITY. By Maxwell S. Stewart. New York: W. W. Norton & Co., 1937. Pp. 320. $3.00.

MORE SECURITY FOR OLD AGE. A Report and a Program. Factual Report by Margaret Grant Schneider. A Program for Action by The Committee on Old-Age Security. New York: The Twentieth Century Fund, Inc., 1937. Pp. 191. $1.75.

THESE two books are addressed to general readers in a country which has suddenly found itself in the swirl of discussion aroused by the recently established social security program. Mr. Stewart has set himself a dual goal: to interpret the American social security program in the light of what Europe has called social insurance, and to examine critically the concept of "social insurance" as a device for meeting the risks which confront individuals in an industrial civilization. The volume issued by the Twentieth Century Fund is likewise dual in plan, since the first half consists of a factual report on measures used to further old-age security in Europe and the United States, while the second offers the conclusions and recommendations submitted by a group of eminent Americans on the basis of their study of the old-age provisions of the Social Security Act. The factual report is the work of Margaret Grant Schneider of the Committee on Social Security of the Social Science Research Council.

Mr. Stewart has set himself a field which in its breadth is both exhilarating and confusing, the more so since he was obliged to write at points in terms of factors such as the constitutionality of the Social Security Act, or the delay in some States in enacting unemployment compensation laws, in which change has already undermined some of his discussion. While it would be admirable, if possible, to explain in a single popular volume the nature of social risks, the expedients tried in Europe and the United States, the limitations of proposed programs, and the potentialities of the future, it may be honestly queried, I believe, whether in this instance the effect is not to leave a previously uninformed reader with a bewildered conviction that the subject

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is almost too complicated to be grasped. In particular, it may be questioned whether it is pertinent to cite European provisions extensively (except as general evidence that other countries have found that *something* must be done) unless there is an opportunity to show the relation of those programs to the social and economic setting in and by which they exist. In one country or another an example undoubtedly can be found for anything that one wishes to advocate or condemn for the United States. Though Mr. Stewart is careful to point out that a comparison between long-established European systems and the American beginnings cannot be made too rigorously, his discussion sometimes tends to invite comparisons on grounds not here made clear and possibly not known at all.

Mr. Stewart criticizes sharply a number of major provisions of the Social Security Act, among them payroll taxes, the old-age reserve account, and the lack of provisions for sickness and disability insurance or for continuing payments to widows of insured workers. Fundamentally, however, his objection is to an "insurance" method of seeking social security—"the impractical actuarial approach." He envisages but does not define very clearly an all-inclusive program of "social assurance" to provide for everyone genuinely in need of assistance, not in terms of relief, though perhaps with a "modified 'means test'." In its broadest sense, he points out, social security should be considered not as a merely negative program to offset risks, but also as a means of promoting positive objectives, such as provisions for holidays and recreation, or for special grants to aid in the support of large families.

More Security for Old Age is naturally more unified in content since it deals with only one aspect of insecurity. Mrs. Schneider's factual report provides a brief, clear outline of the problem of insecurity in old age and of principles and measures used in this country and abroad to mitigate it. The Committee's program presents aspects of the programs of old-age assistance and old-age insurance under the Social Security Act, with comments and recommendations, prefacing the discussion with the statement that the Committee recognizes need for further study on many points and offers its views "not as final convictions but rather as suggestions . . . "

Among the questions to which attention is called are those raised by the Act's establishment of the two programs for old age, one on an insurance basis, one extended on the basis of need. If the two systems were not already in existence, the Committee, with the exception of one dissenting member, would favor study of the possibility of a single comprehensive federal plan. While allusion is made to experience in Europe, this part of the Committee's report does not seem to give due weight to the factors which there, even after long operation of the plans, still seem to make advisable systems which, like our own, recognize these two ways of endeavoring to promote security in old age. The Committee recommends that under the present old-age insurance plan coverage be extended to include public employees and employees of non-profit organizations; that old-age assistance payments and insurance benefits be liberalized in various ways; that payroll taxes be restricted to less than the maximum provided for later years by the present Act, with provision out of general revenues to meet deficiencies in the old-age insurance funds; and that the old-age reserve be limited to a small contingency

reserve or eliminated entirely. In connection with proposal of a government contribution to the old-age insurance system, it is recommended that there be careful study of the possibilities of developing a different basis of taxation whereby costs would be met largely out of "a general income tax with a much broader base and lower exemptions than at present." Under many of the recommendations dealing with basic changes in the present insurance system, strong disagreement from the views of the majority of the Committee is expressed, on varying grounds, by one or another of the members of the group.

The recommendations of the Committee might well have been placed in two distinct groups, those of a largely administrative nature, and those which imply some major modification in the system and sometimes of the economic setting in which it operates. In the former group (including, for example, the recommendation of coverage for workers in non-profit organizations) the questions are largely as to the feasibility of mechanisms within the present plan of the Act and of government. The wider group of recommendations raise more general questions of government policy and practice to which relatively little discussion is devoted in the report. A number of these recommendations are interdependent. The question of a "government subsidy" to the old-age insurance fund, for example, is not separable from that of the base on which general revenues are collected. If federal revenues were to be augmented for this purpose by, say, a sales tax, the scales might be weighted against the poor to a greater extent than that which the Committee believes occasioned by the present payroll taxes. Unless coverage were extended so as to be virtually all-inclusive, a broadly based general income tax to support this system might result in laying a burden on small-income groups who would derive no benefit from the system. It is implicit, though not always explicit, in the Committee's discussion that their more general recommendations on this question imply a more or less fundamental overhauling of the federal revenue system and fiscal policy, and, at least to some extent, of federal-state relationships. The extent to which there is disagreement among their own number indicates the magnitude and complexity of the issues involved.

Each of these books raises more questions than it answers; and in each some of the answers, according to the information given, seem incompatible. Mr. Stewart, for example, does not make clear how his "modified means test" would escape the stigma and drawbacks which he now believes to be associated with "relief." The very fact, however, of diversity and warmth of views on the social security program is a good omen for the future. If it continues to enlist the lively interest of conscientious and variously-minded students, such as those represented by the present publications, and through them to continue the interest of the general public, there can be little doubt that here, as abroad, experience will indicate modifications to bring one or another of the provisions of the program more closely in line with the national needs it is designed to satisfy.

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CASES ON THE LAW OF NEGOTIABLE PAPER AND BANKING. By Ralph W. Aigler. St. Paul: West Publishing Co., 1937. Pp. xvi, 1157. $5.50.

IN 1881 a reviewer unfamiliar with the current innovation of casebooks said of one on bills and notes compiled by Dean Ames[1] that he approached the criticism of it with considerable hesitation, because he wished "on the one hand, to do no injustice, and on the other, not to mislead."[2] With the same attitude this reviewer approaches Professor Aigler's innovation of a casebook on bills and notes which includes a separate treatment of the law of commercial banking transactions.

The four chapters in Part I, on commercial banking transactions, consist of some eighty-seven cases and three hundred and fifty-eight pages. These chapters treat of the legal relation between customer and banker, the duties owed by the bank to the depositor and the depositor to the bank, collections, and bankers' lien and set-off. Such controversy as may arise from the publication of this casebook no doubt will turn on the inclusion of cases on commercial banking transactions in a separate division rather than the distribution[3] of them throughout the book, and in their suggested use as introductory to the study of the law of negotiable commercial paper. Professor Aigler has in support of his innovations the fact that for some years the purpose and scope of the course in bills and notes have been under discussion[4] and the desire of some law teachers that banking material be included in the course.[5] This casebook, however, will not serve the need of those law teachers who prefer that their students become familiar with extra-legal material on the economic aspects of commercial credit instruments and of commercial banking before taking up the study of the law of bills and notes, for Part I on commercial banking transactions consists solely of cases.[6]

No doubt there will be instructors who feel that limitation of time will not permit a study of the law of commercial banking transactions,[7] even though they grant the soundness of Professor Aigler's statement[8] that law school curricula generally do not offer prospective lawyers sufficient acquaintance with the law of banking transactions.[9] Other instructors may feel that many of the problems presented in the chapters on commercial banking are sufficiently taken care of in such courses as trusts and creditors' rights and

1. AMES, CASES ON BILLS AND NOTES (1881).

2. Book Review (1881) 13 CENT. L. J. 499.

3. BRITTON, CASES ON THE LAW OF BILLS AND NOTES (2d ed. 1932).

4. Magill, Book Review (1922) 32 YALE L. J. 518, 519; Chafee, Book Review (1922) 36 HARV. L. REV. 899, 902; SUMMARY OF STUDIES IN LEGAL EDUCATION (The Faculty of Law of Columbia University) (1928) 154; BEUTEL, MATERIAL AND CASES ON INTERPRETATION OF THE LAW OF NEGOTIABLE PAPER (1936) iii.

5. REPORT OF THE COMMITTEE ON CURRICULUM, Handbook of the Association of American Law Schools (1935) 169, 189.

6. *Ibid.*

7. Three semester hours was stated to be the usual number in the course on bills and notes. REPORT OF THE COMMITTEE ON CURRICULUM, Handbook of the Association of American Law Schools (1933) 148, 151.

8. P. v.

9. It is suggested that in the note on page 59 to City of Douglas v. Federal Reserve Bank of Dallas, 271 U. S. 489 (1926), some reference should have been made to City of Douglas v. First Nat. Bank of Douglas, 29 Ariz. 89, 239 Pac. 785 (1925).

that other problems can be satisfactorily treated in that part of the course on negotiable commercial paper.

But Professor Aigler has done more than raise the question of the need for a separate study of the law of commercial banking transactions; by the arrangement of his casebook he has inferentially presented the issue as to whether a prior study of the law of such transactions is essential to a better understanding of the law of negotiable commercial paper.[10] Only actual trial of this casebook in the classroom can furnish an answer; though it has been the experience of the reviewer that a course in bills and notes should not be divorced from some consideration of the law of commercial banking transactions.

Part II on negotiable commercial paper, which extends over seven hundred and fifty-seven pages and consists of some two hundred cases and nineteen textual presentations,[11] follows in general the traditional arrangement of casebooks on bills and notes.[12] The chapter on requisites of form, which in the orthodox casebooks appears as an introductory chapter, has been placed after the chapters on the liability of parties, a change proposed many years ago,[13] and is supplanted, and rightly so it seems, by a chapter on "The Negotiable Quality." In view of the recommendation in the preface[14] that this chapter may be covered by lecture, it is suggested that in lieu of the fifty-five pages of cases the author could have more effectively aided the law student by reprinting in large part two of his very able law review articles on this topic.[15] This would perhaps furnish a more satisfactory treatment of the early history and evolution of the law of negotiable commercial paper.

Part II differs from another ably compiled casebook on bills and notes in that the common law cases are not separated from the cases interpreting the Uniform Negotiable Instruments Law by appropriate section or sections of that act set forth in the body of the book.[16] Nor, as in the casebook mentioned, is there a list of law review articles[17] or an appendix containing the proposed amendments to the Negotiable Instruments Law.[18] The footnotes, not intended to be encyclopedic,[19] are provocative, because of the questions presented and the references to problems in other parts of the book. The index lacks the page citations to the sections of the Negotiable Instruments Law which appear in one casebook[20] and in addition is not as detailed as one

10. It has been stated that "the actual operations of the commercial bank afford probably the best key to an understanding of these parts of the field of credit and finance." SUMMARY OF STUDIES IN LEGAL EDUCATION (The Faculty of Law of Columbia University) (1928) 154.

11. The text material, covering some fifty-eight pages, may be found on the following pages: 439, 457, 499, 586, 618, 669, 718, 766, 873, 877, 881, 904, 924, 968, 933, 997, 1007, 1090, 1091.

12. SMITH AND MOORE, CASES ON THE LAW OF BILLS AND NOTES (3d ed. 1932) 1; BRITTON, CASES ON THE LAW OF BILLS AND NOTES (2d ed. 1932) 1.

13. Llewellyn, Book Review (1922) 22 COL. L. REV. 770, 771.

14. P. vii.

15. Aigler, *Commercial Instruments, The Law Merchant, and Negotiability* (1923) 8 MINN. L. REV. 361; Aigler, *Recognition of New Types of Negotiable Instruments* (1924) 24 COL. L. REV. 563.

16. BRITTON, *supra* note 3, at v.

17. *Id.* at xi. 18. *Id.* at 721. 19. P. vii.

20. BRITTON, *supra* note 3, at 749-752.

might wish. This latter defect prevented finding references to protest and post-dated checks, despite search through the body of the book.

Problems to some extent overlooked or neglected in other casebooks on bills and notes have been treated at least in the textual material. For example, non-negotiable commercial paper is considered;[21] the troublesome problem presented by Section 59 is treated in six pages of text;[22] a comment is made on the irregular indorsement after delivery;[23] and the confusion in the Negotiable Instruments Law between "value" and "consideration" is also brought out.[24]

It is the opinion of the reviewer that Part II of the book will prove quite satisfactory as a teaching device when used in a standardized course on bills and notes. But the major virtue of Professor Aigler's casebook to the reviewer is the issue it presents to instructors in bills and notes as to the nature and scope of the course. Is this course to follow the earlier and traditional lines of an analysis of the uniform act, with little emphasis on the economic aspects of commercial credit paper or on the law of commercial banking transactions; is the law of commercial banking transactions to be taken up in cases sprinkled throughout a fairly orthodox course on bills and notes; is Professor Aigler's plan of an introductory study of the law of commercial banking transactions a satisfactory one; or should there be a separate and more comprehensive course on commercial banking transactions, leaving the problems of investment credit instruments and investment banking to the course in corporate finance?[25]

Law faculties no doubt will vary greatly in their reaction to the place of the law of commercial banking transactions in the law school curriculum. But for instructors in bills and notes, dissatisfied with available casebooks and hopeful of some change in the content of the course, an opportunity is presented to break with the past and try a casebook experimental in part. In view, however, of the limited number of classroom hours ordinarily available to the instructor, the combination of the law of commercial banking transactions and of negotiable commercial paper in one course may compel the compiler in the future to present even more of the problems in condensed textual form.[26]

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21. Pp. 379, 448, 635, 637. See Llewellyn, Book Review (1923) 33 YALE L. J. 894, 896.

22. Pp. 968-973.

23. P. 670.

24. P. 442. *Cf.* SECOND ANNUAL REPORT, New York Law Revision Commission (1936) 155-159.

25. DOUGLAS AND SHANKS, CASES AND MATERIALS ON THE LAW OF FINANCING BUSINESS UNITS (1931) 1080-1155; BERLE, CASES AND MATERIAL IN THE LAW OF CORPORATE FINANCE (1930) 738-750. See Steffen and Russell, *The Negotiability of Corporate Bonds* (1931) 41 YALE L. J. 799; Steffen and Russell, *Registered Bonds and Negotiability* (1933) 47 HARV. L. REV. 741; Steffen, *A Proposed Uniform Act Making Investment Instruments Negotiable* (1934) 34 COL. L. REV. 632.

26. Hall, *Some Observations of the Law School Curriculum* (1923) 5 AM. L. SCHOOL REV. 61, 63; Cavers, Book Review (1936) 46 YALE L. J. 1098, 1101; Powell, Book Review (1937) 47 YALE L. J. 163, 164.

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