

BOOK REVIEWS

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

A titillating feature of this book is the "teachers' manual." According to announcement,¹ the purpose of the manual is (1) "to indicate why certain cases have been included, the reasons for which may, at first, seem obscure," and (2) "to offer comments on those cases which present special problems." Not mentioned is (3) to provide the mentally flat-chested instructor a false intellectual bosom.

Additional ways of slipping the instructor a few needed aces immediately come to mind: A Dale Carnegie manual for the shy instructor; *Joe Jackson's Joke Book* for the humorless instructor; a du Barry course for the ugly instructor. A look around at your colleagues may suggest other possibilities.

Exactly why this important information should be withheld from students is not explained. This is especially puzzling in view of the many excellent explanatory and introductory notes included in the casebook itself. The reason may lie in a realistic recognition that the time lag between the publishers and the brief canneries is short, and the student may soon be equipped with a type of assistance more adapted to his own peculiar needs. With canned briefs for the students and canned intellect for the faculty, the casebook is reduced to the status of a legal fiction.²

A further interesting feature of the teachers' manual is that the instructor is not initiated into its mysteries until after he has adopted the casebook,³ except that "specimen pages . . . will be sent you in a few weeks." Thus you will not really know what you, or rather your students, have bought until after the fact.⁴ The sales method suggests the advisability of sending the judge a box of good cigars at Christmas-time.

In some respects the book itself is outstandingly well done. The editors have recognized that much of a student's study time is more or less wasted because he does not know the point of view from which he ought to read a case. To give direction to his preparation, some excellent introductory notes have been used. The selection of cases and materials is, likewise, excellent for the purpose intended.

On the other hand, the book is open to criticism in at least two respects. It is overly ambitious, and its organization is archaic.

The compression of the whole of procedure, excepting evidence, within the covers of a single volume and the confines of a single course is an ex-

¹ Publisher's letter of March 15, 1949, to the trade.

² "The influence of the fiction extends to every department of the jurist's activities." Fuller, *Legal Fictions*, 25 ILL.L.REV. 363 (1930).

³ See note 1 *supra*.

⁴ For many years the Cracker Jack Company, Chicago, Illinois, has sold a popular confection to children with great success on the basis of a surprise "toy or novelty in each package to please and delight the children."

traordinarily ambitious project. The book affords excellent material for a survey course in procedure, but if you believe that the real difference between a lawyer and an intelligent layman lies in ability to appraise and operate machinery designed for the settlement of controversies, then you will probably conclude that survey courses in procedure have no place in the law school. The book will give you a long ride through procedure but the rate of speed will give slight opportunity for real acquaintance or critical evaluation *en route*.

The first hundred pages, combining cases and explanatory notes, contain by far the best treatment of the forms of action at common law which has yet appeared, although no mention is made, unfortunately, of the extraordinary common-law remedies. A decent acquaintance with the common-law actions is essential to the literacy of a lawyer, yet the question may be raised whether they ought to be taught in a course strictly labelled "Procedure." That the editors share this misgiving is indicated by their treatment of equitable remedies in twelve pages, with the explanation that consideration of equitable remedies "must be reserved for separate courses in Equity and *other substantive* law courses."⁵ Why the distinction between legal and equitable remedies is not disclosed. The only apparent reason is a champertous preservation of the separate course in equity.

Certainly some knowledge of common-law remedies ought to precede the study of equity, but some knowledge of equity ought also to precede the study of modern judicial administration of both legal and equitable remedies in a single court. Effective dealing with problems arising from the union of law and equity can scarcely be expected of intellectually one-legged students whose knowledge of equity is limited to twelve pages of exposure. A preferable treatment ought to be to lump the development of remedies, both legal and equitable, into a single introductory course, with emphasis upon the historical parallel growth of both.

The treatment of remedies, despite the superb handling of common-law actions, indicates the basic reluctance of the editors to undertake any critical reappraisal or reorientation of the teaching of procedure. The old boundaries have been preserved as faithfully as any common-law judge ever insisted upon the maintenance of the boundaries between the actions. The old courses have been refurbished and squeezed into a single volume, but they are still the old courses.

The common-law actions have been included because traditionally they have been regarded as procedural. Equity has substantially been omitted because traditionally it has consisted of a strange group of materials arbitrarily handled in a separate course. Equity pleading classically has been a procedure course, though a somewhat off-color one, and so is included, but safely separated from pleading at law by some two hundred pages of intervening unrelated materials.

The treatment of pleading is highly compartmented. Judge Clark has succeeded in giving the poor dog Pleading such a bad name that his friends either rechristen him⁶ or else hand him a very small bone out of the back door. All this has by no means eliminated the basic problems of formulating

⁵ P. 586. (Italics supplied.)

⁶ *E.g.*, JEROME MICHAEL, *THE ELEMENTS OF LEGAL CONTROVERSY* (1948).

issues and exchanging information in advance of trial, but it has required that consideration go far beyond the mere question of what must be put down on a piece of paper to be filed in court. The inquiry must include summary judgments, pretrial conferences, discovery, demands for admissions, and all devices designed to accomplish the ends which pleading has claimed but often failed to achieve. Some consideration ought also to be given pleading as an effective method of getting lawyers to indulge in some searching analytical thought about a case before it is reached for trial. The materials are not adequate for these purposes.

Pleading in actions at law receives a total of one hundred seventy pages, apportioned forty-eight pages to complaints, sixty-eight to answer and reply, and fifty-four to demurrers and motions. Equity pleading is held in reserve as a surprise until the student has been taken entirely through an action at law, with the chapters on pleadings at law being followed by chapters variously treating the right of jury trial, withdrawal from the jury, instructions, verdicts, new trials, judgments, and review. Not until page 584 is equity pleading reached. The twenty-four pages then devoted to the subject scarcely afford adequate recognition of the contributions of equity to modern pleading and procedure. This organization discourages any comparative approach, such as would be afforded by taking, for example, the problem of stating a prima facie case in a complaint and tracing its treatment through common law, equity, and codes down to the most recent developments as exemplified by the Rules of the Municipal Court of Chicago and the Federal Rules of Civil Procedure.

Minor criticism might be made of the treatment of "Jurisdiction," as being limited to a consideration of the means of getting a defendant or a res within the control of a court without consideration of what court. Jurisdiction of the subject matter is left to be treated in some nonprocedural course, perhaps conflicts. Thus the possibility of helpful parallel handling is again eliminated. The *International Shoe* case⁷ is treated in a note⁸ as concerning only the problem of obtaining service on a foreign corporation, while *Hess v. Pawloski*⁹ appears under the separate heading "Other Forms of Service."¹⁰ This ideological separation fails to furnish any effective hint that a new philosophy of jurisdiction of the person may be in course of evolution.

A further example of the inadequacies of K-ration treatment is the space devoted to instructing the jury. To the trial lawyer, probably no aspect of litigation presents as much theoretical and practical difficulty as the instruction of the jury in the issues of the case and the principles to be applied in resolving them. At this stage counsel is called upon to put into words many things, including some which he should have considered at the pleading stage although perhaps not then required to give them formal utterance. The effective operation of the jury system generally and the avoidance of reversals in many jurisdictions require a high degree of precision in analysis, with expression in language which is both understandable and

⁷ *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 Sup.Ct. 154, 90 L.Ed. 95 (1945).

⁸ P. 168.

⁹ 274 U.S. 352, 47 Sup.Ct. 632, 71 L.Ed. 1091 (1927).

¹⁰ P. 180.

legally accurate. The materials contained in eighteen pages are unlikely, however thorough the documentation, to equip the student to cope with the problem.

“. . . a little pot, and soon hot”¹¹ may be sufficient in areas where the student needs only to become acquainted with enough landmarks to enable him later to undertake further exploration by himself when the occasion arises, but it is inadequate in dealing with the basic requirements of the profession.

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INTRODUCTION TO ACCOUNTING FOR STUDENTS OF LAW. Third Edition.
By Wilber G. Katz. Chicago: The University of Chicago Press, 1948.
Pp. 95.¹ \$2.50.

The burgeoning importance of accounting to lawyers has been so generally acknowledged of late that further argument on it is hardly necessary. The fact is simply that the profession of accountancy is growing absolutely at such an astounding rate that understanding of its functions and principles must be part of the equipment of anyone who would play an important and constructive part in the functioning of our society whether as businessman, public administrator, engineer, or legal counsellor. The importance of both the legal and accounting professions has grown with the concentration of economic endeavor and the ever widening ramifications of government, but relatively the expansion in the accounting profession is far more startling. In the two decades, 1920-1940, while the legal profession was expanding 47 per cent, the number of certified public accountants grew 347 per cent. Since then the accountants' strength has again doubled to 32,000 or approximately 18 per cent of the number at the bar as compared with less than 5 per cent a generation ago.²

This quantitative importance alone would not justify devoting law students' time and efforts to accounting; for with a few well advertised exceptions most law schools do not undertake responsibility for instructing their students in nuclear physics, electronics, and similar flourishing fields. A far more cogent reason for training lawyers in accounting is the interdependence of the two professions and the necessary cooperation between them in the solution of practical problems. Accountants have long recognized this, as witness the breadth of legal training that must be shown to pass the CPA examinations. Far more sluggishly has the older profession recognized its dependence on the younger art. The lag has not been necessarily disastrous, but it has without question contributed to the oft-discussed decline in the prestige of the legal profession, particularly among the managerial class.

Among the first to recognize the need to produce lawyers who were at least housebroken in the realm of accounting and to act upon that need was

¹¹ *The Taming of the Shrew*, Act IV, Scene 1. Compare Samuel Johnson, *The Rambler*, June 6, 1751: "Praise like gold and diamonds owes its value only to its scarcity."

¹ See discussion of format, *supra*.

² Editorial, 86 *J. ACCOUNTANCY* 353, 355 (1948); Swaine, *The Impact of Big Business on the Profession*, 35 *A.B.A.J.* 89, 92 (1949).

Dean Katz and his early collaborator, Professor Willard J. Graham. Since 1932, when their *Accounting in Law Practice* first appeared, many approaches to this problem of teaching budding lawyers the elements of accounting have been advanced and tested, but it is particularly interesting to observe where such a persistent pioneer has arrived after nearly two decades of experimentation.

A casebook, unlike a text or a novel, cannot be reviewed in isolation. It has no function other than as a classroom tool, and the reviewer necessarily finds himself examining the course built around the book, or at least the best course he thinks could be so based. Thus, at the outset a consideration of the type of course that law students need may be ventured. Some schools would settle for any old course given by the accounting or business or economics department of the university; others think the problem can be met by outside reading, particularly from special texts;³ a third group would spice various courses with related dashes of accounting; and still others (including Harvard until 1949) would offer a third-year elective on accounting with emphasis on those portions most closely concerning law practitioners. The radicals, including Chicago, Cornell, Duke, Harvard, Nebraska, and Northwestern, have essentially decided two things: that a law school must take responsibility for a certain minimum of accounting training for all its students, and that this training must include an integrated basic course specifically oriented to lawyers' needs and preferably given early enough in the curriculum to enable teachers of business organizations, trusts, taxation, and regulation to consider the refinements of complex legal-accounting questions in reliance on a firm grasp of accounting concepts and major techniques by all the students. It is not significant whether such a course is separately organized and tagged as Accounting or is incorporated in the corporations course, as at Chicago, so long as it has a reasonable number of consecutive classroom hours. Chicago's 20-25 seem to me the absolute minimum, but Harvard's 32 are certainly reasonably comparable. In such a condensed schedule only the most essential elements can be considered, and many interesting inquiries into cost accounting, particularities of income tax accounting, dividend statutes, treasury stock, etc., must necessarily be deferred to later specialist courses.

There will normally be a large measure of agreement as to the ingredients of the introductory accounting course. It must develop facility with elementary bookkeeping techniques, but not with complicated labor-saving systems. It must give insight into the meaning of accrual accounting in its broadest sense—the what and when of revenues, and the costs to be matched against these in order to determine periodic net income. Specific cost problems involving inventories and fixed assets must be studied sufficiently so that the student can at least distinguish alternative methods. Surplus and capital account transactions and techniques of consolidation virtually complete the list of what generally would be considered musts.

Less specific objectives seem to me to be equally vital: familiarity with financial statements and schedules; ability to converse fluently in the language of accountancy and to grasp the full import of a journal entry; and not the least, an acquaintance with the more frequent errors untrained courts

³ E.g., Oehler, *Accounting for Lawyers*, P.L.I (1946).

fall into when confronted with poorly presented accounting questions. Against such criteria I shall attempt to appraise Dean Katz' book as a classroom aid.

In order to describe the contents and composition of the book, it is necessary to make certain quantitative adjustments because of the lack of uniformity in page size resulting from the use of photo-offset printing methods. The book as a whole can be considered equivalent to approximately 150 pages of normal casebook typography. Of these, some forty-three consist of exposition by the author of basic accounting methods with excellent simple illustrations progressing in an orderly fashion from the elementary accounting equation to common accrual questions. The author also deals in his own manner with problems involving reserves and consolidated balance sheets. Some fifty pages are taken from Paton and Littleton, *An Introduction to Corporate Accounting Standards*. From this well-known and highly regarded work, Dean Katz has selected items from sections on the basic concepts underlying accounting, allocation of revenue, and determination of income, and also disquisitions on inventory pricing and accounting for plant. The next largest ingredient, which would equal about fifteen pages, consists of four of the American Institute of Accountants' recent bulletins, including the highly controversial ones on "Income and Earned Surplus" and "Depreciation and High Costs." The remaining substantial components are Kimmel's excellent article on depreciation policy, an excerpt from Walton Hamilton on cost as a standard for price, and one from Graham and Meredith's highly useful book on ratio analysis. Ten pages of discount tables are also included. In summary then, we have approximately one-third highly condensed text and illustration by the editor, one-third erudite discussion by two of the accounting profession's leading authors, and the balance a heterogeneous collection of composite authorities and economists' dabblings in the field of accountancy.

The author's exposition and problems are on the whole excellent, but some of the former is so tight as to be pretty indigestible for the tyro. Three times as many pages assigned from standard texts might well afford actual saving in time. The explanation of consolidation technique (pp. 78-84) is an example of this over-compression. I applaud his use of round numbers in examples and problems; for one economy of students' time that is mandatory in law school accounting courses is the elimination of effort on pure arithmetic. But all the problems are confined to testing mechanical ability, none to exercising judgment, and this is to be regretted.

The Paton and Littleton component of the book is its greatest weakness, not because those two authors are not among the most provocative and stimulating writers in the field, but because their discussions cannot be other than bewildering and superficially absorbed by men who have never sunk their teeth into a few simple problems in recognition of revenues and matching costs. In their *Introduction to Corporate Accounting Standards* the distinguished authors were addressing the intelligentsia of the accounting profession in an attempt to state a general philosophy to which all could subscribe. For beginning students they just plain fly too high. What earthly good does it do a beginner to follow the elaborate semantic by-play in which they talk of costs cohering (p. 23) and come to the conclusion that the term "price aggregate" is to be preferred to "cost." The inclusion of Paton and

Littleton's discussion of inventories (pp. 53-54) is unfortunate; for in this area the authors are generally recognized to be more isolated from the general thinking of the profession than anywhere else. To expose a green student to their doctrinaire insistence on cost rather than lower-of-cost-or-market and their intransigent rejection of "Lifo" without any discussion of its merits seems pretty harsh.

The selection from Kimmel's *Depreciation Policy and Postwar Expansion* is a splendid and convincing demonstration of the inadequacy of the accounting concept of depreciation on historical cost and of the necessity of facing the issues raised by dilution of the monetary unit if we are not to expend our capital substance under the delightful illusion that the national income and productivity can go up and up while the tools available to the workers wither away. Just why Walton Hamilton's *Cost as a Standard for Price* should be thrown at students at this preliminary stage is a mystery. This 1937 effort dealing largely with the Robinson-Patman Act hardly bears out the editor's preface which asserts that specialized applications of accounting should be deferred to "the appropriate law course." Moreover, the recent irrefutable presumptions of infallibility with which the Supreme Court has endowed the FTC make Hamilton's fears that the Commission would be ensnared in the toils of controllers' figures at most a matter of nostalgia. And in casting asparagus at accounting postulates and their inadequacy to provide all the answers to our complex industrial civilization, Hamilton betrays large gobs of ignorance as to the limits the accounting profession quite naturally sets for itself. If the following sentences display any insight into accounting or anything else, the reviewer is too obtuse to detect it: "Salaries, too, are rather price-made than price-making. . . . An examination of a balance sheet will indicate the reflection of the profit and loss account in executives' salaries."⁴ It might be charitable to dismiss the selection of this article as a waste of time with the comment that satire is usually lost upon those readers who are not acquainted with the subject being satirized; but I feel that is not adequate. On page 21 cost accounting is dismissed in *one* sentence as a "specialized field"; yet the last 9 per cent of the book is devoted to Hamilton's raillery. It is as if a writer of American history were to dismiss the age of Roosevelt as a complicated specialized field and then incorporate a large chunk of Flynn's *Country Squire in the White House*.

So much for what is in the book. Topics which will be missed include the handling of bond discount and other problems of refunding debt capital, with which many lawyers will be closely connected, consolidation except for balance sheet techniques, and the handling of income taxes, particularly when substantially affected by extraordinary charges or credits. But such a complaint is trivial compared to the objection that must be taken to the book's organization. There seems to be no theme running through the book; it is not even an orderly medley. For example, the student faces a mature discussion of depreciation on page 28, but not until page 39 does he receive an elementary statement of depreciation reserves and charges. And if the book is assigned to students in roughly even numbers of pages, one day will be devoted to mechanical stuff and the next to a critique of pretty high-

⁴ P. 12.

falling theory rather than facing a concrete problem, discussing its theoretical implications, and working out practical solutions therefor.

The reviewer misses acutely reproductions of current financial statements, SEC accounting releases, and administrative and judicial opinions, and feels that this makes it difficult for the students to grapple with the subject of accounting with the same interest and absorption which they bring to legal problems through the case method in all its variations. I am afraid that a student could gain a good mastery of the materials in this book and still be pretty badly bewildered by the average company's financial statement or particularly by any of the detailed schedules underlying it. Of course, it may well be the practice of Chicago to furnish auxiliary materials to the students to make up for this lack. As stated before, there are good problems salted throughout the book, but they are utterly abstract in the sense that the type of concern is not identified and all questions of judgment are eliminated; so the most they can contribute is mechanical proficiency, and not development in the art of expressing financial and commercial events in the language of dollars, which alone distinguishes the accounting profession from the occupation of bookkeeping.

In no other area of law schools' responsibility are the possibilities of the case system grander than in accounting. True, there are not too many decisions of appellate courts that are useful except as exhibits in a chamber of horrors, but that lack just emancipates the instructor and turns him loose among the endless resources of administrative tribunals' opinions, Moody's and Standard and Poor's reports, prospectuses, and pamphlets from Wall Street banks and left-wing unions. The "case" or topic for discussion may not be ready-made, but the ingredients are at hand in a way that is never true of the average public or private law topic.

No teacher should turn his back on such an opportunity; and so if one were to supplement Dean Katz' book with as much again of supporting and contrasting illustrations from current accounting practice and a few decisions and were to pass over some of the more refined dogma, I would recommend the book as part of a balanced ration; but as it stands alone, it is to my taste umble pie with some morsels tainted.

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CASES AND OTHER MATERIALS ON LEGISLATION. By Horace E. Read and John W. MacDonald. Brooklyn: The Foundation Press, Inc., 1948. Pp. xlviii, 1357. \$8.50.

A new casebook on Legislation edited by distinguished experts in this field would be a great event even if more than two books for the use of students had been published. The inclusion of a course devoted to legislation in the curricula of an ever increasing number of American law schools is the best index for the growth and *élan vital* of written law in this country. No longer is this source of law treated as a poor immigrant.

Hospitality, however, varies in degrees and kind, and so does the treatment given a department engaged in the discussion of the multifarious problems created by legislated law.

In 1931 Professor de Sloovère published his casebook under the title "Cases on the Interpretation of Statutes." As the name indicated his concept of "legislation" centered around "methods, theories or principles by which courts arrive at the meaning or effect of a statute."¹ According to such a view, the significance of "legislation" as a teaching field must be grasped from "what a statute will mean to the court of last resort in any given case."² Teaching keyed to such an approach might successfully show that "a narrow literalism too often defeated the purpose of remedial legislation,"³ and might, through the efforts of lawyers trained in a new spirit, change the attitude of courts toward statute law. The real integration of written law into the legal system points to its use as a prolific source for the progress of law through analogous application of its policy and of its rules. A similar task was undertaken about the same time by Landis of Harvard.⁴

Such a learned, not a mechanical, handling of legislation presents one of the great modern problems which the future practitioner has to face. Consequently, the spade work should be done in the law schools, directing to this question the attention of those who are the future interpreters of statutes. It may be worth remembering that Justice (later Chief Justice) Stone could write in 1937,

[that our] "law schools have begun to study and investigate the problem involved in an adequate union of judge-made with statute law."⁵

But shortly before this a new political philosophy had come to display its practical side in a plethora of regulatory law. While the organization of economic activities was previously founded upon private contracts, the scope for free contracting has now become restricted, and the give and take from which the action of the parties formerly derived its bearings has yielded to prescriptions and proscriptions. No wonder draftsmen gained in stature, honor, and income.

Years ago, which means in 1921, the final report of the Special Committee on Legislative Drafting of the American Bar Association had expressed the belief that a treatise on drafting does not compete with a treatise on construction.⁶ Now the cry for another method to familiarize law students with legislation, qualifying the task defined by Stone, found some echo. In 1940 when Frank Horack published his "Cases and Materials on Legislation" the old thesis became dubious. Horack offered a book which was not only distinct for the originality of its approach and for the brilliance in its organization but also for its timeliness. As Horack remarked, there were numerous published and unpublished materials dealing with the aspects of legislation "in which constitutional law, administrative law, jurisprudence, and statutory interpretation were emphasized."⁷ The main theme and keynote in Horack's opus was different. No longer should the discovery of legislative

¹ FREDERICK J. DE SLOOVÈRE, *CASES ON THE INTERPRETATION OF STATUTES SELECTED FROM DECISIONS OF AMERICAN AND ENGLISH COURTS* (1931).

² *Ibid.*

³ Stone, *The Common Law in the United States*, 50 HARV.L.REV. 4, 14 (1936).

⁴ J. M. Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 ff. (1934).

⁵ Stone, *supra* note 3 at 15.

⁶ For this point see 46 A.B.A.REP. 410, 412 (1921).

⁷ FRANK HORACK, *CASES AND MATERIALS ON LEGISLATION*, Preface (1940).

policy in a statute and its effect constitute the main subject of a course, but rather the determination of a policy and its formulation in a draft appeared to claim a paramount position in "legislation." He therefore gave ample space in his book to other than legal materials for the purpose of illustrating the reasons for a specific legislative action concerning such matters as gambling and regulations concerning the sale of milk or safety in the construction of buildings.

Whether the inclusion of such materials in a casebook lends itself to its recurrent use, year by year, as is true of other materials, remains a question. But the shifting of emphasis so strongly pleaded by Horack occurred in a time very appreciative of such a change. The war gave a great many lawyers, who were professors, present and future, ample opportunity *intra muros* (of Washington) *et extra*, to engage in drafting of regulations.

With all due reservation against typifying of casebooks, the book under review seems to fit into the last mentioned class rather than into another type.⁸ But, in any case, any appraisal of an outstanding book calls for an exposition of its contents.

Chapter 1 deals with "Some Comparative Aspects of the Growth of Law Through the Judicial and Legislative Process." There is no discussion of comparative law, but a reader is given abundant opportunity of delving into a wide compilation which deals especially with stare-decisis and changes in judicial interpretations of statutes. Two famous cases are presented also, under the title "Unprecedented Law Making."⁹ The choice of the word law making is not a happy one, if restricted to cases of judicial empiricism alone. The use of the expression is explainable however if the tasks which turn upon the effectuation of a policy expressed in or read into a statute are relegated to second place. The question of a justification of such a relegation will be discussed later.

Moreover, the editors allot much space to the Statute of Uses and the Statute of Frauds, to New York cases on sealed instruments and related matters, and to foreign motorists' statutes. Aside from the latter, used as an illustration for "legislative precedents," the three former topics are offered as examples for "law-reforming statutes" and "legislation in aid of the courts." From an educational point of view, one may approve of such an incorporation if one has doubts whether students, who have gone through a full sized course in torts, trusts, and personal property, and possibly conflict of laws and constitutional law,¹⁰ have not become sufficiently familiar with the historical, legal, economic, and social considerations underlying those statutes. In my experience the real difficulties originate in the specific normative problems. The topic of "legislative precedents" is not alien to them and a short reference will recall to their memory what for instance they have heard about the pattern set by Field's Code of Procedure.

⁸ See, e.g., for the other type, N. T. DOWLING, EDWIN W. PATTERSON, AND RICHARD R. POWELL, *MATERIALS FOR LEGAL METHOD* 276 ff. (1946). See also Harry W. Jones, *Notes on the Teaching of Legal Method*, 1 *J.LEGAL ED.* 13, 25 (1948), for the emphasis on extrinsic-aids cases for the purpose of introducing law students in the field of legislation.

⁹ *Oppenheim v. Kridel*, 236 N.Y. 156, 140 N.E. 227 (1923), and *Dally v. Parker*, 152 F.2d 174 (C.C.A.7th 1945).

¹⁰ Preface vii.

Chapter 2 deals with legislative organization and procedure in a very detailed manner.

The same is true of Chapter 3, entitled "Types of Statutes." Many types are well covered; but the great problem of the "conflict of statutes in time" involving the "big" questions of retroactivity is hardly touched. (Not even the word retroactivity can be found in the Index; it is mentioned on pages 355-356.) One aspect of curative legislation can be seen from the *Cannon Case* (pp. 357-362) and another from *McCleary v. Babcock* (p. 378). On this score I raise a doubt. There is hardly any other subject which engages a practitioner's acumen and time more than questions about the application of a new law of this type. Quite a few of such questions, as for example the Portal-to-Portal issues, have even made headlines.

The heading of section three in this chapter is "Creative Legislation." The section consists of obiter dicta taken from a Michigan case of 1888,¹¹ about the ancient background of "adoption." Looking up the Michigan case, I found that the decision went off on a mere construction of a will. This is followed by three paragraphs from an article, rejecting the rather notorious fact that "adoption" itself is a brain child of Roman law, from which it was taken over in other countries. In so far as the utilization of ancient learning for a better understanding of our statutory domestic relations law is concerned, scholars will disagree with that rejection.¹²

Examining the plea for classification, a demurrer must be sustained; for if one applies the editors' definition of "creative statutes," all modern labor, tax, social insurance, and immigration law (if we disregard written constitutions) could claim such distinction, and what would be left outside the "class" is certainly of lesser significance in the practice of law.

Chapter 4 compiles, in nearly 300 pages, material on sanctions, in general, and, in particular, on penalties, contempt, invalidation and disabilities, adverse presumptions, civil liabilities, and requirement of oath and of bond, and finally even material on the administrative process. In assembling such an impressive body of, for the greatest part, secondary material, the book has no rival. An inquiry into the usefulness of such a proceeding commences with the question whether courses on contracts, procedure, evidence, and administrative law do not pass on sufficient information; but answers to the question of what choice among the various classes of sanctions should be made in a legislative-drafting problem at hand, can hardly be found by a draftsman "in any legislative manual nor in the work of great legislative draftsmen."¹³ If, however, for example I should decide to turn to the problem of constitutionality of statutory "adverse presumptions" in a course on Legislation, I believe that I would rather refer to *Western & Atlantic R. R. v. Henderson*.¹⁴ But since, for long, the rationality test has been recog-

¹¹ *In re Session's Estate*, 70 Mich. 297, 38 N.W. 249 (1888).

¹² Only one example, a scientific investigation will prove that the statutory word fraud in marriage statutes draws its meaning in England and in many other states (not in New York) from the Canonistic doctrine of "*error in persona*." See C.J.S. 1083, § 1, and *Moss v. Moss*, [1897] P. 263.

¹³ Words used by Mr. Justice Frankfurter (with reference to another difficult drafting problem) in *Winters v. New York*, 333 U.S. 507, 526, 68 Sup.Ct. 665, 675, 92 L.Ed. 840 (1948).

¹⁴ 279 U.S. 639, 49 Sup.Ct. 445, 73 L.Ed. 884 (1929).

nized as the correct approach to the problem, the educational purpose, if any, of embracing such presumptions would be served better by a reference to new legislative discoveries in this field than by the rehash of well settled topics.¹⁵

Concerning the extent of the use to be made of administrative processes, this had been argued in principle for years. Cases on subordinate legislation and law making through administrative agencies and professional tribunals could have asserted a better claim for more space than secondary material concerning problems, greatly laid at rest by the Federal Administrative Procedure Act. Finally the immense employment of quotations impresses on the reader, at times with persuasive force, the truism that often less may be better than more. Thus, this reviewer would decisively give preference to Mr. Justice Felix Frankfurter's stimulating dissent in *United States v. Monia*¹⁶ to Mr. Jennings' (Tennessee) quotations from Mr. Westbrook Pegler's misunderstandings of this dissent.¹⁷

Section 13 in this chapter contains material on licensing and inspection, section 14 on publicity (as a protective device), and section 15 on other preventive measures. As for licensing, one way to look at it is from the standpoint of a draftsman. But, for the practitioner, might not the question of judicial review be of greater interest? True, licensing is also a medium of prevention, but its regulatory aspect ranks it more closely to problems of administrative interpretation and, where renewal is at issue, to those of adjudication.

Chapter 5 includes material pertaining to ancient and modern sources dealing with the "form of law making" and "the parts of a statute." In section 9 on "clause as to taking effect," the reader encounters, at last, cases which show glimpses of the importance of the time element in a world of changes, including those in statutory law.

With Chapter 6 "Legislative Language, its Arrangement and the Mechanics of Drafting," the editors reach the interpretative part of the teaching subject. Chapters 7 and 8 of the book also deal chiefly with problems of interpretation.

Chapter 7 embraces the material under the title "The Methods of Interpretation and Construction" and Chapter 8 under the designation "Fitting Legislation into a Unified Legal System." The latter title is somewhat misleading. On the one hand, there are many who think that the relationship of common law concepts and rules and of statutory tenets is not coextensive with the four corners of a legal system. On the other hand, any application of law as such presupposes the unity of a legal system, or order, not a dis-order. Antinomies arise within the sphere of judge-made law as well as within that of written law; and, therefore, also between the latter and

¹⁵ A nice example is now supplied by N. Y. CPA § 1444a creating a cause of action for damages in favor of a tenant against his landlord; the action lies where the latter, having succeeded in removal of the former through an eviction proceeding, fails to occupy within 30 days or to rent within one year the housing accommodation.

¹⁶ 317 U.S. 424, 63 Sup.Ct. 409, 87 L.Ed. 376 (1943).

¹⁷ Pp. 597-598. An editors' note referring to the *Monia* case, *supra*, would have been helpful to students ignorant of the source from which the "quotations" are taken.

the former. Questions of adjustment of new law to the old permeate the process of policy making at every stage, particularly, however, at the formative one.¹⁸

With this light touch of skepticism on a picture only imperfectly reflecting the abundant contents of the book, the discussion may broaden to one on matters of approach.

The book brings into a sharp focus first a segregation between legislative language and methods of interpretation; and then between the latter and the labor of avoiding incongruities within the same legal system. We may ask: Is such division methodically right?

Teaching "legislation" one ought to readily lay hands on the inter-relationship between the legislative process and that of interpretation as well as on the interconnection between the various components in the legal organization. Why not introduce the student to the various categories of "norms" before going into matters of legislative process and interpretation? A reference to the legal nature of collective bargaining contracts would demonstrate the wide use made by legislatures of policies formulated by private groups only. All the easier it then becomes to explain the organizational interconnection between the formulation of a policy in the legislative process and that in the process of application.

Parallelisms between judicial activities in this respect and those of administrative agencies and tribunals cannot be grasped by too much emphasis on the old techniques, developed in a period of literalism.¹⁹ Indefiniteness of expression (see title to subsection C, p. 852) is one thing, but it is an entirely different question whether the expanding activity of administrative agencies, that is the effectuation of legislative policy through law making in its particularization through such agencies, should be approached as a linguistic problem. Majority and minority in *Panama Refining Co. v. Ryan* agreed that the expressions used in the N.I.R.A. were definite enough so as to leave the executive no choice whatsoever as to the means, viz. an oil embargo.²⁰ There was no discord between the two groups that the Act had sharply defined and confined what might otherwise be done administratively under the legislation.²¹ Majority and minority differed solely on the question whether the Act had provided for sufficient safeguards against the executive's unwise or improper determination as to the occasion when he should proclaim an oil embargo.²²

Legislation is one method of law-making, and the translation of a policy, expressed in general terms (if not in abstracts) or not literally expressed at all and therefore being a matter of inferences and opinions, into concreteness, is another. The criterion for constitutionality of the latter method can not be found among the "problems of language,"²³ but rather among the

¹⁸ BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 2 (1928).

¹⁹ See Preface vii (lines 2, 26) speaking of "methods of the legislative process and the judicial techniques of applying the statutes . . ."

²⁰ See Justice Cardozo's dissent, 293 U.S. 388, 433, 435, 55 Sup.Ct. 241, 254, 79 L.Ed. 446, 466 (1935).

²¹ CARL MCFARLAND AND ARTHUR T. VANDERBILT, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* 309 (1947).

²² WALTER GELLHORN, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 264 n. (1940).

²³ Title to section 2 covering delegated law making by administrative agencies.

requirements for fairness and justice, varying with the particular needs and circumstances.²⁴

The very nature of the method by which government in its judicial and executive branches deals with enactments created by its legislative branch is a matter of daily experience, whenever the wording of a statute lends support to reading into it more than one meaning.

Few words are so plain that the context or the *occasion* is without capacity to enlarge or narrow their extension. The *thought* behind the phrase proclaims itself misread when the outcome of the reading is *injustice* or absurdity.²⁵

No doubt, a case worth litigating offers to either side in the litigation equally good "canons" and other traditional legal ammunition. Counsel whose interpretative method—*e.g.* an *in-pari-materia* construction—can enlist a stronger appeal to extra-legal factors such as soundness of the result and its justice, decency, moral sentiments, and consistency with fundamental tenets of our political and economical philosophy, than those which lie in the *unius-expressio* construction of his opponent, will throw the balance in favor of his client.²⁶

In other words, policy making is not restricted to legislating. The latter job compares with that of drawing up blueprints for manufacturing new kinds of products. But shape and quality of the product depend upon the work in the machine shop and on the assembly line. Only a few of the students are likely to become engaged in policy making of the blueprint pattern, for most of them will operate in the shop and assembly line stages, which means practicing law. A course on legislation offers one of the best opportunities for instruction for students in a very important sector of advocacy. It was Justice Holmes who observed that the judges legislate (we would fain say make law) "whenever they determine which of two competing principles of policy shall prevail."²⁷ Counsel's role in that work in following each clue of "policy" and bringing all its ingredients to the fore so that they may inspire that judicial determination, is too obvious to require a more detailed description.

Certainly we law teachers need not all travel on the same road. But one approach to the temple consecrated to advocacy wisdom might be paved by those who believe that broader room should be given in class discussion to policy considerations which might determine effect and meaning of a statute rather than to those which make its drafting intelligible. Only fourteen

²⁴ Cf. Freund, *The Emergency Price Control Act of 1942: Constitutional Issues*, 9 LAW & CONTEMP.PROB. 77 (1942).

²⁵ Cardozo, C.J., in *Surace v. Danna*, 248 N.Y. 18, 21, 161 N.E. 315 (1928). (Italics supplied.)

²⁶ See Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 COL.L.REV. 167, 182 (1946), speaking of a case made equally perfect from the view of legal correctness, on either side: "The struggle will then be for *acceptance* by the tribunal of the one technically perfect view of the law as against the other. Acceptance will turn on something beyond 'legal correctness.' It ought to."

²⁷ Holmes, J., concurring in *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 210, 48 Sup.Ct. 480, 485, 72 L.Ed. 845, 852-853 (1928).

years ago, Dean Roscoe Pound noted that handling of legislative texts is the weakest point in our common law technique of decision.²⁸

Unfortunately, this seems to me to be still true today. I have found, also, that students of the second or third year meet with significantly fewer difficulties in understanding the interplays preliminary to the passage of an act than they face when (more or less covered behind artful bandying of juristic dialectics) conflicting interests, public and private alike, call for careful analysis.

The stimulating force which a consideration of competing interpretations entails can hardly be exceeded by any other class discussion. But our classrooms are not teeming with Herculeses who prefer stimulating difficulties to easy-going expositions. For this reason students side usually with those opinions which reach meaning by giving a case a literalistic or technical treatment. So it comes that there are a great many occasions when one has alert students if they are not to identify the best counsel as a hybrid, a union of a master of "canons" and a grammarian.

Let it be well understood, however, that to point to the potent agencies and currents which place interpretative reasoning alongside legislative considerations, is not by any means to intimate that the present volume fails in presenting material also for this aspect of interpretation. A mere glance at the book would disclose the faultiness of such an intimation. On the contrary. Reading the book, one is impressed by the laudable effort to place into equal prominence many lines of thinking. In this connection it may properly be said that as a reference book the volume cannot be equaled. It is nearly a storehouse of learning. I counted about 160 fragments selected from so many texts of writers or other materials, apart from cases, representing all possible ideologies in the field of legislation (for purpose of this computation I even disregarded the innumerable quotations from writings which can be found in the notes). Moreover, the book contains a wealth of bibliographical information and of references to case material. Propounding thus the diversified views of other people, the editors went perhaps too far in refraining from writing any comments or explanatory notes themselves. In the voluminous book one finds very rarely any intervention on the part of the editors, and if they intersperse a few lines, such remarks have, with few exceptions, an editorial rather than an analytical character.²⁹ Questions of methods of teaching and presentation of material lie beyond a reviewer's jurisdiction. After the foregoing discussion the reader suspects that such questions may be called matters of policy. Every teacher has a different opinion regarding the policy of teaching legislation; thus, at this writing some fifty odd policies may have developed. Whatever another may think of the type of a casebook, it seems to be clear that the reviewer's personal preferences for another type is entirely unimportant *quoad* reviewing. Every editor is entitled to be guided by his own ideas, *e.g.* about the question whether the main body of a volume, aside from the cases, should be gathered from excerpts, or written by himself.³⁰

²⁸ In his review of A. L. Goodhard, *Precedent in English and Continental Law*, 48 HARV.L.REV. 863, 867 (1935).

²⁹ *E.g.*, on pp. 21, 52, 141, 238, 355, 375, 377, 462, 704, 764, 798, 865, 972, 975, 1015, 1024, 1041, 1077, 1108, 1176, and 1274.

³⁰ For this alternative see Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV.L.REV. 775, 801 ff. (1941).

But the volume, by the multitude of topic-headings, classifications, and allocations, indicates certain approaches to problems of legislation itself. For instance, it treats *unius expressio* construction as a canon. The incidents of an interpretative approach determine the result. Were *expressio unius* nothing more than a canon of which there are many, any reviewer would be satisfied. In reality, the negative inversion is a *method* of construction, and *expressio unius* and *argumentum a contrario* serve as the most notorious examples of its application. Their immense success is a test case for mental inertia. Most procedural technicalities, for instance, result from reading a negative-opposite into a rule or precept. With the progress of statutory law, the domain subject to all the fallacies inherent in that construction has greatly increased.³¹ Being served with so many dishes from other compartments, one is struck by the frugality encountered in this cuisine. There is only one case included in the volume; and not even one single excerpt from other writings is added.

Some attention is given to statutory analogy, the counterpart, in juristic logic, of the negative-opposite construction. But even so, only a back-seat is assigned to it (p. 1268 ff.). One finds a very short quotation from Landis' famous study,³² and another from a sort of primer on German Civil Law by Schuster,³³ besides three cases only one of which, the *Keifer* case,³⁴ might claim representative rank. The most important results pointed out by Landis are, therefore, not presented. Cardozo's provocative writings are not referred to, nor are any of his cases, in which he resorted to statutory analogy, and explained its importance. Certainly, the few cases included in the volume do not prove so broad a statement as that "in numerous other cases the courts have reasoned by analogy from statutes which were not necessarily determinative of their decisions" (p. 1274). Mr. Justice Frankfurter's opinion in *United States v. Hutcheson*,³⁵ to mention one of the recent cases, does not exemplify the editors' remark. Moreover, they seem themselves to feel the close resemblance, if not affinity of souls, between analogy and *in-pari-materia* (p. 1077, Note 3).

Does the editors' attitude towards analogy account for the inclusion of Schuster's animadversions on its use? Even disregarding the fact that no continental legal scholar (not to speak of bench and bar) has ever set any store by them, Schuster's pronouncement (p. 1269) that statutory analogy "assumes that the omission" (in one statutory provision) "was accidental, while it may have been deliberate," (and yet extends the rule of another provision to that gap) is baseless. The contrary is true. Where the interpreter finds that the omission was intended, the existence of a gap is denied and the way to analogy is therefore barred, for where the legislature attributed significance to a fact, the absence of such a fact in the case at hand pre-

³¹ For details see this reviewer's article, *Extra-Legislational Progress of Law: The Place of the Judiciary in the Shaping of New Law*, 28 NEB.L.BULL. 542 (1940).

³² Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 ff. (1934).

³³ ERNEST J. SCHUSTER, *THE PRINCIPLES OF GERMAN CIVIL LAW* (1907).

³⁴ *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381, 59 Sup. Ct. 516, 83 L.Ed. 784 (1939).

³⁵ 312 U.S. 219, 227, 61 Sup.Ct. 463, 464, 85 L.Ed. 788, 790 (1941).

cludes the application of the legislative rule to the case.³⁶ Schuster's remarks, however, on "English methods of interpretation" are at least on this side of the Atlantic obsolete, and seem in our days like the frozen sounds of Münchhausen's trumpet. By way of contrast, the place given to *Johnson v. United States*³⁷—in the note preceding the *Keifer* case—suggests the editors' belief that Justice Holmes formed his decision in concepts of analogy. What he did was to stay within the boundaries of the statute. He reached the result simply through an *extensive interpretation*, which means by adoption of the scope of a statutory provision to its very purpose where the too narrow statutory language was incongruent with the legislative objective.

It would be too pedantic indeed to place the accent upon mild divergencies between the editors' approaches and those preferred by the reviewer. For every reader will agree with this writer in paying tribute to the authors for the admirable presentation of a subject which seems to baffle traditional organization. The real test for the value of a casebook lies in its usefulness in and outside of the classroom. That the book, embracing more than two hundred cases in the text and countless other cases in annotations, meets this test more than adequately can be seen from the foregoing appraisal.

A topical index, a table of periodical and text materials, and a table of cases facilitate quick orientation in any subject matter.

To sum up, Read and MacDonald's book represents one of the great scholarly contributions offered by the academic branch of the legal profession to the student of legislation.

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CASES AND MATERIALS ON THE LAW OF CORPORATIONS. By Robert S. Stevens and Arthur Larson. St. Paul: West Publishing Company, 1947. Pp. xxxi, 1200. \$8.00.

This casebook offers to the teacher of the basic introductory course in corporation law a new collection of materials that should prove useful and stimulating. The authors have selected carefully many of the best recent cases and have made innovations in organization that are promising. To start with the final chapter as an example of the latter, the arrangement of materials on shareholders' suits is outstanding. The authors utilized as a frame of reference excerpts from the contrasting views expressed by Wood¹ in the Chamber of Commerce Report and by Hornstein² in the law reviews with regard to the controversial New York legislation. This sharpens the issues that are presented in the accompanying statutes and cases. The result is the most satisfactory treatment of the subject that I have seen. Other aspects that I like particularly are the grouping together of materials on

³⁶ See, for instance, O. Piski, in 1 KLANG, KOMMENTAR ZUM ALLGEMEINEN BÜRGERLICHEN GESETZBUCH 139 (1st ed. 1933).

³⁷ 163 Fed. 30 (C.C.A.1st 1908).

¹ FRANKLIN S. WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS (prepared for the Special Committee on Corporate Litigation, Chamber of Commerce of the State of New York, 1944).

² Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 CALIF.L.REV. 123 (1944). See also, Hornstein, *New Aspects of Stockholders' Derivative Suits*, 47 COL.L.REV. 1 (1947).

problems of control, the introduction of more advanced topics, such as preferred shares, in conjunction with basic concepts, the use of SEC opinions in connection with specific problems rather than as a separate section, and the editorial notes which are frequently employed to point out other facets of a particular subject.

The order of presentation is familiar, and susceptible to rearrangement in accordance with the preferences of the individual instructor. After a brief introduction, various aspects of corporate personality are considered. The chapter on "Disregarding the Corporate Fiction" might well have included the *Consolidated Rock Products*³ and *Deep Rock*⁴ cases despite their difficulty. There are some useful materials on the formation of a corporation, the "de facto" doctrine, and pre-incorporation agreements. The "Structure of Corporation Management" has many good features but doesn't seem to me to have developed sufficiently the various questions relating to the authority of officers. The de-emphasis of ultra vires is welcome, but the cases on the tort and criminal aspects of this subject could have been omitted.

The following chapter on "Problems of Control" groups the materials on this important question in an effective fashion. Thus, the proxy section explores the extensive ramifications of this subject in the courts and the SEC.⁵ Similarly, the section on voting trusts is noteworthy for its thorough treatment of problems other than the conventional doctrinal controversy. Both sections enable the teacher to develop the many practical and policy issues that are involved. Other sections deal with agreements as to control, cumulative voting, and non-voting shares. "Managerial Duties of Care and Skill" includes some good recent cases but I believe that it suffers by the omission of some of the old favorites which were especially useful for teaching purposes. The chapter entitled "Fiduciary Duties of Management" contains a good cross-section of the newer decisions coupled with the best of the older landmarks.

The subject of "Acquiring Assets for the Corporate Business" comprises, inter alia, a comparison of the legal attributes of different types of securities, and the rights and duties of promoters and shareholders with respect to capital maintenance, including the doctrines of equitable contribution and preemptive rights. The section on types of securities is provocative but attempts too much in dealing with the tax aspects of "hybrid" securities, and questions such as the "negative pledge" and "no recourse" clauses in bonds and debentures. My own experience has been that the average law student who lacks a background in accounting needs more intensive training in the fundamentals of a capital structure. Consequently, I would postpone these more advanced problems to a second course. In the section on shareholders' liability, one finds most of the familiar cases, but I should have preferred a more distinct treatment of no-par shares, which experience has shown to be a difficult topic to teach. Some text material would have been helpful in

³ *Consolidated Rock Products Company v. Du Bois*, 312 U.S. 510, 61 Sup.Ct. 675, 85 L.Ed. 982 (1941).

⁴ *Taylor v. Standard Gas & Electric Company*, 306 U.S. 307, 59 Sup.Ct. 543, 83 L.Ed. 669 (1939).

⁵ It can now be supplemented by the New Yorker profile of Lewis Dusenbery Gilbert. See Bainbridge, *The Talking Stockholder*, *The New Yorker*, Dec. 11, 1948, p. 40, and Dec. 18, 1948, p. 33.

showing the relation between liability for issuance and for balance sheet presentation.

The subject of dividends is a major one in any basic corporation course, and the authors have presented a rich variety of material. My own view is that it would have been advisable to concentrate more attention on the question of what "funds" are available for dividends and somewhat less on the problem of the shareholder's right to a dividend. The section on special problems of distribution includes *Helvering v. Griffiths*,⁶ followed by a long note on the taxation of dividends, which takes time and space for a difficult topic that might better have been left to the course in taxation. The concluding section on a corporation's right to purchase its own shares is very brief. The relation of these cases to other aspects of the maintenance of capital warrants greater attention to the accounting and legal considerations involved than the authors have given.

The presentation of the topic "Right to Inspection and Information" is thorough, and includes the recent cases on the question of the rights of holders of voting trust certificates. The chapter entitled "Duty of Majority toward Minority in Making Fundamental Changes" introduces effectively the difficult questions of fiduciary responsibility raised by transactions involving either sale of corporate assets, dissolution, merger, consolidation, redemption, or recapitalization. The editorial note comparing recapitalization with reorganization enables the instructor to stress the contrasting standards that have been applied without the necessity of going too far into the complexities of reorganization legislation. I believe that this advanced material belongs in the introductory course, and the authors have brought it within a manageable compass. The final chapter on shareholders' suits has been mentioned previously. As a matter of organization, I believe the topic should be introduced earlier in the course, preferably before the cases involving the substantive duties of directors and management.

A final word on the use of statutory material may be permitted. The Delaware and New York provisions are frequently reprinted in connection with specific topics, and there is occasional reference to the statutes of other states. Some opinions of the SEC rendered in Public Utility Holding Company Act cases provide an opportunity to study the contradictory trends in state and federal legislation. Nonetheless, I feel a greater use of such material would have been desirable. This suggestion stems from my strong conviction that "corporations" properly taught should include an intensive study of the "public" aspects of the subject. This approach requires an analysis of the legislative changes within and between states, as well as an exploration of the reasons underlying the distinct developments in federal legislation. But this difference in emphasis should not obscure my appreciation of the fine collection of materials for a basic course that the authors have given us.

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⁶ 318 U.S. 371, 63 Sup.Ct. 636, 87 L.Ed. 843 (1943). I doubt the wisdom of including so many tax cases throughout the book. The material on diversity jurisdiction, commercial domicile, and apportionment of dividends between life tenant and remainderman might also have been left to other courses.

CASES AND MATERIALS ON TAXATION. Second Edition. By Paul W. Bruton. St. Paul: West Publishing Company, 1948. Pp. xxv, 976. \$9.00.

According to the announcement accompanying the second edition of Professor Bruton's book: "In addition to being up to date it is a completely new presentation. Nearly two-thirds of the material is new and appears in Bruton's case book for the first time."

The reviewer has no quarrel with the publisher's statistics. Without undertaking a critical count, it looks as though at least two-thirds of the material in the second edition of Bruton's book is new. Events move rapidly in the tax field. A good many cases have been decided since the first edition of Bruton's book in 1941. There have been radical and far-reaching revisions of the federal tax statutes. The new edition catches these changes down through the 1948 Act.¹

The "completely new presentation" consists of an increased emphasis on federal taxation and a corresponding decrease in the space devoted to state taxation. It might have been better if Mr. Bruton had gone even further along these lines, and with the exception of the material on state death taxes, deleted the cases on state taxation entirely.

The most significant change in Bruton's treatment of state taxes is the elimination of the cases on interstate commerce. In the author's own words: "State corporation taxes certainly present the lawyer with formidable and important problems. But the complexity and diversity of the various state statutes tend to reduce any general study to a consideration of constitutional issues which in my opinion can more profitably be left to constitutional law courses."²

It is difficult to see why the same comment could not be applied with equal force to a good deal of the author's other material. The cases on state jurisdiction to tax, for example, fall fairly within the scope of a course on constitutional law or conflict of laws. They are, moreover, practically unintelligible except in connection with a consideration of the commerce clause, since basically both jurisdiction to tax and the immunity of interstate commerce from state taxation stem from the same fundamental problem of multiple state taxation. One of the most interesting recent cases on jurisdiction to tax in Mr. Bruton's book, for example, is *Northwest Airlines v. State of Minnesota* (p. 66) which involves the taxation of airplanes engaged in interstate commerce. It is certainly difficult to consider this case realistically as a problem in due process divorced from the commerce clause.

A course on state taxation, which is not confined to a particular jurisdiction, inevitably deteriorates into a "consideration of constitutional issues" or a superficial sampling of the particular tax statutes of the various states. There is no other direction in which it can go. It seems wiser to limit the

¹The 1949 revision of Professor Bruton's book includes the recent decisions in *Commissioner v. Church's Estate*, 335 U.S. 632; *Spiegel's Estate v. Commissioner*, 335 U.S. 701; *Commissioner v. Phipps*, 336 U.S. 410; and *Commissioner v. Jacobson*, 336 U.S. 28, all of which were decided in 1949. Apart from these additions, however, the second edition of the book does not seem to have been substantially changed by the 1949 revision.

²Preface, ix.

basic law school course to federal taxes, with some incidental reference to similar state taxes, and to let constitutional law and conflict of laws take care of their own.

The only common ground between state and federal taxation is the common noun. They came together through sheer expediency rather than any logical nexus and it is past time for the dissolution of their unnatural union. It will probably seem incredible to the younger tax teacher struggling to condense the ever expanding law of the federal income, estate and gift taxes into the time allotted to taxation in most schools, that the reason that the material on constitutional law and conflict of laws was originally imported into the course on taxation was that there was not enough on federal taxes to furnish the foundation for an independent course. Harvard was one of the first schools to give a course on taxation and the responsibility for the course fell to the late Professor Joseph Beale. Mr. Beale was an admirable teacher and a great authority on conflict of laws. Just as the true tax teacher to-day visualizes the law school curriculum as a sort of minor adjunct to taxation, so Mr. Beale saw most of the law as subsidiary to conflict of laws. When he was called upon to teach taxation he lifted the section on jurisdiction to tax from his conflict of laws casebook, added a few constitutional law decisions, and with the aid of the then meager federal statutes and regulations on the income and estate taxes proceeded to put together a course on taxation. Taxation will always be indebted to Professor Beale for his pioneering vision. However, there is no reason why it should remain forever wedded to the pattern in which he originally worked out the course, particularly when the reasons which led to that pattern are no longer operative.

Although Mr. Bruton's book would be a better integrated book with the omission of the preliminary chapters on constitutional law, in one place he has made admirable use of certain state tax cases, which are really tax cases rather than cases on federal constitutional law. Most state income taxes are a reasonable facsimile of the federal law. The student who is well grounded in the federal statute will, therefore, usually experience little difficulty in dealing with the problems which arise under a state income tax. It is impossible, however, to give any clear picture of state death taxation by a consideration limited to the federal estate tax, simply because the federal estate tax is an estate tax, while most of the state death taxes are inheritance taxes. In his treatment of the federal estate and gift taxes, Mr. Bruton has introduced decisions on state death taxes, to point up the differences between an estate tax and an inheritance tax, and to illustrate some of the principal problems which arise in connection with state death taxes. Although it is open to doubt whether anything except confusion is gained by the author's attempt to combine death and gift taxes, his judicious selection of state death tax cases, not only gives a good glimpse of these taxes, but also throws light on various problems connected with the federal estate tax itself, such as the credit allowed against the basic federal tax for state taxes, and the question of what part of the taxable estate actually bears the burden of the federal tax.

Criticism of Professor Bruton's book on the score that it introduces a good deal of extraneous constitutional law questions into a good casebook on federal taxation, loses much of its force in the light of the fact that the author has produced a very good casebook on that topic. His treatment of the fed-

eral income, estate and gift taxes is as complete as any in the field. There is ample material here for a good basic course in federal taxation and nothing at all to prevent the instructor from omitting the preliminary chapters on constitutional law.

The material on federal taxation is edited excellently. The cases are well chosen and interesting. For the most part they are not only current cases, but cases dealing with current problems. Necessary background and historical material is supplied by a series of excellent text statements and judicious selections from Committee Reports. There is an appendix describing the procedure in a tax case and another appendix setting forth filled in specimen returns, which should help the student to visualize the problems with which he is dealing.

Professor Bruton's second edition reflects the growth of a serious scholar through experience in teaching a difficult course. It is a decidedly better book than the first edition and a thoroughly competent and workmanlike job.

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CASES ON PROPERTY. By A. James Casner and W. Barton Leach. Revised Temporary Edition. Brooklyn: The Foundation Press, Inc., 1948. Pp. xviii, 1086. \$8.50.

In their Preface to this edition Casner and Leach say that their casebook has the following objectives:

"(a) to give the first-year law student basic training in property law and in the handling of legal materials generally;

"(b) to provide him with a practical grasp of the essentials of commercial transactions in real estate."¹

They refer also to Leach's article, "Property Law Taught in Two Packages,"² and recommend that all students using the book read the article. I should put it more strongly: both students and teachers who use the book ought to follow this recommendation. Reading of the article discloses, among other things, that the authors' "Final objective is to see that the course and the subject interest the student as they interest us. . . . If there is any rule that requires a property course to be dull it is our aim to violate it."³

There is no room for doubt that the authors have violated the putative rule: it would take considerable skill to give a dull course out of the book. The wild animal cases, with which the book starts, are always interesting to students, and the authors have continued throughout the selection of cases to choose sets of facts which raise interesting human, as well as legal, problems. The well-known predilections of the authors insure that the introductory and explanatory notes could not be cast in the prosy language which we who teach the law of property are all too prone to use, especially when we are dealing with common-law conveyancing. For example: "But A could not create a remainder after a fee simple determinable. . . . Why not? Well,

¹ Preface vii.

² 1 J. LEGAL ED. 28 (1948).

³ *Id.* at 42.

just because there couldn't be, and stop asking impertinent questions."⁴ "But you must become accustomed to learning that we in America adhere to English anomalies and anacronisms long after the British have thrown them down the drain."⁵

Leach and Casner have sent out for the reviewers of the book statements of various changes which they envisage for the permanent edition (not to be published until the fall of 1950). One of the statements is to the effect that Leach "plans 'to tone down' some of the comments and quips because he thinks he may have rather overdone it." I hope that this change will not be made. We all know that it is difficult to interest a large proportion of a class in this subject, except as a chore which must be done. Any lightening of this burden is welcome. I should like to have the authors go even further and insert illustrations, as did Chafee and Simpson in their *Equity* casebook. The problem of the chimney sweeper's boy has been vivid to me ever since I saw a cartoon hanging in Langdell Hall.

The book does a good job with respect to objective "(a)"—namely, to give basic training in the law of property and in the handling of legal materials. The concept of possession is developed, in the traditional way, through the wild animal cases ranging "from a petulant sportsman's row over a fox on Long Island . . . to the claims of rival groups of Cornish fishermen to 2,000,000 herring in the Bay of St. Ives. . . ."⁶ It proceeds through types of possession, including that of unconscious possessors—finders and persons who know that they control something but don't know what the thing is—of adverse possessors and involuntary bailees, to the remedies of possessors. This material on possession covers seventy-nine pages.

Part II covers gifts, both inter vivos and causa mortis, and is allotted seventy-two pages. Leach says, in his aforementioned article, that this subject may be postponed to the second year. I hope not. As he says, the subject is of moderate difficulty and helps to show the insubstantiality of the concept of possession as a means of solving problems. While it is true that a study of gifts is a little incongruous in a course devoted to teaching something about commercial transactions, it is also true (as Leach points out) that it has value in introducing estate and gift taxation and permits of contrasts with the later developed bi-lateral transactions. I should add: it lets the student see the attempts of courts to carry the concept of possession, which was of the greatest importance in the older law, over into the modern approach to property problems. Surely it is well for students to see early in their career the weight of history and judicial habits of thought.

Parts III and IV, covering a total of some three hundred pages, are devoted to bona fide purchase (BFP of personal property—sixty pages; of real property—two hundred and thirty-six pages). Part IV (BFP of real property) begins, following a short introductory note, with a twenty-four page statement by a Massachusetts conveyancer on the mechanics of title search in Massachusetts. This statement is clear and very helpful: it should save some hours of lecture and seems to me one of the valuable features of the book. A recent letter from Casner is to the effect that the final edition

⁴ P. 733.

⁵ P. 736.

⁶ P. 1.

will contain comments by leading conveyancers on this statement, designed to point out differences in practices. This is to be done partly with the hope that students will get some feeling of the peculiar localization of land conveyancing, and of the fact that it is, nevertheless, based to a considerable extent on practices common in various states.

This should be a helpful addition. It may help indirectly in the effort to teach the student that *the* common law is a chimera and that what we have is as many common laws as there are states living under the general system. It is to be hoped, moreover, that Casner and Leach will be able to find conveyancers in the other states whose style is as interesting as that of Richard B. Johnson who wrote the "Massachusetts" statement. He has some Leachy characteristics in his style. He makes very vivid the problem of the searcher who must ignore the "specter of estoppel by deed," because, if he searches under each name in the chain of title, "The cost of each examination would exceed the value of the land."

After this statement of the mechanics of title search come chapters on the "Significance of Failure to Record," "Record Notice," "Inquiry Notice," and "When a Person is a Purchaser for a Valuable Consideration." Some may object that formal categorization of the components of a problem do violence to the ideal "Spartan Education." I have heard criticisms of this nature, but cannot agree. Legal education is Spartan enough anyway, and the student can profit from a pointed and comprehensible chapter or section title printed at the top of each page.

Chapters V, VI, and VII of Part IV continue the presentation of protection given the BFP, through covenants for title, title insurance, and registered titles. I am not sure that the latter two subjects could not be more helpfully covered for the purposes of students in most states by text notes, rather than by cases. A large proportion of contemplated purchases of land cannot get either type of protection. Casner and Leach list only sixteen states in which Torrens Acts have been enacted and say that, even in these states, voluntary registration has proceeded very slowly.⁷

Part V covers estates in land, including common law estates both several and concurrent, the executory interests made possible by the Statutes of Uses and of Wills, and landlord and tenant; of the total of two hundred and seventy-five pages given to this Part, only fifty-five pages are given to estates and nineteen pages to the effects of the Statutes. These few pages contain specially prepared text on the subjects of common law estates, common law conveyancing, and the effect of the two Statutes, with interspersed problems. Leach says, in his article, in the first issue of the *Journal of Legal Education*, that this presentation of these matters in the casebook is due to the fact that much too much time has been given to the historical development of the law of real property in the various law schools. He asks why the historical material should not be put in six pages, in which compass, he says, there could be put what any lawyer needs to know so far as 99.9 per cent of his practice is concerned, but Leach says also that his present judgment is that this would be a mistake. His reasons seem to be: (1) that "our young men . . . must have depth . . . and one aspect of depth is perspective, an understanding of how and why the law came to be

⁷ P. 417.

as it is"; and (2) "Then again there is the form of snobbishness we call culture . . . it may be that a few decades hence it will be mere pedantry to know that Coke was not pronounced as it is spelled, that the judicial protection of wardships and marriages left significant traces in our land law. . . . But my judgment is that things of this type and in this period still comprise the common professional culture of educated lawyers."⁸

It may well be that we are in a stage of transition, between that time when a knowledge of *Coke on Littleton* and Blackstone's *Commentaries* was essential and the time when that knowledge will be a purely snobbish culture. If so, Leach and Casner have hit about the happy medium. I wonder, however, whether they are not leaning too heavily on the presence of cultural offerings in the rest of the Harvard curriculum. Few of the smaller schools can afford formal courses in Jurisprudence and the History of the Common Law.

Should not every student, somewhere in his career in law school, thoroughly be exposed to a demonstration of the force of history in the development of the common law? Do we not all find our students all too prone to look on the law as a fully developed phenomenon, with little or no consciousness of the struggle to climb from the requirements of the comparatively simpler ages to the needs of our comparatively complicated legal civilization? Is there any place in the whole course of study which is as well adapted to the development of this consciousness as the law of real property? Some of the job can be done in the course in Procedure, if it includes a fairly detailed study of the development of the forms of action in their substantive function. But the connection between the formulary system and modern procedure seems much less close than that between the early law of conveyancing and the modern law in the same field. Our courts seem, today, much more loth to cast off the shackles of the old law of property than those of the old law of pleading—witness the narrow construction of many statutes enacted to abolish the rule in Shelley's Case. We have a better chance of convincing our students that the study of the history of the law of conveyancing has a bread-and-butter value than of convincing them that there is such value in the study of the formulary system; and we all know how students search for bread-and-butter study. Perhaps we should not cater to this search, but I cannot help feeling that we might well take advantage of it; that we must somehow give the student an idea of the effect of history; and that we can best do so in a course in which history is, if not, alive and kicking, yet alive. Leach does say that, since examinations have not yet (as of the time of his article) been given in a course taught from the case-book, he and Casner have only guesses as to the effectiveness of the presentation, but that these guesses are hopeful.⁹

This is the only part of the book with which I have a serious quarrel. It may be that these "hopeful" guesses have proven themselves. Even if they have, I still feel that in this particular connection Leach correctly said, *melior est petere fontes quam sectare rivulos*.¹⁰ It seems to me that this material will need supplementation by assignments of parts of *Blackstone*.

⁸ *Supra* note 2, at 46.

⁹ *Id.* at 45.

¹⁰ *Id.* at 46.

Part VII considers (in one hundred and twenty-two pages) the various methods of controlling the use of land, through legislation and by covenants. The constitutionality of the racial restrictive covenants and ordinances is covered by *Buchanan v. Warley* and the recent cases of *Shelley v. Kraemer* and *Hurd v. Hodge*, which fortunately were decided in time to be put in the casebook. Zoning is covered in the *Euclid* and *Nectow* cases, the problems peculiar to mining in *Pennsylvania Coal Company v. Mahon*. Problems raised by covenants get full coverage through the printing of many of the historic cases and a generous number of modern cases.

The part of the casebook covering easements (seventy pages) contains largely quite recent cases: *Arnold v. Fee* and *Boatman v. Lasley* are the two old friends. The selection of the new cases, however, largely makes up for the lack of the familiar ones. The opinions discuss the history of the problems and their solutions, and the facts bring modern problems to the fore.

In so far as lateral support is concerned, the chapter on "Lateral and Subjacent Support" offers an excellent basis for discussion of the foundational principles and raises all the problems which now come to mind. There is no case, however, on subjacent support and no indication that any of the cases cited in the problems touch that matter. *Noonan v. Pardee* is cited in the last problem¹¹ but without any indication that it concerns the subject. It may be that cases which contain untenable analyses are better left out of a casebook like this one. I feel, however, that the struggles of the Pennsylvania court to harmonize the interrelated claims of the surface owners and the mining companies are entitled to a place in the book, and would like to see one of the cases which enunciates that court's peculiar "three estate" doctrine printed in the final edition. It is true that subjacent support is not a problem which touches as large a part of the country as does lateral support, but the desirable solutions may be different and seem to merit some discussion in a casebook which is offered for general use in American law schools.

In the Introductory Note to the chapter on water rights the authors advise the student to consider the different considerations which may be involved when navigable and non-navigable streams are involved and say, "Do not overlook the relevance of the date of a case." The different considerations involved in problems concerning the two kinds of streams are vividly presented by the opinion in the recent case of *United States v. Willow River Power Company*, decided in 1945. In the cases concerning non-navigable streams, however, there is no indication that the date is relevant: the earliest of these cases was decided in 1897 and the latest in 1913. The importance of the date of the case is well brought out by the one case printed in the section on underground water. In *Meecker v. City of East Orange* the step from *Acton v. Blundell* to the preferable modern rule is made vivid by the opinion. In the *Meecker* case the proof of deprivation by the defendant was comparatively simple. The final edition might be made more useful by the inclusion of a problem on a solution of the difficulties of proof in an underground water case that the defendant's activities were the cause of the plaintiff's deprivation.

¹¹ P. 979.

The last chapter in the book, covering invasion of air space, contains only *United States v. Causby*, which is, perhaps, the ideal case if no more space is to be allotted to this subject. Here again, I feel that some survey of the history of the problems, some presentation of the *usque ad coelum* idea, should be made by cases or by text, and that the *Hinman*¹² case should appear as an example of the nuisance approach, particularly because of the queer notion therein expressed to the effect that the ownership doctrine necessarily leads to undesirable results.

The cases in this book are followed by some fifty pages of appendices which should be very helpful: an "A-B-C of Taxes for Property Lawyers," including outlines of federal income taxation, federal and state gift, estate and inheritance taxation, and municipal property taxation; a short but informative outline of various types of insurance; and the "Regulations for the Preparation of Title Evidence in Land Acquisition by the United States." There is to be added to these another appendix explaining the various types of security transactions. These should conduce to the more realistic approach to property problems which Leach says, in his article, is one of the aims of the casebook.

While it is certain that the authors have done a fine job with respect to their objective (a), which is quoted at the beginning of this review, it is impossible to have comparative certainty about their objective (b), until some experience with the book has tested it. The cases seem clearly to have been selected with the practicality of the problems therein considered well in mind, and the above-mentioned appendices should add to this emphasis on practicality.

If it is necessary to cut down the number of hours allotted to the property courses, it is hard to quarrel with any selection of omissions. I find myself a little disturbed, however, by the cursory treatment of estates and conveyancing under the common law and the great English statutes, which I spoke of earlier, and by the virtual lack of materials on fixtures. It may be that, in other states, problems of fixtures as between vendor and vendee, and mortgagor, mortgagee, and conditional vendee, are not so important. In Pennsylvania, the books are full of litigation in this field and I have found no dearth of controversies on the subject in some other states. Some supplementation by a considerable body of mimeographed materials on fixtures may prove almost necessary.

It seems to be somewhat customary to close a book review with references to the index and to typographical errors. I cannot refer to the former because this temporary edition does not contain any, and I cannot be nasty about the latter because my reading disclosed only two very unimportant errors.

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¹² *Hinman v. Pacific Air Transport*, 84 F.2d 755 (C.C.A.9th 1936).

