

BOOK REVIEWS

CASES AND OTHER MATERIALS ON CIVIL PROCEDURE. By Thomas E. Atkinson—James H. Chadbourn. The Foundation Press, Brooklyn, 1948. Pp. xxix, 910, \$8.50.

CASES AND MATERIALS ON CIVIL PROCEDURE. By Paul R. Hays. The Foundation Press, Brooklyn, 1947. Pp. xiii, 1067, \$8.00.

THE ELEMENTS OF LEGAL CONTROVERSY: AN INTRODUCTION TO THE STUDY OF ADJECTIVE LAW. By Jerome Michael. The Foundation Press, Brooklyn, 1948. Pp. xxxi, 756, \$7.50.

Of the making of casebooks there is, quite properly, no end. This is particularly true in the field of judicial administration, where teaching ideas are as fluid and diverse as are the court systems themselves. Nevertheless, the stimulus toward uniformity and the heightened interest in the subject occasioned by the adoption of the federal procedural rules is having its natural effect not only in the practical atmosphere of the courtroom, but in the now far from ivory towers of the professors. Willy-nilly, there results some definite trend toward a concrete body of material which suggests and stimulates some similarity in attitude toward its use. And the generally heightened interest in the widely accepted procedural reforms of the present era accentuates this trend.

This new group of casebooks illustrates perfectly the now quite normal paradox of a seemingly complete diversity in teaching techniques, masking a considerable underlying uniformity. After all, the same ultimate purpose, with materials of the same or like character, is shared by all. This is reminiscent of the changing views shown by procedural reformers themselves. Thus when the Supreme Court's Advisory Committee on Rules of Civil Procedure first came together in the summer of 1935, the members were attuned to the diversities suggested by their various local practice systems. As is usual, each was disposed to think his own the only one really feasible; and it seemed indeed doubtful whether accord would ever be possible. But with increased knowledge of these diversities, together with the realization of the similarities of purpose behind them, it was obvious that the opportunities for reasonable agreement were extensive. Eventually, and quite surprisingly, there was reached a complete accord, which has continued over the years, extending even to novel and unusual problems covering such legal *terra incognita* as discovery.¹ Such agreement is hardly to be expected among teachers and would, in fact, be unfortunate; the case system of instruction thrives only on dispute. Nevertheless the area of underlying unity is substantial.

Hence, as I view these three most modern and highly important collections of cases in this interesting field, I am at a loss whether to emphasize most their diversities or their similarities. I do think a tribute

1. The single case of dissent—that of one member on the issue of discovery of lawyers' files (Report of Proposed Amendments 46, June, 1946)—is to be explained by that member's absence from meetings because of the illness which resulted in his death before the report was acted upon. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 150 (1948).

is due the publisher for its willingness thus to venture three books which must be mutually competing to a considerable extent. Even the volumes of Messrs. Michael and Hays, though intended for the same curriculum at Columbia, overlap to some extent. Thus, to cite a not isolated example, "The Substantive Adequacy of Negative Defenses" of Professor Michael's Chapter XII brings out in part the same group of cases as the "Summary Judgment" of Professor Hays' Chapter VI. And of course the casebook of Messrs. Atkinson and Chadbourn cuts across the fields of both the other books. All three are admittedly shaped by the stimulus of the new federal rules, even the Atkinson and Chadbourn, the most conventional of the three; all are replete with modern citations. Indeed, they definitely suggest that earlier collections are now outmoded. So many and so important are the recent cases illustrating modern trends in the states, as well as in the federal system, that casebooks only a few years old now have a flavor of medievalism. We are indebted, therefore, to this publisher for presenting so useful a series of books from which so abundant a choice can be made.

For choice there must always be, since every teacher of Procedure tends to have his own private and personal approach to the field. Diversities here are certainly much more usual than in standard courses such as Contracts and Torts—or Property before McDougal took to upsetting it.² At any rate, it will accomplish little for a reviewer to pursue his own hobbies and I shall refrain, particularly as I have stated mine elsewhere in some detail.³ I will refer only to my conviction that the teaching of Procedure has been altogether too besotted with ancient history and cramped by the obsession of substantive teachers that it should be an adjunct to, and an explanation of, their courses, at least on the historical level. But if history be employed, it should be only interstitially to illustrate the modern law; and, unless we have before us the cases of the last decade in the light of modern developments, a procedural course is a positive loss to the present-day practitioner and a potential menace to the future reformer. All three of these books fulfil admirably this requirement, which I consider so basic. Hence I shall confine myself to pointing out distinctions among the volumes, rather than to essaying some new critique of the subject.

Of the several collections, that of Messrs. Atkinson and Chadbourn hews more to the traditional line; it can properly be said to be a streamlined and properly modernized version of the older courses. It thus approaches the subject through the common-law forms, with Part One devoted to Actions, Part Two to Jurisdiction, Pleading and Practice, Part Three to Equity: Separate and Unified Systems, and Part Four to Parties, including the modern rules of party joinder. It affords a wholly admirable combination of the historical and modern approach; and even the historically minded should not wish more of ancient procedure than is here given. The book has the greater number of citations; at an estimate it has more than double that of Michael's book, and four times that of Hays', which relies extensively on quotations from texts. The material

2. McDUGAL AND HABER, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT* (1948); Leach, *Property Law Taught in Two Packages*, 1 J. LEG. ED. 28 (1948); Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203, 248-254 (1943).

3. CLARK, *CASES ON PLEADING AND PROCEDURE* ix-xii (2d ed. 1940), and Book Reviews, 28 GEO. L. J. 857 (1940), 8 FORD. L. REV. 293 (1939), and 47 HARV. L. REV. 148 (1933).

supplied by Atkinson and Chadbourn would, I should suppose, well afford content for two courses: an introductory background course and a modern course in the union of law and equity and party joinder. For its purpose, therefore, it is well designed to supersede earlier courses separated along historical lines and to give in one space a remarkably succinct synthesis of both early and modern procedures.

The Hays volume, on the other hand, offers a strictly modernized code-pleading and trial-practice course—if we continue to use the older and more familiar appellations. For its purpose there seems to me only one serious omission, namely, the cases dealing with the union of law and equity, which afford some of the more interesting traditional problems in this field. But I recognize, though I do not agree with, a considerable trend to treat this in a separate—and I suggest now obsolete—course on Equity. Moreover, it must be confessed that this problem looms much smaller than it did even a decade ago. The federal rules, among others, have shown how easily the union of law and equity can slip into modern ways of thinking once we are allowed to get away from the dead hand of the past.⁴ Reviewers have found other absences, such as matters of jurisdiction and the conflict of the laws;⁵ but to me these seem more properly assigned to other courses less concerned with the role of court procedure in law administration. To be noted as a definitely modern touch is the lessened amount of space devoted to pleading proper and the emphasis on the more modern devices of discovery and summary judgment. Interesting, also, is the increased use of text material in place of, or as an introduction to, the cases, resulting in a volume of increased bulk, but fewer citations than the others. Nevertheless, as any teacher knows, this leads to briefer classroom treatment, because of the difficulty of arousing sharp discussion when the cases are abandoned for text. Since much of this material can be properly treated by precept and illustration, in place of the ordinary mimic warfare of the classroom, the result in this particular context should be a gain in time and effectiveness of presentation.

Professor Michael's book is more likely to provoke discussion than are the others. For he has attempted the interesting task of charting new paths, indeed of trying to introduce some philosophy into the subject. I find his attempt most interesting and certainly most stimulating to all teachers in the field. I am bound, however, to express some doubt as to its immediate utility as a tool for instructing first-year students in the mysteries of law administration. Perhaps I am wrong; indeed, I hope so. I may well be too conditioned by the practical problems of effecting court reform and the usual professional resistance to moderate and moder-

4. Curiously enough, the only substantial issue which has arisen as to the federal union of law and equity is the collateral one of the appealable judgment where the spectacle of the chancellor enjoining himself as a law judge still charms the Supreme Court, *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188 (1942), and the nostalgic dictum of *Bereslavsky v. Caffey*, 161 F. 2d 499 (2d Cir. 1947), affords a point of departure for makers of casebooks on Equity, however unreal it may seem in an actual federal case. 2 MOORE, FEDERAL PRACTICE 456-460 (2d ed. 1948); 3 *id.* § 39.01 (1st ed. 1948 Cum. Supp.); CLARK, CODE PLEADING 125, 126 (2d ed. 1947). Note the suggestion in *Stainback v. Mo Hock Ke Lok Po*, 69 S. Ct. 606, 614, notes 26, 27 (1949), of resurrection of the now superseded JUD. CODE § 267, the former 28 U. S. C. § 384, which was repealed by the new Title 28, United States Code; see 62 STAT. 992 (1948).

5. As in *Cleary*, 57 YALE L. J. 672 (1948); *Blume*, 1 J. LEG. ED. 143 (1948); *MacDonald*, 48 COL. L. REV. 660 (1948); *cf.* *Ladd*, 61 HARV. L. REV. 1084 (1948), and *Schaefer*, 43 ILL. L. REV. 127 (1948).

ately vocalized changes to expect ready acceptance of still deeper probing in the need and purpose which should activate our ponderous judicial machinery. Thus it may well be that the problem of stating a case in the complaint can be best visualized by a journey through "The Legal and Factual Conditions of A Remedy," leading to "The Substantive Adequacy of the Facts Stated" and "The Procedural Regularity of the Statement of Facts," as a substitute for the old dichotomies of law, fact, or evidence, or the more modern ones of special versus general or notice pleading. Of course these titles do not give the whole flavor of the book; of course, too, there is much more of familiar stuff—*e. g.*, such as our friend the demurrer, and how it may, at times, "search the record"—than is here indicated. But I think this does suggest the editor's attempt to erect a broader intellectual base for the ordinary down-to-earth procedural operations. Even though some sad teaching experience suggests a lag before this will produce the stimulating results in the classroom it deserves, no one can doubt that over a somewhat longer interval it will contribute greatly to the needed re-awakening of student and teacher.

Hence, choice for use among these volumes must, as ever, depend on personal predilections. Since all three seem to me so much better for the present day than the older collections, I must end by recommending them all. In a judicial vacation to be spent this summer in law teaching, I am about to show a practical preference for Professor Hays' book; but this is only because it so easily and completely typifies the course on modern pleading and procedure to which I have accustomed myself. The Atkinson-Chadbourn volume covers a broader field, with a fine sweep of the centuries. The Michael book opens new vistas. But the Hays version is modern state and federal procedure.

Charles E. Clark.†

CASES AND OTHER MATERIALS ON CIVIL PROCEDURE. By Thomas E. Atkinson—James H. Chadbourn. The Foundation Press, Brooklyn, 1948. Pp. xxix, 907, \$8.50.

What the first-year procedure course should include is a perennial question but regardless of the juggling process a law school curriculum may undergo, there is no doubt about the need for such a course, supported by a substantial time allowance. The objectives of such a course may be two-fold: a study of procedure with the aim of understanding procedure, and a study of procedure to enable the student to understand substantive law and to appreciate its application. With the great emphasis placed upon procedure by the members of the bar with their legal institutes and other professional meetings held for the purpose of studying new state and federal rules of civil procedure, it would indeed be odd for the student to emerge from law school without a thorough background in this subject. Resourcefulness in procedure involves an understanding of it both in its entirety and in the detailed operation of the major procedural devices.

There was a time when there was much discussion of whether procedure could be taught, whether really it did not have to be learned in

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practice. While there is still much to be learned in practice, Procedure has become one of the most basic courses in any modern law school curriculum. Skill in the use of procedure may depend upon experience in practice, but an understanding of the problems and their solution can and should be acquired through law school study.

The modern case and materials book provides a much better source for the study of procedure than was available in the past. The casebook under review is one of the best. It emphasizes the use of cases but does not neglect the materials. Chapter I, the introduction, is a good opening for a first-year student. The method of briefing a case and the explanation of the court system should fill a first-year need. This introduction explains the procedural steps in an action and discusses the various purposes which are served by the pleadings. It is particularly helpful to introduce the question of purposes as an aid to evaluating decisions at the very beginning of law study. It will orient the lawyer-to-be in an atmosphere in which the rules of pleading are to be considered not as an art for the élite among practitioners, but as practical devices which must meet the needs of litigants and satisfy the interests of the community in the efficient administration of justice.

Originally written materials explain the writ system in the second chapter. Textual material by the authors is found at the beginning of many of the chapters or sections of the book, explaining, for instance, the origin and historical development of trespass, case, replevin, ejectment and equity. The original writing by the authors throughout the casebook is very well done. It is concise and exact. Few words have been wasted. The book, however, consists largely of carefully selected cases and illustrative statutes, supplemented by footnotes which include statutes, civil procedure rules, law review material and cases. The editors state that they believe the subject of Procedure may best be presented through the medium of cases, and they have used many of the earlier decisions. This would be expected in a subject in which there is an introductory background in common-law actions and pleading. In dealing with modern procedure, however, they have used many of the most recent cases under both the Federal Rules of Civil Procedure and recent state procedural acts.

The first 104 pages are devoted to the common-law actions, including trespass, case, trover, detinue and replevin, ejectment, and debt, covenant, and assumpsit. The reviewer is happy to see the inclusion of this material, because it is believed that familiarity with it is essential to the education of a lawyer. This is legal culture. This book gives enough of the common-law forms of action to provide the background for the interrelated development of the substantive law and procedure. It is essential that the beginning student have a careful understanding of the common-law forms of action in order that he may appreciate the development of the substantive law.¹

Study of the earlier common-law remedies is useful for a reason apart from its contribution to an understanding of substantive law. It is also essential groundwork to an understanding of what modern procedure seeks to accomplish.

The danger in modern teaching of procedure lies in neglecting to create appreciation of the historical development of procedure and substantive law as a joint process and in neglecting to provide an insight to

1. See Ladd, Book Review, 88 U. OF PA. L. REV. 762 (1940), discussing *MAGILL AND CHADBOURN, CASES ON CIVIL PROCEDURE* (3d ed. 1939).

the rigid niceties of common-law pleadings, which current practice seeks to avoid. The treatment of common-law pleading in this casebook is not burdensome. It is enough to satisfy the need and no more.

The abolition of the forms of action is considered largely through cases showing the struggle of the law to eliminate historical formalism and to adopt a practice designed to inform the parties and the court of the facts out of which the litigation arose, rather than state with meticulous perfection the theory of legal cause to which it was hoped the facts provable might conform. The difficulties in the transition from theory pleading to fact pleading is well illustrated in this section. Part One of the book concludes with Chapter IX, splitting and joining causes of action. This is developed through cases, the Federal Rules, and illustrative state statutes. Concisely presented, it adequately warns of the dangers of merging and barring an entire claim when suing upon a part of it, covers the duplicity of law suits, and shows affirmatively the broadened conception of joinder of actions. The meaning of "transaction", "cause of action", and "subject of action" is demonstrated through an excellent selection of cases and footnotes.

The joinder of causes of action is treated separately from the subject of parties, which is considered in Part Four. There is much to be said in favor of studying joinder of causes of action in connection with joinder of plaintiffs and joinder of defendants. The hard cases such as *Ader v. Blau*,² present both. Indeed, although this case is set forth under joinder of defendants, it is also mentioned under joinder of causes of action. Likewise a teacher may find it helpful to consider compulsory and permissive counterclaims together with the joinder problems. Basically, the policy considerations are common to what are traditionally three separate fields. The combination of them as a unit of study may be regarded as preferable by some teachers of Procedure. This, however, is not a criticism of the utility of the book and its effective use in the class room. The teacher who prefers the less orthodox approach suggested can readily make this adjustment without difficulty. In fact it is doubted that most teachers follow the same program year by year, but rather prefer jumping around in the case book, altering their plan of presentation nearly every time they teach the subject.

Most of the matters mentioned above have been condensed into the first 146 pages of the casebook. If they are to achieve their purpose, these should be slow-moving pages in the class room, with emphasis upon the techniques of case analysis and historical background, and upon a thorough understanding of both procedural and substantive aspects.

Beginning with Part Two, which covers jurisdiction, pleading and practice, the modern problems of procedure are presented. It commences with acquiring jurisdiction and carries through each step of the trial from personal service up to and including appellate review. The jurisdictional problem is exceptionally well handled. Forms for the commencement of action under different jurisdictions are set out to illustrate the different types of process. The manner of service is included, and the jurisdictional problem of personal, quasi in rem and in rem actions are effectively presented. The well-known basic cases, including *Pennoyer v. Neff*,³ *McDonald v. Mabee*,⁴ *Harris v. Balk*,⁵ and *Hess v. Pawloski*⁶ are

2. 241 N. Y. 7, 148 N. E. 771 (1925).

3. 95 U. S. 714 (1878).

4. 243 U. S. 90 (1917).

5. 198 U. S. 215 (1904).

6. 274 U. S. 352 (1927).

used. The footnotes present the associated problems. Appearance is next considered briefly, but sufficiently for the purpose.

Chapter XIV commences the trial practice phase of the course with right of trial by jury, followed by withdrawal of cases from the jury, instructions, verdicts, new trials and judgments. This material, with commencement of actions, is in some schools reserved for the trial practice course, which usually includes the following part on appellate review. Where this work should be covered depends upon the amount of time allotted to Procedure among the three law school years. In a substantial number of schools, all of this material is handled in the first year, as presented by this casebook, and third-year procedure work is sometimes conducted through specialized study of the procedure of particular states. With procedure presented in so many different ways and in areas of the country where the problems of the graduates are different, it would be difficult to prepare any first-year book which would exactly fit into the program of all schools. This book lend itself to adaption for various needs.

Part Three of the book treats the subject of equity procedure, as distinct from law and under unified systems. It is largely procedural equity, carrying through the whole scheme of equitable remedies, including decrees and review. The chapters on discovery and upon testimony and hearing in equity are brief but well done, and should lead to understanding of the differences between law and equity procedure. This part of the book concludes with the union of law and equity. With the elimination of Equity as a separate course in some law schools, it is conceivable that the trial practice aspects of the casebook might have been modified by the inclusion in its place of more substantive equity. It is doubted, however, if such a plan would have met the needs of enough schools to justify this variation. If such a plan is desired, a rather limited amount of supplemental mimeographed material would adequately complement the equity treatment and meet that need in those schools. The reviewer is so impressed with the excellent selection of material used in the casebook in this area that he questions whether the suggested inclusion should be made. After all, everything cannot be accomplished in one book to meet every need, and the plan adopted appears to be the most desirable.

Twenty-five years ago, Equity was a key separate subject in almost every law school. It caught all of the popular interest of students that some of the public law courses now have. Everyone felt he had to have Equity. The course merged the procedural and substantive aspects, emphasizing mostly the substantive. Today Equity has become scattered, and many schools do not offer a course carrying that name. Specific performance is expected to be picked up in the property courses. Restitution includes much of what was designated formerly as Equity. Other courses are expected to develop the equitable considerations related to them. Has Equity become so broadcast that much of it has been lost? It is the procedure courses which must help to fill the gap and to make students fully conscious of the use of equitable remedies. This book gives strong emphasis to the subject, and the materials are well handled. The extent to which it may need to be supplemented depends upon the entire curriculum of the particular school.

One of the most interesting phases of the book is Part Four, on the subject of parties. Representative suits, intervention, third party practice and interpleader are intriguing to teach, and the cases in this part of the book are largely recent and very well selected. Extensive use is made of the Federal Rules, which have become the pattern for procedural

provisions everywhere. In considering the real party in interest and the joinder of parties, plaintiff or defendant, leading older cases have been more generally used. With these are included the modern statutes or court rules. If the course is taught in the order of the arrangement in the casebook, attention should be directed, as indicated by the footnote references, to the common problems of joinder of parties and of causes of action. The subject of parties provides a strong conclusion for the course and should maintain student interest to the end.

This book is used in the reviewer's school and has proved to be very teachable. Throughout, the cases have been very well selected and the comments in the footnotes show keen insight into the lawyer's problems in procedure. A particular feature of the book is its adaptability to various arrangements of procedure in the curriculum. The book represents high quality scholarship by two able and experienced teachers of procedure.

Mason Ladd.†

CORPORATE REORGANIZATION (2 vols). By James W. Moore and Robert S. Oglebay. Matthew Bender & Co., Albany, 1948. Pp. 5964, \$35.00.

No alarm need be felt over the apparently terrifying size of these two volumes. Of the 5,800 announced pages, over 4,500 have been reserved for subsequent additions. The reservation reduces the work to manageable proportions, 1,273 pages in all, and would seem to invite comparison with an earlier work, Finletter, *The Law of Bankruptcy Reorganization*. Differences in approach and content, however, render comparison somewhat impossible. Messrs. Moore and Ogelbay have not attempted a critical and analytical work; instead they have given us an exhaustively annotated statute, each section discussed in its proper order. Finally, although now published as a separate work in two volumes, these two volumes are simply a reprint of Volume 7 of *Collier on Bankruptcy*, and there are, therefore, liberal text and footnote cross-references to that work, which detract somewhat from the usefulness of the book as a separate reference work.

The authors give us first the text of the statute itself, all of the sections in one article being stated. This is followed by a series of cross-references in fine print, then by a detailed table of sectional headings and subheadings of the authors' discussion, which proceeds on a section by section basis. While such a format has its disadvantages, if the reader knows in advance that his problem involves the interpretation of a given section or sections of Chapter X, he can readily find all that the authors have to say about it, and in the main can learn enough about the cases cited to narrow substantially the field of necessary research.

Finletter, on the other hand, approached the problem from a functional point of view, collecting in one chapter, for example, all matters of valuation, not only arising under Chapter X, but under the other rehabilitation chapters of the Bankruptcy Act as well, and discusses the sections of Chapters I to VII where they are applicable. Finletter, then, is a better starting point for the student and for the lawyer who is not too familiar with the field.

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It must, indeed, be disheartening to any author to write in a swiftly moving field of law, for much that he writes becomes out of date, sometimes even while the presses are printing his book. This has happened to our authors. Between press time for the book and press time for the preface, the United States Supreme Court in *Williams v. Austrian*,¹ reversed a lower court decision criticized by the authors. It is a tribute to the sound judgment of James William Moore in matters of procedure and jurisdiction that he argued that in Chapter X proceedings, the trustee in reorganization could have the issues in a plenary suit determined by a federal court without regard to diversity of citizenship or amount in controversy. This result is not, however, regarded as soundly reached by all authorities in the field.²

On the other hand, our authors were not so fortunate in at least one substantive field, that of interest on claims accruing after the petition is filed. Recent decisions of the Supreme Court have interesting implications for this phase of reorganization law. The authors state: "In corporate reorganizations the 'absolute priority rule' demands that the creditors of each class receive full compensatory treatment for the entire bundle of rights they surrender. Interest on a claim is one of such rights and hence it is entitled to the same treatment as the principal. It is settled, therefore, that in corporate reorganizations, as a general rule, interest on all claims, whether fixed by contract or by the applicable local law, accrues until the date of the consummation of the plan and must be accorded the same priority as the principal of the claim."³ The authors recognize the exception that the deficiency claim of mortgage bondholders against free assets is not entitled to accrue interest subsequent to the date of the petition, and that the same rule applies to claims of unsecured creditors in such a case. In *Vanston Bondholders Protective Committee v. Green*,⁴ however, the Supreme Court denied a claim for interest on overdue coupons although mortgaged assets were sufficient to pay it. The Court founded its decision on the "equitable principles" prevailing in bankruptcy generally, and upon the further ground that to allow the claim would leave nothing for junior creditors. While the holding in the *Vanston* case can perhaps be limited to the "interest on interest" problem, the broad language of the opinion regarding the nature of all allowance of interest accruing after the filing of the petition may foreshadow an application of the *Vanston* doctrine to all such claims for interest, whether the mortgaged assets are sufficient to pay them or not, except where denial would result in a surplus for stockholders. And the very recent ruling denying interest on tax claims in bankruptcy may well be a part of the same pattern.⁵

As I was involved in the interest on interest issue before Judge Patterson in the *Interborough* receivership,⁶ I may be pardoned for re-

1. 331 U. S. 642 (1947), 60 HARV. L. REV. 636 (1947), 45 MICH. L. REV. 906 (1947), 33 VA. L. REV. 764 (1947).

2. See comment, 2 HANNA AND MACLACHAN, CASES ON CREDITORS' RIGHTS, 387-88 (4th ed. 1948), and 95 U. OF PA. L. REV. 679 (1947), commenting on the same holding in the lower court.

3. Pp. 2816-17.

4. 329 U. S. 156 (1946).

5. *City of New York v. Saper*, 69 Sup. Ct. 554 (1949). This was, of course, a straight bankruptcy case under §§ 57(j), 64(a), which are not applicable in Chapter X. See §§ 102, 199, 52 STAT. 883, 893 (1938), 11 U. S. C. §§ 502, 599 (1946).

6. *American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 26 F. Supp. 954 (S. D. N. Y. 1939). In an earlier decision involving the same issue, *Mack, J.*, said by way of dictum that under New York law such a promise was not enforceable, 11 F. Supp. 418 (S. D. N. Y. 1935).

fusing to pass without mention the brusque statement in a footnote⁷ that under the law of New York a promise to pay simple interest on overdue coupons still attached to the bond is against public policy. The case cited was the *Vanston* case in the Sixth Circuit, and as is the case with many of such statements, the court relied on the *Williamsburgh* case⁸ in the New York Court of Appeals and federal cases citing it. The *Williamsburgh* case involved a bond that contained no agreement to pay interest on overdue coupons and so is quite distinguishable and no Court of Appeals case squarely in point has been found. The New York Court of Appeals has expressly held that an agreement made by a corporation borrowing at six per cent to pay *additional* simple interest after maturity at the rate of seventeen per cent, totalling twenty-three per cent in all, violated no public policy of the state.⁹ An agreement to pay simple interest at seven per cent on an overdue seven per cent coupon is, in dollars and cents, (and a rule of public policy based upon financial oppressiveness should look only at the dollar cost) nothing more than an agreement to pay additional simple interest at about one-half of one per cent upon default. It seems difficult to believe that the New York Court of Appeals would on grounds of oppressiveness deny validity to the agreement to pay one-half of one per cent while enforcing an agreement to pay twenty-three per cent because the magic words "interest on interest" are not used in the latter case. Mathematically, of course, the compound interest, outlawed in prior New York holdings, imposed a far different burden than additional simple interest on an overdue coupon.¹⁰ Nor has it ever been pointed out in print that no one contested New York law before Judge Mack in the *Interborough* case, so that his dictum was not based upon a consideration of controverted points.¹¹ But the point is now, per-

7. P. 2817, n. 14.

8. *Williamsburgh Savings Bank v. Town of Solon*, 136 N. Y. 465, 32 N. E. 1058 (1893). The distinction here made that there was no contract to pay simple interest on the coupons, was also made by Judge Lacombe, sitting as special master. (B. R. T. Receivership Record, Vol. VII, pp. 163-170.) But see the later federal cases to the contrary effect, e. g., *Empire Trust Co. v. Equitable Office Bldg. Corp.*, 167 F. 2d 346 (2d Cir. 1948), refusing to distinguish the *Williamsburgh* case.

9. *Union Estates Co. v. Adlon Construction Co.*, 221 N. Y. 183, 116 N. E. 984 (1917). (In New York, a corporation cannot plead usury.) In the Circuit Court opinion in the *Vanston* case, this case was dismissed upon the ground that it only involved an agreement to pay a higher rate of interest after maturity and not interest on interest. "The case is not analogous to the case at bar." *In re American Fuel & Power Co.*, 151 F. 2d 470, 478 (6th Cir. 1945).

10. For example, at the end of 50 years, the actual period of time involved in one of the early New York cases originating the alleged rule, a principal sum of \$100 at 7% simple interest would be \$450. With simple interest on *one* overdue coupon, the sum would be \$472.38 and at true compound interest the sum would be \$2,925.70. Even if we assume that each installment of interest in the 50 years draws interest at 7%, the total sum will only be \$1,062.50 or a little over $\frac{1}{3}$ % of the amount at true compound interest. Rarely will 50 coupons be involved. Judge Clancy has said the difference between "interest on interest," and "compound interest" is "not in character or quantity but only in quantity." *Transbel Investment Co. v. Roth*, 36 F. Supp. 396, 399 (S. D. N. Y. 1940). But amount should be the decisive factor in a rule based upon the reason that advance agreements to pay compound interest "may serve as a temptation to negligence on the part of the creditor and a snare to debtor, and prove in the end oppressive and even ruinous." *Young v. Hill*, 67 N. Y. 162, 168 (1876). Judge Clancy has also correctly observed with respect to the alleged New York rule, "It is an odd circumstance that none of the cases that we have found actually enforces the doctrine they announce." 36 F. Supp. 396, 398 (S. D. N. Y. 1940).

11. Judge Mack called for briefs on New York law as well as on the "federal rule." All counsel involved cited the *Williamsburgh* case, but the argument was on the federal rule.

haps, moot under the *Vanston* rule, except, of course, where claim is made that stockholders have an equity and are entitled to share in the reorganized corporation.

The authors feel that the "absolute priority" rule is here to stay, and they may well be right, and those wrong who see in the *Otis* case,¹² and in the *Vanston* case, straws in a wind bringing on a new rule, perhaps treating all publicly held securities as ventures upon a financial sea entitled to some sort of "general average" when the ship must be lightened by jettisoning some of the charges against earnings.

If a criticism were to be made of the book, it would lie in the comparative allocation of space between matters of procedure and matters of the substance of reorganization law. Important though such subjects may be, devoting some 390 pages to "Jurisdiction and Powers of Court," "Petition," "Answer" and "Approval or Dismissal of Petition" seem disproportionately large compared with only seventy pages allowed for tax aspects of reorganization and some fifteen or twenty-five pages given over to the all important matter of valuation. Perhaps it was felt to be enough to point out, as Finletter had predicted, that valuation here must in general be on an earnings basis, rejecting the mumbo-jumbo of "prudent investment," "reproduction-cost-new" and the like except in the case of nonproductive assets. But I for one would have preferred a more extended discussion of the factors used in various situations in which value was litigated and of the attitude displayed by the Securities and Exchange Commission on matters of valuation in its advisory reports. It is all very well to be told that the problem is one of earnings times the appropriate multiplier and that the S. E. C. has used rates of capitalization ranging from eight to twenty per cent.¹³ What, however, is the basis upon which the *pro forma* earnings statement is to be calculated? What weight is to be given to possible trends in business conditions? What factors influenced the selection of the approved multiplier? And a host of other questions could be asked. The authors avoid much trouble by stating that "determination of the rate of capitalization tends to be arbitrary."¹⁴ Indeed, the whole problem of valuation may well become one in which the courts will defer more and more to the "expert feel" of the Securities and Exchange Commission and this, in turn indicates the need for more detailed studies of the work of that Commission, and especially of the danger that multipliers may be selected with an eye to the result desired on other unexpressed grounds.¹⁵

On the technical side, one misses a detailed working index, a statement of the latest volumes of reports covered, and a table of cases. The latter especially is a useful tool for finding where the minor points that arise in practice are discussed. While the statutory text of each article of Chapter X is followed by a "Synopsis" giving the detailed headings of the authors' discussion, in a two volume work, the summary table of

12. *Otis & Co. v. Securities and Exchange Commission*, 323 U. S. 624 (1946); 58 HARV. L. REV. 604 (1945).

13. P. 3856. The authors state that the S. E. C. "generally uses a rate between 8% and 10%."

14. *Ibid.*

15. See Billyou, *A Decade of Reorganization Under Chapter X*, 49 COL. L. REV. 456, 498, and especially the table at p. 499, giving a tabular comparison of S.E.C. estimates and vastly differing actual earnings in the years following the reorganization.

contents at the beginning of each volume could well have been followed by a complete table of paragraph headings and subheadings for ease of reference.

Fairfax Leary, Jr.†

DISCRIMINATION BY RAILROADS AND OTHER PUBLIC UTILITIES. By Isaac B. Lake. Edwards & Broughton Company, Raleigh, North Carolina, 1947. Pp. xii, 346.

This book is one of interest to economists as well as lawyers, and particularly to those interested in the discrimination in freight rates that continues to be borne by the South and West despite the view of the Interstate Commerce Commission that such discrimination is unjust and unreasonable. Regional freight-rate discrimination is not the only subject dealt with, however, as is indicated by the title.

Professor Lake reviews neatly and concisely the English law and early cases in the United States on the subject of discrimination that formed the background for the enactment of the Interstate Commerce Act. He sets his course by Holmes' statement that "The passion for equality sometimes leads to hollow formulas."

The author asserts that in discussing discrimination he has approached the problem by weighing the reason for giving the preference against the consequences to the patron disfavored. If the weighing is done with a reasonable amount of accuracy, Lake asserts, discriminations which should be discontinued can be distinguished from those that are relatively harmless and which are also, from the standpoint of the utility, supported by "sound business reasons."

The regional rate discrimination problem is presented as a part of a logical sequence. Discussed in succession are discriminations by government order; preferences to specific patrons; preference to a class of patrons; and preferences to patrons in a given locality, in which the regional freight-rate problem is given attention. Remedies and penalties relating to discrimination are the subject of the final chapter. The reviewer will presently give more detailed attention to the author's handling of the freight-rate problem, but first for some general comments.

As is true with most lawyers, Professor Lake's economic sensibilities are not as acute as his legal ones. He points out that the Statute of Labourers¹ was enacted in England after the Black Death to require agricultural workers to work for their usual wages, with severe penalties for violation, but he does not follow up by pointing out that many of those in the body that passed the legislation freely paid higher than legal wages to obtain the relatively scarce services of workers. Such is the working of the simple economic principle that prices will rise when goods and services become scarce in relation to effective demand—legislation to the contrary notwithstanding.

Another statement with which the reviewer might take issue, although many will agree with Professor Lake, is his statement concerning what he terms the "Civil War." (Professor Lake is a more courageous man than the reviewer when it comes to disregarding the views

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of the United Daughters of the Confederacy.) He declares that “. . . the cause of the war was the power which the institution of slavery gave to one individual over another” (p. 50). Going to a more fundamental cause it would seem that the issue which brought on the War Between the States was whether the policies of the Federal Government were to be shaped for the benefit of the agricultural South or the industrial North. In the opinion of the reviewer, the institution of slavery, in large part, furnished the emotional drive to a group that economically had no large stake in its abolition. A higher average temperature and a different pattern of economic endeavor in the northern section of the United States might well have given a different turn to the thinking of the thrifty Yankees on the subject of slavery. Many will agree, no doubt, that the policies pursued by the victors after the war were inconsistent with the lofty ideals which should be attributed to a group advocating the end of slavery. Professor Lake seems to recognize this in stating that “The history of the Reconstruction Period should be sufficient to remind one that the United States has not always been a benign uncle scattering benefits among his nephews and nieces impartially” (p. 96). The present freight-rate structure may be termed a vestigial remain of the policy of the Reconstruction Period.

Those interested in the discrimination in freight rates against the South and West will read Chapter V with much interest. Although the author does not exhaust the subject, he gives a short, concise discussion of the topic, including an account of the anti-trust suit brought by the State of Georgia after waiting several years for relief from the Interstate Commerce Commission. The suit, brought as one of original jurisdiction in the Supreme Court of the United States against the principal eastern and southern railroads, charged that the economy of Georgia had suffered irreparable damage because of a conspiracy to exact discriminatory rates from shippers located there.

On the whole, the terminology used and the facts asserted are accurate, but in a few instances violence is done to the parlance of the transportation fraternity. None are serious enough, however, to lessen the value of the book.

For instance, at page 238 it is stated, in connection with an explanation of the manner in which class rates are computed, that “every kind of article is assigned a *class* rating . . .” A proper statement would be that every article is assigned a *classification* rating.

Another more serious error is found in the discussion of the interim order of the Interstate Commerce Commission aimed at alleviating the freight-rate discriminations found to be unjust and unreasonable in the *Class Rate Investigation*.² In this connection, Professor Lake writes (pp. 239-240) that “. . . the Commission undertook to relieve the Southern and Western shippers from the disadvantage under which they labored by ordering the existing interstate class rates within Southern and Western Territories, and from them to Official Territory, reduced by ten per cent, and by ordering such rates in and from Official Territory raised by ten per cent . . .” This is not what the Commission ordered. What Professor Lake should have said is clearly set forth in the report of the Interstate Commerce Commission as follows: “The existing interstate class rates applicable to freight traffic moving [*sic*] at the classification ratings within southern, southwestern, and western trunk-line territories and interterritorially between those territories, and also between

those territories and official territory, will be unjust and unreasonable unless reduced 10 per cent . . . Simultaneously as part of the adjustment, the existing applicable interstate class rates for freight traffic moving at classification ratings within official territory . . . should be increased 10 per cent. . . ."³

The difference between the two statements is briefly this: the Commission ordered all class rates, whether intraterritorial or interterritorial, applicable in the several rate territories under investigation, reduced ten per cent except those applicable *within* Official Territory, which were increased ten per cent. Professor Lake overlooked the fact that reductions were ordered on class rates applicable *between* the territories and indicated that the rates applicable *from* Official were raised, when in reality, they were lowered. Attention might be called to the meaning of "between" in freight rate terminology as used by the Commission in its report; it means from either territory to the other territory. "Within" also needs explanation. This term, defined in a negative way, means not beyond the boundaries of the territory named.

Accuracy in the statement made at page 242 by the author that "The Commission's order involved interterritorial rates on shipments both to and from Official Territory, intraterritorial rates within Official Territory and intraterritorial rates within each of the other territories" would require that it be altered to account for interterritorial rates between all the territories involved, which were reduced.

Again, at page 258, Professor Lake mixes his transportation terms when he states that, "The United States is divided for railroad rate purposes into three classification areas. . . ." Keeping in mind that classification is a concept apart from scales of class rates, it would be more fitting to state that the country is divided generally into three major classification areas, Eastern, Southern, and Western; and five rate territories, Eastern, Southern, Southwestern, Western Trunk-Line, and Mountain-Pacific.

Incidentally, all the classification areas, and all the rate territories except Mountain-Pacific, were included in the *Class Rate Investigation*.

In describing the suit brought by the State of Georgia charging monopolistic practices on the part of the railroads and their rate bureaus, Professor Lake did not foresee, and could not reasonably be expected to have foreseen, that the 80th Congress would enact into law the Reed-Bulwinkle Bill,⁴ which allows these rate bureaus to obtain immunity from the anti-trust laws—and incidentally from Georgia's charges. Neither could he be reasonably expected to have foreseen that the Interstate Commerce Commission would meekly ask, not order, the railroads to draw up the uniform freight classification necessary to replace the existing unlawful systems of classification, in order to give justice in class rates to the South and West. The railroads promptly put the task of compiling a uniform freight classification in the hands of one of the monopolistic groups under attack in the Georgia suit. There it languishes today with the result that the South and West do not have the parity in freight rates with the East that the Commission in 1945 found to be necessary.

Professor Lake quotes from Mr. Justice Jackson's dissent to the ruling of the majority in *New York v. United States*⁵ that the Interstate

3. *Id.* at 449.

4. 62 STAT. 472 (1948), 49 U. S. C. A. § 5 b (Supp. 1948).

5. 331 U. S. 284 (1947).

Commerce Commission was correct in finding that discrimination in class rates could be removed by raising class rates in Eastern Territory, and lowering those applicable in and between the southern and western rate territories and between these rate territories and Eastern Territory. Mr. Justice Jackson said: "The Court's approval of this order is based on an entirely new theory of 'discrimination.' It has never been thought to be an unlawful discrimination to charge more for a service which it cost more to render."⁶ It might have been pointed out that Mr. Justice Jackson apparently did not read the record before the Commission, or did not understand it if he read it, because the record plainly shows, and the Commission so found, that the cost of rendering rail transportation in the South is less than in the East, although southern class rates were substantially higher than those of the East.

A general comment might be made that Professor Lake did not call attention to the pioneering work done by members of the staff of the Tennessee Valley Authority in the field of regional freight-rate discrimination, but contented himself for the most part with citing less important writings on the subject.

No further observations are necessary on the minor discrepancies contained in Professor Lake's excellent work. These errors are extremely minor in comparison with the excellent material generally contained in the treatise. Calling attention to two groups of observations made by the author will illustrate the quality of his work.

At page 269 it is said that "Carrier competition, subject to Commission supervision, is a far more effective means than Commission investigation alone of combating unreasonable preferences to patrons in a given locality . . ." Further, at page 270, the statement is made that "Certainly, carrier competition offers a much speedier method of counteracting preferential rates by other roads than a Commission hearing does. The solution seems to be to restore active carrier competition and limit interference therewith to cut-throat competition found to be such by the Commission—a possible but a greatly exaggerated danger. . . ."

No doubt Professor Lake is aware that the Interstate Commerce Commission, joined by the heavy thinkers comprising most of railroad management, considers these incisive statements as heresy. Proof of the abhorrence of competition on the part of these two groups, between which exists such a beautiful friendship, is easily found, of course, in the various utterances made in support of the Reed-Bulwinkle Bill. Too, Professor Lake may realize that nothing less than outright government ownership of the railroads will awaken these gentlemen from their sweet dreams long enough to realize that the prime justification of private ownership is competition. Once competition is dead within an industry, it seems preferable to have the control of that industry in government hands rather than in the hands of a group of private individuals who may or may not be aware of responsibility toward the public.

In the opinion of the reviewer, the observation which distinguishes *Discrimination by Railroads and Other Public Utilities*, by Isaac Beverly Lake, is found at page 230, where the author writes that "It is possible to believe that the Commission is a better informed and more public minded planner than the railroads, though that is by no means a certainty." This gem of flawless brilliance alone is enough to make reading the book worthwhile. The transportation field needs more writers with

6. *Id.* at 358 (dissenting opinion).

insight approaching that possessed by Professor Lake. The only suggestion offered to him is that he consult some less scholarly but better-informed persons on the subject of transportation rate terminology.

Frank L. Barton†

THE LAW AND YOU. By Max Radin. A Mentor Book, The New American Library, New York, 1948. Pp. 190, 35¢.

Judges, lawyers, law teachers, and generations of law students have known that anything written (or spoken) by beloved Professor Max Radin is highly worthwhile. It is hoped that this little, inexpensive volume, written especially for the Mentor series, will bring him before a larger audience.

Disavowing any intention to produce a handbook of law, a manual for law students, or "a practical guide of that deservedly reprobated pattern called 'Every Man His Own Lawyer,'" Dr. Radin writes to his fellow-citizens, in direct, simple terms, about this thing called law and their relationship to it throughout life. At the outset, in an endeavor to establish that "if there is any part of his social institutions which it would profit the ordinary citizen to know something about, it is the law," the author announces that there is no mystery to the law and he proceeds to explain painstakingly why this is true.

He discusses with lucidity why in some respects the law is "reasonably certain" and why in others "it must of necessity be uncertain." To remove mystery and bring understanding, Professor Radin, speaking from long experience, gives "a glimpse into what lawyers do, why they speak the way they do, and why the law cannot accomplish all that is demanded of it." Others than the layman may profit from reading this dissertation.

A third of the book is taken up by a discussion of the family, parents and children, husbands and wives, and the duties, privileges, and restrictions imposed by or through law. A heading "Keeping Our Blood Pure" affords several opportunities for the delightful Radin touch. Speaking of the Oklahoma prohibition against persons of African descent intermarrying with persons not of African descent, "This prevents Osages and other wards of the nation, on whose reservation there is an absurdly large amount of oil, from wasting the resources of the country on others than Nordics."

Generally speaking, however, Professor Radin confines himself rather strictly to factual statement and simple explanation of legal relationships and why the law operates as it does. He could not otherwise have covered such a variety of subjects within so few pages. His discussion of legal procedure is (believe it or read for yourself) interesting and informative. The severest critic of the law (its "red-tape" and delays) ought, if he has a reasonably open mind, to be given some pause as he reads why many procedures are necessary on grounds of fairness, thoroughness, and protection. Let it not be thought, however, that this wise legal scholar undertakes to convince the layman that the law is a perfect instrumentality. It is pictured with candor as the human institution it is.

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