

## BOOK REVIEWS

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**Contracts: Cases and Materials.** By Friedrich Kessler and Malcolm P. Sharp. New York: Prentice-Hall, 1953. Pp. xvi, 807. \$8.50.

"Adult education should be conducted on the democratic basis of pooling knowledge and experience, and not on the class basis of the educated talking down to the ignorant."

—STEPHEN SPENDER

One need not read far into the new Kessler-Sharp contracts book to recognize an adult-democratic attitude toward legal education, in the sense in which Spender uses it. Anyone who knows the teachings, writings and ideas of Friedrich Kessler and Malcolm Sharp would expect no less of this product of fifteen years of joint research and teaching experience begun as colleagues at Chicago and completed after Professor Kessler joined the Yale faculty. For Sharp and Kessler assume on the part of their students a broad set of interests and an intellectual curiosity with respect to contracts and the world about. They expect their students to bring to the course an adult approach and fund of experience. In their teaching, and now in this rich coursebook, they share their own wide reading and experience with their students as equals.

As anyone who has taught contracts knows, it is not a simple matter to make an outstanding contribution to this field of law. No other area of private law is doubly endowed with such full-scale treatises as Williston's and Corbin's. As for available teaching tools, in addition to the respected doctrinally arranged casebooks,<sup>1</sup> innovations have been made by Havighurst,<sup>2</sup> who first broke ground by classifying cases under types of contracts (rather than under doctrines), such as employment contracts, contracts for professional services, contracts for the sale of goods; Fuller,<sup>3</sup> who has organized the traditional materials around the theme of legitimate interests to be protected, and the advocate's remedies for realizing such protection, with a substantial modern business practice emphasis and a heavy gloss of jurisprudence; and Mueller,<sup>4</sup> who has imaginatively built his book around a step-by-step story of the construction of an apartment house, interlarded with related business practice and industry documents. The Kessler-Sharp book definitely belongs in the class of innovations; it is another marked departure from the familiar classical analysis in terms of offer, acceptance, consideration and the rest of the catechism.

<sup>1</sup> Williston, *A Selection of Cases on Law of Contracts* (5th ed., 1949); Corbin, *Cases on the Law of Contracts* (3d ed., 1947); Patterson and Goble, *Cases on Contracts* (3d ed., 1949); Shepherd, *Contracts and Contract Remedies* (3d ed., 1952).

<sup>2</sup> Havighurst, *Cases and Materials on the Law of Contracts* (2d ed., 1950).

<sup>3</sup> Fuller, *Basic Contract Law* (1947).

<sup>4</sup> Mueller, *Contract in Context* (1952).

In their introductory chapter entitled "Contract as a Principle of Order," Sharp and Kessler give us the key to their approach to contracts. Eschewing Williston's attempt "to explain the whole law of contracts in terms of a few fundamental principles uniformly applicable throughout the whole field," they suggest that "a realistic understanding of the law of contracts can be achieved only through an awareness of the different functions fulfilled by the various kinds of contract in our society." (P. 1.) Kessler has previously expressed this pluralistic view of contracts:

Any attempt to unify the law of contracts must inevitably do violence to the complexity of the living law. For the law of contracts covers such vast areas of human conduct that we should not be surprised to discover, instead of unity, a rich polytheism of values reflected in and frequently hidden behind "fundamental principles." Rules and counter-rules expressing different ideals of social policy and of justice are constantly competing with one another in a struggle for recognition in the marketplace of ideas. General principles cannot be relied upon to decide concrete cases. The choice between rule and counter-rule—often in delicate balance—can be made only with reference to public policy and with the help of our sense of justice.<sup>5</sup>

At an admitted risk of oversimplification, the authors divide the law of contracts "broadly into two sectors governed by principles which are inconsistent with if not diametrically opposed to each other. At one pole is a body of institutions and doctrines which are influenced, if not governed, by the principle of free volition. At the opposite pole, freedom of volition is limited if not suspended by an ever-expanding system of judicial and legislative control." (P. 2.) Thus their book is divided into two major parts: Part I, entitled "Contract and the Free Enterprise System," where, although control is dealt with, the emphasis is on volition; and Part II, entitled "Irregularity, Inequality and Imperfect Competition," where the emphasis is on control. Historically (and roughly) speaking, the ideal of free volition represents in Sir Henry Maine's phrase "a movement from status to contract" ("From Status to Contract" is the first chapter of Part I), and the ideal of social control in Kessler and Sharp's perspective consists of the counter-balancing forces designed to prevent a retrogression from contract back to status ("Status and Contract in Insurance" is the final chapter of Part II). The theory of private volition, which most contract courses stress, looks upon contract as a private affair based on the consent of the parties freely given—in a word, private legislation. Social control, which few contract courses stress, is the countervailing force which polices the multitude of contractual obligations which are today predetermined by statute, public authority or group action:

The terms and conditions under which [a member of the community] obtains his supply of electricity and gas will in all likelihood be regulated by a public utility commission. So will his fare, should he use a public conveyance going to work. The rent he

<sup>5</sup> Kessler, Symposium Review of Corbin on Contracts, 61 Yale L.J. 1092, 1093 (1952). See also Kessler, Contracts of Adhesion—Some Thoughts about Freedom of Contract, 43 Col. L. Rev. 629 (1943).

will have to pay may be fixed by governmental authority. The price of his food will depend partly on the government's farm support program and not solely on the interplay of demand and supply in a free market. No longer will he be able to have the advantages of simple price-competition in buying many a standard brand used in daily consumption, since prices may well be fixed by arrangement between producer and distributor under price-maintenance requirements with the blessing of statutory approval. The wages he will have to pay or will earn may have been fixed for him beforehand. (P. 9.)<sup>6</sup>

While the significance of "compulsory contracts" has been explored on past occasions,<sup>7</sup> the Kessler-Sharp book is the first full-scale attempt, within the framework of modern contract law, to elevate the concept of compulsory contract to the status of the prevailing notion of the classical bargained-for contract. It is thus natural to inquire whether Sharp and Kessler have succeeded in explaining modern contract law in terms of the two diametrically opposed principles of free volition and social control, and whether in the process they have produced a teachable casebook.

Part I begins with a lucid historical chapter on the development of assumpsit. In tracing Maine's progression "from status to contract," the authors rely not only on common-law development but also on illustrations from economic history, such as the Statute of Laborers and the English Commercial Revolution. In their second chapter, "The Domain of Contract," they briefly relate contract to the obligation of contracts clause in the U.S. Constitution. Unless it is to illustrate the pervasive effect of contract on our society—on treaty-making as a major base of international law, for example—it is a little difficult to understand the purpose of stringing together the Supreme Court cases revealing the great struggle between the police power and the contracts clause, which ended with the resounding defeat of the latter in the Minnesota Moratoria cases<sup>8</sup> and the apocalyptic dissent of the "four horsemen."

There follow two further unusual prefatory chapters. In "Contract, Free Choice, and Free Competition," the authors, by a selection of very teachable cases<sup>9</sup> and several illuminating notes, present the basic ideals of an individual-

<sup>6</sup> For an earlier British preview of this approach, see Eastwood and Wortley, *Administrative Law and the Teaching of the Law of Contracts*, [1938] *Journal of Society of Public Teachers of Law* 23, esp. 29-31 ("the ordinary man in the street does not retain even a theoretical bargaining power in respect of an increasing number of transactions he performs each day").

<sup>7</sup> See, e.g., Symposium on Compulsory Contracts, 43 *Columbia L. Rev.* 565 (1943) (including Kessler's piece); Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (1937); Cohen, *The Basis of Contract*, 46 *Harv. L. Rev.* 553 (1933); Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 *Yale L.J.* 704 (1931); Isaacs, *The Standardizing of Contracts*, 27 *Yale L. J.* 34 (1917); see also frequent references in the casebooks of Fuller and Mueller, *op. cit. supra* notes 3 and 4.

<sup>8</sup> *Home Building and Loan Ass'n v. Blaisdell*, 290 U.S. 370 (1934).

<sup>9</sup> Old favorites usually found in other contexts are here brought together: *Boston Ice Co. v. Potter*, 123 *Mass.* 28 (1877); *Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 211 *N.Y.* 68, 105 *N.E.* 88 (1914); *Davis & Co. v. Morgan*, 117 *Ga.* 504, 43 *S.E.* 732 (1903); *Wood v. Boynton*, 64 *Wis.* 265, 25 *N.W.* 42 (1885); *Sherwood v. Walker*, 66 *Mich.* 568, 33 *N.W.* 919

istic law of contracts: that individuals cannot be forced into contracts that are not of their own choosing and that the parties are free to determine the contents of their contracts. They are quick to note, however, that there always existed a counter-principle of control over private volition in that common-law courts never hesitated to refuse to enforce a contract for reasons of public policy, or to give protection to one whose consent was obtained by misrepresentation, fraud, duress, or undue influence. However, in the authors' view, a far more powerful limitation on freedom of volition was the requirement of consideration:

Freedom of contract, even during the period when *laissez faire* had its greatest triumphs, never succeeded in overcoming a deep-rooted suspicion on the part of the common law against the social desirability of enforcing what have been called one-sided or gratuitous promises, as contrasted with reciprocal bargains. . . . Instead of developing and expanding categories like duress and unconscionableness, courts have shown a tendency not only to solve these problems with the help of consideration, but also to permit the expansion of ideas of public policy favoring limitations on freedom of contract under the shelter of the consideration doctrine. (P. 37.)<sup>10</sup>

In "Contract and Tort," the authors briefly relate contract to tort, mainly to demonstrate (via the *MacPherson v. Buick Motor Co.*<sup>11</sup> line of cases) that "just as the action on the case of old was used to pave the way for the expansion of contractual liability, more recently tort law has been called upon to provide remedies in areas not yet covered by contract law, frequently with subsequent gradual absorption of these remedies into the body of contractual remedies." (P. 56.)

It is hard to assess these introductory chapters as teaching materials. There can be no doubt about their worth as original scholarly essays, containing new insights into the role of contract in our society and into the vast ramifications of contract as a principle of order. For the beginning student, no matter how adult, they probably require reading and rereading, and will take on meaning only as the course progresses, and the abstract legal concepts become clothed with the facts of cases.

As in most contracts books the bulk of materials in Part I centers around formation-of-contract doctrines: offer, acceptance, consideration, the statute of frauds, the parol evidence rule. The familiar cases are here, but their treatment is unique. Here is a definite attempt to back off from the cases and search for the basic principles, ideals, motivations, much as Sharp did in his pioneering articles on "Promissory Liability."<sup>12</sup> For example, probing into the validity of

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(1887); *Stees v. Leonard*, 20 Minn. 448 (1874); *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854) (the latter to raise the question whether the idea of volition has not gained a foothold even in the law of damages).

<sup>10</sup> The related question of whether the consideration technique has always been the most rational way of achieving a just control over private volition was explored by Sharp in his perceptive study, *Pacta Sunt Servanda*, 41 Col. L. Rev. 783 (1941).

<sup>11</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>12</sup> 7 Univ. Chi. L. Rev. 1, 250 (1939).

traditional analysis, the authors "make the disquieting discovery that the distinction between genuine and implied-in-law contracts is not as clear-cut as the hornbooks make it out to be." (P. 81.) Or speaking of the rule in *Dickinson v. Dodds*,<sup>13</sup> they note: "It may . . . be ordinary business understanding that an offer for a bargain is revocable until the bargain is made, and to that extent, our common law is sound. To say, however, that a firm offer will not be given effect according to its terms, is something quite different." (P. 122.)<sup>14</sup> Or, referring to the relation between economics and contract, their comment is that "[t]he rise of mass production and mass distribution, with their emphasis on standardization in the interest of rationality, had as its counterpart in the field of contract the 'mass production of bargains.'" (P. 134.) Under the knife of Kessler and Sharp the venerable distinctions between unilateral and bilateral contracts become "manufactured difficulties." Another of Sharp's favorite whipping-boys, the "ideal of reciprocity,"<sup>15</sup> comes in for a double study: one section on "Firm Offers. A Preliminary Study of the Ideal of Reciprocity"; a later section on "Freedom of Contract and the Ideal of Reciprocity."

Following this chapter on "The Bargain," there appears an organization of traditional and nontraditional materials under the chapter heading of "Fairness of the Bargain and Equality. Exchange Justice." Here the authors emphasize some often neglected limitations on freedom of contract—economic duress, undue influence, forms of overreaching. Their main case in point is *United States v. Bethlehem Steel Corporation*,<sup>16</sup> which, with an accompanying instructive note on the peculiar nature of war procurement contracts, serves to illustrate the stresses and strains when giant bargainers meet, here the United States and a leading shipbuilding company. In "Readjustment of a Going Business Deal; Over-Generalizations and Over-Corrections," the authors deal with the difficult problem of increasing or reducing a wage, rent or price bargain without running afoul of the requirement of consideration. And in "The Classical Struggle between Debtor and Creditor" they bring together various aspects of debt settlement, including the rule in *Foakes v. Beer*,<sup>17</sup> duress and undue influence practiced by the debtor against the creditor, composition arrangements among creditors, accord and satisfaction, and finally some difficulties in getting the creditor to accept the debtor's cash as illustrated by that favorite classroom exercise, *Petterson v. Pattberg*.<sup>18</sup> This miniature study in debtor-creditor relations is an excellent example of how a specific legal-economic-

<sup>13</sup> 2 Ch. D. 463 (1876).

<sup>14</sup> Quoted from Sharp, *Promissory Liability*, 7 *Univ. Chi. L. Rev.* 1, 10 (1939). Based on a study of business practices in the construction industry in one state, I expressed a dissent from this view that firm offers should invariably be treated as firm despite the absence of consideration, 19 *Univ. Chi. L. Rev.* 237 (1952). Professor Sharp took some exceptions to my conclusions in 19 *Univ. Chi. L. Rev.* 286 (1952).

<sup>15</sup> See Sharp, *Promises, Mistake, and Reciprocity*, 19 *Univ. Chi. L. Rev.* 286 (1952).

<sup>16</sup> 315 U.S. 289 (1942).

<sup>17</sup> 9 *App. Cas.* 605 (1884).

<sup>18</sup> 248 N.Y. 86, 161 N.E. 428 (1928).

business problem can be explored by bringing together familiar cases usually classified under separate doctrinal headings.

While chapters on "Formalism in Our Law of Contracts," "The Statute of Frauds: Insurer of Certainty," and "The Ideal of Integration: The Parol Evidence Rule" do not, despite their principle-revealing titles, represent substantial departures from standard doctrinal treatments, "The Ideal of Security of Transactions and the Objective Theory of Contracts," a chapter dealing with mistake, deserves special note. Here the authors have rounded out the standard cases on unilateral and mutual mistake (the ship *ex Peerless* case,<sup>19</sup> the barren cow case,<sup>20</sup> the mistaken building bidder case,<sup>21</sup> the garbled Western Union message case<sup>22</sup>) with teachable cases developing refinements in the area of mistake, misunderstanding and failure of communication, including Judge Frank's perceptive concurrence on the objective theory of contracts in *Ricketts v. Pennsylvania R. Co.* (P. 360.)<sup>23</sup>

I must confess that I do not find the latter half of Part I, dealing with the performance-breach end of the contract cycle, quite so rewarding. True, the titles continue to rise above the doctrines. Impossibility and Frustration of Contract become, in the authors' characterizations, "Contract and Absolute Liability. The Rule: *Pacta Sunt Servanda*"; "The Counterrule: Frustration of Purpose—*Clausula Rebus Sic Stantibus*. Interpretation vs. Construction"; and "Freedom of Contract and the Control of Contractual Risks." The law of Conditions becomes "Protection of the Exchange Relationship." Third-Party Beneficiary doctrine becomes "Freedom of Contract and Third Party Beneficiaries"; Assignment becomes "The Liquidity of Contractual Obligations." But the contents do not, for the most part, show the same originality of research and analysis, the long search for just the right case to develop a tangential point, the compact, carefully composed notes delving into the economic, social and historical ramifications of a case, or the searching questions designed to prod the student to think about the problem and dig further on his own. Perhaps the answer lies in the fact that the research of Sharp and Kessler (as revealed by their writings) has been concentrated on the making of the bargain rather than on its performance or its multiparty relations. If so, we may anticipate whatever deficiency exists here will be remedied in the years ahead.<sup>24</sup>

<sup>19</sup> *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (1864).

<sup>20</sup> *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887).

<sup>21</sup> *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N.E. 564 (1907).

<sup>22</sup> *Germain Fruit Co. v. Western Union Tel. Co.*, 137 Calif. 598, 70 Pac. 658 (1902).

<sup>23</sup> 153 F. 2d 757 (1946). Judge Frank has finally received recognition for his other provocative miniature treatises on contracts: *Zell v. American Seating Co.*, 138 F. 2d 641 (C.A. 2d, 1943) (p. 406); *Martin v. Campanaro*, 156 F. 2d 127 (C.A. 2d, 1946) (p. 94). It should be noted that much of the spade-work on rounding out the law of mistake was done by Sharp in *Notes on Contract Problems and Comparative Law*, 3 Univ. Chi. L. Rev. 277 (1936), and *Williston on Contracts*, 4 Univ. Chi. L. Rev. 30 (1936). See also his *Promises, Mistake, and Reciprocity*, 19 Univ. Chi. L. Rev. 286 (1952).

<sup>24</sup> In contrast, the three chapters on Damages and Remedies sandwiched in near the end of Part I provide an exceptionally able exposition of modern damage law in terms of reliance,

Part II, designed, it will be recalled, to develop the concepts of legislative and judicial controls which limit the operation of the ideal of free volition, is somewhat disappointing, largely because it attempts too much in the short compass of 100 pages.

Chapter 1 has the appearance of a short course in Antitrust, with special emphasis on the use and legality of agreements in restraint of trade or price. *Standard Oil Company of California v. United States*,<sup>25</sup> which, I assume, is difficult enough to comprehend with an antitrust background, seems like a very large bite for the uninitiated. This is not to deny that the materials on the advantages and disadvantages of contract as opposed to other devices for industrial integration (such as outright purchase, merger, consolidation, control by stock ownership) open unexplored mines to contract scholars (e.g., why is the oil industry an integration by ownership and not by contract as is the automobile industry?).

The next chapter on "Automobile Merchandising—A Case Study in Contracts of Adhesion" presents a more teachable, because more familiar, study of exclusive agency and other intra-industry contracts dictated in many instances by the financially superior manufacturer or distributor.

The subject given by far the most coverage in Part II is "Contract and Labor." The labor materials afford the authors an opportunity to demonstrate the tenacity of freedom-of-contract dogma, which in *Coppage v. Kansas*<sup>26</sup> (declaring an anti-yellow-dog statute unconstitutional) was elevated to the status of a Fourteenth Amendment fundamental property right. Collective bargaining "agreements" (to be distinguished from "contracts") both before and after the Wagner Act raise the interesting question of how radical a departure from freedom of contract is the compulsion to hire.

Finally, "Status and Contract in Insurance," the final chapter, completes the circle. The root and branch of this tree is, of course, Kessler's suggestive essay on "Contracts of Adhesion—Some Thoughts about Freedom of Contract,"<sup>27</sup> where, dealing with risk of loss without insurance caused by the unreasonable delay of the insurer, Kessler demonstrated that "the courts pay merely lip service to the dogma that the common law of contracts governs insurance contracts. With the help of the law of torts they nullify those parts of the law of contracts which in the public interest are regarded as inapplicable." It is not inappropriate that the book ends on the note of the most attenuated of modern contracts, the standardized insurance policy.

One difficulty with Part II is understanding the authors' selection of com-

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restitution and expectation interests (the last embracing specific performance), as well as in terms of the duty to mitigate damages and prevention of economic waste. Nowhere is the authors' careful historical research and legal understanding better exemplified than in the introductory note to "Damages and Reasonable Expectations," which traces the shift from jury to judge control of the amount of damages and the special considerations which have limited the scope of contract damages.

<sup>25</sup> 337 U.S. 293 (1949).

<sup>26</sup> 236 U.S. 1 (1915).

<sup>27</sup> 43 Col. L. Rev. 629 (1943).

pulsory contracts. Industrial integration, automobile merchandising, labor and insurance contracts, while intrinsically interesting, do not seem to present a coherent span of those types of contracts dominated by the elements of social control. At least, if there is a design, it fails to come through these materials. It might have been better had the authors followed their pattern in Part I and attempted to spell out the principles and ideals (such as the ideal of rationality) which emerge from compulsory contract cases. Compared to the prodigious research in Part I, the notes and insights in Part II appear quite thin. In its most favorable light, Part II may be looked upon as an interesting experiment which contract teachers may be expected to build upon as more studies are made on the operation and control of the dictated and standardized contract.

Although there is a compelling urge to approach the Kessler-Sharp book as a scholarly treatise, it must necessarily be examined primarily for what it is—a first-year casebook. As such it is, in my opinion, an unusual and effective teaching device. It accomplishes its novel purpose of presenting contracts in terms of the dual principles of private volition and social control, although the control principle apparently emerges most effectively interstitially in Part I. Its faults, I believe, are two. One is that some areas of Part I and most of Part II are still undeveloped theses. The other is that it tries to cover too much ground, too much legal and non-legal learning, for a single first-year course. It should be hastily added that this is a fault which an experienced teacher's scalpel can readily remedy.

But the Kessler-Sharp book is obviously much more than a casebook. It is a serious scholarly work which cannot help but be a spur to legal scholarship. Its citations—which are legion—to British, Canadian, South African and Continental cases, legal works, and law reviews, to old and recondite economic and historical treatises, to applicable sections of the new Uniform Commercial Code, and to subsequent developments in landmark cases (e.g., Cardozo's lecture commenting on the motivation of the New York Court of Appeals in the *Sun Printing* case,<sup>28</sup> pp. 111, 112) represent a rich storehouse of source materials. Suggestions for field studies to examine the pertinent business facts and standards of behavior in troublesome areas of contracts should act as gadflies to student note-writers and mature scholars.<sup>29</sup> Scholars will also want to weigh the authors' thesis of the law's development from status to contract to status.

<sup>28</sup> *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.*, 235 N.Y. 338, 139 N.E. 470 (1923).

<sup>29</sup> E.g., in dealing with the Corbin-Llewellyn controversy as to the abolition of the Statute of Frauds, the authors refuse to take sides because "there are no reliable field studies on the degree of formalization in the various transactions covered by the Statute of Frauds." (P. 393.) See in this connection the work of the Contracts Editorial Group in the reports of the Committee on Auxiliary Business and Social Materials, *Handbook of the Association of American Law Schools* for any year, beginning 1949. Professor Addison Mueller of Yale, presently chairman of this group, is endeavoring to obtain studies from contracts teachers and scholars for use in contracts courses—"to fill in the students' imaginations with a 'tangible sense of the going ways of business.'" *A.A.L.S. Handbook* (1949), at 139.



Such shortcomings as this book has as a scholarly endeavor, in fact, are the shortcomings of the present primitive stage of legal research on the periphery of contract proper.

One thing is clear: the research and study which other scholars have poured into law-review articles and treatises, Kessler and Sharp have put into this book. Its real meaning, I believe, has inadvertently been set down by one of the authors in his review of Corbin's great treatise:

This reviewer can well imagine that there will be some students who will take fright when reading this book because their sense of security requires a diet of black letter law, an oversharpening of doctrinal issues, and a treatise which makes things simpler and clearer than they are, which is rich in myth, and which unquestioningly accepts rationalizations at face value. But if the student is willing to hear out the author with patience, he will be richly rewarded. He will begin to realize that the security he is longing for is a false security; that our living law of contracts is not a closed system of harmonious rules but an open system of social action rich in dynamic complexity and full of contradictions; that the scenes where ideals are in conflict are constantly shifting. A reading of the book will therefore be a constant invitation to work at the concretization of our notions of justice and to create working rules of our own.<sup>30</sup>

FRANKLIN M. SCHULTZ\*

<sup>30</sup> Kessler, *Symposium Review of Corbin on Contracts*, 61 *Yale L.J.* 1092, 1094 (1952).

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*Civil Liberties and the Vinson Court.* By C. Herman Pritchett. Chicago: University of Chicago Press, 1954. Pp. xi, 297. \$5.00.

On June 21, 1946, the President of the United States issued a commission announcing "[t]hat reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Fred M. Vinson, of Kentucky I have nominated, and, by and with the advice and consent of the Senate, do appoint him Chief Justice of the United States."<sup>1</sup> On October 3, 1953, Mr. Justice Black, on behalf of the Court, delivered a eulogy in which he said: "His colleagues of this Court respected him for his integrity and ability. They loved him for his kindness, sympathy, understanding and fairness. We join the Nation in lamenting the death of this capable and loyal public servant."<sup>2</sup> The President's commission followed a form of long standing. The memorial remarks of Mr. Justice Black followed a somewhat less rigid but nonetheless required formula. Thus, the Supreme Court career of the late Chief Justice was both opened and closed with phrases of doubtful applicability. Historians may find hyperbole in the words "wisdom," "learning," "ability," "understanding," and "capab[ility]," as applied to the Supreme Court's thirteenth Chief Justice.<sup>3</sup>

<sup>1</sup> Appointment of Mr. Chief Justice Vinson, 329 U.S. v, vi (1946).

<sup>2</sup> Death of Mr. Chief Justice Vinson, 346 U.S. VII (1953).

<sup>3</sup> My prediction as to the historical evaluation of the late Chief Justice's role on the Supreme Court is by no means universally shared. Professor Francis A. Allen who served Vinson so well