REVIEWS

OUTLINE OF LECTURES ON JURISPRUDENCE. By Roscoe Pound. Cambridge: Harvard University Press, 1943 (Fifth edition). Pp. viii, 244. $3.00.

IT is today acknowledged on all sides that the survival of a vital democracy requires continuous intelligent discussion of the purposes of our institutions and of whether existing institutions are effectively serving those purposes. Such discussion, so far as it relates to our legal institutions, is what has been called "jurisprudence." That Latin label is unfortunate, for it frightens many people. We should try to substitute a less forbidding label; perhaps "thorough-going-talk-about-government" would do.

At a time when such talk among American lawyers was none too popular, Roscoe Pound kept insisting on it. For forty some years he has been busy on that job. We owe him a great debt.

He first published an outline of such talk in 1903; then he revised it in 1914, again in 1920, and again in 1938. We now have his latest revision, made in 1943. It is unquestionably the most erudite work of its kind available. Anyone who wants—and every lawyer should want—to think hard about the functions of courts, of administrative agencies and of legislation will find this book an invaluable guide. It will stimulate his thinking and direct him to books and articles by other men who have done hard thinking about these subjects from fifth century B. C. Greece to twentieth century Europe and America, with side glances at similar efforts in the East and the Near East.

Pound's scholarship is almost overwhelming. Unfortunately, at times it has overwhelmed Pound. It is not true that a man can know too much. To learn all that others have said about fundamental problems can be a powerful stimulus to original reflections. It can also be a brake on hasty, superficial conclusions. But the braking effect may go too far; it may completely stop the movement of the thinker's own thoughts; and the fear of overlooking what someone else, somewhere, has said, may have the same consequences.[1]

1. Hobbes's biographer, Aubrey, reports, "He was wont to say that if he had read as much as other men, he should have known no more than other men." Quoted in HOBBES, LEVIATHAN (Smith ed. 1909) xxv. *Cf.* SCHOPENHAUER, *On Books and Reading* in RELIGION: A DIALOGUE AND OTHER ESSAYS (Saunders trans. 1899) 59.

Hazlitt, in 1818, said in an essay "On the Ignorance of the Learned," "The bookworm wraps himself up in his verbal generalities, and sees only the glimmering shadows of things reflected from the minds of others. Nature *puts him out.* The impressions of real objects, stripped of the disguises of words and voluminous roundabout descriptions, are blows that stagger him; their variety distracts, their rapidity exhausts him; and he turns from the bustle, the noise, and glare, and whirling motion of the world about him . . . to . . . the less startling and more intelligible combinations of the letters of the alphabet. . . . The habit of supplying our ideas from foreign sources 'enfeebles all internal strength of thought' as a course of dram-drinking destroys the tone of the stomach." But Hazlitt also said of one learned man, "He was an exception that confirmed the general rule,—a man that, by uniting talent and knowledge with learning, made the distinction between them more striking and palpable." SELECTED ESSAYS OF WILLIAM HAZLITT, 1778-1830 (Keynes ed. 1930) 14, 18.

Pound's own writings reveal that his learning and his dread of overlooking have sometimes put the brakes on him excessively. To shift the metaphor, his is a fertile mind; but he has produced too few new Poundian roses for the amount of fertilizer employed. Pound has been too little creative, considering his gifts. He has (to change metaphors again) been too much the mere importer of foreign-made ideas. Yet we should be grateful, for his zeal as importer has brought us many valuable intellectual goods from other lands.

All of us are likely to be shaped to some extent by our early achievements. As Bohlen once said,[2] Pound's early success as a classifying botanist has influenced his approach to legal problems. His *Outline of Jurisprudence* bears out Bohlen. Here Pound groups writers into "schools" and according to dates. His botanical classifying obsession is reinforced by his tacit but complete acceptance of the idea, made popular by Hegel, of the "spirit of the times." Now the fact is that in any period there is no one "time spirit"; there are many such "spirits." Thinking does not, as Pound seems to believe, go according to those artificial calendar compartments called "centuries." [3] Look at Vico, an eighteenth century writer whose theory of history—an "evolutionary" theory—was substantially different from the theories of those thinkers who are generally regarded as embodying the spirit of the Age of Reason.[4] In almost every period there are numerous currents and cross-currents, not a single drift in one direction; it is only a casual or a one-idea observer who sees merely one current or singles out the current at the surface.[5] One need not adopt all President Hutchins's educational theories [6] to agree with him that it is a mistake to dispose of a philosophy "by placing it in a certain time and then saying that time is gone." [7]

It is unwise, for example, for Pound to pigeon-hole Aristotle. Undoubtedly, Aristotle shared some attitudes with other Greek thinkers of his day. But

2. Bohlen, Book Review (1931) 79 U. OF PA. L. REV. 822, 823.

3. See, for instance, Pound's classification, "the seventeenth century" at p. 50.

4. Even they, however, were not as "unhistorical" as they were said to be by many nineteenth century writers. See, *e.g.*, as to Voltaire, Schevill, *Voltaire* in METHODS OF SOCIAL SCIENCE (Rice ed. 1931) 424.

5. Compare comments in Witmark v. Fisher, 125 F. (2d) 949, 964 (C. C. A. 2d, 1942); Hume v. Moore-MacCormack Lines, 121 F. (2d) 336, 346 (C. C. A. 2d, 1941).

6. Pound's *Outline* should fit into a curriculum contrived according to Hutchins's recently revised attitude. For Hutchins, in his recent book, *Education for Freedom*, is breaking away from the authoritarian dogmatism of Mortimer Adler. Thus Hutchins now calls for "candid and intrepid thinking about fundamental issues," says that "moral standards" should be "based on reason and not on precept and authority alone," speaks of "democracy as a fighting faith," and actually quotes the pragmatist John Dewey with approval. HUTCHINS, EDUCATION FOR FREEDOM (1943) 32, 63, 91, 95.

7. *Id.* at 32-33. Yet we need to have in mind that "often the praise of ancient authors proceeds not from the reverence of the dead but from the competition and mutual envy of the living. . . . For men contend with the living, not with the dead, to these ascribing more than due, that they may obscure the glory of the other." HOBBES, *op. cit. supra* note 1, at 48, 395. *Cf.* ARISTOTLE, RHETORIC, bk. II, c. 10, to the effect that "we envy those who are near us in time, place, age or reputation" and "do not compete with men who lived centuries ago."

some of his ideas transcend the boundaries of any school and are as fresh and vital now as they were in ancient Greece. To regard him merely as an ancient Greek, or merely as the founder of a "school," is to lose the value of many of his observations.[8] The same is true of other sprightly minds. We may—we should—disagree with much of what Hobbes or Machiavelli said; but, as is often done, to call Hobbes a "Hobbesian" or Machiavelli a "Machiavellian" is a distortion, and one that blinds us to their flashes of insight which are still valuably illuminating. It is, accordingly, a deadening and misleading practice to label Jhering, as Pound does, "a leading representative of the Social-Utilitarians," or Gény a "neo-scholastic," or—to come closer home—Thurman Arnold a "psychological realist," Seagle an "historical realist," Llewellyn a "sceptical neo-realist," and to shove Holmes into the category of the "sociological school" in "the stage of unification."

The reader is tempted, just for fun, to try new classifications which would, for instance, lump together Aristotle's great manual on how to win law suits, comprising a considerable part of his *Rhetoric*,[9] with Holmes's famous "bad

8. There is, however, a need to be on guard against misinterpreting the "ancients"; the differences between their cultures and ours render it likely that they sometimes used words in ways we cannot fully comprehend. See FRANK, IF MEN WERE ANGELS (1942) 193-94.

9. Aristotle says that rhetoric deals with the modes of persuasion and includes "forensic" argument used to persuade judges and juries. "The use of persuasive speech," he wrote, "is to lead to decisions." The speaker must, for instance, try to "make his own character look right and put his hearers, who are to decide, into the right frame of mind." For when "people . . . feel friendly to the man who comes before them for judgment, they regard him as having done little wrong, if any. . . . The emotions are all those feelings that so change men as to affect their judgments . . . such as anger, pity, fear and the like, with their opposites. . . ." Young men "are ready to pity others, because they think every one an honest man, or anyhow better than he is: they judge their neighbors by their own harmless motives"; but "elderly men . . . have often been taken in. . . . They are cynical; that is, they tend to put the worse construction on everything. . . . People always think well of speeches adapted to, and reflecting, their own character; and we can see how to compose our speeches so as to adapt both them and ourselves to our audiences." "If you have no witnesses on your side, you will argue that the judges [or jurors] must decide what is probable. . . . If you have witnesses, and the other man has not, you will argue that probabilities cannot be put on their trial, and that we could do without the evidence of witnesses altogether if we need do no more than balance the pleas advanced on either side." RHETORIC, bk. I, cc. 1, 3, 15; bk. II, cc. 1, 12, 13.

It is usually overlooked that one of Aristotle's famous utterances on "natural law" was made as part of his instructions, in the *Rhetoric*, concerning law-suit tactics. "If," he says, "the written law tells against our case, clearly we must appeal to the universal law, and insist on its greater equity and justice. We must argue that the juror's oath, 'I will give my verdict according to my honest opinion,' means that one will not simply follow the letter of the written law. We must urge that the principles of equity are permanent and changeless, and that the universal law does not change either, for it is the law of nature, whereas written laws often do change. . . . Or that the better man is, the more he will follow and abide by the unwritten law in preference to the written. . . . If however the written law supports our case, we must urge that the oath 'to give my verdict according to my honest opinion' is not meant to make the jurors give a verdict that is contrary to the law, but to save them from perjury if they misunderstood

man" thesis, found in his paper, *The Path of the Law*,[10] and to collocate parts of Plato's totalitarian theories, found in his *Republic* and *Laws*,[11] with current Nazi writings on government.

Seldom is there a man—outside of an insane asylum—who is all-of-one-piece, thoroughly consistent. The Freudians have done us some harm in putting over the ideal of the completely "integrated" personality. Happily, almost all men—and this is particularly true of most of the great thinkers—are multiple personalities. Pound himself is by no means a hundred per cent Poundian; perhaps it is because he thinks he is that he has been insufficiently aware of his own peculiarly perplexing inconsistencies.[12] In this challenging book, however, he has stuck pretty steadily to one method; that is both its vice and its virtue.

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what the law really means. . . . Or that trying to be cleverer than the laws is just what is forbidden by those codes of law that are accounted best." *Id.*, bk. I, c. 15.

10. (1897) 10 HARV. L. REV. 460-61, reprinted in HOLMES, COLLECTED LEGAL PAPERS (1920) 172-73. There Holmes said: "Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from *what is decided by the courts* . . ., that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not *coincide with the decisions*. But if we take the view of . . . the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the . . . courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." (Italics added).

That Holmes was here merely describing the practical consequences of the judicial process and was not rejecting reason or moral or ideal factors (affecting judges and others), see FRANK, IF MEN WERE ANGELS (1942) 54-59, 297-98, 307-08.

Of course, Aristotle, too, was intensely interested in reason, morals and ideals as applied to legal institutions, as shown in his *Politics* and *Ethics*.

11. In his ideal state, there was to be rigid censorship; all innovations in the arts were to be forbidden; men were to be assigned specific jobs and obliged to stick to them; and the rulers were to "have the privilege of lying" to the citizens "for the public good," for they would "find a considerable dose of falsehood and deceit necessary for the good of their subjects." REPUBLIC, 377, 389, 401, 424, 459. In his later treatise on the proper conduct of a practical state he called not only for rigid censorship and state control of all details of education but also for state regulation of religious beliefs with severe punishment of heretics. See, *e.g.*, LAWS, 701, 816-17, 907-09.

As to Plato as totalitarian or fascist, see, *e.g.*, CATLIN, STORY OF THE POLITICAL PHILOSOPHERS (1939) 51 *et seq.*; SABINE, A HISTORY OF POLITICAL THEORY (1937) 41, 81-85; FRANK, IF MEN WERE ANGELS (1942) 192; Corwin, Book Review (1940) 54 HARV. L. REV. 533. For contrary interpretations, see MCILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN (1940) 34-35; Morrow, *Plato and the Rule of Law* (1940) 14 PHILOSOPH. REV. 105, 106, 126.

12. As to his puzzling inconsistencies, see FRANK, IF MEN WERE ANGELS (1942) 332-41.

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RADIO NETWORKS AND THE FEDERAL GOVERNMENT. By Thomas Porter Robinson. New York: Columbia University Press, 1943. Pp. iv, 278. $3.50.

THE eternal problem of democratic government is that of reconciling the freedom of individuals to do as they please with the right of the community to insist that the good of each must be subordinated to the good of all. This issue has been posed in its most pressing modern form by the rise of giant corporations during the era of *laissez-faire*. Since the advent of Big Business, one of the major and never-ending tasks of democracy has been the employment of the police power of the state to the end that corporate interests will be protected in the carrying on of their legitimate activities and will at the same time be restrained from exploiting their customers, crushing their competitors, and destroying freedom of the market through unregulated monopoly.

This problem is the only meaningful context within which the current relations between the Federal Communications Commission and the radio industry can be fruitfully discussed. The chief defect in Dr. Robinson's detailed analysis of these relations is that he tends to ignore this context, save in his four page introduction. While it would be unfair to say that he has lost sight of the forest because of the trees, he has assuredly not attained that illuminating perspective on his subject matter which would have accompanied a more constant awareness of the frictions between Business and Government during the past half century.

He therefore fails to see that much of his material illustrates anew a familiar pattern: Big Business, in the sacred name of "freedom" and "private rights," at first opposes all public regulation; then it challenges the legality and constitutionality of specific controls, often to the tune of loud outcries against "bureaucrats" and shrill complaints that proposed regulations spell bankruptcy for the business man and slavery for the citizen; and finally, after much trial-and-error correction of abuses and mistakes on both sides, it comes to accept reasonable regulation in the public interest as not only inevitable but even desirable for business itself. This has been the history of every Big Business in the United States. All enlightened citizens familiar with that history know that the alleged "tyranny" of Government over Business is in the end preferable to the actual tyranny of Business over Government (and the public) which attends a regime of wholly unrestricted profit-seeking by monopolists. That the radio industry is now in mid-stream in this process is obvious. Reflective readers may well regret that Dr. Robinson now and then overlooks the truth of Justice Holmes's dictum that "the vindication of the obvious is sometimes more important than the elucidation of the obscure."

This treatise is, nevertheless, an extremely useful contribution to the understanding of a public issue which has not hitherto been systematically discussed in book form. Dr. Robinson reviews the history of broadcasting and gives a good account of the problems and practices of the three great chains—NBC, CBS and Mutual. He surveys the course of federal regulation during the early period of patent controversies and analyzes the development of the regulatory power under the Communications Act of 1934 which established the FCC. His well-balanced treatment of censorship, advertising,

artist contracts, transcriptions and the various problems of network-station contracts (*e.g.*, rates, duration, exclusivity, option time, etc.) will be helpful to public officials and business executives, to lawyers and laymen, and to broadcasters and auditors.

Dr. Robinson's pages are judiciously "objective" in style and apparent intent. Yet in their total effect they will impress informed and critical readers as a kind of brief for NBC and CBS in their long battle against the regulations issued in 1941 by Chairman James Lawrence Fly with the approval of a majority of the commissioners. This brief is far from persuasive. Like the spokesmen for the two major chains, the author contends, with no convincing proof, that the 1941 regulations are "destructive to chain broadcasting itself." He argues that the goal of more competition can better be achieved by "a greater available supply of frequencies for commercial broadcasting which in turn would result in a greater number of national networks." He minimizes the demonstrated willingness of the FCC to amend regulations in accordance with changing technological and business conditions. He ignores altogether, save in his bibliography, the two White Papers issued by Mutual in support of the new regulations.

The author's predilections are also revealed in lesser ways: his wholly unsupported allegation that governmental control of radio "shows a trend toward totalitarianism"; his statement that Mr. Fly "raises up a specter of network monopoly"; his reliance upon Westbrook Pegler as a witness against Mr. Petrillo; and his accusation, supported by nothing save a quotation from Senator Wheeler, that the FCC "can be fairly charged with political bias and favoritism in the past." On the other hand, he shows how the controversial regulations grew out of an exhaustive inquiry undertaken in 1938 not on the initiative of the FCC but on the demand of Congress, many of whose members saw tendencies toward monopoly in the practices of the networks. He also exposes, perhaps inadvertently, some of the curious logic of NBC and CBS in their efforts to defend essentially monopolistic practices. His principle quarrel with the FCC is based on the contention that its regulations emphasize "station sovereignty" at the expense of chain broadcasting and therefore promote "the wrong type of competition." His case for federal licensing of networks, as well as of individual stations, is a persuasive one.

It is unfortunate that Dr. Robinson's book went to press in February. Had he waited but a few months longer, he might well have altered certain of his judgments, for he would have been able to discuss recent developments which are only foreshadowed in his pages. On May 10, the Supreme Court put an end to the five-year struggle of NBC and CBS against public control by upholding the right of the FCC to regulate the radio chains under the Act of 1934. More recently the Blue Network has been sold by NBC to independent owners. And ever since February the enemies of the FCC have been attacking the agency through the Cox Committee's so-called "investigation" in a fashion which is a stench in the nostrils of all citizens who cherish honesty, integrity and ordinary decency on the part of their law-makers. These events, all of which have their counterparts in past battles against monopoly,

are an integral part of the story Dr. Robinson has tried to tell. When he includes them in his next edition, if any, he may also conclude that the FCC has served "public interest, convenience and necessity" far better than he believed was the case when he completed this volume.

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THE LABOR RELATIONS ACT IN THE COURTS. By Herbert O. Eby. New York: Harper and Bros., 1943. Pp. xvii, 250. $3.50.

THE fate of social legislation in this country, as Justice Frankfurter once remarked, rests ultimately with our judges.[1] Even when our courts do not slay a statute in one fell decision, they may condemn it to a lingering death or bind it hand and foot in a web of statutory construction. If, however, our courts look with favor upon a statute, they will brook no legalistic evasions or circumventions and will be adroit to assist in fulfilling both its express and undeclared purposes.

The National Labor Relations Act is peculiarly subject to this judicial favor or disfavor since, unlike the rulings of some other administrative agencies, the orders of the National Labor Relations Board are not self-enforcing. Not only is there no penalty for the violation of an order of the Board, but the order itself is a mere exhortation unless and until the Board has petitioned a United States circuit court of appeals to embody the order in one of its decrees.[2] For only one type of order, that requiring an employer to reinstate discharged employees, is any incentive provided by the Act to induce employer compliance in advance of a circuit court decree. This sole statutory incentive or sanction is that "back pay" due discharged employees continues to accumulate while the order remains unobeyed.

The Act consequently has been subject to a judicial scrutiny unprecedented in our legal history. Since April 12, 1937, when the constitutionality of the Act was upheld,[3] the United States Supreme Court has handed down no less than 47 decisions interpreting the Act;[4] in the October, 1940, term alone, it issued 11 such decisions. Even more striking are the circuit court cases. Between June 15, 1936, when the first decision involving the validity of a Board order was handed down, and April 1, 1943, there has been a total of 419 such

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1. See LAW AND POLITICS, OCCASIONAL PAPERS OF FELIX FRANKFURTER (1939) 4.

2. Of the 54 unfair labor practices cases reported in Volume I of the Board's decisions, no less than 19 had to be reviewed by the circuit courts.

3. See NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937).

4. The Interstate Commerce Act adopted in 1887 did not receive its first Supreme Court test until 1892, and during the next 10 years came before the Supreme Court only 12 times; the Federal Trade Commission Act, which became law in 1914, waited 6 years for its initial Supreme Court review, and in the succeeding 10 years was passed upon by that Court in only 21 additional cases. See *Committee Investigating Labor Board, pursuant to H. R. 258,* 76th Cong., 1st Sess. (1939) NLRB exhibits 64, 65.

cases.[5] This total comprises only decisions relating to the validity of final orders of the Board; excluded are decisions relating to injunctions,[6] motions, interrogatories, subpoenas, representation cases, contempt proceedings, and consent decrees.[7] Nor is there any likelihood of any diminution of this mighty flood. As of April 1, 1943, there were pending in the circuit courts no less than 101 petitions either to enforce or set aside final orders of the Board.[8]

The Board on the whole has achieved a singular record of success in the courts.[9] No part of the Act had even prior to the *Jones and Laughlin* decision ever been deemed unconstitutional by any circuit court. Although before April 12, 1937, not a single federal judge had held the Act applicable to manufacturing enterprises,[10] since that date in only three cases has the Board's jurisdiction over any enterprise been questioned; and in two of these the United States Supreme Court reversed the circuit court.[11] One circuit court has even stated: "In the light of the expanding concept of interstate commerce, and of circumstances under which the impact of industrial strife burden and obstruct such commerce, it is now futile to renew assault already repeatedly repelled upon the jurisdiction of the Board." [12]

In deciding questions of law, the circuit courts have on the whole displayed a liberal attitude toward the Act. Instead of a literal reading of the statute,

5. The yearly totals follow:

1936	2
1937	12
1938	24
1939	37
1940	64
1941	121
1942	87
Nine months ending March 31, 1943	72

See NLRB Release No. R-5390 (1943).

6. Until the decision in Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938), no less than 95 suits were filed by employers in various district courts throughout the country seeking to enjoin the hearings provided for by the Act. For an account of this early struggle, see NLRB FIRST ANNUAL REPORT (1936) 46-49; NLRB SECOND ANNUAL REPORT (1937) 21-26.

7. A total of 639 such decrees were entered as of July 1, 1942.

8. Information obtained from the Litigation Division of the NLRB.

9. As of July 1, 1942, the circuit courts had passed upon the validity of 345 Board orders, enforcing 174 in full, modifying 115, and setting aside 56. Many of the modifications were trifling.

10. There was not even a dissenting opinion to console the advocates of increased national power.

11. See NLRB v. Bradford Dyeing Ass'n, 310 U. S. 318 (1940), *rev'g* 105 F. (2d) 119 (C. C. A. 1st, 1939); NLRB v. Fainblatt, 306 U. S. 601 (1939), *rev'g* 98 F. (2d) 615 (C. C. A. 3d, 1938); NLRB v. Idaho-Maryland Mines Corp., 98 F. (2d) 129 (C. C. A. 9th, 1938). The employer in the last named case operated a gold and silver mine in California, all of the products of which were shipped to the United States mint located in that state. The Board did not petition for certiorari.

12. See NLRB v. Colten, 105 F. (2d) 179, 181 (C. C. A. 6th, 1939).

the judiciary has followed the Board's lead and has approved the orders which have been devised to remedy the practices the Board was commanded to prevent. Perhaps one reason for the liberal reading the circuit courts have given the Act is the vigilance the Supreme Court has exercised to prevent any sterilization of the Board's powers. Thus intervention of the Supreme Court was required to clarify and guarantee the Board the power: to order disestablishment of company-dominated unions;[13] to compel the reinstatement of employees who had engaged in a strike not caused by unfair labor practices;[14] to forbid an employer to discriminate against union men in hiring new employees;[15] to compel the employer to reduce to writing any agreement reached with a union;[16] to direct the reinstatement of employees who had obtained equivalent employment elsewhere;[17] to set aside closed-shop contracts executed after the contracting union had received the illegal assistance of the employer;[18] and to determine its own election procedures without judicial interference.[19] On several occasions, however, the Supreme Court has modified or reversed decisions of the various circuit courts upholding Board orders.[20]

An indication of the Court's concern over the proper interpretation of the Act is the readiness with which it has granted certiorari even though questions

13. See NLRB v. Pacific Greyhound Lines, 303 U. S. 272 (1938), *rev'g* 91 F. (2d) 458 (C. C. A. 9th, 1937); NLRB v. Pennsylvania Greyhound Lines, 303 U. S. 261 (1938), *rev'g* 91 F. (2d) 178 (C. C. A. 3d, 1937).

14. See NLRB v. Mackay Radio & Telegraph Co., 304 U. S. 333 (1938), *rev'g* 92 F. (2d) 761 (C. C. A. 9th, 1937).

15. See NLRB v. Phelps Dodge Corp., 313 U. S. 177 (1941), *modifying* 113 F. (2d) 202 (C. C. A. 2d, 1940); the First Circuit had, however, in NLRB v. Waumbec Mills, 114 F. (2d) 226 (C. C. A. 1st, 1940), upheld the Board's exercise of this power prior to the Supreme Court decision.

16. See H. J. Heinz Co. v. NLRB, 311 U. S. 514 (1940); this power had been denied by the Seventh Circuit in Inland Steel v. NLRB, 109 F. (2d) 9 (C. C. A. 7th, 1940), but had been upheld by the Second, Fourth, and Sixth Circuits.

17. See NLRB v. Phelps Dodge Corp., 313 U. S. 177 (1941), *modifying* 113 F. (2d) 202 (C. C. A. 2d, 1940); the Ninth Circuit had taken a contrary position in NLRB v. Carlisle Lumber, 99 F. (2d) 533, 537 (C. C. A. 9th, 1938), but the view of the Supreme Court had been anticipated by the Second, Fourth, and Seventh Circuits.

18. See NLRB v. Electric Vacuum Cleaner Co., 315 U. S. 685 (1942), *rev'g* 120 F. (2d) 611 (C. C. A. 6th, 1941), but the view of the Supreme Court had been anticipated in International Ass'n of Machinists v. NLRB, 110 F. (2d) 29 (App. D. C. 1939).

19. See NLRB v. Falk Corp., 308 U. S. 453 (1940), *rev'g* 106 F. (2d) 454 (C. C. A. 7th, 1939). See also NLRB v. International Brotherhood of Electrical Workers, 308 U. S. 413 (1940), decided the same day as the *Falk* case; A. F. of L. v. NLRB, 308 U. S. 401 (1940).

20. See Southern Steamship Co. v. NLRB, 316 U. S. 31 (1942), *modifying* 120 F. (2d) 505 (C. C. A. 3d, 1941); Phelps Dodge Corp. v. NLRB, 313 U. S. 177 (1941), *modifying* 113 F. (2d) 202 (C. C. A. 2d, 1940) (as to calculation of back pay); NLRB v. Express Publishing Co., 312 U. S. 426 (1941), *modifying* 111 F. (2d) 588 (C. C. A. 5th, 1940) (as to scope of order); Republic Steel Corp. v. NLRB, 311 U. S. 7 (1940), *modifying* 114 F. (2d) 820 (C. C. A. 3d, 1940) (as to calculation of back pay); Consolidated Edison Co. v. NLRB, 305 U. S. 197 (1938), *modifying* 95 F. (2d) 390 (C. C. A. 2d, 1938).

of fact are involved. As Mr. Justice Black has pointed out, the Supreme Court does "not ordinarily grant certiorari to review judgments based solely upon [such] questions. . . ." [21] As of April 1, 1943, the Board's petition for certiorari had been granted in 29 cases and denied in only 4.[22] Although respondents do not fare so well, certiorari was granted in their petitions in 19 out of 78 cases, a ratio still somewhat higher than the one in five chance the average petitioner for certiorari has.[23]

The circuit courts have not, however, displayed the same support of the Board in cases in which the sole problem was whether the Board's findings were supported by substantial evidence, accepting with difficulty Chief Justice Stone's dictum that "courts are not the only agency that must be assumed to have capacity to govern." [24] The doctrine of "administrative finality" which limits the range of issues open to judicial review to "questions affecting constitutional power, statutory authority and the basic requisites of proof" [25] met with grudging recognition in the circuit courts. "[Some courts] though professing adherence to this mandate, honored it we think with lip service only. In form the court determined that the finding . . . had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision forbid that exercise of power." [26]

The Board has repeatedly protested in petitions for certiorari to the Supreme Court that the courts below were substituting their judgment for the Board's in appraising testimony. In asking the Supreme Court to review the decision of the Fifth Circuit in *Waterman Steamship Corp. v. NLRB*,[27] the Board stated that its petition for certiorari was "grounded upon the apparently consistent failure of the court below in the present decision and in its other decisions rendered during the past two years to give effect to the provision of the Act that the findings of the Board as to facts if supported by evidence, shall be conclusive." [28] After an elaborate recital of the testimony, Justice Black speaking for a unanimous court held that "all of the Board's findings, far from resting on mere suspicion, are supported by evidence which is substantial." "The Court of Appeals' failure to enforce the Board's order resulted from the substitution of its judgment on disputed facts for the Board's judgment and power to do that has been denied the Court by Congress." [29]

21. See NLRB v. Waterman Steamship Corp., 309 U. S. 206, 208 (1940).

22. See NLRB v. Express Publishing Co., 317 U. S. 676 (1942) (on contempt); DuPont v. NLRB, 313 U. S. 571 (1941); NLRB v. Peninsular & Occidental Steamship Corp., 305 U. S. 653 (1938); NLRB v. Delaware-New Jersey Ferry Co., 302 U. S. 738 (1937).

23. See Hart, *The Business of the Supreme Court at the October Terms 1937 and 1938* (1940) 53 HARV. L. REV. 579.

24. See United States v. Butler, 297 U. S. 1, 87 (1936).

25. Rochester Telephone Corp. v. United States, 307 U. S. 125 (1939).

26. Mr. Justice Cardozo, in FTC v. Algoma Lumber Co., 291 U. S. 67 (1934).

27. 103 F. (2d) 157 (C. C. A. 5th, 1939).

28. See Brief in Petition for Certiorari, p. 18, Waterman Steamship Corp. v. NLRB, 103 F. (2d) 157 (C. C. A. 5th, 1939).

29. See NLRB v. Waterman Steamship Corp., 309 U. S. 206 (1940).

In *NLRB v. Bradford Dyeing Association,*[30] Justice Black, again speaking for a unanimous Court,[31] reversed the court below and observed that the courts as well as the Board must "act as Congress has required." Justice Black contrasted the manner in which "the Board and its representatives solicitously guarded respondent's and intervenor's right to a full and fair hearing with the Court of Appeals' failure to give proper regard to the evidence which was before the Board."

In *Link-Belt Company v. NLRB,*[32] the Board argued that to sustain the action of the court below would substantially jeopardize enforcement of the Act in the Seventh Circuit, an important industrial area. The Supreme Court in a unanimous decision [33] reversed the circuit court, holding that "the Court of Appeals in reaching that conclusion substituted its judgment on disputed facts for the Board's judgment. . . ." [34]

Of course, this judicial reluctance to grant conclusiveness to administrative findings supported by substantial evidence is not limited to the findings of the Board alone. We are now witnessing a struggle [35] between administrative agencies and courts, comparable in scope and importance to the seventeenth century conflict between common law and equity. The Board's chances of obtaining more respect for its findings and the orders based thereon depend upon the outcome of that battle.

One turns hopefully therefore to a book entitled *The Labor Relations Act in the Courts,* announced by its publishers as "A Five-Year Survey and Analysis of Legal Decisions Affecting the Rights and Responsibilities of Employers and Employees," for the long-awaited and sorely needed definitive treatise on the judicial history of the Act. Mr. Eby's work is a far cry from such a treatise.

His book is nothing more than a collection of excerpts from about two hundred judicial opinions on the Act preceded by a brief digest of the material facts in the cases quoted, arranged in what the author conceived to be logical fashion. Each of the fourteen subdivisions of this collection is prefaced by one to three pages of background material. The discussion of the decisions is confined to footnote references to other cases interpreting the Act. There are no references to decisions involving other administrative agencies, no references to the wealth of non-legal materials buried in Congressional reports, no allu-

30. 310 U. S. 318 (1940).

31. Mr. Justice McReynolds did not participate.

32. 110 F. (2d) 506 (C. C. A. 7th, 1940).

33. Mr. Justice McReynolds did not participate.

34. See NLRB v. Link-Belt Co., 311 U. S. 584 (1941). The Supreme Court was, nevertheless, thereafter twice impelled in brief *per curiam* opinions to reverse the same circuit court because it persisted in "weighing evidence" in reviewing Board orders. See NLRB v. Automotive Maintenance Machinery Co., 315 U. S. 282 (1942); NLRB v. Nevada Consolidated Copper Co., 316 U. S. 105 (1942).

35. In NLRB v. Thompson Products, 97 F. (2d) 13, 17 (C. C. A. 6th, 1938), Judge Hamilton stated: "The Board's findings in these cases tends to destroy the purpose of the Labor Relations Act and to prompt discord between employer and employee. . . ." See *Hearings of the Committee on Education and Labor on S. 1000,* 76th Cong., 1st Sess. (1939) 1465, 2150, 2197.

sions to other treatises or even to the great number of useful law review articles.

What discussion there is of the principles announced by the courts is exceedingly superficial. The chapter entitled "Due Process" does not even cite any of the *Morgan* cases dealing with the requirements of a fair hearing[36] or even refer to the three cases in which the circuit courts held the hearing before the trial examiner to have been unfair. The troublesome question of successor company unions is treated without referring to those cases in which the court reversed the Board on the issue of successorship.[37] Finally, the entire problem of contempt of court decrees enforcing Board orders is completely ignored.

The book not only lacks an index, but the arrangement of cases is contradictory and confused.

The Labor Relations Act In the Courts is, therefore, neither a digest, a treatise, a survey, nor an analysis of the court decisions interpreting the Act.

WILL MASLOW †

YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT. New York: Charles Scribner's Sons, 1943. Pp. xiii, 451. $3.50.

To review the book of a friend is inevitably a delicate and ofttimes a dangerous task. There should be no traffic between author and critic, otherwise the latter may be accused of reading into its pages something that is not there. This is doubly true in the present instance since it was I who originally suggested to Mr. Tutt the desirability of writing his reminiscences and finally overcame his objection to joining, as he put it, the galaxy of vainglorious old fools who rush into print with the result that their old age becomes a laughing-stock instead of a tranquil prelude to a deserved oblivion. Having done so, I confess that I looked forward to the publication of *Yankee Lawyer* with a distinct feeling of responsibility and no little apprehension.

But my fears proved unfounded. Although I had watched Ephraim Tutt in court, played poker and gone fishing with him for over forty years, I was wholly unprepared for the wealth of pungent narrative and the richness of human philosophy which his entertaining autobiography contains. In fact, I saw him in his full intellectual and moral stature for the first time. I have nothing to blame myself for in persuading him to tell the story of his life, which he has done with a good deal of literary skill and as much modesty as is possible when willy nilly he is the hero of most of its episodes. After

36. See Morgan v. United States, 298 U. S. 468 (1936), 304 U. S. 1 (1938), 307 U. S. 183 (1939), 313 U. S. 409 (1941).

37. Compare DuPont v. NLRB, 116 F. (2d) 388 (C. C. A. 4th, 1940), *cert. denied*, 313 U. S. 571 (1941).

† Trial Examiner, National Labor Relations Board. The views expressed herein represent the personal views of the author and do not necessarily reflect those of the Board.

all, Mr. Tutt would indeed be an old fool if he were not aware that he had more on the ball than most of his contemporaries at the bar. He has sought to explain his character as moulded by his experience; he has done so with conspicuous success; surely it was worth doing; and if I be accused of bias, I need only point out that his distinctly acidulous comments upon myself more than balance the scales. The sad truth is that I think a great deal more of Mr. Tutt than he does of me. Time and again in the pages of *Yankee Lawyer* he makes it quite plain that he regards me as a conscienceless literary hack who has misrepresented his true character and distorted the facts of the cases in which he has taken part. In fact, he has used such expressions about me that I have been tempted to sue him for libel per se; he has gone so far as to accuse me of manufacturing stories about him out of whole cloth. Well, perhaps I have, and turn about is fair play; but, at any rate, he has more than evened things up. He has now set everything right, and his picture of himself and of his time is exact and in its proper frame.

And what an engrossing and engaging picture it is—of this farmer's boy who worked his way through college and law school, won his spurs in a country town and later achieved eminence at the New York Bar! Yet it is the story of hundreds and perhaps thousands of young Americans who go forth to put their fortune to the touch in a big city "to win or lose it all." Ephraim Tutt won professional and financial success, but he won far more—the respect and affection of his fellows. What a curious contrast between him and his boyhood friend Calvin Coolidge—the warm-hearted, impulsively generous humanitarian, and the cautious, grim, thrifty politician! What made these two Vermonters, born within twelve miles of one another, so different? Was it Eph's Irish mother with her belief in pixies? Was there a prenatal influence that gave and still gives Eph his occasional impish waywardness? Or was it his devotion to the lovely and gentle Esther of whom I had never heard until I opened my friend's presentation copy? What a strange love story for these realistic days! Suppose it had happened now instead of nearly fifty years ago. Would they have hesitated to take the step that then seemed so unthinkable? Each reader must decide that for himself; but, if in the negative, he should also ask himself whether in the end Ephraim Tutt would have developed into the man he did.

The lawyer, *qua* lawyer, will find much matter for argument in these pages. In his chapter "The Law—Model T" the author, like his friend the late John H. Wigmore, spares no punches in his castigation of the hide-bound precedents with which it is encrusted. Here, perhaps, the old fellow is at his best. But he is a firm believer in law as such without which, as he acknowledges, civilization could not exist; he merely attacks the subterfuges and dissimulations by which it is at present administered. His own legal philosophy is set forth at some length in "The Legal Cavalcade" in which he shows himself, like Roscoe Pound, an advanced favorer of its socialization, while reducing its complex and cumbersome machinery and the multitude of regulations that entangle the ordinary citizen in their web. He believes that the truest democracy is that society in which the individual is allowed to exercise the utmost freedom of thought and action consistent with order and that the higher the civilization, the fewer laws it will need and the more it will

rely upon sympathy, kindness and loyalty—what Lord Moulton calls "self imposed law"—and that so far as we have any real justice in this world, we get it less through the courts than by virtue of the inherent decency of our fellowmen. There is also food for thought on the part of the legal profession in the chapter entitled "The Law and Literature" where the effects of the legal training upon the habits of mind and expression of the brethren is discussed with humor and insight. It might have been called "Why Lawyers Can't Write"!

During the last quarter century that Mr. Tutt has so good naturedly permitted me to use him as a character in what was otherwise largely fiction I have occasionally been disturbed by the possibility that some people might think him merely a figment of my imagination. That ghost, I am glad to say, has now been laid. Ephraim Tutt's actuality is established forever—at least for all those who are not such constitutional skeptics that they are prepared to question the authenticity of any alleged fact of history, like the man who wrote an erudite work proving that Napoleon Bonaparte never existed. In any event, to paraphrase Voltaire's famous aphorism, "If Mr. Tutt did not exist, it would be necessary to invent him."

ARTHUR TRAIN†

ROLLS OF THE GLOUCESTERSHIRE SESSIONS OF THE PEACE, 1361-98. Edited by Elizabeth Guernsey Kimball. Transactions of the Bristol and Gloucestershire Archaeological Society, Volume LXII (1940). Kendal: Titus Wilson and Son, 1942. Pp. 185. $3.00.

SOME SESSIONS OF THE PEACE IN CAMBRIDGESHIRE IN THE FOURTEENTH CENTURY, 1340, 1380-83. Edited by Mary Margaret Taylor. Cambridge Antiquarian Society, octavo publications, No. LV (1942). Cambridge: Bowes and Bowes, 1942. Pp. lxxii, 76. $3.00.

FROM a legal standpoint the most interesting of the four Gloucestershire rolls, edited by Miss Kimball, is the latest (1395-98). Not really a roll, this collection of material hastily compiled for a visit of the King's Bench to Gloucester illustrates procedure in the peace sessions in unusual detail. Especially interesting is the record of the protracted trials of various offenders against the statute of 1394 protecting salmon. We even learn how six buckets of little fish, caught by means of illegal weirs in the Severn, were brought into court and assigned to the poor and to prisoners in Gloucester castle. Analysis of offenses on these rolls reveals the usual types. About half the felonies were grand larcenies; and over half the trespasses, assaults. Although rape, when prosecuted by indictment, had been made a felony in 1285, it was occasionally presented as a trespass. Of eight Gloucestershire cases, seven were presented as felonies and one as a trespass. The rolls throw further light on the knotty problem of the fourteenth century attitude towards ac-

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cessories. An instance of an accessory to a trespass is here added to the one found by Miss Kimball in her recently published edition of the Warwickshire and Coventry peace rolls. These two instances controvert Professor Holdsworth's statement, based on the Year Books, that there could be no accessory to a trespass. Again Professor Holdsworth maintains that, during this period, the accessory at the fact was coming to be considered as a principal. In the three instances of aid of this kind on these rolls "the accomplice was presented as an accessory rather than as a principal, and treated as such by the king's bench." [1]

Miss Kimball has given us a fine edition of these rolls, preceded by an adequate and lucid commentary. Certain minor criticisms occur to the reviewer. In the interests of clarity, cross references for the same offense presented by two different hundred juries or for the results in the King's Bench of two indictments for the same man would have been desirable. Unfortunately the editor, so well provided with the names of most presenting jurors, did not search for pertinent data to bring out the position of the jurors in their respective communities, or note the interesting recurrence of the names of the same man or members of the same family over long periods of years. Miss Kimball cites evidence that the justices were collecting fines for trespasses, that in 1396 they took sureties of the peace, and that four justices in 1361 investigated an attempt to defraud the executors of a will. More detail on these points would have been welcome.

The later of the two Cambridgeshire rolls (1380-83), edited by Miss Taylor, is made up of only thirty-three undetermined indictments. Like the three earlier Gloucestershire rolls, it more nearly resembles the usual type of extant peace roll. Its chief interest lies in the indictments for crimes committed during the Great Revolt of 1381.

The earlier Cambridgeshire roll (1340) is one of three rolls extant for the early years of Edward III. The other two are a Somerset roll published by Professor Putnam in *Proceedings before the Justices of the Peace, Edward III to Richard II* (1938), and an unpublished Lancashire roll. In even greater detail than the latest Gloucestershire roll, this Cambridgeshire roll illustrates procedure in the peace sessions. Its special character may be attributed to the peculiar circumstances of its compilation and preservation, which Miss Taylor, in convincing fashion, connects with the constitutional crisis of 1341. The roll contains inter alia: suits, initiated by bill, by writ or by indictment, most of them past the presentment stage; writs to secure the appearance of jurors or of offenders; returns of the sheriff; determinations of both felonies and trespasses.

Mention can be made of only a few arresting details. Several suits begun by bill are described, though unfortunately with too little elaboration of the steps in the process. The instructions to one jury suggest the beginning of the process of indictment by a "grand jury" and trial by a "petit jury" [2] Three pleas of trespass begun in the King's Bench were removed into the peace sessions. Three cases afford evidence to modify the opinion that the justices of the peace could not award damages.

1. P. 45.
2. P. iv.

Miss Taylor has ably presented the text of both rolls. Her introduction to the rolls is less adequate. Though thoroughly familiar with the political and constitutional background and with Miss Putnam's studies, she often fails to bring out clearly the significant points about the Cambridgeshire rolls and to relate them to other published peace rolls. Many details such as those on the oath and payment of the justices—subjects on which the Cambridge material sheds no light—might profitably have been omitted. Her discussion of the commissions is confusing and gives no succinct list, with references to the Patent rolls. While one commission, that of 1338, is enrolled, useful references to published models of later commissions are frequently omitted. Possibly the justices assigned to hear and determine *felionas et prodiciones*[3] were acting under a special commission issued after the revolt. Miss Taylor gives a good account of the experiment in local "election" resulting in the commission of 1338, but does not note the significance of the documents on the peace roll excluding the justices from the bishop of Ely's liberty, though their commissions gave them jurisdiction *infra libertates*. She remarks[4] that "in common with the other two surviving rolls under the commissions of 1338," the distinction of the Cambridgeshire roll lies in the number of suits of the party brought by writ for common law offenses. This is certainly not true as regards the Somerset roll which contains only presentments by jurors. The reviewer has no knowledge of the unpublished Lancashire roll. Repeated returns of the sheriff that a *venire facias* came too late for execution hardly seem to constitute a trespass on the part of jurors.[5]

Even though they contain practically no "economic" cases, the rolls published in these volumes are of value not only to the legal historian but to the economic and social historian as well. After 1350 the part played by the justices of the peace in enforcing economic legislation became increasingly important, and the scarcity of economic cases can only be explained on the valid assumption that the justices determined such indictments in session. Excluding ten offenses against the statute on salmon, Miss Kimball found only four "economic" offenses on the Gloucestershire rolls. Yet these rolls give vivid economic and social details. We note, inter alia, pans, peacocks, pigs and pots under "prices of goods stolen" in the excellent index prepared by Mr. Roland Austin, F.S.A., editor of *Transactions*. A flourishing "racket" appears in the indictment of two men who canvassed the countryside, saying they were proctors of a monastery and collecting alms to the value of 100 shillings per year, which they kept. The rolls contain scattered references to the iron-mining, farming, sheep-raising and wool manufacture of Gloucestershire, forest, vale and hill, so well described in the introduction. The reviewer wonders at the statement[6] that, with some exceptions, the people on these rolls probably represent the rank and file of the middle-class population.

The references to economic and social matters on the Cambridgeshire rolls make up in quality for what they lack in quantity. Merchants are assaulted

3. Appendix iv.
4. P. lxx.
5. P. lxi.
6. P. 52.

going by water to the famous Barnwell fair. Of outstanding importance are the indictments of rebels in the peace sessions. Miss Taylor's introduction gives little conception of the economic and social background of medieval Cambridgeshire, and dismisses the Great Revolt in two or three sentences. When, for example, in the indictment of the notorious Wiliam Gore, Miss Taylor refers to subsequent proceedings in the King's Bench, the uninitiated reader, wondering if this is a new rebel come to light, is not informed that Réville and others had already used the King's Bench material or that Gore was one of four Cambridgeshire rebels excluded from the general amnesty. She publishes in Appendix III a noteworthy chancery document illustrating how a justice of the peace took sureties of the peace from the mayor of Cambridge and fifteen other men early in 1381, a few months before the revolt. She seems unaware that this document throws interesting light not only on the character of the mayor, who pleaded after the revolt that he was "forced" to lead an attack on the Priory of Barnwell, but also on the hostility towards the justices of the peace which was one cause of the revolt. Miss Taylor might well have amplified her modest conclusion that these rolls "illustrate many aspects of life in the middle ages."

ELIZABETH CHAPIN FURBER