

Book Reviews

The Social and Economic Views of Mr. Justice Brandeis. Collected, with Introductory Notes, by Alfred Lief. With a Foreward by Charles A. Beard. New York, The Vanguard Press, 1930. pp. xxi, 419. \$4.50.

WHEN one writes a book and also the title to it, a reviewer should, I think, take it or leave it, title and all, as he finds it. But when the book consists of the selected opinions of a great jurist, introduced and bound together by a titular ligature chosen by the collector to foreshow its contents, surely a reviewer may, and if he is a lawyer, I think he must, *in limine*, raise and dispose of the question of variance between title and contents. Especially is this so when, as here, the opinions represent the juridical thinking of a strong and vigorous personality, whose ardor in championing, and skill and success in advocating causes before, and whose virile thinking and trenchant style since he came to the Bench have in some quarters made not only his writings but himself, a controversial subject.

The title chosen, I think, both in what it says and in what it does not say, fails to make for the reader the essential distinction between the judge *qua* person, and the judge, *qua* judge, and in effect promises him that he will find in the book not the juridical, but the personal and economic views of the writer. Is this an accurate characterization of its contents? I do not think so.

In a juridical sense every legal opinion represents and always has represented the social and economic views of its writer, whether lawyer or judge, because long before there was a science of sociology or political economy law was, and it concerned itself then as it does now and always will, with the social and economic relations of mankind. But by the same token this same law, this science of action, concerned as it has been and is with life as it has moved along, and with the social facts of life at the point of controversy and conflict, has long since developed a methodology and technique of approach to and treatment of economic and social facts and relations, distinctive of and peculiar to itself, to which its servant, the lawyer and the judge, must of inexorable necessity, because he may not wrest judgment, conform. True it is, as it always has been and always will be, that the great lawyer, the great judge, is the product of his life and thinking, and that to great judging imagination, intuition, courage, high ideals, a feeling of and for justice, are quite as essential as the "being long accustomed to and acquainted with the judicial decisions of their predecessors" of Blackstone, and that "when formal rules have failed the judge he must trust to his own skill in finding the proper decision, which when found, he is not permitted to refuse."

But however true it is that "the settled and normal part to be played by the judge in the development of the law consists in a personal mental activity" and that "whenever it is the duty of the judge to discover what the law is in fields in which it has not been formulated, the considerations that must guide him in accordance with the end to be obtained are exactly the same as those which would influence the legislator, for the one, as well as the other, aims at promoting by appropriate rule, the ends of judicial and social utility", still it remains inescapably true that the

nature of his function greatly circumscribes the freedom of action of the judge. For in no case is it permitted to him to declare as law any social or economic views he may hold, unless those views juridically arrived at, square with and conform to the law as he actually believes it to be. And more—while the judge may in his struggle to find the law in such cases almost invent a new category, he can never quite do that, for since the growth by the judicial process of the law is interstitial, the judge will feel uncomfortable if the category he chooses cannot be made to find contact and placement in the midst of prior related categories.

If these views be sound, and what informed one can gainsay them, it goes without saying that this book, consisting of the opinions of a great judge, the arguments of a no less great lawyer, contains not the personal, but the juridical thinking of the writer, and the social and economic views presented in it are those views which his juridical thinking has revealed to him as law.

It must not be taken, however, that I believe or profess that the contents of this book will be found colorless and without flavor; or that the opinions, the result of juridical thinking, must be because of that fact no different from those held or announced by any other lawyer or judge. To so contend would be a flying in the face of legal history, enriched as it is with the precious life blood of its master spirits, treasured up to a life beyond life, studded and adorned as it is with their great and brilliant names. I merely maintain that however much the opinions of great lawyers and judges may and do differ from each other in substance and in style, the views expressed in them represent the differences not in their personal, but in their jurisprudential outlook and point of view.

I propose therefore, but with diffidence, in lieu of Mr. Lief's, this title for the book: "The Influence upon the Juridical Thinking of Mr. Justice Brandeis of his Jurisprudential Point of View."

Mr. Beard in his introduction, written so beautifully and with such understanding, has nearly but not quite made the point which I am laboring. He has drawn with exquisite precision and delicacy a pen picture of Brandeis, the man, Brandeis the justice, and has set down precisely and with vividness the quality of his thinking. He has failed, however, to point to what the book itself shows, the deep springs from which this thinking flows.

"All his reasoning is 'orderly'. His speeches, arguments and judicial opinions march. He has a passion for concrete things, rather than abstractions; pertinent data revealing the intimate relation of laws and judicial decisions to practical affairs. Above all, he seeks to draw his jurisprudence out of the realities of life—its work, its economy, and its social arrangements."

"We may be sure that the fact-burdened method which he has employed in all his thinking about legal and economic affairs will have an increasing influence on coming generations of students, lawyers, and judges. Humanity and ideas, as well as things, are facts, and a jurisprudence which takes them into account cannot perish from the earth."

Almost I say, but not quite has he made the point I labor. Almost, in that he has set down the facts which sustain it. Not quite, in that wittingly or unwittingly, he has failed to point out with the ungrudging emphasis which it deserves, the dominant fact in the life and thinking of Mr. Justice Brandeis, that he is first of all a lawyer, and that all his mature thinking has therefore been juridical. It is this dominant desire to square law with life, and life with law, which the writings in the book reveal that has given vigor and power to his judicial marches across the field of law, and made him with his keen and practical sense of justice, dominated and

inspired as it is by great ideals, a tremendously vital force in integrating law in America with the life it serves.

One who reads this book searching for the viewpoint of the writer, must feel that paramount over every other there has always been in the mind of Mr. Brandeis the idea of the invincible supremacy of law, and in his soul a passion against lawlessness, a yearning for legal righteousness. It is because this is so that his juridical thinking on social and economic questions in terms of their part in and their relation to established or establishable legal systems, has always been practical, forceful and on the march.

It is at once apparent that these are not the writings of a mystic oracle, a dreaming idealist, improvising on impulse. Rather they are those of a downright pragmatic legal philosopher, a sound and brilliant lawyer, equipped with a steady and powerful mind. In them speaks one who from long study and experience, profoundly perceiving that "Law is a science of action based on the facts of social life which it aims to so order and arrange as that the consequences flowing from them are those which are socially desirable", and that "laws are the product of life", uses all the abundant learning and experience of his life to find and declare the law in conformity with that "reality of the moment which life is at each instant forging."

The second characteristic of Mr. Justice Brandeis' juridical thinking which will, I think, strike the reader of these opinions, is that he is neither jealous nor afraid of legislative law, but gladly accepts and gives full effect to it; that he has no patience with that jurisprudence of conceptions which by laying down fixed and universal rules, would keep society static. Profoundly acquainted as these writings show him to be with the historical bases of the law, and the importance of its slow, steady and powerful growth through the long processes of judicial inclusion and exclusion, they show also that he realizes fully that there come times when the effort to discover and develop law by this slow and painful process bears too hardly on the many litigants affected, and that then direct and vigorous legislation must be had to provide new and better starting points, more in accord with the facts of life, from which courts may proceed.

These opinions show that the juridical thinking of Mr. Justice Brandeis squares with Geny's view that "the needs of actual life must never be sacrificed to mere concepts", and with that of Mr. Justice Holmes "that every opinion tends to become a law". Its general viewpoint is that when a sufficient force of public opinion has gathered behind a social theory to bring about its legislative articulation into law, courts should not let any vague and nebulous imagined brooding spirit of the law strike it down, but should give it effect and scope unless it transgresses some positive provision of the fundamental law. Mr. Justice Brandeis' juridical thinking gladly accepts and gives full effect to legislative law.

A third characteristic of his juridical thinking is that it is realistic. It is very evident that Mr. Justice Brandeis believes in the tremendous importance of facts, not only the facts of the past and the facts of the present, but the beckoning facts of the future. He knows that while abstract conceptions must serve not only as guide and anchor to juridical thinking, but as fruitful sources in a constantly expanding system of law for increasing the "scope and fecundity" of legal principles, "the simple observation of social facts must have first place among the indispensable elements of juridical method"; that the truth is at last that from the changing facts of life law emerges, and no amount of sophistry or abstract reasoning can put this stubborn fact down.

And yet, factualist though his opinions show him to be, they also show

that he is never buried under his facts. He is their master, not their servant. He knows as well as any that "facts are nothing except in relation to desire", that "they are sterile unless there are minds capable of choosing between them and discerning those which conceal something and recognizing that which is concealed. Minds which under the bare fact see the soul of the fact;" that "there is in the human intellect a power of expansion, I might almost call it a power of creation, which is brought into play by the simple brooding upon facts." They show too that while he knows that "the rules of practical morals are the product of life, that it is life which in its course determines each appropriate stopping point, that implies its appropriate laws." He also knows full well that "the play of the obscure forces of nature is powerless of itself to create true juridical customs. The incessant collaboration of man is needed; judges are daily called upon to discover and initiate, and to exercise in the name of the people, the freedom of the social will."

I have reserved for the last, comment upon that glowing quality in his juridical thinking which, springing from a feeling which culminates in advocacy for what is just, makes his mind luminous and gives it in difficult cases the power and the will to range when the track is cold, to cast in ever widening circles to find a fresh scent. It is the quality of advocacy which, lighting and warming his style, wings his words home, and gives to his arguments persuasiveness and power, whether he is pounding away with fact upon fact, authority upon authority,—for he esteems and freely uses authorities as the most potent of facts—in some of his great dissenting opinions, or writing the law of the case in his less argumentative, because more authoritative opinions for the majority.

Somewhere Goethe says: "A thorough advocate in a just cause, a penetrating mathematician facing the starry heavens, alike bear the semblance of divinity."

Practical men, and in that classification, since "law is the science of action", judges must be included, must have impulses. The lawyer has them, and because he has them his work is tremendously important. If a lawyer merely reasoned abstractly and without motive, he would do the judge no good. But the driving impulse to bring about his client's success not only makes him burrow industriously for precedents, and as industriously bring them forth, but also makes him belabor and cudgel the brains of the listening judge to bring him into agreement.

If the judge sat upon the Bench in a purely abstract relation to the cause, his mind merely a recording instrument, his opinions in difficult cases would be of little worth. He must have some motive to fire his brains, to "let his mind be bold." By the nature of his occupation he cannot have advocacy for either side of the case as such, so he becomes an advocate, an earnest one, for the—in a way—abstract right solution. Having become such advocate, his mind reaches and strains and feels for that result. He says with Elihu, the son of Barachel, the Buzite of the family of Ram: "There is a spirit in man, and the breath of the Almighty giveth him understanding. It is not the great that are wise, nor the aged that understand justice. Hearken to me; I also will show mine opinion. For I am full of matter; the spirit within me constraineth me. Behold my belly is as wine which hath no vent; like new wineskins it is ready to burst."

And so the book presents him to the reader as he has gone marching through the world, his keen and cultivated mind the servant of his soul. Whether maintaining the liberty to think, to speak and to utter freely above all liberties, as in his opinions upon Freedom of Speech; denouncing the lawlessness of government agents, affirming that not only men and

groups of men but governments themselves must stand accountable to law; upon varying facts upholding legislative acts as lawful or opposing them as unlawful invasions of liberty; affirming in one case that the law should stand as decided, in another that "*stare decisis* is not an inexorable rule"; that "modification implies growth; it is the life of the law"; denouncing unreasonable practices in restraint of trade, or upholding reasonable practices for the maintenance of fair prices, he is at once pragmatist and idealist, idealist and pragmatist. A pragmatist, he wants to know of every legal rule or institution under review—is it in accordance with the law? Has it worked, does it work, will it work? An idealist, he also wants to know, has it worked well, will it work well, does it work well: if not, an idealistic pragmatist, he wants to know, can it by modification be made to work well?

If, concluding this review, I should yield a little to the temptation to characterize the thinking of the writer, not only juridically, but personally, I should say of it that it is the thinking of one who perhaps unconsciously, has yet faithfully followed the Pauline injunction: "Quench not the spirit; despise not prophesyings; prove all things; hold fast that which is good."

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The Bramble Bush: Some Lectures on Law and Its Study. By K. N. Llewellyn. New York, Columbia University School of Law, 1930. pp. ix, 158.

THIS is no mere law book. It is an important piece of literary art, the reflection of a rich personality. It is a worthy successor, for our times, to Holmes' *Path of The Law*: a brilliant survey for students and lawyers of what law is and what legal education does and can do to make a man a lawyer. The style is charmingly racy, colloquial, contemporary. Written primarily for students—but appealing to all intelligent lawyers—this book discusses admirably in the homeliest terms some of the most difficult and important legal problems.

First, what is law about? What is the place of law and lawyers in society? Law, says Llewellyn, has to do with maintaining order. It does not make order, but keeps it from being disrupted when disputes arise, "maintaining order when it has gotten out of order." The doing of something about disputes—dispute-settlement and dispute-avoidance,—that is law. The function of lawyers is (a) the handling of specific suits caused by disputes (getting the judge to do what you would like to have him do) and (b) counselling laymen how to shape their conduct in anticipation of what courts are likely to do if a dispute arises; and, as a part of that job, inventing "devices to make it easier for people to accomplish what they want in their relations with other people." Thus oriented, it is easy to see that "the meaning of law in life and in the practice of lawyers is its meaning not to courts, but to laymen."

But if dispute-settling is the thing to be stressed, then, says Llewellyn, the lawyer needs to know how courts will settle disputes, how to get courts to settle them as his client desires. This leads to a study of the "so-called rules of law which judges say they are bound by." But the lawyer must look to see "whether what judges say matches with what they do." The so-called rules are mere "pretty playthings" except "so far as they help you see or predict what judges will do, or so far as they help you to get judges to do something."¹

¹ There is a recent tendency of critics of nascent "legal realism" to

How the law school aids and fails to aid in the learning of what courts and lawyers do, is the main theme. The study of cases, the doctrine of precedents, the effect of statutes, the analysis of legal concepts, the weaknesses of the case system,—these and other problems are searchingly considered.

Here is a book to read many times, be you law school student or that somewhat humbler type of student, a sensible practicing lawyer. You will find it hard-headed yet (or, rather, and) vigorously idealistic.

There is much to admire. But there are some things to quarrel with. It is trite yet ever true that, if you find a man's strength, nearby you will find his weakness. Llewellyn wants to see every side of all his problems. He wants to know the old solutions and the new. He is eager about the latter but he demands that attention be paid to the former. He opposes "either-or" thinking, and is all for "both-and" thinking. All of which is splendid, especially in a man who is one of the leaders in the minority "movement" known as "Legal Realism." He constantly serves notice on his fellow pioneers to conserve, to repair, but not to destroy, the ancient attitudes, the traditional tools of legal thought. Last year he made plain this point of view:

"It is along the same line that I feel strongly the unwisdom, when turning the spotlight on behavior, of throwing overboard emphasis on rules, concepts, ideology, and ideological stereotypes or patterns. These last are, by themselves, confusing, misleading, inadequate to describe or explain. *But a jurisprudence which was practically workable could not have been built in terms of them, if they had not contained a goodly core of truth and sense.* To be sure, it was not the precept-ideology of jurisprudence, but the practice that jurisprudence only partly mirrored, which actually worked. But one thing sociological study ought to do for the advance of science is to school the advocates of new insight against which they are rebelling. *The rebelling indicates inadequacy in the old. It does not indicate that the old did not have much solid basis. The bare fact that the old exists, could come into existence and persist, evidences that it had.* If we can examine it for what it has, and carry that with us into a new alignment, we shall do much to reduce the well-known pendulum swing from exaggeration to exaggeration. This is of less moment in the early stages of a new movement. The innovator carries over willy-nilly the virtues of the same training against which he is in intellectual revolt. But those newly trained in the new school will be half-trained unsound exaggerators, if the original innovators fail to incorporate in their doctrine as in their practice the life-

attempt to damn that movement by unfairly calling it "behaviorism." That label has been pre-empted by Watson whose glibly optimistic psychology is entirely unacceptable to most of those who advocate patient study of what courts do in fact.

There is as little warrant for the critics to ascribe to most legal realists the beliefs (1) that any psychological, economic or statistical studies will yield any certain bases for predicting specific decisions; or (2) that there are no rational or ethical factors in legal thinking. *The point is that the rational and ethical factors are thwarted in their operations by the conventional tendency to ignore the non-rational and non-ethical factors.* Llewellyn's article, *A Realistic Jurisprudence—The Next Step* (1930), 30 COL. L. REV. 431, first gave the name "a realistic jurisprudence" to the point of view of a certain minority "movement." It was doubtless this "movement" that Dean Pound had in mind in his recent article, *The Call For a Realistic Jurisprudence* (1930), 44 HARV. L. REV. 697, which purports to describe the outstanding characteristics of that "movement." Anyone who reads THE BRAMBLE BUSH or Llewellyn's article just cited will find difficulty in believing that Dean Pound's description is even approximately accurate.

power of the older school, even while attacking the latter's false emphasis and implications."²

There is much soundness in this declaration of the wisdom of moderation. But, too, it is, in part, exaggerated moderation, moderation become excessive. "The bare fact that the old exists, could come into existence and persists" is not adequate evidence that the "old had much solid basis" or "contained a goodly core of truth and sense." It is some evidence; it does unquestionably raise a presumption of value. But, from the point of view of human values, many an old thing was evil when it came and/or is still evil in its persistence.³ With thought contrivances weighted with superstitions and unscrutinized dogmas, men have often built workable institutions. But the workability has been hindered by the superstitions and erroneous dogmas. Many institutions have been built and maintained in the face of such disadvantages. *And it will not do at all to say that because a practically workable institution has survived, although built in terms of superstitions and dogmas, that this practical workability proves that those superstitions and dogmas "contained a goodly core of truth and sense" or had "much solid basis."* Such an argument is the equivalent of contending that streptococcus germs and tuberculosis are substantial aids to human health because mankind is passably healthy despite these handicaps.

All of which relates more or less to Llewellyn's handling of *stare decisis* and the value of the "formal-law" way of looking at decisions. Nowhere have the artificiality and bad effects of that approach been more devastatingly set forth than in the *Bramble Bush*. But, almost in the same breath, Llewellyn pleads for its utility, its positive social significance. First he elaborately describes the folly of arid formalism.⁴ Then (influenced by his "it-existed-and-exists-therefore-it-must-have-a-solid-core-of-truth" attitude) he proclaims that the syllogistic-reasoning-from-major-premises-supposed-to-be-found-in-precedents-system promotes "the common weal". "We see," he writes, "wisdom made institutional, caught up and crystallized into a working system; by way of logic the weak judge is penned up within the walls his predecessors built; by way of logic, the strong judge can scale those walls when in his judgment that is needed. And either phase, and both, promote the common weal."

² Llewellyn, *op. cit. supra*, note 1, at 462, n.

³ There is much to be said for Manichaeism. Of course, some evils have fortuitous consequences which may be valuable. A recent medical writer traces the Reformation in England to the fact that Henry VIII had syphilis. If you believe that story and if you are glad that England quit the Romish faith, you may perhaps be delighted that syphilis came to plague mankind.

On the other hand, the mere fact that an institution has been abandoned does not prove its lack of value.

⁴ No summary will do justice to his criticism. The sharpest attack is on the "two-headed," "Janus-faced" aspect of the doctrine of precedent: (1) There is the strict view which "confines the case to its particular facts." This is "in practice the dogma which is applied to unwelcome cases. It is the recognized, legitimate, honorable technique for whittling precedents away, for making the lawyer, in his argument, and the court in its decision, free of them." (2) There is the "loose view." Argument is based upon language found in past decisions, language used largely "without reference to the facts of the case which called the language forth." "This is a device for capitalizing welcome precedents." It, too, is "recognized, legitimate, honorable." Accordingly, the precedent doctrine is really two contradictory doctrines. See also his excellent discussion of the difficulty that "the raw events as they happened are not before judge or jury;

Now those statements will not stand up. Adequately to develop the lurking fallacies would take many pages.⁵ But it is possible to hint at some of the more obvious fallacies of this statement that the conventional theory promotes the common weal because it serves to hem in the weak or unskilful or ignorant judge, while it is no impediment to the strong or skilful judge:⁶

(1) The ignorant, unskilful judge—precisely because he is ignorant and unskilful—frequently blunders unwittingly out of the clutches of the bothersome precedent. As Goodhart says, "Cases which have been decided on incorrect premises or reasoning" have often established "new principles" of which "their authors were unconscious or which they have misunderstood. . . . Paradoxical as it may sound, the law has frequently owed more to its weak judges than to its strong ones."⁷ (2) The skilful judge may be weak in courage or common sense. As Street puts it, "It will not infrequently be found that the judge of greatest legal acumen, the greatest analyzer, is the very one who resists innovation."⁸ (3) The strong judge who is not skilful (or the skilful strong judge when too fatigued to use his strength and skill) may let himself be dragooned by a precedent into injustice. As Llewellyn himself recognizes, precedents may bind "a strong judge by the errors of the weak." (4) The strong and/or skilful judge is not necessarily the scrupulous, conscientious, socially-minded judge. He may be dishonest or a bigot, a tyrant, and dominated by anti-social prejudices. His skill in apparently syllogizing from the precedents often enables such a judge the better to conceal his ill-doings and to make his unwise or unjust decisions seem to favor the common weal.⁹ (5) The dishonest judge, although weak and unskilful, can easily cover up his conduct by having a skilful opinion, replete with citations, written for him by the skilful attorney for the party he favors.

Syllogistic reasoning using as major premises doctrines or "rules" found in previous opinions has some effect on decisions; that no sane person would deny.¹⁰ How much effect no one knows. But an increasing number

there has been a straining process"; of the use of artificially prepared statements of facts in judicial opinions to make them "look sound, look right, persuade"; of the obstacles to accurate prediction of decisions because of the impossibility of guessing the attitude of future judges with respect to past cases; of how "major premises still are dictated by a conclusion desired and already fixed"; and of the fundamental inadequacy of legal theories resulting from restricting attention solely to the opinions of upper courts.

⁵ Some of those pages could be taken from *THE BRAMBLE BUSH*.

⁶ See pages 64, 65, 71. Llewellyn seems to treat as equivalents the terms "weak," "unskilful" and "ignorant" on the one hand, and "strong" and "skilful" on the other.

⁷ Goodhart, *Determining the Ratio Decidendi of a Case* (1930), 40 *YALE L. J.*, 161, 164. The use above of the quotation from Goodhart is not to be taken as an acceptance of his views of "law" or "principles".

⁸ 1 STREET, *FOUNDATIONS OF LEGAL LIABILITY* (1906), 343. Cf. Llewellyn's own comment (p. 64) on the effect of "the finer minds" on the perpetuation of "orthodoxy".

⁹ Cf. FRANK, *LAW AND THE MODERN MIND* (1930), 137. *Per contra* Llewellyn (p. 62): "If he is biased or corrupt the existence of past practices to compare his action with gives a public check upon his biases and his corruption, limits the frame in which he can indulge them unchallenged."

¹⁰ See Frank, *op. cit. supra*, note 9, 125-127, 130-132, 104 note, 153-155, 187-8, 278.

of observers—including Llewellyn—are ready to say that the effect is very considerably less than is conventionally supposed. As yet we know little about how much effect it has, and we are certainly in no position today to say that the effect is always, or usually, or often, beneficent.

We do know something about the evil consequences of the conventional theory. According to the theory, all decisions are born of the wedlock of cold logic and stable precedents, and any decisions born out of that wedlock are assumed to be illegitimate. That belief frequently thwarts and distorts clear legal thinking and interferes with the well working of court justice, for it compels lawyers and judges to suppress both the expression and the frank recognition of many important factors that affect and produce decisions, and to devote countless precious hours to the articulation of distorted and inaccurate "reasons" for decisions¹¹ in terms of artificial so-called legal "rules."¹² Of all this Llewellyn writes at length and most effectively.

It is, then, with a shock that one comes upon his statement that the old theory promotes the common weal. For it is not keeping a sane balance, it is not serving the ends of good pedagogy, to say, in effect, at one and the same time: (1) The conventional theory frequently shows up as, in large part, a sorry sham, a harmful survival, an impediment to good judicial work; (2) The conventional theory "promotes the common weal."

There are times when "both-and" will not serve. There are antitheses, there are choices between alternatives. There is such a thing as a middle of the road position, and it is often sound. But there is no such thing as following at once two roads at the cross-roads, riding on two trains going in opposite directions.

Llewellyn could properly say: "The traditional theory must be studied. Woe be unto you if you overlook it when addressing the judges. There is, too, a wealth of good common sense and shrewd wisdom buried in the so-called rules. But improvement of the judicial process requires that the old theory be drastically overhauled because it is hopelessly misdescriptive of what courts do in fact." Or he could say: "The conventional theory exists, it contains elements of value worth preserving, although its evil consequences are moderately obvious. What is its net worth, I don't know, nor does anyone else as yet. Whether and when and how much it serves the common weal, is today unknown."

But, whatever he says, he must elect where to place his emphasis—unless he is content (and he is not¹³) to say: "There is no good way or better way, and there is no bad way or worse way; there are only ways, and they all look alike to me." You see what Llewellyn has done. His belief that what has been and survives must be somehow good, his eagerness to be open-minded, his leaning over backwards when judging what he

¹¹ See Thurman Arnold's brilliant article, *Criminal Attempts—The Rise and Fall of an Abstraction* (1930), 40 YALE L. J. 53.

¹² The legal "realists" in denying the tenets of conventional formal-law do not write themselves down *nominalists*. They do not deny that in the legal field or elsewhere there are "universal or repeatable abstract qualities, relations and transformations which characterize objects and events and constitute their objective meaning." [See Morris Cohen, *Justice Holmes and The Nature of the Law* (1931), 31 COL. L. REV. 352, 361.] They do question whether most of the so-called legal rules correctly state such repeatables in the conduct of courts. To say that some alleged chemical theories are wrong is not to deny the possibility of all chemical theories. One may be doubtful whether $2 \times 8 = 28$ without accepting pyrrhonism as a philosophy.

¹³ Else he would not bother about the common weal.

adversely criticizes—these have betrayed him at moments into incorporating into his description of the traditional theory a too emphatically favorable appraisal of the social benefits of the old ways. That appraisal is puzzlingly at variance with most of what he writes elsewhere in the same book.

One ventures thus to find this much fault¹⁴ just because Llewellyn is one of the ablest, subtlest, most hard-working of Holmes' disciples. He has already done much, but this book is crammed full of hints of far more to come. No *false use* of the notion of a golden mean should mar his splendid contributions to the teaching and practice of law. Let him dare to be daring, let him not check his notable creative impulses for fear of offending the false god of "good form"¹⁵ masquerading as the comic spirit.¹⁶

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JEROME FRANK.

Cases and Materials in the Law of Corporation Finance. By Adolf A. Berle, Jr. St. Paul, West Publishing Co., 1930. pp. xv, 911.

THIS book is not, as might be inferred from its title, merely a collection of materials on the strictly financing aspects of corporation law, such as the issue of securities, merger and consolidation, and reorganization. It is the product of a fundamental re-examination of the principles of corporation law from the point of view of the security holder, and includes by far the greater part of the subject matter of the traditional course on private corporations, as well as other matters discussed in other courses or not at all. The material is divided into two parts, the first, under the heading "The Corporate Organism", embracing two-thirds of the book, and the second dealing with "The Processes of Financing".

The first part opens with a consideration of the corporate contract: the relation between the state, the corporation, and the shareholder, with the emphasis principally upon the conflict between the strict shareholders' "property right" theory illustrated in the New Jersey cases, and the theory of the Delaware courts, that the shareholders have conceded to the management very broad powers to alter their interests by new financing projects. In connection with these cases, Mr. Berle introduces the student to his theory of management powers as "powers in trust" for the benefit of all security holders. The cases in this section appear to the writer an excellent selection; and there is added an interesting tabulation showing the striking trend toward Delaware as a state of incorporation.¹ The succeeding section, on the corporate management, includes material on the responsibility of directors, non-voting stock, voting trusts, and various forms of "non-titular" management: dominant stockholders, etc.

A section dealing with the rights of various classes of shareholders follows, consisting of almost 300 pages. It opens with explanatory material on the concept of corporate capital from the points of view of economics, accounting, and law. The problem of introducing students who have had no accounting training to the treacherous terms "capital", "capital stock", and "surplus", and to their confusing use in judicial opinions, is perhaps

¹⁴ And at disproportionate length as compared with the praise. For, despite the adverse criticism, the book is sure to have wide constructive effects on legal thinking and pedagogy.

¹⁵ See BERTRAND RUSSELL, WHY MEN FIGHT.

¹⁶ See GEORGE MEREDITH, ESSAY ON COMEDY AND THE COMIC SPIRIT.

¹ Pp. 122-25.

the most difficult confronting a teacher of corporation law. The material here included should prove extremely helpful; it is not an attempt to dogmatize or to state correct definitions, but rather to suggest the reasons for the varying approaches of the economist, the accountant, and the judge, and to present a *caveat* and a challenge to the alert student.

Material dealing with the issuance of stock and with the distinction between unissued and treasury stock is followed by a section of sixty pages illustrating various methods by which "throughout the history of corporations men have attempted to secure shares of stock without making a corresponding contribution to the corporate assets". In connection with these cases, Mr. Berle introduces his newly-christened "rule of equitable contribution": since the power to issue stock, like other management powers, is held in trust, it must be exercised only in such a way that the incoming shareholder "shall have contributed to the capital of the corporation on an equitable basis". The cases and statutory material in this section are especially well selected, ample consideration being given to the modern problem of the power of directors to fix the price at which no-par shares are to be issued. Fifty pages are then devoted to the shareholders' preemptive right, which is analyzed as being primarily the right to invest more capital in a successful enterprise rather than the right to protect the shareholder's relative voting position or participation in corporate assets. The section on dividends embodies no great change from the older books, except, perhaps, the greater emphasis on the problem of dividends out of "paid-in surplus". Mr. Berle's note suggesting different types of such surplus furnishes a wholesome warning that this problem is more complicated than has sometimes been assumed.

For want of cases defining the rights of holders of "option warrants", a form of such warrant is included. Cases on preferred and "special" classes of stock follow, with sufficient emphasis on the recent cases on non-cumulative preferred stock and various "implications of the preference contract". A very brief treatment of the purchase, retirement, and reduction of stock completes the consideration of stock, and is followed by a section on "Evidences of Claims on the Corporate Assets", principally bonds. This section covers less than 100 pages and includes a form of corporate mortgage and a few cases on the sinking fund and after-acquired property clauses, the bondholders' control over the management, their relation *inter se*, their rights to sue on the bonds and to force a foreclosure, the obligations of the trustee, and redemption and retirement.

Part II begins by tracing the new enterprise from an embryonic idea through the stages of promotion, negotiation with investment bankers, underwriting and selling syndicates, and public offering of securities. An intensely interesting financial history of Nash Motors Company is printed as an illustration of some phases of the financial process. This material should hold the attention of even the most jaded third-year student, although some teachers, if not students, may object to the author's characterizations of certain steps taken by the company and the bankers, Lee, Higginson & Co.

The protection afforded to the originator of the idea of the enterprise against the appropriation of his idea, and to the "finder" (the intermediary in the negotiation between the promoters and the bankers) against being "squeezed out", is then considered, together with familiar cases on promoter's profits. The investment banking operation is outlined in a brief note, followed by a complaint in an action for breach of a bankers' commitment. Further steps in the process are illustrated by cases construing various provisions of underwriting agreements, and by a form of "selling group letter". Problems arising out of the public offering and the bankers'

circular are suggested, and a number of cases as to the remedies of purchasers for misrepresentation, are included. The process of listing the securities on a public market is illustrated by rules of the Committee on Stock List of the New York Stock Exchange and a sample listing application. There is no material, however, on "Blue Sky" laws.

The next section includes not only familiar cases on the private purchase of stock by directors and officers without full disclosure, but also cases on the liability of directors for action taken with a view to affecting the market.² There follow cases on the use of subsidiary corporations and on merger and sale of corporate assets. With the merger cases is happily included as a "business precedent" from the abortive Bethlehem-Youngstown merger, the provocative letter of Haskins and Sells and other accountants as to the fairness of the merger terms to the Youngstown shareholders.

The concluding material, on reorganization, consists only of a very brief bibliography, a plan and agreement for a voluntary reorganization, and a bondholders' protective committee agreement. It seems rather paradoxical that a collection of materials on "corporation finance" should not include *Northern Pacific Railway Co. v. Boyd*,³ which many instructors have attempted to cover in the ordinary course on corporations. A smattering of knowledge of this difficult field, however, seems of little value, and the writer agrees that all of this material is better left to a specialized course or individual study.

Inadequate as the foregoing outline of Mr. Berle's collection must be, it immediately suggests the question as to whether the book is suitable for schools which have but one course on the law of private corporations. A teacher accustomed to the casebooks of Richards, Warren, or Canfield and Wormser will miss from this collection material on *de facto* corporations, the powers of corporate officers, many phases of the doctrine of *ultra vires*, and a few other subjects. Some may also miss the traditional extended introductory chapter on the "nature" of a corporation, and the things which it is not, and the congeries of problems as to "disregarding the corporate fiction" or, if you prefer, "overriding the corporate conception". Other instructors, however, may feel that it is the excessive emphasis on these topics which has made the traditional course on corporation law seem to many students impractical and too far removed from the problems faced in practice by the corporation lawyer. The writer believes that the subjects covered by Mr. Berle are, in general, much more important than those omitted. The approach and arrangement is stimulating, and should facilitate and vivify the teaching of the subject. In short, the book is an excellent casebook on the law of private corporations—and one may hazard the guess that the substitution of a new name reflects primarily a wholesome insistence that modern corporate problems are largely financial and that they imperatively demand that the law of private corporations be cut loose from its roots in the law of charitable and municipal corporations.

The writer believes, however, that as a collection of materials on the specialized problems of finance, bond issues, mergers, etc., the book will be disappointing to many. This field is obviously one in which but a small part of "the law" appears in the reports. Here the teacher who is not in direct touch with corporation law practice is handicapped and looks hopefully to Mr. Berle in his almost unique position as both teacher and

² See also Mr. Berle's recent article, *Liability for Stock Market Manipulation* (1931) 31 COL. L. REV. 264.

³ 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931 (1913).

active member of the metropolitan corporate bar. The limits of size doubtless prevented a detailed treatment of the specialized problems in a book also covering the general principles of corporation law, but the result is that on these specialties the book furnishes only a starting point, and will not be of great use in advanced courses devoted to such problems. Mr. Berle's expository notes are valuable here, as throughout the book, but they are tantalizingly brief.

The specimens of corporate documents and the frequent collections of statutory references are helpful features. More frequent references to law review articles might well have been made, for example, in the section dealing with subsidiary corporations no citation is given to the recent study of Douglas and Shanks.⁴

One may perhaps be permitted to regret that Part II depicts the "financial processes in action" as a rather orderly succession of steps from the generation of the idea through the public offering of the securities, with no consideration of the terror-inspiring device all too frequently used to interrupt the processes of financing—the stockholder's suit. Richard's casebook contains a section of over fifty pages devoted to this subject, and it is surprising that a re-analysis of the materials of corporation law from a functional and realistic point of view should result in a reduction of the emphasis on this problem. True, Mr. Berle uses, in his analytical study in Part I, a number of decisions handed down in such suits; and an alert student will probably read much between the lines of Vice-Chancellor Lane's caustic remarks concerning Clarence Venner and his corporations.⁵ But surely this double-edged weapon, developed as a heroic remedy for threatened irreparable wrongs to minority stockholders, but equally available for the sinister purposes of the "strike suit", challenges study as a dynamic phase of the process of financing. Behind the hostility of many corporate lawyers to Mr. Berle's suggested rules of powers in trust and equitable control,⁶ there apparently lies a fear, born of bitter and hectic experience, that these rules may operate principally for the benefit of the corporate sharp-shooter. The present collection of cases gives no sign that Mr. Berle regards this fear as requiring serious consideration.

It might also be wholesome for the student of corporation finance to consider, as bearing upon the complexities of many financing transactions, provisions of the Clayton Anti-Trust Act, the Federal Income Tax laws and various state foreign corporation laws. Obviously, anything approaching full consideration of the bearing of these provisions can not be achieved in a single course such as that Mr. Berle outlines; but an introduction to these matters would help to prevent the impression that the complexities of many financial and intercorporate transactions are all the result of "corporate skullduggery".

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WILBER G. KATZ.

⁴ *Insulation from Liability through Subsidiary Corporations* (1929) 39 YALE L. J. 193.

⁵ *General Investment Co. v. Bethlehem Steel Corporation*, 88 N. J. Eq. 237, 102 Atl. 252 (1917), printed in Berle at p. 475.

⁶ See reviews of Berle's *Studies in the Law of Corporation Finance* by Swaine in (1929) 38 YALE L. J. 1003, and by Kline in (1929) 42 HARV. L. REV. 714.

Lezioni di Filosofia del Diritto. By Giorgio Del Vecchio. Città di Castello, Società Anonima Tipographica "Leonardo da Vinci", 1930. pp. iv, 351.

THIS work by the distinguished editor of *Rivista Internazionale di Filosofia del Diritto* and professor at the University of Rome seems to have had its first public appearance in a Spanish translation by Professor Luis Recaséns supplemented by original notes of the translator.¹ The Spanish version coincides with Del Vecchio's completion of twenty-five years of activity as professor of legal philosophy successively at Ferrara, Sassari, Messina, Bologna, and Rome. This event was recently celebrated by publication of a "*Festschrift*" in the author's honor which contained contributions of the leaders in legal philosophy of Italy and of scholars in various other countries.²

The author needs no identification for those who have any concern with or for philosophy in general or legal philosophy in particular. His first introduction to readers of our language was by means of an article under the title "Positive Right" published in an English law review.³ This eloquent essay was soon followed by publication in English of a trilogy of separate but logically connected legal-philosophical studies.⁴ The English title for this collection was "The Formal Bases of Law".⁵

With respect to the title of the translated volume, an eminent writer, Professor Biagio Brugi of the University of Pisa in a communication to Reale Accademia Nazionale dei Lincei remarked that "*la traduzione letterale del titolo in Basi formali . . . potrebbe far cadere in un grande equivoco*". Professor Brugi then suggested by way of improvement "essential characteristics ("*caratteri essenziali*") or "constitutive elements" ("*elementi costitutivi*").⁶ The English version (being the excellent translation of the late John Lisle) contains an illuminating and competent editorial preface by Professor Joseph H. Drake, who has considered all the problems raised by use of the word "formal" both from the standpoint of usage by philosophers and of etymology. Professor Drake shows that "the primitive meaning of 'formal' was 'essential' and that the antonymic use of 'formal' (as opposed to 'essential') was a development of 'a comparatively modern period.'" ⁷ Professor Brugi's concern for lay misapprehension may therefore be put aside, although the risk must be admitted, but only on the assumption that one reads only the title of the book.

Coming now to a comparison of the "Lezioni" with the "Formal Bases", we find that they are entirely different in form, purpose, and execution. The earlier trilogy was written by a man in his late twenties just at the beginning of his teaching career. The present work is that of the same author at the height of his reputation and in the maturity of his powers. The trilogy is heavily documented after the fashion of the doctoral thesis. These earlier papers are not easy reading but they embody a mine of

¹ DEL VECCHIO, *FILOSOFIA DEL DERECHO* (1929): Libreria Bosch, Barcelona.

² *STUDI FILOSOFICO-GIURIDICI DEDICATI A GIORGIO DEL VECCHIO NEL XXV ANNO DI INSEGNAMENTO* (1904-1929): Modena, Società Tipografica Modenese.

³ *Sulla positività come carettre del diritto*, (1911) *RIVISTA DI FILOSOFIA*: translation in (1913) 38 *LAW MAGAZINE AND REVIEW* 293.

⁴ (1905) *I presupposti filosofici della nozione del diritto*; (1906) *Il concetto del diritto*; (1908) *Il concetto della natura e il principio del diritto*.

⁵ DEL VECCHIO, (1914) *THE FORMAL BASES OF LAW*.

⁶ *Reale Accademia Nazionale dei Lincei: Rendiconti* Vol. XXXI fasc. 12 (17 Dec. 1922).

⁷ *Op. cit. supra*, note 5, pp. xx-xxiii.

patiently collected reference material of great value. They were better suited for the expert than the lay reader. The "Lezioni", although designed for the novice, would in truth have been better adapted to our needs than the essays already translated. The present work contains everything of essential value in the essays, produced in an easy, flowing, and beautiful style.

The work is divided into a General part (consisting of an Introduction and a brief history of legal philosophy) and a Special part (dealing with the concept of law, the origin and historical evolution of law, and the rational basis of law). The work combines what in this country would be called "jurisprudence", with legal philosophy. The historical part stops short with the living. Living legal philosophers are named but not discussed. This limitation is at once understandable and regrettable. The author would have been one of the most competent persons to appraise the contributions to legal philosophy of the existing epoch.

The author is everywhere labeled a neo-Kantian. To the reviewer this qualification seems unnecessary and in substance untrue. Del Vecchio and Kelsen, it seems to us, keep the Kantian doctrine within the ancient landmarks as no other representative of this time of the Critical philosophy has done. Del Vecchio and Stammler are often spoken of together, but Stammler appears to have modified the Kantian program by the elements of voluntarism and of teleology.⁸ It is, however, curious to note the important breach between Del Vecchio and Kelsen on the nature of law. According to Del Vecchio law is a formal concept and is independent of the state. "*Ubi homo, ibi societas; ubi societas, ibi ius; ergo, ubi homo, ibi ius.*"⁹ Kelsen, on the contrary, identifies law and state.¹⁰ This conflict is disturbing but not necessarily fatal. It does, however, call for attention.

Kant's system arose somewhat as an historical accident. Hume had arrived at scepticism in dealing with the concept of causation. Kant sought to solve Hume's problem (*i.e.*, to show a necessary connection *a priori* between cause and effect) and in that effort (that he succeeded is doubtful) found a single principle for the deduction of concepts of pure understanding. He developed a system of *a priori* synthetical principles which are the basis of possible experience but which can not be referred to things in themselves. Mind was set apart from outward things. Kant's principal work appeared before the discovery of the conservation of matter and energy, the doctrine of evolution, the laws of thermodynamics, the electronic theory of matter, and the more recent theories of special and general relativity. The newer ideas do not abolish the Kantian system, but, on the whole, they have tended to diminish its influence. Kant formulated his ideas with amazing confidence in his own position and with extraordinary care and skill, but yet as one attempts to follow him into the transcendental atmosphere where his reasoning leads, and as one contemplates the luxuriant manifoldness of all that which lies beyond the mind, the reflection intrudes itself that *subtilitas naturae subtilitatem argumentandi multis partibus superat.*

Del Vecchio's chief insistence is on the priority to experience of the

⁸ Cf. Berolzheimer in (1911) *Archiv. f. Rechts—und Wirtschaftsphilosophie* Vol. V Heft 2 p. 311, 320.

⁹ Del Vecchio *Sulla Statualita del diritto* (1929) *Riv. Int. d. Fil. d. Diritto*. An. IX fasc. 1, p. 1 (19).

¹⁰ Cf. Kelsen (1925) *Allgemeine Staatslehre* 6-13. Cf. Jones, *Modern Discussions of the Aims and Methods of Legal Science* (1931) 47 *LAW Q. REV.* 62, 78-86.

¹¹ KRITIK DER REINEN VERNUNFT (1781).

concept, law. It is hardly necessary to say that the terms '*a priori*' and '*a posteriori*' have nothing to do with subjective recognition or with temporal connection or with innateness. The realistic philosophy which perhaps today predominates does not put aside the basic laws of logic or the ideas which spring from logic. It admits *a priori* ideas as points of reference to universals. Modern science has not abolished reason.

The problems involved do not for the present submit to solution by way of definite demonstrations, but the assignment of *a priori* truth to the mind as the lawgiver of reality does not today find wide attraction. There is also the question whether Kant and Del Vecchio have not extended the field of the *a priori* beyond legitimate bounds. Mathematics is readily admitted, but can we extend the idea to such purely historical notions as law, state, and justice?¹² To avoid misapprehension, the reviewer is ready to admit the existence of thought forms which have the merit of great utility, composed of pure and empirical elements. Jural relationship is one of these, and, as we think, law is another.

The thoughtful lawyer must solve these problems for himself. To do so he must, however, travel far afield. He must read the *Kritik* itself—if he can. But first he should read the *Prolegomena*.¹³ The *Kritik* notoriously is one of the most difficult of all books but it reduces to dialectic elements not reasonably beyond understanding.

One thing more as to Del Vecchio's book may be pointed out—it emphasizes two elements: the problem of Truth (as based on the *Kritik der reinen Vernunft*) and the problem of Value (as based on the categorical imperative of the (1788) *Kritik der praktischen Vernunft*). On the whole, Del Vecchio's new book is one of the most readable expositions now available of the consequences of the Kantian system as applied to law.

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A. KOCOUREK

Lawful Pursuit of Gain. By Max Radin. Boston and New York, Houghton Mifflin Co., 1931. pp. 144.

THIS is a scholarly little book tracing through the years the development of certain legal and ethical standards of the market place. Delightfully written, it makes no effort to prove a thesis. There is no loud voiced assertion to bolster a faltering argument, no reform to sell. Though it contains many suggestive historical references, the book can not be regarded as an exhaustive or important historical work. The utilitarian will credit it principally with an entertainment value.

Of the many points at which "law" and "morals" have been at odds, Professor Radin has exploited only a few. In legal terminology these are selling price, usury, bankruptcy, warranty and unfair competition. But this enumeration gives no suggestion of the discussion, for example, of the centuries old debate over the ethics of profit making or of interest charges for the use of money. Nor does it indicate the author's entertaining treatment of the many modern developments in advertising and their relation to the law of warranty.

At times Professor Radin seems to ask too much. For instance, the

¹² The present writer previously raised that question in his review of Del Vecchio's *LA GIUSTIZIA* (Bologna, 1924), (1925) 19 *ILL. L. REV.* 497.

¹³ (1783) "PROLEGOMENA ZU EINER JEDEN KÜNFTIGEN METAPHYSIK, DIE ALS WISSENSCHAFT AUFTRETEN KÖNNEN." A highly recommended explanation of Kant is (1876) STADLER, *DIE GRUNDSÄTZE DER REINEN ERKENNTISTHEORIE IN DER KANTISCHEN PHILOSOPHIE*.

impression is given that wide advertisement of the fact that a certain kind of soap floats, though legal, is not ethically commendable, since it has never been shown that floating is a quality of any particular value in soap. But when compared, let us say, with the publicity given by some universities to the great quantity of important "research" they expect soon to complete, an advertiser's assertion that its soap floats, which at least has the virtue of being true, is a harmless indiscretion. Of course it is just such opportunities for differences of opinion which make the subject of the book interesting, and its discussion inconclusive.

New Haven, Conn.

ROSCOE TURNER.

Mr. Justice Holmes, edited by Felix Frankfurter. New York, Coward-McCann, Inc., 1931. pp. viii, 241. \$2.50.

THIS book is offered to Mr. Justice Holmes upon his ninetieth birthday "as a symbol of homage and affection." The tribute is the more sincere because it was not produced for the occasion. None of the pieces makes an original appearance here; the earliest of them goes back fifteen years, the latest is to be found in the Holmes number of the Harvard Law Review. The essays voice general and thoughtful appreciation of a master by members of the craft who are themselves skilled workmen. They are written late enough to catch the manner of the man, to record his mature achievement, and to sense the contemporary significance of the work. They come too early to present his work in perspective, to appraise his contribution to the system of law in the making, and to discover his distinctive place among the immortals. The contributors to the volume are John Dewey, Learned Hand, Elizabeth Shipley Sargeant, Joseph Redlich, Morris R. Cohen, Philip Littell, John H. Wigmore, Walter Lippmann, Harold J. Laski, Benjamin N. Cardozo, and Felix Frankfurter. This list is testimony enough that "Holmes belongs to philosophy and letters as well as to law."

W.H.H.

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