Book Reviews

Reason and Nature. By Morris R. Cohen. New York: Harcourt, Brace & Co. 1931. pp. xxiv, 470. $5.

PROFESSOR COHEN'S book belongs to that very small class which is clearly destined to mark a revolution in our habits of thought. Its mere learning is overwhelming. A writer who shows profound acquaintance with mathematics, physics, biology, psychology, history, jurisprudence, economics, political science, seems to have realized the medieval ideal of specialism in omniscience. But even more impressive than the learning are the clarity of exposition, the skill in dialectic, the intense passion for truth, to which practically every page bears witness. This single volume places Professor Cohen at a single bound among the masters of American philosophy.

I am not competent to deal critically with any part of the book save that which is concerned with the social sciences; and, even here, Professor Cohen's remarkable learning leaves one with a sense of excessive audacity in venturing to expound, let alone criticize, what he has to say. In a sense, it is illegitimate to extract for discussion one section of a work which is emphatically a whole; for the essential nature of the book is to discuss, as a totality, the metaphysical assumptions of method in all the sciences. My excuse is the twofold one that I am incapable of dealing with the rest; and that the section on the social sciences is as good a sample as any other for revealing the character of Professor Cohen's enquiry. It displays also, with perhaps special brilliance, that peculiar combination of historical knowledge and logical insight which gives to the book its epoch-making character.

The section on the social sciences consists of five chapters, four of which are closely related to each other. The first (and the most important) deals with the resemblances and differences between the natural and the social sciences. The second attacks the notion that historic analysis can, *of itself*, give rise to values. The third, perhaps the least satisfactory essay in the volume is an attack on the theory that corporate personality is real, and, therefore, is a pungent criticism of the pluralistic theory of sovereignty. The fourth chapter (the most brilliant of all) is an analysis of the objections to a theory of natural law and a refusal, in terms of their considered refutation, to accept the view that a positive theory of law is, as such, more than formally adequate. The final chapter discusses the possibility of an ethical science, and explains with eloquence how long and arduous is the path to its attainment.

If I mistake not, the clue to the whole is to be found in a sentence on p. 437. "It is . . . illusory to suppose," Professor Cohen writes, "that a humanly desirable life can be lived without rules to regulate it, or without the recognition of invariant laws or relations on which these rules must be based." He is the enemy of antinomianism; and, hence, he rejects all attempts at the interpretation of social phenomena which rest upon a purely subjective appreciation of values. But he is the enemy, as well, of all ethical absolutism since he is decisively aware that any effort to make the criteria of social good *necessary* and *a priori* will inevitably seem to a later generation the canonization of indefensible error.

But, even with this clue, questions are raised in the reader's mind to which I do not feel I know the answers that Professor Cohen would give. What

are the "rules to regulate" to which he refers? What are the "invariant laws or relations"? Sometimes he seems to use those terms as though they mean principles of behaviour which have got themselves accepted as good over a long period of time; sometimes, again, they appear as the principles of formal logic. The things he insists upon as desirable in the final appendix to his book do not seem to me to help us with the essential question of whether good is to be defined in terms of men's desires (in which case, though the criterion is constant, the content may change) or whether it is to be defined as something rationally or intuitively defined as absolute and eternal. If I interpret Professor Cohen aright his sympathies would be with the first view since he seems, in one place, to regard the task of ethics as the construction of a system of principles whereby we may know the proper means to attain our ends. These ends are, at least in part, truth, contemplation, and security. We should then be entitled, as I understand the matter, to experiment with the means. Account could be taken of the elements of time and change. Each of these would be valid as a factor in judgment. We should be untrammelled by the fetters of the absolute.

But there is another view in the book, present in great vigour in the fourth and fifth chapters, which is far less comforting. On this view, it appears that there may be a number of ethical systems, each of which is valid in terms of its postulates; and what is right on one system may be wrong on another. Confronted by the prospect of this plurality, Professor Cohen recommends us, though without himself embarking upon the task, to construct a hierarchy of values. But he gives us no clue to the principle that would underlie the construction. He says only of such realistic ethics as those of Dewey that they fail in the task because they evade the necessity of defining the good. Yet Professor Cohen does not himself define it; and though he tells us things that he regards as desirable ends, he does not emphasize, what his first system seems to require, the means whereby we can attain them. Indeed, I am not sure that his insistence that where action begins, philosophy ends, is not to be taken as a refusal to consider the problem of a practical programme as worthy of the philosopher's attention. We are then driven back to an insistence that there are propositions in social philosophy which formal logic can establish as invariably true and that these only are worth consideration.

I emphasize all this in preamble because of its bearing upon the problems of legal philosophy. There we are presented with certain ways of conduct upon the goodness or badness of which we have to pronounce. Professor Cohen warns us to discover amongst those ways the invariants; but he seems to hesitate between the possibility that experience can discover them, and the alternative possibility that some ways are invariants on one set of principles, and others, invariants upon others. Because he evades giving us his own principles of value we are ultimately left without a clue to the ends legal philosophy must serve and the means it must take for those ends. We know that he would not have us accept the past as in itself compelling; that appears from his attack on history and on positivism in law. But we know also that there is a constant tendency in Professor Cohen to regard the demands of a given time, especially where these have the smack of novelty about them, as lacking in that invariance which would give them objectivity. How are we to choose? Is it enough to tell us that our methods must satisfy the demands of formal logic? Does anyone seriously deny that this is the case?

It is, of course, difficult to criticize Professor Cohen's approach since the values to which he draws attention as precious are stated in so highly abstract a way. I can only, therefore, lay down some general propositions which legal philosophy, as I think, must take into account. The law, I take it, is concerned with organizing the formal channels through which demands

made upon the state get themselves accepted. Those demands are never static in character; they differ in their content in place and time. Novelty always enters into their substance, because growing experience always adds freshness to the tradition. Professor Cohen will tell us that the right of any demand to receive satisfaction is a function of the justice it embodies. That justice will be related to an idea of the good. We ought not to satisfy demand just because it is demand, or because it is powerful, or knows how to get itself accepted. We ought to be certain that it has some continuity about it, that it does not represent a momentary whim destined almost immediately to pass away. But, granted all this, a legal philosophy which fails to emphasize the relation of justice to human desire seems to me to suffer from grave defects. It is, in fact, significant that law has mainly ceased to function because it has neglected demands persistently pressed upon those who make it for acceptance. A refusal to meet demands which men feel to be fundamental results in a search for new formal channels through which law may be able to afford them satisfaction.

That is to say that only a functional theory of law offers prospects of adequacy. And it is precisely upon this functional side that Professor Cohen's theory seems to me to be lacking. For that theory tells us nothing concrete about ends, and, largely, it is silent about means. We know from it only that both means and ends must be capable of rational justification. That is to say that we must know the source and the consequences of the ends we promote, the goodness or badness of the means we use to realize them. Granted that this is undeniably the case, does it constitute all that Professor Cohen can contribute to a philosophy of law? Must we not have his progamme of specific values, and his way of attaining them, if legal philosophy is to be more than that "perpetual motion without any definite direction" which he himself so specifically deprecates? Is there not something a little excessively godlike in his emphasis upon detached contemplation in the face of that 'daily crucifixion' of humanity to which he draws our attention? And does not that detachment in experience lead to an acceptance, in minds less sensitive than Professor Cohen's, of the *status quo* on the ground that immediate desire, however urgent, is weak and dubious at best when set over against those wonted ways of social habit to which the past traditions of the law have accustomed us? What precisely, in a word, does Professor Cohen offer to a philosophy of law save the caution that in attempting experiment we must beware lest we neglect the wisdom of our ancestors? And, if that is so, how is their wisdom to be tested, especially when, as now, the strain under which it labours is evident, save by continuous experiment in fields where the conditions call for novelty?

These general considerations lead me to say a word about the third chapter in Professor Cohen's book in which certain views of my own are subjected to rigorous analysis. Upon his account of corporate personality I would only make the comment that I think Professor Cohen has greatly exaggerated the differences which exist between his view of the matter and that of my own masters, Gierke and Maitland. The essence of the matter is that men united by a common purpose are different because of their union and that there is always social loss in assuming that the purpose depends upon the state for its recognition. So long as groups were treated in the courts as what Professor Cohen calls "communal ghosts" they could not be made effectively responsible for the acts committed in their name. Once it became admitted that the unity created by a common purpose must be treated as different from the individuals of whom it was composed they could be treated in the fashion demanded by the facts. No one argues that a corporation exists apart from its members. What is insisted, to use the analogy of Professor Cohen, is that the unity which associates them may be

fitly called personality, just as the mathematician calls sums numbers and obtains valuable results from the process.

From his attack on the personality of groups Professor Cohen passes to an attack on pluralism. "The Community," he writes (p. 397), "cannot irrevocably part with its power to revise such grants" as autonomy or home rule to cities, trade unions, and similar bodies. But that is not, at least as I have conceived it, the issue with which pluralism is concerned. The problem is the duty of an individual who is, let us say, a member of a church and a state when the two come into conflict. The law makes the state sovereign, and the individual is bound to obedience to its orders. Pluralism is concerned to deny (1) that the identification, which Professor Cohen assumes, between state and community is justified; they are, in fact, quite different things; (2) that the priority of a state-command over the command of any other body is necessarily acceptable. It insists that the individual's duty is to make up his own mind in the conflict and act, in the light of all the circumstances, as he deems best warranted; (3) that there is any such thing as sovereignty at all in the absolute sense in which Professor Cohen uses the term. I wholly agree with him that, in most instances, the best interests of the community are served by obedience to the state. But I reject the thesis, explicit in Hegel and Bosanquet, that because it embodies the best will we can know, its title to obedience is invariable. I have nowhere proposed, so far as I know, the bestowal of absolute sovereignty on churches and trade unions to counterbalance the absolute sovereignty of the state. What I have pointed out is the very different thing that the state-context is only one among many relations in society, and that its power is a function of its ability to satisfy its constituents. I have pointed out, just as Professor Cohen has done, that it arose from a combination of historical circumstances to be sovereign; but I have added, what I do not know if he would add, that the needs once supplied by its sovereignty are definitely irrelevant to the problems of our time.[1]

I do not, however, desire to end upon a note of dissent from Professor Cohen. Like most of those who, to my knowledge, have read his book, I owe it a debt greater than I can hope to repay. It is not merely his massive scholarship, nor his impressive dialectical power which makes one humble in the presence of his achievement. Even more it is the sense of contact with a mind deliberately able to make the difficult sacrifices involved in seeing things *sub specie aeternitatis*. The days I have spent with his book have been a spiritual experience that adds deepness and insight to the troubled vision of one who seeks to understand a difficult and complex world. If I regret a little that he is not a leader in the army under whose banner I fight, that is only because I realize what aid his great powers would have brought to its cause.

The London School of Economics and Political Science.

HAROLD J. LASKI.

*Cases on Personal Property.** By Harry A. Bigelow. Second edition. St. Paul: West Publishing Co. 1931. pp. xiii, 465. $5.

IN idea, plan and purpose this second edition differs very little from the first edition published in 1917. The number of pages has increased from 404 to 465. About 55 new cases were added; some 22 cases appearing in

[1] *Cf.* my GRAMMAR OF POLITICS (5th ed., 1925), pp. 44-65, and my INTRODUCTION TO POLITICS (1931) cc. i, iv.

* A different point of view in regard to this book was expressed in a note by Professor Madden, (1931) 41 YALE L. J 159.

the first edition were omitted from the second; and a number of the remaining cases were rearranged under new chapter and section headings. The editor states that a "definite effort has been made to give the beginning law student as close a contact with reality as possible. Hence the marked predilection for cases dealing with present day problems of automobiles, safety deposit vaults, illicit liquor selling, and the like." [1] One wonders what would have been the result if this "definite effort" had not been made. For, of the roughly 210 cases reprinted in the second edition, 10% antedate 1800; 30% antedate 1850; 72% antedate 1900 and only 28% were decided in this century. Of the new cases added in the second edition only some 55% were decided since 1917, the year in which the first edition was published; 25% were decided before 1900, and 45% were available for inclusion in the first edition.

The volume opens, as did the first edition, with a chapter entitled "Distinction Between Real and Personal Property," consisting of an extract from *Williams on Personal Property* which states that real property was subject to feudal tenure while chattels were not, that fee simple estates descended to the heir while chattels descended to the executor or administrator, that real property was recovered by real actions while the remedy for the deprivation of chattels lay in personal actions and that ultimately the "term real estate was appropriated to realty, which passed to the heir," so that "in modern terms what is called personal property or estate comprises all chattels, which go to the executor, be they chattels real, that is, chattel interests in land, or chattels personal, namely, movable goods."

With this lucid introduction to the subject matter of the course, the student is taken directly to Chapter II, Possession,[2] which is divided into three sections: Physical Control, Intent, and Rights of Action Based on Possession. The significance of possession and the variety of the situations in which it may become important are apparently irrelevant. Possession is to be studied for possession's sake and its meaning is to be derived from the courts' discussions of its "elements" in the following cases (listed in the order in which they appear in the book): trespass by one hunter against another who shot and carried away a fox which the first was pursuing (1805); trespass by one fisherman who was preparing to close a large net which he had drawn around some fish against another fisherman who drew up to the opening and caught some of the fish (1844); a prosecution for larceny against a person who took fish from enclosed nets in Lake Erie (1902); trespass by one person who discovered and marked a bee-tree against another who felled the tree and removed the bees (1823); a bill in equity by one who had made certain preparations for the salvage of a cargo sunk in the Mississippi River against another who beat him to it (1861); a controversy between boys who found an old stocking with which they were all playing when it burst open and disclosed that its "stuffing" consisted of money (1896); a controversy between two persons with respect to a sum of money found by one of them in a crack in an old safe which was delivered to him by the other for sale with permission to use till sold (1877); a case in which it is stated the question was whether a sheriff's levy upon a locked safe operated as a levy on its contents from the date on which the sheriff seized the safe or from the date when he succeeded in opening it (1885) (the editor has carefully excised the state-

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1 Preface, p. v.

2 Although this is a new chapter in the second edition, it is composed substantially of cases reported in the first edition in § 1 (Mere Taking of Possession) of Chapter IV (Acquisition of Ownership) and in Chapter II (Rights of Action Based on Possession).

ment of the facts and the portions of the opinion which might disclose the confusing and irrelevant information as to what the contents of the safe were and who the interested parties were);[3] a suit against the owner of a parking space near a baseball field for the loss by theft of an automobile parked there for a fee (1924); an anonymous case in 1353 in which we are told a clerk was adjudged a felon because he attempted to steal a coverlet and two sheets from his host; another anonymous case in 1587 with some talk as to whether trespass lies when a servant steals from his master's shop and when he converts property which his master delivered to him "to deliver over"; a state prosecution against a bartender for unlawful possession and sale of intoxicating liquor (1928); a state prosecution for unlawful possession of liquor against a person who accepted a bottle from another only for the purpose of taking a drink (1922); trespass by one from whose beehives a swarm of bees escaped and went into a tree on a third party's land against another who later took the bees and their honey (1836).

The third chapter titled Bailment, is developed along similar lines. It is divided into four sections: Elements of a Bailment, Bailment Distinguished from Other Transactions, Nature of a Bailee's Responsibility, and Rights of Action Based Upon a Bailment.[4] Quite obviously the logical first step in studying bailment is to discover exactly what it is and how it can be differentiated from other abstractions. It would, of course, be irrational to ask first: Why bailment? What function bailment? What is the concrete controversy with which the litigants are concerned? Or what are the objectives toward which the transactions in question were directed? Such questions would be patently confusing. They might lead the unaware to think that the controversy or the objective is the important thing and shapes the concept, whereas the initiate know that we start with the concept and that once we find the bailment in the case, the road to judgment becomes smooth and straight. And so the "elements" of a bailment are set forth in extracts from the opinions in the following four cases which comprise section 1: a suit by a patron of a dance hall for loss of a fur piece which she had concealed in her coat and checked in the check room; a suit by a person who had hired a bathhouse near a swimming pool for a month, for loss of jewelry which she had checked with the proprietor on a Sunday, one ground of defense being that a contract made on Sunday was void; a suit against a woman whose husband drove her automobile negligently and injured the plaintiff; a case in which an unknown thief, representing himself to be from the defendant's department store ordered some goods from the plaintiff to be delivered to the defendant and, after the delivery, secured them from the defendant by representing himself to be the plaintiff's agent and showing an order purporting to be from the plaintiff and requesting return of the goods to the bearer with the explanation that the goods were intended for someone else and had been delivered to the defendant by mistake.[5] The second section then sets forth eleven

[3] This is not a unique instance. Considerable portions are omitted from almost every opinion reported. On almost every page there are stars or a footnote, or both, indicating the omissions. And too frequently the statement of facts is omitted entirely and so little of the opinion is reprinted as to make an understanding of the actual controversy, let alone the legal discussion, almost impossible.

[4] The fourth section is composed substantially of the cases in Chapter II of the first edition; but the remaining sections are new, although two or three of the cases in the second section (Bailment Distinguished) appear in the section on Confusion in Chapter IV of the first edition.

[5] In a footnote to this case (p. 33) the editor details the facts in Cowen

heterogeneous cases in which the courts said that the transactions involved were not bailments but were something else or vice versa; so that the student can see for himself that the primary object of inquiry is the determination of whether or not there has been a bailment, and that he must learn to recognize a bailment in any line-up. The six miscellaneous cases in the third section clearly show that there are several different kinds of bailments; and that there may be some differences in the measure of responsibility attached to each. In the fourth section are collected diverse cases which determined either whether trespass or case was the proper form of action under certain circumstances or whether the bailor or bailee had good causes of action in the several situations.

The chapters on Liens and Pledges are of a kind with the preceding chapters. Factual problems are not followed up. The cases involve all kinds of different set-ups; and just when his curiosity is aroused by a case of a certain type, the reader turns to the next case only to find that it deals with a different situation and different interests. The only element of relation between some of the cases in any chapter or section is the reference to the concept around which the chapter is organized,—the courts' discussion of the concept in support of the decision or in refutation of an argument advanced by counsel. And only those portions of the opinions are reprinted which deal with that concept. The portions which discuss other problems, other grounds for decision or other contentions of counsel are omitted. And the same approach is evident in the remaining three chapters: Acquisition of Ownership, Fixtures, and Emblements. Greater unity of subject matter makes the latter two more satisfying; but the first is a conglomeration of diverse bits of doctrine, some of which is studied more intensively and appropriately in other courses and the rest of which does not merit independent class-room attention.

There is, indeed, an excellent opportunity for a source book and a course on the history and position of property in the law; the different forms and functions of property in the periods before and after our industrial development; the creation of "property" by court decisions; the use of the term "property" as a means of providing or denying judicial protection. Or, an interesting and valuable course can be given on the study of judicial decisions in general and on the nature of legal concepts, like possession, title and bailment,—their potentialities and their limitations as channels for thought or as premises for reasoning and argument. But the volume under review is not designed to meet either of these objects;[6] chronological or genetic presentation is not even attempted. The purpose of the volume seems to be to teach the student in a logical and analytical manner some rules and doctrines which constitute "the" law. And in this it must fail. For, it deals with an impossible variety of human activity, some of it presently important, much of it trivial or of another age; and, in large part, it deals only with fragmentary portions of the problems raised by that activity. It seems to be devoted to a statement of the common law uncontaminated by statute.

v. Pressprich, 117 Misc. 663, 192 N. Y. Supp. 242 (1922) with the statement "Held, B was liable as involuntary bailee." No mention is made of notes on that case in 22 COL. L. REV. 354 and 35 HARV. L. REV. 873 or of the fact that the judgment was reversed by the Appellate Division and the complaint dismissed upon the dissenting opinion of Lehman, J. below. 202 App. Div. 796, 194 N. Y. Supp. 926 (1st dep't 1922).

[6] If the books were designed to meet either of the objects mentioned how much more interesting and instructive the chapters on Possession and Bailment in HOLMES' THE COMMON LAW, or the discussion in POLLOCK AND MAITLAND'S HISTORY OF ENGLISH LAW would be than the opinions comprising the chapters on these subjects in the casebook!

The footnotes are not very helpful and there is a sad lack of reference to periodical literature. It can be successful, therefore, only in imparting to students large notions and half-truths which they can learn more effectively and less painfully from forty pages of black letter text and of which they will have to disabuse themselves at the first opportunity. The property courses await revision and modern casebooks.

New Haven, Connecticut. HARRY SHULMAN.

American Interpretations of Natural Law. By Benjamin F. Wright. Cambridge: Harvard University Press. 1931. pp. x, 360. $3.50.

THIS book is the expansion of a doctoral dissertation and, like other works of this type, it shows greater regard for fullness of documentation than for the illumination of fundamental ideas. Following the work of Merriam, Gettell, and Haines, Professor Wright has read and abstracted many pamphlets, printed speeches, and some treatises in which the concept of natural law is explicitly or implicitly used. The result is a useful compilation of sources, important and unimportant, as to the colonial, revolutionary and pre-civil-war periods, with fewer but clearer references to later writers. Professor Wright does not seem to have any first hand familiarity with our juristic literature and modestly admits that "the portion of Chapter IX which deals with judicial opinions is essentially a shorter and more superficial survey of material dealt with by Prof. Haines in his Revival of Natural Law Concepts." It is, therefore, not surprising that he fails to get the point of *Gitlow v. New York* (pp. 304-305). However, he does show that James Wilson, Chase, Marshall, Story, Kent, Cooley and Miller were all of the opinion that courts have the right to set aside legislative enactments as against natural law even where there is no violation of any specific provision of the Constitution; and if this is no longer so often asserted, it is because the same result is now achieved by stretching the fifth and fourteenth amendments to the Constitution and the requirement of "due process."

The last chapter gives a brief summary of the history of the American use of the concept of natural law in its various meanings and concludes with an attempt to indicate its permanent significance. The distinction between natural law as a description of an *existing* order and as a prescription of what *ought to be* is well drawn and the confusion resulting from trying to derive one from the other is aptly pointed out. But the difficulties of making law conform to justice do not justify the conclusion that it is an "attempt to solve the insolvable." (p. 345).

Professor Wright disarms criticism of his book by his modest disclaimer of any "careful estimate of the relative position of the concept of natural law in the entire body of American political thought." That, he thinks, is one of "the things which can be done only after many additional studies in this field have been made." (p. ix). That may be so. But the requisite additional studies need not be directed solely to the further unearthing of deservedly forgotten writers. Not all who wrote long ago are important any more than all who write today. Many who have written have had little, if any, influence, and it is not necessary to follow every straw to see the direction of a current. It is, however, important to trace the actual history of the great current of thought on natural law. Those who do so will find that Puritan thought in America was not autonomous, but rather an offshoot of Puritan thought in England, which was Calvinistic in origin. Pro-

fessor Wright would have done well if he had distinguished between the Protestant and the Catholic doctrines of natural law. Catholic writers have used the concept of natural law to defend the right of members of the Church to disobey certain enactments of temporal sovereigns (which explains the position of Father Ryan in the note on p. 276), while Protestant thinkers like Grotius and Hobbes, tried to liberate the State (which claimed dominion over the national church) from the rule of the Roman Pontiff. With the rapid expansion of modern commerce and industry the 18th century doctrines of natural law began to emphasize the rights of the individual man, and especially of the business man, against the rulers of the state. And it was this view that vitalized the thought of the French, as well as of the American Revolution. Ultimately, then, the essence of all doctrines of natural rights is the view that any established or proposed social order or institution must defend itself before the bar of human welfare. In this sense the doctrine has not only a great past but is significant for today and for tomorrow.

College of City of New York. MORRIS R. COHEN.

Future Estates in New York. By William F. Walsh. New York: Baker, Voorhis & Company. 1931. pp. ix, 274.

THIS work can be properly appraised only if the reader keeps in mind the writer's aim in preparing it. In the preface he tells us that for nearly thirty years he has been constantly telling his classes in the New York University Law School that "the state of the law on perpetuities in New York is a disgrace to the bar of the state and its bar associations." He also tells us that "This little book is the result of the author's desire to get some action on this matter by making definite suggestions as a basis of discussion." With this warning we should not be surprised to find that in his text his pent-up indignation occasionally breaks out in forms of expression that are as rare in legal treatises as they are refreshing to the reader who sympathizes with the author's resentment. Thus the author, commenting upon the decision in *Benedict v. Salmon*[1] that a gift over in equal shares to the children of the testator's eight daughters who might be living at the death of the survivor of his eight daughters was void for remoteness, was so greatly annoyed by the thought that the gift would have been quite good if only the testator had had but two daughters, remarked, "If a man is so imprudent as to have more than two children, he must be exceedingly careful in selecting the lawyer who draws his will." (p. 156).

Aside from the warning found in the preface that the book is designed to promote a sweeping reform in the law of perpetuities in New York, the meager extent of the volume, less than one-fifth as large as the second edition of Kales' great work on Future Interests in Illinois, and only one-third as large as the third edition of Gray's masterly treatise on perpetuities, gives notice of its limited objective. It would be highly unreasonable to expect to find in such a little book an exhaustive treatment of so vast a subject as future interests in New York, or that all of the innumerable problems that have arisen should be discussed, or even stated. We do note omissions; and if one is of a mind to seek for inaccuracies of statement, he can occasionally find them.[2] One can even wonder why so many misprints

[1] 177 App. Div. 385, 163 N. Y. Supp. 846 (1907).

[2] For example. on p. 50, the so-called doctrine of Edwards v. Hammond, 3 Lev. 132 (1683) is inaccurately stated.

were allowed to disfigure an otherwise handsome volume.[3]

But disregarding such petty defects, and taking the work within the scope of its declared purpose "to give in simple and concise form the present situation of the law of future estates in New York," it is quickly seen to be excellently well done and of great value. The treatment is summary, but by no means superficial.

The author introduces his treatise by a brief but excellent account of the development of the common law rules governing future interests in England and in New York up to 1830, when the code intended to simplify and improve the common law was adopted. This preliminary picture of the common law of future estates, done with swift, bold strokes, commands one's admiration. Possibly some of the strokes may be a bit too bold, but the whole effect is one of clarity and vigor. With such a back drop he brings upon the stage the revisers with their famous code, intended to reduce the tangled scheme of the common law to such simplicity, such compelling order, that it could be easily understood by a child or a business man, without the need of a lawyer. But alas for the vanity of human hopes, the uncertainty of human plans! While the author is willing to admit that "the revisers did a thoroughly good job in simplifying and rationalizing the law of future estates" (p. 77), apart from their treatment of the rule against perpetuities, yet in regard to that, he finds it difficult to keep his language within the limits of professorial restraint. "It is a disgrace to the bar of New York," he says, "that this irrational mixture of arbitrary rules which make up the scheme of the Revised Statutes substituted for the common law rule, should have been allowed to continue without substantial change for just over a hundred years." (p. 78).

One may entertain some doubt as to whether this form of statement is best calculated to induce the bar to adopt the extensive changes the author proposes, but at least it must be admitted that he makes good his indictment in the pages that follow. It is true that in making this attack on the code provisions the author could follow some mighty warriors. Professor Gray had shown[4] that while only one case involving a perpetuity had been reported in New York prior to 1830, yet after the adoption of the Revised Statutes in that year down to 1894, 336 such cases were reported. Writing in 1927, Professor Whiteside[5] stated that during the preceding two years and seven months over 50 cases involving some phases of the perpetuity statutes had appeared in the New York Supplement reports. But nowhere else is to be found such a clear, vigorous and complete account of the New York system of perpetuity control and its operation as Professor Walsh has given us in this book. It certainly deserves the strong words of condemnation he pronounces upon it.

Professor Walsh proposes very definite changes in the statutory law of future interests, particularly in that part relating to the suspension of the power of alienation. Some of the sections he would repeal entirely and others he would radically amend. Especially he would change § 42 of the New York Real Property Law so as to make remoteness of vesting rather than suspension of the power of alienation the basis for avoiding undesirable restraints upon alienation by the creation of future estates, and to substitute for the existing arbitrary and vexatious provision fixing the period of not more than two lives as the measure of remoteness, the familiar rule of the common law that allows future estates that must vest within twenty-one years after lives in being at the time of the creation of the interest in ques-

[3] *E.g.*, *dicta* for *dictum* (p. 34); *visa verse* for *vice versa* (p. 247).

[4] GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) § 749.

[5] Whiteside, *Suspension of the Power of Alienation in New York* (1927) 13 CORN. L. Q. 197.

tion. He would also change §§ 96 and 103 so as to abolish the curious compulsory indestructible spendthrift trusts created by those sections and authorize spendthrift trusts of the type judicially developed in most of the other states. It is interesting to note that these and other changes proposed are for the most part intended to restore the common law system still loved after a century of banishment. For such a course there is the precedent set by Connecticut, which in 1895 abandoned a much less vexatious statutory provision for perpetuities to return to the common law rule.

This reviewer returns especial thanks for the terse and readable style in which the book is written. Even the author's forthright expressions of opinion (for example, "this utterly false perverted notion" [p. 55]), while probably unwise, afford the reader a welcome relief from the cautiously qualified observations, sicklied o'er with a pale cast of relativity, which are usually to be found in legal literature.

Yale University. W. R. VANCE.

Legal Psychology. By Harold Ernest Burtt. New York: Prentice-Hall, Inc. 1931. pp. xiv, 467. $4.50.

THIS volume is the outgrowth of the author's studies under the late Professor Hugo Münsterberg and of experience in lecturing on this subject before classes in the Ohio State University. Professor Burtt has written in a clear and objective spirit what it seems to him the intelligent lawyer ought to know about the rapidly growing science of psychology. There is no suggestion that such knowledge will revolutionize the conduct of our courts or that it will put an end to crime or to litigation. Instead there is a calm consideration of the principal points in our modern knowledge of mental processes and of our modern methods of diagnosing mental conditions and situations. Where the psychologist himself is on unsteady ground, as he is in the use of the so-called lie-detectors, Professor Burtt is becomingly cautious in his statements. He does not, however, take the easy step of leaving out the less certain psychological problems, and this is well when we consider the tendency of "expert" witnesses to cloud the air of court proceedings with all of the theoretical issues and unvalidated formulas of which they have ever heard.

The book is built mainly around the basic chapters of psychology rather than around the problems of the courts, though there are frequent legal citations and the legal problems are constantly brought forward. Perception, attention, memory, and suggestion are discussed with special reference to errors of testimony. There are chapters on the detection of guilt by the word-association and the blood-pressure methods. Psychological facts of delinquency, criminality, and the mentally disordered are well and soundly set forth. Such facts should help to remove the almost mystical haze which so frequently accompanies description of criminal types. And finally there is a brief treatment of trade mark infringement and the psychologist's experimental procedures for the measurement of the amount of confusion in doubtful cases.

The general position of Professor Burtt in regard to the relations between psychology and the law can best be summarized in his own words: " . . . the law, in the interest of justice, must perforce remain comparatively stable. It can disregard precedents only when scientific principles which run counter thereto become fully accepted by the scientists. But changes are coming gradually and some psychological principles are becoming recognized in this way. When dealing with the 'regulation of social

relations,' psychological facts are inescapable. The legal profession has followed many of these by the use of a common-sense psychology. The present work is an effort to give a scientific interpretation of these facts and to point out others that may be utilized as time goes on. The psychologist is glad to participate in any coöperative contribution to social problems. It is hoped that some of the points to which we have called attention in this book will be of value to those who are interested in furthering justice or in improving society."

This is a respectable, conservative, and useful attitude and the book which it has motivated will probably be welcomed by the average lawyer and student of law. It is full of the spirit which keeps bricklayers laying bricks and plumbers plumbing without any uninvited interference in each other's business. It is an attitude wherein the professors of psychology are not likely to ask embarrassing questions such as: Why does the law take a natural science view toward the gibbering psychotic and one of scholastic theology toward the paranoid victim of bad luck? It is an attitude which stays clear of such delicate questions as why judges persist in giving explanations of their own thought-processes which they ought to know are psychologically irrevelant. But Professor Burtt is right. He could not have done the good job he has done in selling the wares of the psychological union if he had mixed into his self-effacing sales talk the logical consequences of a collision between the law as an institution and psychology as a devastatingly realistic outlook upon the whole of human nature.

Yale University. EDWARD S. ROBINSON.

Convicting The Innocent. By Edwin M. Borchard. New Haven: Yale University Press. 1932. pp. xxix, 421. $3.75.

THE state's obligation to indemnify innocent victims of the errors of criminal justice might, as Bentham thought, be so obvious that any attempt to demonstrate it could only obscure it—provided that the circumstances of such errors were generally known and, still more important, generally contemplated. But relatively few have intimate contact with the processes of criminal law enforcement, and those few are rarely the most articulate concerning its problems. One might even hazard the observation that criminal laws are administered largely to suit the respectable citizen who does not contemplate ever being himself thrown into the process. To create an awareness on his part of these errors, as of other conditions of law enforcement, is accordingly as important as it is difficult. Professor Borchard's book is a noteworthy effort in this direction.

Appropriately dedicated to John H. Wigmore and Felix Frankfurter, the book is largely devoted to a lucid account of sixty-five cases of mistaken convictions, largely recent, and selected from a much greater number of known miscarriages of justice. About half these convictions were for murder, and the rest for lesser felonies. In all, the innocence of the person convicted was later conclusively established, but often after considerable time spent in the penitentiary with attendant misfortunes. In several, the accused came within a hair's breadth of execution. Often the family solvency had been wrecked by the expenses of defense, the victim "thrown out of step" by the injustice of his conviction and ensuing confinement. Under the circumstances the "Sorry, old man!" of a pardon or new trial and nol-pros, resembles adding insult to injury.

So related as to indicate how the errors occurred and how they were later discovered and unravelled, these cases fall readily into representative

groups, each with its recurring pattern of causes of error. In about half the cases mistaken identifications play a leading role. In others the error is largely attributable to mistaken inferences from circumstantial evidence, to perjury, to over-zealous prosecution and combinations of these. In a period when crowded dockets and obstacles to "efficient" prosecution, real and fancied, fill thought on the subject with imagery of cases in the mass, studies of particular instances of "frameup" such as these have a peculiar value. Impressions produced by mortality tables statistically constructed from thousands of cases must be leavened by a corrective sense of the importance of the particular case. To this end such a collection as the present is timely and apt. The cases are fraught with suggestions as to possible procedural improvements, to the discussion of which an introductory chapter is devoted. Here crop up the vagaries of the privilege against self-incrimination, the frequent untrustworthiness of eye-witness and expert testimony, the advantages of less restricted appellate review, the overly prejudicial effect permitted past records, the third degree and other forms of irresponsibility on the part of the prosecution.

An occasional miscarriage of justice is no doubt part of the inevitable price of law administration; but all the more reason, then, for spreading the burden of this item like that of the others. State indemnity to the luckless victim amounts to no more than that. As Professor Borchard demonstrates in a painstaking survey of the history of such indemnity, the United States is decidedly behind the times in this particular instance. California, North Dakota, and Wisconsin provide such relief by general statute, but "the statutes, probably by reason of their apparent novelty, have been narrowly construed and but little has been accomplished by them." With the same thoroughness displayed in his writings on the Declaratory Judgment, the author reviews legislation and theory with respect to state indemnity in a considerable number of countries. There follows an analysis of the relief granted under the various statutes, and the book concludes with a draft bill designed for the federal jurisdiction. *Convicting The Innocent* is thus a work admirably designed to further the cause of state indemnity. The cases speak for themselves and, incidentally, afford fascinating reading.

Yale University. GEORGE H. DESSION.

Cases on The Law of Damages. By Ralph Stanley Bauer. Second edition. Chicago: Callaghan & Co. 1932. pp. xxi, 747. $5.50.

PROFESSOR BAUER'S new edition, may be said to represent a considerable advance over its predecessor, at least, as far as scope and treatment are concerned. Several chapters, notably those on Interest and on Pleading and Practice, have been considerably expanded and improved. The material on Causation has been cut down; out of fifty-seven cases on the subject printed in the first edition, only twelve remain, supplemented by five new cases. The new edition gives us thirteen additional cases on Avoidable Consequences, though the editor continues to neglect the more complex phases of that subject. Chapters are now included on the measure of recovery in cases involving patents, copyrights, the anti-trust acts, and workmen's compensation.

However, the viewpoint of the compiler has not changed. Professor Bauer's chief interest still seems to lie in analysis; in particularization; in the isolation of numerous definite rules applying to narrowly bounded factual situations. The fact that the new edition contains forty-five chapters, and that a single chapter may be divided into as many as a half-dozen sections, indicates the extent to which this aim has been realized. It is the

classic approach; the orthodox treatment of the subject. The results achieved no doubt possess considerable value, but one may wonder whether an even more desirable end might not be reached through a modification of the method. Does not the accepted approach place a considerable premium on the choice of "standard cases," with a tabloid statement of facts, and a few paragraphs of over-facile judicial reasoning? Is not too much emphasis placed on a ready-made analysis, often artificial? Perhaps these dangers are never to be avoided; even a recital of "stark facts" must of course depend on the operation of a definitely biased process of analysis and selection. Some compromise, however, seems possible. Prominence could be given to cases in which the court attempts exhaustively to examine the factual situation before it, and shows itself unwilling to be limited to criteria of a purely legalistic nature. Moreover, wherever feasible, excerpts from the pleading and briefs might complement the decisions. For example, the case of *United States v. Burton Coal Co.*,[1] when studied with the decision of the lower court,[2] and the briefs on appeal, is of more value to the student as an instance of the practical operation of the law of damages than a dozen "standard" cases.

Certain minor changes in Professor Bauer's introductory essay, on the nature of the right to damages, are rather interesting. Dean Green's book on Proximate Cause—published after the appearance of the first edition of this case-book—has evidently had its effect. Further, one may note certain variations in phraseology. In the 1923 edition, Professor Bauer spoke of "general principles," which "govern." In 1932, he speaks of "supposed general principles" which "seem" to the "perfunctory observer" to apply. Is Professor Bauer drawing a distinction between a "general principle" and a "non-general principle" (a "rule?"), with the inference that only the latter is of any validity? The whole philosophy of his case-book would seem so to indicate. Or is he saying that principles and rules yield alike to the influence of some more potent deciding force? Perhaps the next edition will inform us.

It is of course extremely difficult to prepare a collection of cases on damages without including a good many which might or ought to be classed as decisions on the existence of a cause of action, rather than on the measure of recovery. A large portion of the cases which are argued and decided on the basis of the law of damages might more sensibly have been considered on some other footing. In this situation, the compiler must decide whether he will be the only man in the army out of step. Mr. Bauer has elected to include a number of cases connected but slightly with the law of damages. Justification is presumably to be found in a statement in his introductory essay to the effect that "there is no distinct and separate law of damages . . . (It) is one of those legal subjects least capable of attaining any degree of isolation." Granting the reasonableness of this point of view, one may yet question the amount of space given to such a subject as Emotional Disturbance, when certain other fields—for example, the measure of recovery in quasi-contract—remain comparatively neglected. But such criticisms do not greatly affect the fact that Professor Bauer has furnished materials for a course of study of considerable interest and value.

New Haven, Connecticut. GEORGE T. WASHINGTON.

[1] 273 U. S. 337, 47 Sup. Ct. 351 (1927).
[2] 60 Ct. Claims 294 (1925).