not be answered if men seek salvation in the exclusive worship of a popular present-day secular trinity: Purely informative education, tolerance and democracy.

Today many men and women have turned for anchorage in a time of stress from religion or devotion to the gods of science to public education. It is assumed that free education for all will give men common goals and a saving wisdom even though the goals of education are not agreed upon. It is assumed that if men accumulate enough facts somehow a sound philosophy will emerge from the pile like some genie from a bottle. Combine education with unlimited tolerance for any and all ideas however incompatible or false and with devotion to a vague something called democracy and everything will come out all right. Do not ask the deeper question, what are the wise and proper purposes of your democracy; do not suggest limitations on its power lest you be branded as an enemy of the people. The worship of this trio, education, tolerance and democracy, gives men the pleasing sense of having all the answers, or if not that somehow the answers will come through without too much trouble. This secular religion encourages drift under an illusion of progress. Let us hope that it will not be a drift towards totalitarianism, or better yet that men will realize the need of sound and long-term principles. Having found them, the climate of opinion in which the Supreme Court works will be philosophically helpful rather than evasive of fundamental issues or deleterious.

And whether or not the judiciary, as Jefferson charged, are miners and sappers of the Constitution, the fact that they work unobtrusively and without the dramatic gesticulations of spotlighted executive and legislature, should not blind us to the importance of their work. Nor does it free bench and bar, political scientists and all thoughtful Americans from the duty of constant scrutiny and constructive criticism of the Supreme Court of the United States whose members do so much to make the supreme law of the land.

BEN W. PALMER†

THE RATIONAL BASIS OF CONTRACTS AND RELATED PROBLEMS IN LEGAL ANALYSIS. By Merton Ferson.* Brooklyn: The Foundation Press, Inc., 1949. Pp. ix, 330. $4.00.

In this volume Dean Ferson has brought together a number of his essays on the legal analysis of consensual acts. The title of the book might well have been, "Legal Transactions and Juristic Acts," for those two conceptions provide the common denominator of the diverse legal problems which the author

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reduces to their simplest terms. "Legal transaction" includes not only contracts in the narrow sense of legally obligatory promises but also gifts, exchanges, barters, declarations of trust and wills. In a final chapter, Dean Ferson discusses certain problems of agency, and presumably he would include the creation of the principal-agent relation as a legal transaction. The "juristic act" is the signal that flashes the actor's will to be bound by a legal transaction. While his definitions of these terms at the end of the first chapter are avowedly tentative, his use of them clarifies their meanings. Wisely enough, he does not set out to build up formal definitions of them, but rather to use them in solving a number of familiar controversial problems of the law of contracts and the law of agency.

The term "contract" was once used to include most of the things that Dean Ferson regards as legal transactions. Its narrower meaning (enforceable promises) came about through the interest of text-writers and the division of subject matter in law school curricula. This narrowing and other factors, more or less accidental, led to the dispersal of other legal transactions into the courses in personal property (gifts, pledges), sales, agency, wills, trusts and others. Dean Ferson's book provides an argument that this dispersal was unwise, and that the beginning law student should be introduced to the elemental aspects of the whole panoply of legal transactions because the legal requirements of one type of transaction throw light on those of another type. To this may be added the argument that the pressure to reduce or omit the traditional courses on private law and to increase the amount of student time and energy devoted to taxation, corporations and "public law" courses, would make an introductory course in legal transactions a curricular economy. Dean Ferson's book would be useful collateral reading for the student in such a course. For the student in the present courses in contracts it offers an elementary and readily understandable comparison of the various types of transactions.

Some examples of Dean Ferson's use of his basic conception, juristic act, will serve to illustrate the theme and content of the book. He first shows that not all juristic acts need to be communicated to the other party to the transaction in order to be legally effective. A's gift of a chattel to C can be made effective by delivery of the chattel to B for C, even though C does not know about the juristic act. C's "acceptance" of the gift is presumed.[1] At this point he fails to note that the presumption is not conelusive, in the sense that C may, on learning of the gift, disclaim any interest in the chattel. Thus communication of the juristic act to the donee has legal significance. The same may be said of a gratuitous declaration of trust, and of a will that becomes effective on the dcath of the testator. The legal effect of such a juristic

1. P. 11.

act is a tentative transfer of ownership, based upon the presumption, justified by experience, that donors rarely make gifts that will be onerous or unwelcome to their donees. Aside from this tentative legal effect, a gratuitous juristic act is like an offer in that the offeree may by his assent accept or reject it. This point is rather crucial in Dean Ferson's conception of the juristic act, which he frequently treats as if it were effective without regard to the assent of the other party.

He uses this conception to provide solutions of a number of familiar legal problems. One is the creation of a right in a third party beneficiary. When R makes a (legally binding) promise to E that R will render a performance to B, a third person who does not know of the transaction at that time, R's juristic act of making the promise manifests his will to be bound and the absence of communication to B should not prevent the act from being immediately effective to create a legal right in B. Quite properly, he says that the difficulty which some American courts have made out of the absence of "privity" between R and B is needless.[2] Since almost all American jurisdictions now allow the third party beneficiary to maintain an action against the promisor, this argument will be needed only for the die-hards who still defend the citadel of privity. Presumably, the English House of Lords, which never overrules its precedents, will remain uumoved. However, Dean Ferson's argument would, I should think, lead logically to the conclusion that, the promisor's manifestation of his will to be bound to the beneficiary being a sufficient criterion, the relation of the beneficiary (B) to the promisee (E) should be irrelevant, and hence the distinction between creditor beneficiaries and donee beneficiaries is, unless justified on other grounds, merely an historical survival. However, he accepts the division into creditor beneficiaries and donee beneficiaries approved by the Restatement of Contracts,[3] without noting that these are Procrustean beds for some varieties of beneficiary transactions.

Dean Ferson also uses the conception of a juristic act to attack the preexisting duty rule. If D owes C a debt of $100, past due, and C orally accepts $50 from D in full discharge of his obligation, most courts still hold that C is not thereby precluded from recovering a judgment against D for the unpaid balance of the debt, on the ground that D gave no sufficient consideration for C's promise to discharge him. Dean Ferson argues that C's juristic act is not a promise to discharge D but a manifestation of a present discharge, and that, like a present exchange or a gift, it shonld be effective without regard to consideration.[4] This analysis seems to me an over-simplification, both from the standpoint of formal analysis and of policy arguments. As to the former, either C's juristic act is an exchange, in which case a consideration is required

2. P. 146.
3. P. 151.
4. P. 157 *et seq.*

(contrary to Dean Ferson's conclusion) or it is a gift of C's chose in action, in which case, as an oral gratuitous transfer of a chose in action, it would be revocable. Dean Ferson at times seems to assume that any manifestation by a donor of his intent to make a gift is legally effective,[5] although at one point he recognizes that the creditor's juristic act must, to be effective, comply with the requirements of gifts.[6] On the policy side, he mentions Ames' excellent analysis of the pre-existing duty rule but neglects to mention Ames' argument that the rule is based on public policy rather than the absence of a bargained-for consideration. The pre-existing duty rule is a kind of indirect sanction to coerce men into performing their contractual duties. The wisdom of imposing this indirect sanction universally may well be questioned. Yet even where, as in New York and some other states, it has been partly abandoned by statute, the problem of unjust coercion by an obligor who takes advantage of his obligee and threatens not to perform unless promised additional compensation, will still have to be dealt with. Dean Ferson does not discuss these latter problems.

The principle that a promise should be enforced because it arouses expectation in the promisee is persuasively used by Dean Ferson to attack the rule that the intervening death or insanity of the offeror, unknown to the offeree, revokes an offer.[7] Yet elsewhere, as in defending the acceptance-by-mailing rule and attacking the view that cross-offers do not make a contract, the author seems to assume that a declaration of the will alone is or should be legally effective to create a duty or a transfer. It seems safe to say that no system of law has ever adopted and applied this principle universally. On the contrary, some additional requirement, such as a writing, a delivery of property, a bargain, or injurious reliance or a *causa,* is almost universally imposed. Such requirements are open to criticism in detail, and are sometimes circumvented where they appear to thwart the will of the declarant. Still it is arguable, at least, that the privilege of changing one's mind is entitled to legal recoguition unless someone else can show a sufficient reason to the contrary. In this book Dean Ferson does not squarely face this antithesis.

Despite his self-imposed limitations, the author has presented a unified analysis of some familiar and recurrent problems of the law of contracts. The absence of full citations of cases and legal literature makes it all the more readable for the law teacher and the law student.

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5. P. 11, pp. 158, 165, 173.
6. P. 167.
7. Ch. V.

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