REVIEWS

Cases and Materials on Rights in Land. By Oliver S. Rundell. Chicago: Callaghan and Company, 1941. Pp. xii, 674. $6.00.

This smallish volume in an expanding field shows the craftsman's touch within its chosen purpose. It follows the traditional division of Property as originally fashioned by John C. Gray and followed in many law schools and casebooks since. Among these Dean Bigelow's *Cases on Rights in Land* has always been popular. I had the honor of reviewing the first edition of Bigelow more years ago than I like to remember [(1920) 29 Yale L. J. 477], it is interesting to see how much of what I there said could be repeated here. For the present volume takes the subject much as the older books plotted it out — with some few eliminations of topics, such as public rights and the traditional historical introduction to land law — and brings it down to date in ways which Gray would have found fitting and proper. Here are the new decisions, the recent and pending Restatements, much of the new law review material. The work is therefore up to the minute, and yet it is a boon to teachers and curriculum fashioners in that it is briefer than other books on what we always called "Property II." For Personal Property, that conglomeration of leftovers from Sales and Torts, was Property I, and the topics of conveyances, titles, estates, and future interests came later, with their own appropriate Roman numbers. Property II is slightly conglomerate itself; it deals with "Possessory Interests" — earth, air, land, and water — subjects which the restaters have relegated to "Torts," and with "Interests in the Land of Another," which is, aptly enough, to be restated by "the Property II group." Nevertheless, this arrangement of subject matter has survived in most law schools; and they need up-to-date books as tools of the trade. Hence, this new volume amply justifies itself.

Moreover, there is a lot of developing interest in these topics, and so far as private land law goes, full advantage has been taken of it here. From his position as reporter of the pending restatement of Property II, the editor is familiar with the ideas and purposes of that work. That, together with Dean Fraser's "Torts" Restatement of the possessory interests, furnishes the main basis of departure for all the topics as yet wholly or partially restated. And it is a good jumping-off point — particularly the editor's own work of restatement which contains an unusual number of trial balloons, refreshing, indeed, if a bit unusual, in a supposed mere recording of existing law. Such, for example, is the division of easements in gross into the categories of commercial and non-commercial easements, which represents a valiant attempt to cut the Gordian knot of assignability *vel non* by a new christening to furnish a new dichotomy. His forthcoming restatement of running covenants, somewhat foreshadowed herein, will, it seems, have its goodly share of new condiments. All this makes for pleasant, vigorous discussion in an attractive teaching field.

Again, several innovations of detail will interest property teachers. Perhaps the most striking is the treatment of Rights Respecting the Use of Land Arising by Contract or Agreements, which covers the field traditionally

divided between "covenants running with the land" and "equitable restrictions." Here the editor has eliminated consideration of leasehold covenants, leaving them to the law of landlord and tenant, while he considers the real-covenant and equitable-restriction cases as a single subject matter under various topics such as intent of the parties, privity, "touching" and "concerning," and so on, rather than as separate and isolated phenomena. I suspect quite a few will dislike this treatment; on the whole it seems to me sound and workable. Personally, I would be disposed to pick a bone or two with the editor on some other points where we have pleasantly disagreed previously, such as the summary treatment of the usual rule of non-assignability of easements in gross, or a like brusque disposition of the modern English rule of licenses in theatre-ticket cases, though rather extensive consideration is devoted to the traditional cases. But these are questions of taste and predilections, and the material is in any event sufficient so that an instructor can take off in any and all directions he wishes. I like, too, various details as to arrangement, such as the chapter introductory notes, which at least suggest aim, direction, and purpose to the wondering student. Clear and readable type, attractive page, and a brief workable index are joys. All in all, one can confidently expect ready acceptance of this as a workable trade tool.

Of course there may be some doubters, such as Professor McDougal of Yale, who feel that this traditional arrangement of property teaching serves to emphasize the by-waters of the law, rather than the rushing stream, if not the wave, of the future. The editor does not yield an inch to such critics; he leaves all matters of public housing, zoning, municipal planning, soil erosion, drainage, irrigation, power, and other schemes quite undisturbed. I will not quarrel with him for his plan and purpose. Students are waiting to be taught, and teachers to teach; and while the McDougals are toying with the law which is to come (to the law schools — maybe it is already here so far as the courts are concerned), by all means let's give the others the efficient helps required by their immediate purpose. I confess, however, to a bit of surprise that not even a gesture of compromise towards the newer trends was permitted. While the life of a compromiser is hard, since he runs the risk of damnation from all sides, the middle way does have certain advantages in law curricula development. The new materials are hard to discover or create and to canalize into workable teaching materials, and, unfortunately, the new thought course tends to be at first disorganized, diffuse, and dull, rather than vigorous and virile as, theoretically, it should be. Until it finds its sea legs it suffers by comparison with the older course, where the teaching highlights have long been shrewdly exploited. And so a judicious compromise of the new and the old may often help to break new ground without too many or too serious birth pains. Hence, I should have thought that a section, or at least a chapter, on new public controls in various types of modern land development would have fitted in quite handily with the editor's general scheme, as well as afforded an opportunity for a little worthwhile experimentation in pedagogy.

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STUDIES IN FEDERAL TAXATION, THIRD SERIES. By Randolph E. Paul. Cambridge: Harvard University Press, and London: Oxford University Press, 1940. Pp. 539. $6.00.

CHANGES in the tax structure used to be made only once every two or four years, but beginning with 1932 there has been a new major revenue act each year, and in the last two years there have been two or more acts a year. Taxes based on income, which in fiscal 1938 yielded about $2,500,000,000, are now being called upon to yield over $9,000,000,000. Except for the addition of a corporate excess profits tax, however, the framework of the system has undergone no important change since 1939, despite the fact that tax rates have increased in some instances as much as 800 per cent. In the third series of Mr. Paul's studies of problems in the field of federal taxation, the author discusses at length five matters which for some time have been crying aloud for the intervention of the legislature. A Congress which has had to devise an excess profits tax and almost triple the yield of the tax system as a whole, all with a view to selecting sources of revenue suitable for curbing inflation, stimulating the defense program, and helping meet the increased costs of that program, could spare little time to restitch the seams for a tax system which has grown far too big for its breeches. Nevertheless, if the system is to continue to have the cooperation of the taxpaying public, some way must be found for current revenue legislation to deal with more than tax rates. As Mr. Paul points out, a search for unattainable perfection is in time of crisis an exceptionally poor excuse for doing nothing.

Mr. Paul handles his subject matter with his customary breadth of vision. His inexhaustible technical knowledge, his awareness of the broader implications of tax policy, and his impartiality of approach make for a book which will stimulate the thinking of anyone possessing a basic knowledge of the law of federal taxation.

The first and longest of this series of studies deals with corporate reorganizations[1] and the host of unsolved problems which have arisen since the reorganization provisions sprang almost fully armoured from the brow of the Treasury in 1924.[2] Among the problems which are discussed in detail are: the unsatisfactory definition of "recapitalization" in determining whether a transaction is or is not a reorganization; step transactions, the continuity of interest theory and the refusal of the courts to extend the reorganization sections to cases in which corporate property is transferred to a subsidiary of the corporation issuing its stock in exchange therefor; the latter day interpretations of *Gregory v. Helvering*[3] and the business purpose doctrine; the indescribable confusion which once reigned on the subject of assumptions of liabilities as a result of *United States v. Hendler*,[4] now mercifully ended by Section 213 of the 1939 Act; the effect of reorganiza-

1. INT. REV. CODE §§ 111, 112, 113, 115 (Supp. 1939).
2. Revenue Act of 1924, §§ 201–04 incl.
3. 293 U. S. 465 (1935).
4. 303 U. S. 564 (1938).

tions upon earnings and profits as a result of *Commissioner v. F. J. Young Corporation,*[5] which has been tentatively set at rest by the amendments to Section 115 of the Internal Revenue Code made in Section 501 of the Second Revenue Act of 1940; and finally the tax effects of creditors' reorganizations. This latter problem is perhaps the most vexing in the field. As a result of *Commissioner v. Kitselman,*[6] the reorganization sections may apply to deny losses and to preserve high and unreal bases for depreciation where creditors of the old company become stockholders in the new. Furthermore, there is considerable diversity of tax treatment between reorganizations effected under the Bankruptcy Act[7] and reorganizations accomplished in other ways. Congress made a tentative gesture in the 1939 Act towards dealing with the tax effects of a discharge of indebtedness, but this provision is not sufficiently comprehensive, leaves too many questions unanswered, and is, in any event, only effective through 1942.

The reorganization sections had their heyday at a time when gains were the rule and losses the exception. They bear every evidence of having been drafted to meet conditions of increasing business prosperity and they have come open at the seams when applied to depression conditions. In the past twelve years no serious effort has been made to revamp them in the light of a rapidly fluctuating economy, much less to re-examine the basic philosophy of postponing until the indefinite future the taxation of appreciation in the value of corporate property.

The second study deals with revocable trusts and the income tax. The various devices in this field which have been concocted by sophisticated taxpayers are reviewed in detail. There is a discussion and defense of the famous *Clifford*[8] case. As Mr. Paul points out, few tears need be shed over the fate of the taxpayer in that particular case. To make the argument that the Court has destroyed certainty by buttressing the specific language of Sections 166 and 167 of the Internal Revenue Code with the general language of Section 22(a) ill becomes a taxpayer who is merely seeking the certainty of a loophole. Nevertheless, it must be conceded that the Court's approach may well trap many an innocent. Section 22(a) may tell him what is income, but it will furnish no clue as to whose that income is. If the satisfaction derived from the economic independence of those near and dear may be income, there is scarcely an item which may not be simultaneous income to all members of a family group. Legislation may well be necessary on this account. As Mr. Paul suggests, the overwhelming majority of problems of this nature could be permanently and equitably solved by compelling joint returns to be filed by spouses not divorced or separated.[9] Perhaps most of the residue could be eliminated by including the income of dependent children in these returns.

5. 103 F. (2d) 137 (C. C. A. 3d, 1939).

6. 89 F. (2d) 458 (C. C. A. 7th, 1937), *cert. denied,* 302 U. S. 709 (1937).

7. BANKRUPTCY ACT (1938) § 270, as amended by 54 STAT. 709 (1940), 11 U. S. C. A. § 670 (Supp. 1940).

8. Helvering v. Clifford, 309 U. S. 331 (1940).

9. Section 111 of the Revenue Bill of 1941, as reported by the Committee on Ways and Means, contained such a provision but it was stricken out on the floor of

More than fifty pages are devoted to the subject of alimony trusts. That the Federal income tax law treats divorced wives with a chivalry beyond all the bounds of reason, can scarcely be disputed by any but the beneficiaries of that chivalry. Mr. Paul evidently feels so strongly on this point that he is moved to defend the logic of the *Fitch*,[10] *Fuller*,[11] and *Leonard*[12] cases as a limitation on *Douglas v. Willcuts*.[13] It may seriously be questioned, however, whether the interests of a uniform system of taxation are best served by a doctrine which taxes a wife who is a beneficiary of an alimony trust resulting from a Nevada divorce decree and taxes the income of an identical trust to the husband where the divorce decree was obtained in New York. One who is prepared to abolish the distinctions in the taxation of husbands and wives between the eight community property states and the forty non-community property states, is hard put to it to defend the latest pronouncements of the Supreme Court on the subject of alimony. It might also be pointed out that these decisions result in the taxation of the wife if she must look exclusively to the trust for her alimony payments and taxation of the husband where the wife has recourse to the husband upon failure of the trust income. It would seem that the wife in the latter situation has a far greater ability to pay than in the former. Mr. Paul finally suggests, however, that all payments of alimony be taxed to the wife and that appropriate deduction be made from the gross income of the husband on account of such payments.[14] With this solution, there can be little quarrel.

The third study deals with the limitless confusion with which mortgagors and mortgagees must contend in computing their income taxes. Mr. Paul has summarized the law on this subject and it would be fruitless to attempt to resummarize it in the space of a paragraph. Should losses be deducted at the time of foreclosure sale or voluntary transfer or abandonment, or rather at the expiration of the period of redemption, or, in the case of the mortgagee, when the property is finally disposed of? Are such losses capital or ordinary or a combination of both? To what extent are gain or loss and basis for depreciation governed by the bid price at foreclosure sale, a price which is usually artificial and is always so in jurisdictions which do not recognize an equity of redemption? The statute is silent, the regulations[15] illogical, and the decisions conflicting. The subject of foreclosures and related transactions is another instance in which the revenue law has conspicuously failed to deal with the problems of a depression period.

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the House. H. R. 5417, 77th Cong., 1st Sess. (1941). 71 CONG. REC., July 28, 1941, at 6475.

10. Helvering v. Fitch, 309 U. S. 149 (1940).

11. Helvering v. Fuller, 310 U. S. 69 (1940).

12. Helvering v. Leonard, 310 U. S. 80 (1940).

13. 296 U. S. 1 (1935).

14. Section 117 of the Revenue Bill of 1941, as passed by the Senate, contained such a provision but it was eliminated in Conference. H. R. 5417, 77th Cong., 1st Sess. (1941).

15. 1638 C. C. H. 1941 FED. TAX SERV. ¶208, Reg. 103, § 19.23(k)-3.

The next study deals with the tax treatment of life insurance and annuities. This field is still a fertile one for the ingenious. Mr. Paul very properly questions whether the exemptions applicable[16] to life insurance and annuities should be allowed to continue in their present form in the case of combined life insurance and annuity contracts. Such contracts are in reality a form of investment rather than of protection for dependents. All too often they are purchased with a single premium by uninsurable taxpayers who only secure the contract by virtue of the insurance company's ability to hedge the insurance risk by means of the annuity feature. This problem has arisen most frequently in connection with the estate tax but there are also serious income tax aspects, particularly in the case of certain forms of annuity payments and dividends on fully paid-up life insurance policies.

The final chapter deals with the vexing question of the extent to which the Commissioner may, without legislative authority, change regulations once they are promulgated. In this connection, the *Reynolds*,[17] *Wilshire Oil*,[18] and *Hallock*[19] cases are discussed in detail. The last word on this subject has doubtless yet to be spoken by the Supreme Court. The present situation is one in which the Commissioner can never revise his interpretations retroactively and in some cases may be prevented from doing so prospectively. The Court, on the other hand, is free retroactively to overturn its long-standing and almost hallowed constructions together with administrative regulations based on those constructions. The result will inevitably be that the Commissioner in his initial regulations must go the limit in protecting the revenue, for fear that any less strict interpretation will become frozen in the law despite changing circumstances. Taxpayers may thus be able to rely on the immutable nature of his rulings except in cases in which such reliance would seem to be most justified, that is, where the ruling is merely a paraphrase of a Supreme Court decision. In such cases the Commissioner and his counsel seem free to argue that the regulations are erroneous. The problem of securing flexibility of administration while at the same time assuring the taxpayer that he is ordinarily entitled to rely upon long-standing judicial and administrative interpretations is a difficult one. Mr. Paul suggests that possible abuse of the regulatory power might be remedied by requiring public hearings upon all proposed regulations to be issued under new sections of the statute. Unfortunately, with two and three major revenue acts a year, the Bureau of Internal Revenue is hard pressed enough to give taxpayers at least some indication before the following March 15 as to how it proposes to interpret a new provision. To require public hearings before the issuance of such regulations does not seem administratively practicable. It is to be hoped that the problem can be largely corrected at the source by the exercise of reasonable restraint all 'round: by the Court in awaiting legislative cures of mis-

16. INT. REV. CODE § 22(b)(1) & (2) (income tax) and § 811(g) (estate tax) (Supp. 1939).

17. Helvering v. Reynolds Tobacco Co., 306 U. S. 110 (1939).

18. Helvering v. Wilshire Oil Co., 308 U. S. 90 (1939).

19. Helvering v. Hallock, 309 U. S. 106 (1940).

taken Supreme Court decisions, by the Treasury in a freer use of the powers conferred upon it by Section 3791(b) of the Code to prescribe regulations without retroactive effect, and by the Department of Justice in refraining from contending that a regulation of the Commissioner is erroneous.

The subjects discussed by Mr. Paul are not ones which can safely be consigned to the leisurely domain of academic speculation. They demand immediate attempts at corrective measures and the higher tax rates rise, the more acute will become the necessity for correction. The inequity of a provision which operates unfairly against the taxpayer increases many fold with each increase in rates. At the same time, it cannot too often be repeated that a provision which unfairly discriminates in favor of some taxpayers results inevitably in heavier burdens being placed upon the rest of the public, and the greater the need for revenue the more onerous will these avoidable burdens become. The greatest merit of Mr. Paul's very stimulating book is to focus attention upon the urgency of facing and meeting this problem.

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JURISPRUDENCE. By Edgar Bodenheimer. New York and London: McGraw Hill Book Co. 1940. Pp. 357. $3.50.

THE fermenting capsule of Bodenheimer's thought is the distinction between power and law which he identifies as the struggle between totalitarianism and constitutionalism. Hitler's *Reich* represents a power despotism; other states may approach an anarchy extreme, but there is an ideal mean between the two in which "law" reigns. It is only when there are restraints upon the powers of governmental officials (including judges) that we have, in the author's view, a distinctively *legal* order.

The whole discussion is in the realm of doctrinaire theorizing, the views of various jurists being set out like so many dead insects stuck on pins. Although its thesis is most easily understood as a refugee's reaction against Germany's hell, the book is nonetheless steeped in the philosophic tradition of German Idealism, without much grounding in empirical knowledge and concrete situations. Such point as the book possesses derives from its protest against tyranny, but the argument travels a long way 'round, taking us through many a shifting landscape of juristic thought with a range which is encyclopedic. After an initial section dealing with the concepts of power, law, other agencies of social control, justice, and the state, we are treated to a discursive discussion of the mercurial substance of natural law; and then, after a consideration of the various factors which enter into the shaping of law, there is a concluding section on positivism in jurisprudence, in the course of which the Realist movement in America (by which this reviewer takes his stand) is duly castigated.

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Continually Mr. Bodenheimer recurs to the insistence that since our rulers are not perfect men "their powers to decide over the fate of their fellowmen must be made subject to legal limitations" (p. 51). It is not because this statement is essentially untrue that exception is taken to it, but because it is so remote, unanchored, without referent, a mere say-thing. In terms of the context and materials of his analysis, it would seem as though Mr. Bodenheimer, like many another academical philosopher, were simply making this declaration in the blue — as if he were writing it in smoke across the sky. We know, however, that his contention does have some connection with what is going on in the world. It relates to the framework of governments like our own with a working tradition of civil liberties whereby the citizen is safeguarded from arbitrary intrusions by government. Even when Mr. Bodenheimer's sky-writing *is* thus practically oriented, however, there are still two questions he should ask himself. "Legal limitations" *set by whom?* And *backed by what?*

To ask the first question is to realize that Mr. Bodenheimer is reluctant to face the inevitably human aspect of all legal activity, including restraint. The "law" which Mr. Bodenheimer exalts is largely the behavior of certain officials known as judges. And the real choice before us is: to what extent do we want judicial overseers? "Legal limitations" as words-in-a-statute-book are not self-executing. They have always been subject to judicial construction, which, as any practicing lawyer will tell you, often means judicial destruction.[1]

To ask the second question is to indicate, with Jhering, that a legal rule without coercion is "a fire which does not burn, a light that does not shine." We have only to consider the status of so-called international law to see the unhappy validity of this contention. It follows that the dichotomy between power and law must be abandoned for, unless legal sanctions are backed by power, they are worthless in a showdown. It is silly to be a defender of law against despotism, while failing to consider the arts of achieving and maintaining power in the domestic as in the international struggle. Bodenheimer's position would condemn us to an angelic ineffectuality based on pious and earnest reiteration, as though of a liturgy, that law-with-restraints is best, while (to borrow a phrase of Dewey's) "burly sinners rule the world." He seeks to make a distinction between the concept of law to which compulsive sanctions are not essential and a developed system of law which must have coercive power. Such an attempted distinction serves only to illustrate further the doctrinaire mode of thinking.

The notion that law can still today be discussed in disregard of the psychology and individual characteristics of the persons involved is carried over from the rulers to the ruled. We are told, in typically formalistic fashion, that:

> "The realization of justice demands that two situations in which the relevant circumstances are the same should be handled in an identical way." (p. 38).

1. See my discussion of the judge as prestidigitator and artist in CARDOZO AND FRONTIERS OF LEGAL THINKING (1938).

A father, he illustrates, who forbids his sons to climb a tree should punish each of them in the same way for an infraction. It does not make any relevant difference to our author that one son is rebelling against his father's domination, while the other loves apples.

The authentic learning of Mr. Bodenheimer and his many confrères, who have been driven to our shores, has put us under a perverse debt to Herr Hitler. That learning should not be minimized but neither need our indebtedness impair straight-hitting criticism. My own feeling is that when Mr. Bodenheimer's life in Germany has receded in time and his career as an active lawyer in this country has progressed further, his vast and impressive erudition will be saddled more usably. Perhaps in time Mr. Bodenheimer will also lose the somewhat morbid distrust of the capacities and motives of men which this book displays, as well as distrust of the collective will of the people which now seems to him non-existent except as "forcefully imposed upon the members of society from above" (p. 192). Such views are understandable in the after-taste of his ex-country's bitter draught, but they cannot be universalized and made the foundation for a sound jurisprudence.

No one can deny that men in power who run riot are dangerous. But the Realist's insistence is equally undeniable, that the law is administered by human beings and that the record discloses their capacity to get around rules on paper even in a "government of laws". Leeway to be arbitrary is also leeway to be untechnical. The real job is to get able and trustworthy men, and for jurisprudence to center more than heretofore in the human techniques and potentialities of legal operations. Nothing can be gained by sidestepping or sideswiping our inescapable dependence on human wisdom and, along with it, human frailty. Nor can I see much point in pounding away at certain ideals irrespective of their conditions of fulfillment. For an infusion of our legal doings with the democratic impulse we cannot rely solely or primarily on precepts or doctrines, legal or otherwise. They may help a little but, in the last analysis, each of us must search and commit his own soul; and as a nation we must be genuinely devoted to processes of majority rule and minority protection, with a "stern, intractable sense of that which no man can stomach and still be free."

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SKELETON OF JUSTICE. By Edith Roper and Clara Leiser. New York: E. P. Dutton & Co., Inc., 1941. Pp. 346. $3.00

So basic to our form of government as to be commonplace is the concept of "Justice for all." It is therefore particularly shocking to read a first-hand account of the "administration of justice" in Germany today, an account which demonstrates the fact that the brutal disregard of human rights characteristic of the Nazis has permeated even so far as the courts. Retaining in part the skeleton of a judicial system once intended to serve no special interests, the Nazis have transformed the courts into instruments for politi-

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cal oppression, substituting new concepts to control private rights in accordance with the Nazi creed.

Early in its assumption of power, the National Socialist Party became shrewdly aware that it was best to resort to established legal means whenever possible. This, the Party reasoned, would satisfy the average German's passion for order and legality, at the same time providing an effective method for the liquidation of many troublesome problems. Hence, the regular courts were utilized in the fight against the Catholics. Sensationally publicized trials involving charges of depravity against nuns and monks were instigated; witnesses were procured to present trumped-up evidence in these trials. Nevertheless, the conduct of the trials was given the appearance of objectivity; the procedural formulae were followed to the letter. But the intense newspaper campaign eventually had the desired effect of arousing a believing public to indignation against this source of opposition to the government.

Ordinarily press passes in Germany are limited to journalists "of proved political reliability" and anything to be published is carefully examined and "corrected" or censored with an eye to its value as propaganda. Of course the authorities ban reference to any undesirable information which might encourage anti-National Socialist thought. The resultant unreliability of newspaper accounts of court matters in present-day Germany is apparent.

The standard of the bar and bench has also sadly deteriorated under the watchful reign of National Socialism. The "best" lawyers are those who stand high in party rank. Similarly, so long as a judge serves the interest of the State, he may remain capricious and ignorant. The quality of the criminal bench is especially bad. The authors have quoted in some detail the reasons given by various judges for convicting defendants on trial before them in particular cases. They reveal much stupid inconsistency and a personally colored emphasis on insignificant circumstances. Opportunity for an independent appraisal of the facts is precluded by the preliminary investigation of the Gestapo whose findings in almost all instances are obviously accepted by the judges as verity.

The book furnishes many other interesting details of a field of Nazi administration where precise information has been all too meagre in the past. Edith Roper was one of the very few newspaper correspondents permitted to attend trials and report court matters in Germany. She fortunately was able to remove her files out of the country and with the collaboration of Clara Leiser wrote the book under review. It is perhaps regrettable that Mrs. Roper did not have a more thorough working knowledge of judicial processes in general, and some technical understanding of legal concepts. Her critical evaluation of a number of court matters she witnessed suffers accordingly. Both layman and lawyer, however, will find in *Skeleton of Justice* further factual basis for provocative thought concerning the Nazi tyranny which threatens the world.

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