

BOOK REVIEWS

CASES ON FEDERAL ANTI-TRUST LAWS. By S. Chesterfield Oppenheim. St. Paul: West Publishing Company, 1948. Pp. xxxv, 1044. \$8.50.

A new casebook in the field of trade regulation has been much needed. An enormous development has taken place in the field since the publication in 1937 of Professor Handler's *Cases and Other Materials on Trade Regulation*,¹ in 1936 of Professor Oppenheim's *Cases on Trade Regulation*,² and in 1933 of the second edition of Professor MacLachlan's *Cases on the Federal Anti-Trust Laws of the United States*.³ Those casebooks made their appearance immediately before the revival of the Sherman Act. The revival under Robert Jackson, Thurman Arnold, and Wendell Berge was for a long time thought of as a period of consent decrees, and not as a period of law clarification. Yet in retrospect the contribution of the revival period to law making is most significant. The law against price fixing was clarified in the *Socony Vacuum* case in 1940.⁴ The law against monopoly took a new turn—indeed, the most significant in the history of the Sherman Act—in the *Alcoa* case in 1945.⁵ A new basis for attacking the problem of industry control by a relatively few large companies has emerged as a result of the *Interstate Circuit* case in 1938⁶ and the second *American Tobacco* case in 1946.⁷ New theories for the handling of the problem of vertical integration may be seen developing in the *General Motors* case in 1941,⁸ the *Pullman* case in 1943,⁹ the *Great Atlantic and Pacific Tea Company* case in 1946,¹⁰ and the *Yellow Cab* case in 1947.¹¹ Recognition of the importance of patents as devices to gain monopolistic control beyond the scope of the patent grant has resulted in drastic curtailment of patent privileges in a line of cases beginning with the *Ethyl* case in 1940¹² and continuing most recently in the *Line Material*¹³ and *Gypsum* cases.¹⁴ The drive against international cartels

¹ The Foundation Press, Inc., 1937.

² West Publishing Company, 1936.

³ McLAUGHLIN, *CASES ON THE ANTI-TRUST LAWS OF THE UNITED STATES* (Published by the Editor, 1933). [See Decree of the Probate Court of Middlesex County, Massachusetts, Jan. 21, 1948. Ed.]

⁴ *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 60 Sup.Ct. 811, 84 L.Ed. 1129 (1940).

⁵ *United States v. Aluminum Company of America*, 148 F.2d 416 (C.C.A.2d 1945).

⁶ *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 Sup.Ct. 467, 83 L.Ed. 610 (1939).

⁷ *American Tobacco Co. v. United States*, 328 U.S. 781, 66 Sup.Ct. 1125, 90 L.Ed. 1575 (1946).

⁸ *United States v. General Motors Corporation*, 121 F.2d 376 (C.C.A.7th 1941).

⁹ *United States v. Pullman Co.*, 50 F.Supp. 123 (E.D.Pa. 1943).

¹⁰ *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F.Supp. 626 (E.D.Ill. 1946).

¹¹ *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 Sup.Ct. 1560, 91 L.Ed. 2010 (1947).

¹² *Ethyl Gasoline Corporation v. United States*, 309 U.S. 436, 60 Sup.Ct. 618, 84 L.Ed. 852 (1940).

¹³ *United States v. Line Material Co.*, 333 U.S. 287, 68 Sup.Ct. 550 (1947).

¹⁴ *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 Sup.Ct. 525 (1948).

finally emerged from consent decrees and into case law in the *National Lead* case in 1947.¹⁵

The development is exhaustively covered in Professor Oppenheim's new *Cases on Federal Anti-Trust Laws*. Professor Oppenheim has met and seems to have overcome the traditional problem of a collection of cases in the trade regulation field—the great length of so many of the cases. By skillful editing he has managed to include the more relevant portions of most of the opinions in sufficient detail to make possible careful classroom discussion. His copious footnotes and reference materials make the collection an invaluable lawyer's aid. In his compilation of materials he has not overlooked the rich source of materials which consent decrees afford. The anti-trust field is an area in which a casebook can constitute a complete collection; and, except for the *Line Material* and *Gypsum* cases, which came down after the date of publication, Professor Oppenheim's collection is complete and skillful for the commercial antitrust cases. The word "commercial" must be emphasized, however. I think it is unfortunate, although understandable, that Professor Oppenheim has chosen to omit antitrust cases dealing with labor. The explanation is that such cases are to be handled in courses dealing with labor law. And in any event the view that such cases have no place in a course focused on the problems of commercial competition gains weighty support, if indeed it is not derived, from the opinions of the Supreme Court. Yet it is one of the dangers inherent in the specialized nature of law-school curricula that related problems are pushed into separate categories and after a period of time the relationship is forgotten. Students ought not to be permitted to forget that the power and structure of labor organizations have their impact on the problem of competition. Courses whose orientation is necessarily that of regulation rather than competition are not the best vehicles for showing the relationship between specialized treatment and the over-all problem of competition.

But the necessity for some comparison between the monopoly approach and that of competition is recognized in the casebook. Professor Oppenheim devotes a chapter to what he terms "Legal Monopolies and Federal Anti-Trust Laws." The material included deals almost exclusively with patents and copyrights, and the emphasis for the case material is on the misuse of these devices. Nevertheless, Professor Oppenheim has sought through introductory materials to lay the basis for justification or criticism of these permitted monopolies. It is perhaps a little disturbing to find Professor Oppenheim beginning his discussion of patents with the statement that "a casebook is not the place to present in extended text all the ramifications of the issues on this problem" (page 465), and saying, in discussing purported deviations from the theoretical assumptions underlying the patent system, that "the deviations mentioned in this outline are chosen either from writings or from court opinions and are not to be read as statements of the personal views of the Editor of this casebook" (page 475). I assume Professor Oppenheim means that a casebook is supposed to contain cases and not an extended text, and that in any event the materials ought to show many sides of an argument. Yet a casebook on competition ought to dig deeply into the

¹⁵ *United States v. National Lead Co.*, 332 U.S. 319, 67 Sup.Ct. 1634, 91 L.Ed. 2077 (1947).

theory of patents, and the ramifications should be considered, if not in extended text, at least by some other means. The special disclaimer of responsibility, which is certainly not usual when different legal theories are presented, seems to be based on the notion that economic or political arguments are somehow different. Yet the economic and political arguments must be at the very center of a course in trade regulation.

Again, it is clear that Professor Oppenheim recognizes this. In a chapter entitled an "Introduction to the Sherman Anti-Trust Act," he has sought to set forth the types of economic problems with which the cases are concerned. The difficulty of bringing the economic materials to bear on the cases is explicitly recognized. At one point (page 82) Professor Oppenheim states:

Rather than risk distortion of the whole picture by offering fragments of published material on debatable subjects, the device employed here, as in other places in the book where the subject does not lend itself to the exception of reprinting of non-case material, is a series of bibliographical references on certain features of the published studies relevant to the succeeding chapters in this volume. Whatever approach may be taken, it is clear that in the last analysis the interested student should be encouraged to undertake individual inquiries into selected aspects of the allied social science material so that the structure of American industry may be better understood in dealing with the strictly legal aspects of the cases.

The problem is an old one. In a simple version it is: How can social science material be presented alongside the case material so that the arguments derived from the social sciences can be presented in classroom discussion with something of the same precision accorded to "the strictly legal aspects of the cases"? Professor Oppenheim uses the technique of a general checklist of arguments in an introductory chapter, together with copious references which, as he indicates, can be used for class reports and seminar discussion. Unfortunately, however, a checklist of economic words is much like a checklist of legal concepts: that is to say, fairly meaningless or, worse, misleading unless woven into the case materials. The technique of casebook teaching recognizes this fact when it comes to legal words. The same thing is true of words from the literature of economics. I do not know, for example, of what benefit it is to give students a definition of cutthroat or destructive competition which begins:

Competition is said to be cutthroat or destructive when the existence of idle capacity and the pressure of fixed charges lead sellers successively to cut prices to a point where no one of them can recover his costs and earn a fair return on his investment. [Page 74.]

It is hard to see how the pressure of fixed charges leads sellers to cut prices, unless the argument is that the desire to make money (which presumably is present in the absence of fixed charges) is less strong than the special desire of management to retain its job. It may be desirable to give students a sample of this kind of talk from the field of economics, however unfair this

may be to economics, although I am not sure that we would do so if a comparable legal argument were involved. But it is important to make sure that the matter does not stop there, and references for class reports and seminar discussion do not seem an adequate corrective. Yet there may be no solution to this pedagogical problem.

There are two aspects to the problem. One is the confusion about what are the so-called underlying facts of an industry which are necessarily somewhat involved in every antitrust action. The other is the inability to handle intelligently arguments using technical words from the social sciences—which for this field means the concepts of economics. As to the first, it should be possible to present a series of assumptions about the particular industry. The assumptions may be classified. There are those which are normally accepted by most people talking about the industry and to which, for example, opposing counsel might agree. Then there are other sets of assumptions which will be accepted or not, depending upon the side of the case one is on. If these assumptions could be made explicit, set alongside the case in the materials, and made part of the classroom discussion, the social sciences would begin to play a role in the classroom comparable to the role they already play in the active field of the law. To argue from these assumptions, however, does mean that there must be a readiness to argue about economic theories. And this might require in the case materials themselves some development of economic analysis. Professor Oppenheim's excellent collection of cases really brings us to a consideration of whether this kind of next step can be taken.

The arrangement of the cases within the collection is so much a matter of individual taste that perhaps the most important thing to say about the arrangement used is that it is one which permits rearrangement with comparative ease. To put the matter this way is probably to confess that I would not choose the arrangement which begins with the historical materials, goes to the close-knit combination cases, then to trade-association and price-fixing cases, legal monopolies, exclusive arrangements, tying and misuse-of-patent cases, boycotts, cartels, and remedies. An arrangement which began with monopolies which are justified and then went to the difficulties of preserving competition might pose the economic and political problems more directly. But the presentation can probably be made equally well either way, and Professor Oppenheim has not presented his material in compact units designed for one classroom hour per unit. As a consequence the instructor may make his own pattern.

One reason for the arrangement which was adopted may be that Professor Oppenheim is devoting another volume to the problems of unfair competition. It is indicated that in that volume the cases dealing with trade-marks are to be found. The discussion of trade-marks appears to belong with the discussion of patents, particularly as legal restrictions on the abuse of patents cause a shift to the use of marks. But it is probably churlish to complain of such an omission from a collection of cases so complete, particularly when the omission may be caused by a desire to be equally complete in the field of unfair competition. It is to be hoped, however, that no division-of-fields arrangement is to be the accidental outcome of this divi-

sion of the field of trade regulation. Unfair competition and the anti-trust laws ought to be one course.

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

This is a book of many pages and many parts. Starting with "the commencement of an action," the author takes the reader through various phases of pre-trial, trial, and appellate practice, concluding the tour with arbitration. Dividing the 1,050 pages of materials into fifty-page shares, venue and process are allotted approximately one share, parties and joinder three, pleading two, provisional remedies one-half, discovery one and one-half, pre-trial one, trial practice five, appellate review two, judgments three and one-half, extraordinary remedies one, and arbitration one-half.

Before undertaking to discuss any of the various parts, it is necessary to consider the place of the materials as a course in the law-school curriculum. Unfortunately, there is no foreword indicating when—that is, in what year—the materials should be used; how many class hours should be devoted to them; whether they are supposed to be used alone or in connection with other courses. It is obvious there is no attempt to cover the law of evidence or federal jurisdiction. The most puzzling feature is the part devoted to pleading. After a full treatment of parties and joinder of actions, a scant one hundred pages are devoted to pleading. The treatment is at a high level—pleading theory and reform. The materials are not suitable for use in teaching fundamentals to beginning students. It must be assumed that they are to be used after the student has had an elementary course in pleading—one which does not include a study of parties and joinder. Attention is also called to a statement that no attempt is made to indicate in what state an action may be tried, this consideration being left to the course in Conflicts.

Turning to the subjects covered, we find, after a brief treatment of venue, a substantial coverage of service of summons. In spite of the declaration that problems of jurisdiction over persons and property are left to the course in Conflicts, various methods of obtaining jurisdiction over nonresidents are taken up. For instance, *Wuchter v. Pizzutti* (page 15) is included. If any of the various bases of jurisdiction over persons is to be dealt with, all should be considered together. With the development of thorough-going courses in civil procedure, there is no good reason for leaving this material to the course in Conflicts.

The joinder problems—joinder of parties and of claims—are treated together in one section. This scheme is to be commended. Joinder of parties usually involves joinder of claims. Also included are the materials on third-party practice, intervention, interpleader, and representative suits. These are joinder procedures, and therefore properly included. There is a real advantage in dealing with all problems of joinder at one time. Whether, in the time available, one can afford to cover fifty pages of materials on representative suits seems doubtful. The topic is difficult and important, but,

after all, we cannot teach all the law. The propriety of putting the joinder material in a course dealing principally with trial and appellate practice may be questioned. If pleading is thought of as the art of alleging the elements of claims and defenses it has little relation to the extent of the action. In joinder the real consideration is whether certain claims should be tried together. The relation to trial practice is very close.

The provisional remedies (attachment, arrest, receivership, and injunction) are presented briefly, largely by means of text.

The treatment of discovery is substantial, as is the treatment of pre-trial hearings and summary judgments. Here again, most of the material is in text form, which means that it can be covered rapidly in class.

Approximately half the book is devoted to trials, judgments, and appeals. This combination of materials appears in other casebooks, and has proved satisfactory. While it is difficult to estimate the time needed to teach a course without actually teaching it, any thorough coverage of the materials on trials, judgments, and appeals will require at least three semester hours.

From figures furnished by the publishers it appears that about 27 per cent of the material is federal, 16 per cent New York, and the remainder either general or taken from scattered jurisdictions. It is gratifying to note that the percentage of recent cases is very high.

Again using the publisher's figures, it may be noted that about 25 per cent of the book is text, $5\frac{1}{2}$ per cent statutes, and $69\frac{1}{2}$ per cent cases and notes. When it is realized that most of our procedure is statutory, the small amount of space devoted to statutes is startling. The present casebook does as good a job as any in this respect. What is needed is a new technique which will give law students an acquaintance with the great body of procedural statutes. We may end with a case, but certainly we should start with the statute.

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CASES AND MATERIALS ON EQUITY. By Garrard Glenn and Kenneth Redden. Charlottesville: The Michie Company, 1946. Pp. ix, 905. \$9.50.

The authors state that this collection of cases and materials is due to the fact that in giving the courses known as Equity I and Equity II in the Law School of the University of Virginia the instructor found himself using half a dozen casebooks at the same time because none of them exactly met his requirements. The natural solution, as the preface suggests, was to assemble the desired scattered case material in a new casebook, adding at the same time such of his own selected materials as seemed desirable.

The book is intended to cover those portions of equity which are usually treated in the separate course in that subject as still offered in many law schools, with the incorporation of some materials in the field of quasi-contracts dealing with restitution for unjust enrichment even where the plaintiff's rights are enforceable by an action at law.

The authors acknowledge their indebtedness to the scholars who have worked in this field, especially Ames. The influence of this master casebook

builder is apparent in the inclusion of such old favorites as *J. R. and M. P.* (page 33), *Pegge v. Skynner & Richardson* (pages 34, 411), *Toller v. Carriert* (page 36), *Duke of Somerset v. Cookson* (page 88), *Vane v. Lord Barnard* (page 102), *Cronin v. Bloemecke and others* (page 162), *Goodson v. Richardson* (page 170), *Diamond Match Company v. Roeber* (page 443), *Beck v. Allison* (page 458), *Jones v. Parker* (page 460), *Parkin v. Thorold* (page 490), *Bellamy v. Debenham* (page 496), *Castle v. Wilkinson* (page 510), *Willard v. Tayloe* (page 532), *Lumley v. Wagner* (page 671), *Crawshay v. Thornton* (page 796), *Mayor of York v. Pilkington* (page 832), and *Sheffield Waterworks v. Yeomans* (page 844), to mention just a few decisions taken at random.

Instead of resorting to the usual excerpts from Maitland and similar materials as an introduction to the subject, the authors have utilized the interesting and lucidly written article entitled "Equity: A Visit to the Founding Fathers," by Professor Glenn, published originally in the *Virginia Law Review*.¹

The book is marked by two features. First, at the beginning of principal cases in which the material facts do not appear early in the course of the opinion itself, the authors have made it their practice to place in brackets a streamlined statement of the essence of the problem and how the case came before the court writing the opinion. Second, most of the cases are followed by notes of non-encyclopedic character. These either direct the student's attention sharply to the point or points which the decision presents, or suggest further relevant cases and law-review material for his consideration, or both. If any criticism of this approach is to be made it is that perhaps it oversimplifies the problem for the student and does not sufficiently throw him on his own resources in working out the facts and the rule that the case applies. On the other hand, there is this to be said: that where note material is too copious—as is true of some case collections—undoubtedly it has a tendency to overwhelm the student and at times to prevent him from seeing the woods for the trees.

The arrangement of the materials in the book, as has been mentioned, is based on the course in Equity as presented at Virginia, where the subject is taught for two periods weekly during the second term of the first year and for three periods weekly in the first term of a succeeding year. Accordingly, the first half of the book starts with the difference, essential and historical, between common-law and equity jurisdiction. It then takes up the subject of equitable relief against torts and thereafter considers the quasi-contractual relation, concluding with an examination of equitable protection of the rights of privacy and of association. The second half of the book, intended for presentation after completion of the first year of law study, deals with the usual topics of specific performance of contracts: the nature of the jurisdiction, the feasibility of the remedy, consideration, performance of conditions, marketable title, partial performance with compensation for defects, hardship as bearing on refusal of specific performance, the Statute of Frauds as a defense in cases of partial performance of oral contracts, the vendor's bill, the rights and obligations of third parties, and negative specific performance.

The topic of equitable servitudes is omitted except for a paragraph (page 682) citing half a dozen leading cases, including *Tulk v. Moxhay* and *Vogeler v. Alwyn Improvement Company*. The authors explain that this is because at Virginia this topic is taught in the course in Real Property. The concluding parts of the book take up rescission and reformation, including restitution in specie as well as quasi-contractual recovery, and relief against unjust situations at law (interpleader, discovery and accounting, bills quia timet, and bills of peace).

The authors have arranged their case materials under each head and sub-head with thought and skill and with the view of carrying the student along from a grasp of the basic principle in each instance through its application or modification in related situations, with a consideration where necessary of statutes that may affect or modify the case rule.

Law-review materials have been employed to a limited extent in presenting the various topics. The authors have utilized for this purpose case notes taken from the *Virginia Law Review*. They explain in their preface that they have limited these excerpts to this source not with any opinion that it necessarily offered the best materials but simply because it was more convenient to use notes with which they were personally familiar by way of contemporaneous suggestion and criticism.

A number of recent decisions will be found under the different topics, among them *Griesdieck Western Brewery Co. v. Peoples Brewery Co.*,² on infringement of trade-marks; *Levey v. Warner Bros. Pictures*,³ on the right of privacy; *Gulbenkian v. Gulbenkian*,⁴ on the specific performance of a contract for the sale of stock; *In re Feuer Transportation, Inc.*,⁵ on the enforceability of an arbitration agreement under the New York statute; *Knott v. Cutler*,⁶ on the question of the adequacy of consideration as bearing on the right of specific performance; *Morris v. Goldthorp*,⁷ on the specific performance of an open contract; *Lynbrook Gardens, Inc., v. Ullmann*,⁸ on the vendor's obligation to tender marketable title; *Friede v. Pool*,⁹ on specific performance with compensation for defects; and *Olszewski v. Sardynski*,¹⁰ on the vendor's bill.

While there is a fair scattering of cases taken from middle-western and far-western jurisdictions, the great majority of the cases other than the English and federal decisions are selected from jurisdictions along the Atlantic seaboard. In this connection, a feature which the writer noted with satisfaction was the frequent use of authorities from the New York courts. Undoubtedly this is because of the wealth of excellent material in the field of equity to be found in the reports of the Empire State. Nevertheless, their use is in refreshing contrast to the approach of some casebook com-

² 56 F.Supp. 600 (D.Minn. 1944).

³ 57 F.Supp. 40 (S.D.N.Y. 1944).

⁴ 147 F.2d 173 (C.C.A.2d 1945).

⁵ 295 N.Y. 87, 65 N.E.2d 178 (1946).

⁶ 224 N.C. 427, 31 S.E.2d 359 (1944).

⁷ 390 Ill. 118, 50 N.E.2d 857 (1945).

⁸ 291 N.Y. 472, 53 N.E.2d 353 (1943).

⁹ 217 Minn. 332, 14 N.W.2d 454 (1944).

¹⁰ 316 Mass. 715, 56 N.E.2d 607 (1944).

plers in other fields who, although there is available an equal wealth of New York authority, at times seem motivated by a desire never to use a New York case if another, even though a less satisfactory one, can be found elsewhere.

The authors have not attempted—as is the tendency in a number of casebooks in recent years—to include problem material as such for use in developing the rules exemplified in the principal cases included in their collection.

Viewing the casebook as a whole, it is the writer's opinion that the authors are to be commended for having accomplished a clean-cut, scholarly job of conventional type and for having produced a casebook which should prove to be a useful and convenient teaching tool for the purposes for which it is designed.

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CASES AND MATERIALS ON ADMINISTRATIVE LAW. By Carl McFarland and Arthur T. Vanderbilt. Albany: Matthew Bender and Company, 1947. Pp. ix, 1048. \$8.50.

ADMINISTRATIVE LAW, CASES AND COMMENTS. Second Edition. By Walter Gellhorn. Brooklyn: The Foundation Press, Inc., 1947. Pp. lxxxix, 1138. \$7.50.

CASES AND MATERIALS ON ADMINISTRATIVE LAW. By Milton Katz. St. Paul: West Publishing Company, 1947. Pp. xiii, 1108. \$8.00.

An economist employed by the United States Department of Agriculture used to assert that he was the only person who had actually weighed the evidence in the famous *Morgan* cases. This he did by placing the administrative record on the scales before it was transmitted to the court in the review proceeding. Unless he chooses to publish the results they must remain unknown, since memory fails at this point. But the directness and simplicity of the method used and the unassailable character of the result inspire a desire to emulate his achievement. Therefore, I am now in position to report that I have carefully examined nine and three-fourths pounds of Cases and Materials on Administrative Law and have determined the distribution to be as follows:

Gellhorn	3 lbs. 12 oz.
Katz	3 lbs. 11 oz.
McFarland and Vanderbilt	2 lbs. 5 oz.

It is thus apparent, on the basis of this objective comparison, that the Gellhorn and Katz books are approximately equal in merit, while the McFarland-Vanderbilt work is definitely inferior.

The foregoing completes the formal portion of this review. However, there are a few general observations which may be made. They will not result in a conclusion that any one of these books is better than the others, since, like beauty, the relative excellence of casebooks is largely in the eye of the beholder unless it is obvious that the editor has failed to do a workmanlike job. With respect to the works under consideration it is clear that

no such charge can be made. Each of the editors is highly qualified from the standpoint both of scholarly background and practical experience in the field. Each has included timely and significant materials in his selection. Each has offered an arrangement which can be used effectively in the classroom.

It thus becomes evident that differences in emphasis are of primary significance in any attempted appraisal. Preferences in this regard depend basically on the purposes which a particular instructor has in mind when a course in Administrative Law is offered. However, it seems clear that in the evolution of the subject primary attention has shifted from the constitutional problems involved to a consideration of the functions and procedures of agencies. Fifteen years ago Felix Frankfurter rightly placed great emphasis on problems of delegation and the separation of powers. Today, with the battle on these fronts won by the proponents of administrative action, the contending forces have shifted to new fields. If a student, prior to studying Administrative Law, has had a course in Constitutional Law which includes more than interstate commerce and due process, there is little, if any, need for more than incidental reference to constitutional limitations.

McFarland and Vanderbilt have recognized and neatly dealt with this matter by lumping the general topic of constitutional limitations in one chapter which can easily be left out. In the Katz book, constitutional materials are interspersed with others in such a way that the astute observer can detect and eliminate them with comparative ease. Gellhorn's collection contains a full treatment of the delegation of powers in a separate chapter. In the remainder of his work the constitutional requisites of a fair hearing and other restrictions on administrative action are interwoven with materials designed to illustrate proper procedure. Since it is virtually impossible to consider the problem of hearings without being constantly mindful of the limitations imposed by courts through constitutional interpretation, there would seem to be no valid objection to this method, although, under the assumption stated in the preceding paragraph, it may not be necessary.

Apart from the matter just mentioned, wide differences in general arrangement are to be observed. It may, perhaps, be said that both the Katz and McFarland-Vanderbilt books are authentic post-war models, new from the ground up and, in fact, virtually atomic in their modernity. The Gellhorn work, being in the second edition, has undergone a face-lifting job in the sense that new materials have been added, but essentially the structure remains the same. This is nothing against it, since what was once a good book does not become a poor book simply because the editor has not made a completely new start in arranging a second edition. However, the fact that each book is quite different in arrangement, if not in content, raises significant questions as to the basic premises of the editors.

If these gentlemen engage in the doubtful practice of reading reviews of their own works they may be somewhat surprised to discover what they were thinking about when they compiled their respective selections. However, since reviewers, like related types of individuals, rush in where angels fear to tread, the following suggestions are offered. It would seem that Professor Katz wishes to present administrative law as an evolving govern-

mental process, having its inception in statutory schemes, becoming manifest in the creation of administrative agencies, taking effect in the promulgation and enforcement of administrative programs, and being controlled through judicial review. Messrs. McFarland and Vanderbilt appear to be primarily concerned with the functioning of administrative agencies rather than with their origins or their ultimate fate in the courts. For this reason, great emphasis is placed on activities taking place at the administrative level, and agency procedure, both formal and informal, is stressed. Professor Gellhorn is largely concerned with what happens to administrative agencies in the courts, since, in his view, judicial decisions exercise a general effect upon administrative practice and policy even though the bulk of administrative decisions are never subjected to judicial review.

These differences might suggest the tale of the blind man and the elephant except for the fact that each of the editors, while retaining his own perspective, manages somehow to keep the whole animal in view. That is why it seems entirely possible to use any one of the books successfully in the classroom. As a matter of fact, this reviewer has used two of them with no apparent difference in result.

The McFarland-Vanderbilt selection has, however, one outstanding excellence which I do not find to such a degree, at least, in either of the others. Perhaps because of Mr. McFarland's long interest in the preparation and enactment of the Administrative Procedure Act, he and his co-editor seem to me to have attained a closer integration of the materials and the statute than that which appears in either of the other volumes. Illuminating extracts from the legislative history are frequently included, and in general the selection highlights the Act in an admirable manner. Since the Act represents the culmination of many years of study and discussion, and since it will undoubtedly have a tremendous influence on the course of administrative law, its importance can scarcely be overemphasized. It should not be regarded as an unfortunate appendage but as a highly significant codification of standards of administrative practice.

The virtually simultaneous publication of these three works is a welcome indication of the intense interest in administrative law which characterizes students now in law schools. Straight thinking about administrative agencies, such as each book helps to induce, is not only of the greatest practical value in the practice of law but also will aid in the solution of the basic problem of the relation of government to the individual, which is of constantly increasing concern.

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CASES ON THE LAW OF BILLS AND NOTES. By Ralph W. Aigler. St. Paul: West Publishing Company, 1947. Pp. xxii, 876. \$7.50.

The course in Bills and Notes has long been a strong contender for the position of the dullest course in law school. Commonly, perhaps, the teacher thinks of the subject as a fascinating one, either because he finds romance in the flow of cash and credit or because he takes the pleasure of a chess-player in tangled multi-party relations. At least as commonly, however, the

teacher's enthusiasm is communicated only to a small fraction of his students. The reasons might apply to a compulsory course in chess. Students come to law school ignorant of fundamental terminology and conceptions; unfamiliar with underlying realities, they find the problems abstract and lifeless. Meanwhile, other courses tend to crowd Bills and Notes into a smaller share of the curriculum, and it becomes difficult even to lay the groundwork. Yet it is hard to regard as complete a legal education which does not include more than a nodding acquaintance with the collateral note, trade acceptance, and check.

In this setting, one turns to Mr. Aigler's new casebook with high hope. His 1937 book was one of the leading casebooks in the field. Learned in the subject as well as enthusiastic about it, he was a pioneer in attempting to place the law of commercial paper in its setting in the modern banking system. After ten years, we look for a dividend from that experiment and hope to find a more finished attempt to make commercial paper come alive. The 1937 book did not really integrate banking practices and negotiable instruments; it was really two casebooks bound in one cover, too bulky for three semester hours. Moreover, it was less than completely successful in bridging the gap between commercial financing and the student's known world. What is his new solution?

Thus approached, the new volume is disappointing. It is a partial second edition of the 1937 book, omitting the banking material which made up the first third of that edition. The experiment, it seems, was a failure; *de mortuis* . . . The remaining two-thirds has been little changed: text, somewhat expanded, now adds up to some 166 pages, scattered among the cases; some new cases have been added, including eleven decided since 1937; more have been deleted or demoted to footnotes. The net shrinkage shows a substantial concession to the pressure of crowded curricula: case material now comprises 175 cases occupying, with footnotes, some 650 pages. Minor defects have been retained: cases and law reviews are cited without dates, and articles without titles and often without authors; sections of the NIL, reprinted in the text are never in bold-faced type. The changes from the previous volume do not justify extended comment.

Nevertheless, Mr. Aigler has provided at least two signposts which may point to the way of the future. The first is to begin by studying the check, the one negotiable instrument with which students are normally familiar. Students often find the relations between the parties to a foreign bill of exchange ineffably confusing, especially if those parties are named *D*, *P*, *E*, and the like; yet similar relations on an ordinary personal check often seem quite obvious to the same students, unless the picture is cluttered with too many banks. The traditional course in Bills and Notes starts, like the NIL, with Formal Requisites; dozens of complex, defective, or extraordinary instruments are introduced before the first check, probably a certified check, appears at about page 200 under the heading Acceptance. Mr. Aigler postpones Formal Requisites, and from his ninth case concentrates heavily on check cases. It may be regretted that he did not go further on this road. If the chapter heading had been "Checks" instead of "Liability of Parties," he might have been able to introduce some of the material on bank collections now unhappily omitted.

The second possible signpost to the future is the increased use of text. Mr. Aigler's first 63 pages include 45 pages of text, consisting of a historical introduction, brief statements on signature, delivery, and consideration, and samples of typical instruments and indorsements. He thus eliminates the waste of having students read two pages of judicial opinion to learn that an indorsement "Pay to X" has the same effect as an indorsement "Pay to the order of X." As the time allotted to the subject is reduced, the pressure to eliminate such waste is increased; and the use of precious classroom time to lecture on such matters cannot be justified. Text also seems appropriate for the elucidation of history. And it may or may not be captious to regret that more use has not been made of text to supply much-needed commercial background for the problems raised by the cases.

Here, however, an exception must be taken. When lack of student interest is a serious problem, it becomes important that the material be presented as simply and directly as possible. Nothing is more likely to confirm the student in his impression that Bills and Notes is, as Mr. Aigler says, "just one thing after another" than text written in the traditional law-review style. Excessive display of footnote learning is well calculated to deter the student from attempting to understand the most fascinating material. The purpose is thus likely to be defeated: either the student does not read the material, or the teacher must divert classroom time to drill concerning it. Moreover, the defense that the matter in fine print may be useful to the teacher is particularly unpersuasive in this field; surely a casebook should not try to compete with *Braman* or the *Uniform Laws Annotated*. Mr. Aigler has sinned like others before him. Perhaps one-fifth of the printed matter in his book, including problems, abstracts of cases, quotations, and text, as well as citations, is to be found in fine footnote print; it is not unusual to find four lines of text supported by footnotes occupying the rest of the page. The utter omission of the footnotes, it is submitted, would improve the book, even if no other change were made.

All this is not to say that Mr. Aigler has not done a scholarly and workmanlike job. The defects alleged, if such they be, are traditional defects. The cases have clearly been selected carefully and well, and their arrangement may well constitute an advance over previous efforts. But the problem of providing a fascinating course in the law of Bills and Notes remains unsolved.

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BASIC CONTRACT LAW. By Lon L. Fuller. St. Paul: West Publishing Company, 1947. Pp. xxiv, 994. \$7.50.

The prominent place assigned to Contracts in the required first-year curriculum is due not alone to the frequency of contract litigation. The concepts, traditions, and techniques associated historically and doctrinally with consensual relations are closely interwoven with human psychology and behavior, as well as economic needs, commercial customs, and business habits. They have, therefore, wide ramifications throughout the field of private law, and reappear in varying shades in other substantive-law courses. Recognition of this fact may have suggested the title "Basic Contract Law" for

Professor Fuller's unique and valuable book. Contract notions, however, cover so broad a field that any attempt in 981 pages to get at the fundamentals of some things and make the interrelations between them and other courses meaningful necessitates some limitation of subject matter. Professor Fuller has chosen to omit the traditional topics—illegality, joint contracts, and discharge (accord and accord and satisfaction are, however, adequately covered in the chapter on consideration)—and to cover the Statute of Frauds in forty-one pages by means of hypothetical cases, followed by text analysis and answers. The author's objective justifies the outright omissions (my only suggestion being that there are some rather "basic" notions about the nature of illegality and its collateral effects); and the unorthodox treatment of the Statute of Frauds provides an interesting experiment in an informational approach to a topic that lends itself readily to that kind of treatment.

How does *Basic Contract Law* differ from other leading casebooks in the field? One significant difference appears in the very first chapter. It begins on a remedial theme—the action at law for damages. The high spots are covered and the landmark cases, *Hadley v. Baxendale*, *Clark v. Marsiglia*, etc., are there. But the chapter properly does not stop with damages. Attention is given to the other weapons in the arsenal of remedies—specific performance, restitution, and quasi-contractual recovery. To each remedy is assigned an informative note written by the editor, and the net result of the chapter is a sense of remedial completeness not found in other books. It answers the normal question of the uninitiated, "How much?" at a time when natural interest is high, and, by emphasizing complementary remedies, minimizes the frequent and often justified student comment, "It may be the law, but it doesn't seem just." The "basic" importance of remedies is apparent from their frequent reappearance later in the book: damages—in successive recoveries for the same breach of contract, in suits by landlord against tenant, measuring market value, fluctuating value; quasi-contract—by prior assignee against a subsequent assignee who collects, where a contract is frustrated or performance has become "impossible," where defendant prevents test for selling price; rescission—by the aggrieved party in installment contracts, in aleatory contracts, etc.

Of the 981 pages, approximately two-thirds consists of conventionally edited case material, well selected and arranged, but no better perhaps than in other leading books. The remaining third of the book is different, and in it is the author's real contribution. One hundred fifty-eight cases have been drastically abridged, by partial or complete restatement by the editor both of facts and decision. The fairly complicated case of *MacTier's Administrators v. Frith* (page 204), for example, which covers about twenty pages of fine print in the original report, has been restated in just seventeen lines. While this device for wider information and broader coverage is not original with Fuller, he has employed it on a much wider scale than others.

More significant, however, than his abridgment of cases are his own extensive and carefully prepared notes. Typographically, they are given the same prominence as the edited case material. They, with his problems and exercises in drafting, are the most significant departures in the book and

deserve special comment. For convenience, the notes may be classified as follows:

1. Notes on additional facts in the case, gathered from trial briefs, records, or other sources, and not appearing in the reported opinion. Typical are "Additional Facts in *James Baird Co. v. Gimbel Bros.* Obtained from the Record and Briefs" (page 376), and "The Arguments of Counsel in *Schnell v. Nell*" (page 347). These are valuable and shed light on otherwise obscure opinions. *Schnell v. Nell*, while still far from satisfactory, is at least more understandable. The first year is not too soon to learn that the whole story may not appear in the reported opinion.

2. Historical notes. Roughly, thirty pages are devoted to this type of note. Interesting and typical ones are "The History of the Enforcement of Contracts in England" (page 303), "Historical Introduction" in connection with the past consideration problem, and "The History of the Assignment of Choses in Action" (page 585). The note on enforcement of contracts, for example, outlines in modern English an accurate picture of the limits imposed by the actions of debt and covenant in early law prior to the action of assumpsit, the development of the action of assumpsit, and the more modern formulation of the complex consideration doctrine. The modern doctrine makes much more sense with this historical perspective. Here, as in other places where historical matter is covered, is an excellent opportunity to save much needed time and come out with a better student perspective than is possible even with days of minute dissection of old cases in which both language and subject matter are wholly foreign to the experiences of a first-year student.

3. Introductory problem-analysis notes. This is my own designation, but I refer to material like the introductory note to contracts concluded by correspondence (page 181), the analysis preliminary to the problem of third-party beneficiaries (page 526), the introduction to the chapter on conditions (page 744), and "The Distinction Between Conditions Precedent and Conditions Subsequent" (page 766). Material of this kind covers approximately seventy pages. It serves the very laudable purpose of insuring a glimpse of the forest as well as the trees and furnishes a framework within which the accompanying cases can be considered. When Professor Fuller and I studied contracts, it would have been a confession of weakness on the part of a teacher to put material of this sort into print. The same objective, however, was frequently attempted by lecture, usually with apology and in deference to an assumed inability of the average student to appreciate the more subtle intricacies of the "case system." I prefer it in print, where it will be more carefully thought out and where it can be referred to by students as many times as may be necessary. I have always suspected that the only valid objection to student use of texts was the fact that few texts suitable for student use existed. Texts prepared primarily as digests and collections of authorities for judges and practitioners were usually lacking in original analysis and devoid of intellectual stimulation. The text material prepared by Professor Fuller (for text it is), while not lacking in information, is at the same time analytical to a high degree and often provocative. Material of this sort fills a definite need in the curriculum; and one need not fear an overdose of spoon-feeding, for there is still enough of

orthodox case material and problems to satisfy the most ardent case-method teacher.

4. Notes covering the business and economic background of particularly significant cases. Typical ones are those dealing with the applicability of the beneficiary doctrine in situations where there are "assuming" and "non-assuming" grantees in the sale of mortgaged property (note to *Schneider v. Ferringo*, page 567), the economic significance of the assignment of claims (page 581), and successive assignees of the same chose in action and the applicability of the Bankruptcy Act (note to *In re Vardaman Shoe Company*, page 626).

5. Comparative-law notes. The author's scholarship in the field of comparative law has enriched the book. The comparative-law aspects of interesting problems in connection with the revocability of an offer contemplating a unilateral contract (page 257) and the gratuitous promise (page 328) are illustrative.

In addition to the categories mentioned, there are still other notes on legal method (used as an introduction to the chapter on third-party beneficiaries, page 519) and even one on psychology in connection with "Changed or Unforeseen Circumstances" (page 666). Statutory material has in no sense been neglected, but rather emphasized. I have counted at least thirty-seven typical and significant modern statutes which nowadays play an increasing role even in private law.

In 1941 an unpublished study of 500 contract cases decided in the year 1940 was made under my supervision. Among other things, we wanted to find out what contract problems were involved in "run-of-the-mine" litigation. We noted that about 25 per cent of litigated cases covered by the study and reaching appellate courts revolved about problems of interpretation of language. A good part of the difficulty, we concluded, was traceable directly to incomplete negotiation by the parties and poor draftsmanship either by the parties or their counsel. In many of the cases the courts bluntly said so. The emphasis given throughout Fuller's book to the practical problems of negotiation (see, for example, pages 92, 424), draftsmanship (pages 33, 354, etc.), and techniques of proof (page 415), should do much to correct what has been in the past a serious curricular deficiency. Curriculum builders and casebook editors will find many constructive suggestions in Fuller's exercises in negotiation and draftsmanship.

From what has been said it must be apparent that I like the book. I do. And if I may conclude on a personal note, it will be to express satisfaction in the recognition given in the book to the scholarship of Professor Fuller's teacher of contracts and mine—Clarke B. Whittier.

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