

1937

## Book Reviews

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## BOOK REVIEWS

CASES ON DOMESTIC RELATIONS. By Frederick L. Kane. St. Paul: West Publishing Co. 1936. pp. x, 572. \$5.00.

In presenting this book Mr. Kane has approached the subject primarily as a professor. His obvious purpose in publishing this book has been to meet the needs of the students in the classroom. He has done this in a practical way, rather than by a broader and more academic treatment of the subject, which characterizes some of the former case books on Domestic Relations. Such an observation need not however, be regarded as an unfavorable criticism. There is no evidence in the treatment of the subject either in the selection of cases or the scope of the subject matter which would indicate that there has been any sacrifice of scholarship or thoroughness in an attempt to be practical.

Professor Kane has followed in the main the traditional divisions and sequences that are usually adopted in the study of Domestic Relations and, while in some instances more cases might have been reported as part of the text, an astute appraisal of the limitation of time in presenting this course, has dictated in these instances, selection of fewer and more typical cases. These are augmented with citations and comments which are especially instructive to the student. For instance, in dealing with the arresting and perplexing question of jurisdiction in marital actions, the book reports less than a dozen cases. The comments set forth as footnotes on these cases, however, include pertinent references to twice that number of the leading cases bearing on the question raised in the reported cases. In addition thereto, opportunity for further research work by the student is afforded and painstakingly guided by references to several law review articles and sections of the statutes for a period of ten years and as recently as April 1936.

In addition to the cases reported as the text of the volume, there is also included in the Appendix the Domestic Relations Law of the State of New York, together with portions of the Law of Massachusetts and pertinent sections of the New York Civil Practice Act.

In reference to statutory law, Professor Kane, in submitting his volume, has carried out what seems to be an innovation in the treatment of this subject from a case book approach. He has with a few necessary exceptions limited the selection of his cases to the cases of the jurisdiction in which his students will actually for the most part be engaged in the practice of law. The only extension of this field is to neighboring States. The cases cited are almost exclusively from New York, New Jersey and the New England States.

This presents squarely a challenge to the efficacy of the traditional method of selecting cases decided in every state, for the academic value of their reasoning, as opposed to a more practical treatment of the subject, in limiting it to a narrower field. It would seem that where there is a relative uniformity either through the general following of the Common Law, or through a similarity of statutory enactments, that the former method of careful selection of cases from all the jurisdictions is a more desirable manner of carrying out the case work method of teaching. The training of the mind of the law student to a refined, well-rounded capacity for legal reasoning based on the best expressions of the judiciary throughout the country and throughout our judicial history must be still regarded as the most desirable method yet prescribed. But where there is a multiplicity of variations and even virtual contradictions in the statutory laws of the several jurisdictions, it becomes almost futile to attempt to devise a logical, instructive, educational program of study based on decisions dealing with these varied and variable laws. It would seem that the field of Domestic Relations may have reached (and Professor Kane in his In-

roduction states that this is the fact based on his years of teaching the subject) throughout the several States a complexity which militates against its being further regarded as a "Common Law" subject. It would seem that the growth of social consciousness with the resultant recognition of the vital nature of the problems arising in the field of Domestic Relations has resulted in a flood of social legislation throughout the States which has brought about codification, in some instances, of the Common Law doctrines on Domestic Relations and in others of modernizing and elaborating existing statutes.

In narrowing his scope from the traditional field of all the States however, Professor Kane does not depart from a case system method of teaching. Only as a limit of the field of selection of cases does his volume reflect a statutory treatment of the subject. He follows what has been sometimes characterized as a treatment of the "Common Law of the Statutes".

In selecting his cases Professor Kane has reflected in a slight degree the procedural angle of the subject which would seem to make for interest particularly for a student who is first approaching the subject. His cases are deliberately selected from different courts within the jurisdiction, citing at times a decision from a lower court to bring out the manner in which the problem comes up rather than to cite the case for its value as substantive law.

This new volume of Cases on Domestic Relations by Professor Kane is a useful, instructive case book carefully prepared and attractively presented.

STEPHEN S. JACKSON†

HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY. By Max Radin. St. Paul: West Publishing Co. 1936. pp. xxiv, 612. \$5.00.

This is, in many respects, an excellent compendium of English legal history, well documented. American legal history, however, is slighted, nor is there any way of finding out such topics of American legal history as are treated, except by reading the book through. Neither the table of contents, nor the index, affords any aid in this quest.

While the author tells when the accused was allowed the aid of counsel in England, and when counsel acquired the right to cross-examine and to address the jury, he does not tell us what were the rights of counsel in the colonies. He does not tell us when the District Attorney came into existence, nor does he inform us of his ancestry. Yet these are questions in which the reader would naturally be interested.

His English history is good. He takes up all the conventional topics such as courts, civil and ecclesiastical, feudal system, royal writs, precedent, the legal profession, and legal literature.

A student who is interested in the topic, might accumulate from the book a list of customs which would make intelligible the old title: "*Lex et Consuetudo Angliæ*," though here again the index would not be of much aid to him.

In the same way, and with the same limitation upon the index, the reader might discover the indebtedness of English to Roman law.

The author writes clearly and explains in very intelligible language obscure points in English law. It is a book which will be of great value to law students. Its value would be greatly increased, however, by an adequate index.

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A TREATISE ON THE LAW OF CONTRACTS. By Samuel Williston. Revised Edition, Volume II. New York: Baker, Voorhis & Co. 1936. pp. xi, 927-1723. \$35.00 per set of 8 volumes.

The original "Williston on Contracts" worked a well-merited chorus of praise.<sup>1</sup> The revision by Williston and Thompson has already given evidence of a crescendo yet to come.<sup>2</sup>

This new volume is instantly likable. The dignity of its gold lettering on a rich red binding immediately inspires a sense of acquisitiveness. This soon blends into inquisitiveness, which is effectively nurtured and developed by the traditional Baker-Voorhis format of large, clear type on friendly, durable paper, with bold-face section headings and thoroughly readable footnotes. A salute, in passing, to the proof-reader, and the minutiae may be left behind.

The subject matter of the second volume is readily discernible from its nine Chapter Headings:

- XIII. Joint Duties and Rights Under Contracts.
- XIV. Contracts for the Benefit of Third Persons.
- XV. Assignment of Contracts.

### Part III

#### The Statute of Frauds

- XVI. Scope of Statute. Promise to Answer for the Debt of Another.
- XVII. Contracts in Consideration of Marriage; Contracts or Sales of Any Interest in Lands; Contracts Not to Be Performed Within a Year.
- XVIII. Contracts for the Sale of Goods.
- XIX. Effect of Failing to Comply With Statutory Formalities.
- XX. Satisfaction of the Statute by Acceptance and Receipt or Part Payment.
- XXI. Satisfaction of the Statute by a Memorandum in Writing.

What stimulus to creative thought is here? Let us devote ourselves principally to the first three topics and relegate the Statute of Frauds to the rear to ruminate on Life's limitation of time and space.

#### 1. *Joint Contracts*

The concept of "several" liability is a simple one. So also is that of "joint" duty or obligation under a contract, which reduces itself to this: that two or more persons are together bound as if they were a single person. The idea of "joint and several"

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1. Corbin, Book Review (1920) 29 YALE L. J. 942, 945: "No difficult question in contract law should be answered without first consulting Professor Williston's work." Cook, Book Review (1920) 20 COL. L. REV. 716: "... the best treatise upon the Anglo-American law of contracts." Oliphant, Book Review (1921) 19 MICH. L. REV. 358, 362: "Considered from almost any angle this is easily the best treatise on the law of contracts in our language . . . [Professor Williston's] work abounds in sane and well-matured conclusions richly rewarding his great industry, patience and thoroughness." Terry, Book Review (1921) 34 HARV. L. REV. 891, 892, 896: "A monumental treatise on contracts, a treasure house of the accumulated learning of centuries on the subject, an exhaustive exposition of the principles which constitute this branch of law, accompanied by a critical analysis of them running with and through their statement . . . the science of law is advanced and improved by this highly meritorious contribution."

2. Bacon, Book Review of Revised Edition of WILLISTON ON CONTRACTS, vol. I, 5 FORDHAM L. REV. 526, 532: "... Williston's Treatise on the Law of Contracts continues to be the best law book of our times."

liability, however, is at times confusing. A good example of a "joint" obligation is that of partners liable upon a partnership contract. A good example of "joint and several" liability is that of joint tortfeasors.

Joint obligors are necessary parties if alive and within the jurisdiction and objection to their omission from the litigation is seasonably made. "Joint and several" obligors, on the other hand, are not necessary parties, and one, any or all of them may be sued by the obligee.

It has been the law that a release of one or more joint obligors discharges the others and that the same rule is applicable to the joint liability and the several liability of the joint and several debtors who are "contractually" such, as distinct from joint tort-feasors.<sup>3</sup>

In most of the United States, however, statutes have somewhat changed the common law in regard to joint obligations. Some states have adopted the Uniform Joint Obligations Act, familiar in New York as Sections 231-240 of the Debtor and Creditor Law. This Uniform Act alters the law pertaining to the release, without the express reservation of rights, of fewer than all the co-obligors by extending into this field, with modifications, the equitable rule of suretyship that a release of a co-surety releases the other joint or "joint and several" sureties to the extent that their right of contribution is impaired.

The text under review states that the Uniform Act "governs the rights and duties of joint tort-feasors as well as of joint contractors."<sup>4</sup> Substantially the same language appears in the New York statute.

Yet the text also states, with respect to joint tort-feasors, that "a release of one discharges all."<sup>5</sup> And the New York Court of Appeals has squarely held, even since the adoption of the Uniform Act, that "a general release of one tort-feasor, made without reservation, creates a bar to an action against another for damages, arising from the same injury. . . . The law does not permit a double satisfaction for a single injury."<sup>6</sup>

Where, therefore, are we? Does Section 235 of the New York Debtor and Creditor Law, providing for only a limited release of co-obligors apply to joint tort-feasors or is it still the rule, as to them, that a release of one discharges all in toto? The latter seems to be the law of New York and yet why it should be so is difficult to understand in view of the express language of the Uniform Act. Scrutiny of the text has failed to resolve the difficulty.

## 2. Beneficiaries

Does a *Lawrence v. Fox* beneficiary ever get a better right than his promisee?

The text after thorough analysis of the rights of a creditor beneficiary, concludes that "in substance, the right is derivative."<sup>7</sup> The beneficiary's right is, of course, limited by the terms of the promise. If there is no valid contract between the promisor and the promisee, the beneficiary has no rights. So also, if the promise

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3. The Restatement of Contracts departs from the older common-law rule that a release or discharge of one joint and several contractual obligor by act of the creditor, without reservation or rights against the others, discharges all. It states that the others are "discharged from their joint duty but not from their several duties, except in the cases and to the extent required by the law of suretyship." This appears to be a more logical and more practical point of view, since to the modern mind a release of one debtor is not necessarily a release or satisfaction of the debt itself.

4. P. 985.

5. P. 994.

6. *Milks v. McIver*, 264 N. Y. 267, 190 N. E. 487 (1934).

7. P. 1061.

is void between the promisor and the promisee for fraud, want of consideration or failure of consideration.<sup>8</sup> What if there is a valid conditional promise by the promisee, who fails to perform the condition? May the beneficiary perform the condition himself? The text soundly concludes that "Where the condition is not merely some adventitious occurrence but something which can be brought about by the beneficiary himself, . . . on the occurrence or performance of the condition the beneficiary acquires a right of action."<sup>9</sup> The New York case of *Gennett v. Smith*<sup>10</sup> is not discussed but it was undoubtedly rejected as unsound.

What if the promisee has breached a condition subsequent after the beneficiary's rights have vested? The problem was suggested in *Doll v. Crume*<sup>11</sup> and *Borden v. Boardman*.<sup>12</sup> Should it be governed by the pronouncement of Judge Andrews that "it would be contrary to justice or good sense to hold that one who comes in by . . . 'the privity of substitution' should acquire a better right against the promisor than the promisee himself had"?<sup>13</sup> The most recent cases suggestive of the answer are those in which injured persons attempt to recover on liability insurance policies voluntarily taken out by the insured tort-feasor. If the insured fails to perform a condition precedent such as "giving immediate notice" of the accident, the beneficiary has no rights.<sup>14</sup> If, however, all conditions precedent are performed and the beneficiary's rights accrue, the insured and the insurer cannot thereafter deprive him of such vested rights.<sup>15</sup> After the injury, for instance, the assured might, by ratification of an unauthorized cancellation of his policy, estop himself from recovering benefits under his policy; but such ratification would be ineffectual as against the beneficiary whom he injured.<sup>16</sup>

The quest for situations where a beneficiary gets better rights than his promisee is intriguing. It will undoubtedly become keener as the law evolves.

### 3. Assignments

Does an assignee of a chose in action acquire a legal right or an equitable right? Hot has the battle raged.<sup>17</sup> The text adequately discusses the problem. An excel-

8. *Dunning v. Leavitt*, 85 N. Y. 30, 35-36 (1881).

9. P. 1062: "So it has been held that the beneficiary of a promise to give a lease if a certain rental was paid, was entitled to recover on tender of the rental."

10. 244 App. Div. 3, 278 N. Y. Supp. 478 (3d Dep't 1935).

11. 41 Neb. 655, 59 N. W. 806 (1894).

12. 157 Mass. 410, 412, 32 N. E. 469, 469 (1892): "The subsequent failure of Collins to perform his contract would *not* release the defendant from the obligation if any, which he had assumed to the plaintiffs. . . ."

13. *Dunning v. Leavitt*, 85 N. Y. 30, 35 (1881).

14. *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y. 271, 160 N. E. 367 (1923); *Rushing v. Commercial Casualty Insurance Co.*, 251 N. Y. 302, 167 N. E. 450 (1929).

15. After an accident, an assured could not agree with his liability insurance company to cut off the injured man's rights. *Rushing v. Commercial Casualty Insurance Co.*, 251 N. Y. 302, 167 N. E. 450 (1929).

16. *Spann v. Commercial Standard Ins. Co. of Dallas*, 82 F. (2d) 593 (C. C. A. 8th 1936); *Hooker v. American Indemnity Co.*, 12 Cal. App. (2d) 67, 54 P. (2d) 1128 (1936). These two cases are not cited in the text.

17. Cook, *The Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816; Williston, *Is the Right of an Assignee of a Chose in Action Legal or Equitable?* (1916) 30 HARV. L. REV. 97; Cook, *Alienability of Choses in Action: A Reply to Professor Williston* (1917) 30 HARV. L. REV. 449; Williston, *The Word 'Equitable' and Its Application to the Assignment of Choses in Action* (1918) 31 HARV. L. REV. 822.

lent analysis of the distinction between legal and equitable rights appears in Section 446A. It ends with the following paragraph not found in the old edition:

"For the present purpose, however, the important thing in describing the right of an assignee is to use words that are likely to cause as little ambiguity as possible. Partly in spite of what has been said in the preceding paragraphs and partly in view of its, equitable ownership and equitable right have a perfectly definite meaning—namely, an ownership or a right good against one person primarily, and also good against both the possessor of a later equitable right and the possessor of a later legal right acquired gratuitously or with notice of the equity. The statement that an assignee has a legal right or a legal title, though generally true as far as the procedure is concerned, surely tends to, and actually in some instances has induced the belief that the assignee's rights are more extended than is or ought to be the case. The use of the word "equitable" on the other hand, unfortunate as the different meanings of the word are, will not cause anyone to believe that a bill in equity is the necessary means of enforcing an assignee's right, and when the word has been used it has not caused doubt as to what are the substantive jural relations of the parties."

The conclusion is therefore drawn, at page 1305, that "the assignee's rights should still be regarded in the sense of being governed and defined by the principles originally established by the courts of equity."

The discussion might have been enhanced by a consideration of *Superior Brassiere Co. Inc. v. Zimetbaum*<sup>18</sup> and *Salem Trust Co. v. Manufacturers Finance Co.*<sup>19</sup> Where there are successive assignments of a chose in action and the second assignee has been paid by the debtor, the legal phenomenon which permits the first assignee to recover from the second assignee is, of course, indicative of higher "rights" in the latter. Are they legal or equitable? Does the first assignee prevail because he has a better legal right or a higher equity? The question itself suggests the possibilities for discussion.

So much for the present. No gold mine of any consequence was ever exhausted in a day. The revised Williston is a gold mine of great worth. Professor Thompson has brought to the revision a fresh keenness, an aptness of citation and an unerring accuracy. It is small wonder that Williston himself became fascinated by the new brilliance of his old gem and soon warmed to the task of perfecting perfection. This is not a rehash of any old dish. It is a thorough revision and almost a new work. The combination of Williston's thoroughness of analysis, depth of experience and facility of expression with Thompson's diligence of application, relentless energy and unbounded enthusiasm for contractual concepts has served to produce a treatise as nearly perfect as human hands can mould.

JOHN F. X. FINN.†

CASES ON PUBLIC UTILITIES. By Young B. Smith, Noel T. Dowling and Robert L. Hale. (Second edition). St. Paul: West Publishing Co. 1936. pp. xl, 1107. \$6.50.

This second edition of a well-known casebook on public utilities is the largest of new casebooks in this field. The editors point out that it is one hundred pages shorter than in its first edition. The cases are arranged with excellent regard for historical development but without neglecting the possibility of an analytical arrangement at the same time. The use of introductory notes and extracts from arti-

18. 214 App. Div. 525, 212 N. Y. Supp. 473 (1st Dep't 1925).

19. 264 U. S. 182, 197 (1924).

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cles, at some length, is generous. The opening chapter deals with the traditional theory of businesses affected with a public interest and has the following order of arrangement:

1. Introductory Note on Public Utilities at Common Law
2. Regulation by Affirmative Legislative Action
  - (a) Company's Claim to Freedom from Regulation as a Public Utility
    - (1) On the Ground of No Public Interest
    - (2) On the Ground of No Public Profession
  - (b) Company's Claim that Regulation Shall Not Be Confiscatory
3. Regulation by Contracts and Conditions Attached to Privileges

In this first chapter you have the landmark cases of *Munn v. Illinois*,<sup>1</sup> *Brass v. North Dakota*,<sup>2</sup> *Wolf Packing Company v. Court of Industrial Relations*,<sup>3</sup> *Ribnik v. McBride*<sup>4</sup> and such moderns as *New State Ice Company v. Liebmann*,<sup>5</sup> *Nebbia v. New York*<sup>6</sup> and *Stephenson v. Binford*.<sup>7</sup>

The editing of the opinions has been carefully done with a regard for proper balance between court and dissenting opinions. In the *Liebmann* case,<sup>8</sup> Mr. Justice Brandeis' dissenting opinion, for example, is given very full space so that both the economic discussion and the brilliant appeal for state experiments are included. It is to be regretted that the editors did not also include his original notes to the part of the opinion they have printed. On the other hand the equally powerful dissent on the other side of the economic battlefield in an earlier case, *Budd v. New York*,<sup>9</sup> is printed so that the full picture of court development can be seen. And in the *Nebbia* case<sup>10</sup> you find the same fair apportionment of space between the majority and minority opinions.

Chapter two begins with the closely allied topics, "Competition and Monopoly," taking up restraints and the granting of certificates of public convenience and necessity. Only court opinions are used, thereby giving the authoritative source, and there is a liberal use of state court decisions in this important field of state policy. The reviewer's preference for court rather than commission decisions seems vindicated in the selection of cases given here.

Chapter three deals with "Service and Facilities," properly begins with "Suspension or Abandonment of Service" and then in brief space covers "Duty to Serve," "Expansion of Facilities," "Connecting Service," "Subsidiary Service," "Service to Intermediaries" and "Collateral Business," taking for those topics only 130 pages.

Chapter four is on "Cost Plus Fair Return as the Test of Rate Levels." It opens with an introduction to *Smyth v. Ames*,<sup>11</sup> showing the origin of judicial intervention to prevent "taking" property without compensation. That introduction is *Reagan v. Farmers' Loan and Trust Company*.<sup>12</sup> *Smyth v. Ames* is followed by a series of useful notes on reasonableness, property taken for public use, and physical,

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1. *Munn v. Illinois*, 94 U. S. 113 (1876).
  2. *Brass v. North Dakota*, 153 U. S. 391 (1894).
  3. *Wolf Packing Co. v. Court of Industrial Relations*, 262 U. S. 522 (1923).
  4. *Ribnik v. McBride*, 277 U. S. 350 (1928).
  5. *New State Ice Co. v. Liebmann*, 285 U. S. 262 (1932).
  6. *Nebbia v. New York*, 291 U. S. 502 (1934).
  7. *Stephenson v. Binford*, 287 U. S. 251 (1932).
  8. See note 5 *supra*.
  9. *Budd v. New York*, 143 U. S. 517 (1892).
  10. See note 6 *supra*.
  11. *Smyth v. Ames*, 169 U. S. 466 (1898).
  12. *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362 (1894).

as distinct from intangible, values. Next we have the realistic study of the fair rate of return, with reference to the need of raising funds, beginning with the astonishing case of *United Railways and Electric Company of Baltimore v. West*.<sup>13</sup> Only the rate of return section is published here in a short extract, and a note from the dissenting opinion of Mr. Justice Brandeis in this case. There is, however, a valuable presentation of the financial situation in the same case in an editorial note. Next there is a Connecticut commission opinion indicating a somewhat more realistic result. The discussion of actual costs and reproduction costs is presented in the following classic cases: *Minnesota Rate Cases*,<sup>14</sup> *Missouri, ex rel. Southwestern Bell Telephone Company v. Public Service Commission of Missouri*,<sup>15</sup> *McCardle v. Indianapolis Water Company*,<sup>16</sup> the *O'Fallon* case,<sup>17</sup> an extract from a dissent of Commissioner Eastman;<sup>18</sup> the *Los Angeles Gas and Electric* case;<sup>19</sup> a note by Mr. Hale analyzing the *Lindheimer* case<sup>20</sup> and the *Dayton Power and Light Company* case,<sup>21</sup> and finally, the last major attempt to clarify the situation, *West v. Chesapeake and Potomac Telephone Company*.<sup>22</sup> In nearly all, the dissenting opinions are given, especially the brilliant dissents of Mr. Justice Brandeis in the *Southwestern Bell Telephone Company* case,<sup>23</sup> and the *O'Fallon* case,<sup>24</sup> and the dissent of Mr. Justice Stone in the *Chesapeake and Potomac Telephone* case.<sup>25</sup> The *Southwestern Bell* case is used twice, its text actually appearing in the beginning of another section headed, "Articulate Discussions of Premises, Replacement Cost v. Actual Cost." Its extremely valuable notes to the dissenting opinion appear to be fully used. It is followed by a series of short extracts from state court and commission opinions as well as extracts from several law review articles. There are also similar extracts discussing security issues as a rate base, differentiation between investments made before and after announcement of regulatory policy and incentives to efficiency. There are separate sections on the intangible values, such as franchises, good will, going value and accrued deficits. There is a special section which deals with reservations and surpluses, another with depreciation, including in this latter portions of the majority and dissenting opinions in the *United Railways and Electric Company of Baltimore v. West*,<sup>20</sup> and the opinion of the court in the *Lindheimer* case,<sup>27</sup> but only a short extract from the concurring opinion of Mr. Justice Butler. The chapter concludes a very complete survey with the section "Operating Expenses." That section is made up of an

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13. *United Railways and Electric Co. of Baltimore v. West*, 280 U. S. 234 (1930).

14. *Minnesota Rate Cases*, 230 U. S. 352 (1913).

15. *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U. S. 276 (1923).

16. *McCardle v. Indianapolis Water Co.*, 272 U. S. 400 (1926).

17. *St. Louis & O'Fallon Ry. Co. v. United States*, 279 U. S. 461 (1929).

18. Commissioner Eastman dissenting in *Re San Pedro, Los Angeles & Salt Lake R. Co.*, 75 I. C. C. 463 (1923).

19. *Los Angeles Gas and Electric Corp. v. Railroad Commission of California*, 289 U. S. 287 (1933).

20. *Lindheimer v. Illinois Bell Telephone Co.*, 292 U. S. 151 (1934).

21. *Dayton Power and Light Co. v. Public Utilities Commission of Ohio*, 292 U. S. 290 (1934).

22. *West v. Chesapeake and Potomac Telephone Co. of Baltimore*, 295 U. S. 662 (1935).

23. See note 15 *supra*.

24. See note 17 *supra*.

25. See note 22 *supra*.

26. See note 13 *supra*.

27. See note 20 *supra*.

extract from the opinion of the court in *Smith v. Illinois Bell Telephone*<sup>28</sup> and an annotation to that case by the editors.

Chapter 5 takes up "Standards for Individual Rates." The first section deals with specific services. Next the costs and profits of those operations not subject to regulation, and their effect upon the regulative business, are considered in a series of court and commission opinions. The very difficult question of cost apportionment has a section composed of notes and two annotations. The exposition of just and reasonable rates, with reference to value of the service as a factor, has a note and extracts from law reviews.

Chapter 6, "Discrimination," deals first with discrimination at common law and under statutes. This is a well extended section with many illustrations from Federal and state court decisions and occupies 44 pages. The next section deals with special grounds for discrimination, for example, rates low relative to costs, including the famous *Intermountain Rate* cases,<sup>29</sup> and rates high relative to costs, using the recent *Great Northern Utilities* case<sup>30</sup> and the *Mississippi Valley Barge Line* case.<sup>31</sup> An interesting annotation comes under a sub-division (c) on reasonable earnings from reasonable rates. Next is a section dealing with rationing of service, including, among others, the *Assigned Car* cases.<sup>32</sup>

Chapter 7 deals with the question of "Liability of Utilities" and opens with a general section filling 44 pages. Liability as an insurer takes another 40 pages and exceptions to liability as insurer about 27 pages. Section 4 of the chapter, inception and termination of insurer's liability, has 38 pages. Section 5 deals with liability of connecting carriers. Section 6 on limit of liability at common law and under statute, such as the Interstate Commerce Act, concludes the chapter, which, in its entirety, takes 290 pages and is the longest chapter in the book.

The final chapter, 8, deals with "Functions of Commissions and Courts in the Regulatory Process" and opens with limitations to court jurisdiction. In this section are groups of cases on initial recourse to administrative agencies (including the *Prentis* case)<sup>33</sup> and the question of negative orders of the Interstate Commerce Commission, the difficult *Proctor and Gamble* case<sup>34</sup> on this point being followed by a special note. Another section deals with notice and hearing in administrative proceedings and has only the brief *Southern Railway v. Virginia* case<sup>35</sup> and two short notes, one on hearings before the Interstate Commerce Commission, the other on the power of the Commission to compel the production of evidence, both useful annotations. Reparation awards are dealt with in two cases, and the final section of the chapter, and of the book, judicial review of administrative action, has only the three standard cases, i.e., *Interstate Commerce Commission v. Union Pac. R. R. Co.*,<sup>36</sup> *Interstate Commerce Commission v. Northern Pacific Ry. Co.*,<sup>37</sup> and, finally the *Ben Avon* case.<sup>38</sup>

It is to be regretted that, in view of the excellence of this book, the final section

28. *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133 (1930).

29. *Intermountain Rate Cases*, 234 U. S. 476 (1914).

30. *Public Service Commission of Montana v. Great Northern Utilities Co.*, 289 U. S. 130 (1933).

31. *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282 (1934).

32. *Assigned Car Cases*, 274 U. S. 564 (1927).

33. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210 (1908).

34. *Proctor and Gamble Co. v. United States*, 225 U. S. 282 (1912).

35. *Southern Ry. Co. v. Virginia*, 290 U. S. 190 (1933).

36. 222 U. S. 541 (1912).

37. 216 U. S. 538 (1910).

38. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920).

of the last chapter is not given more complete treatment. From the dates of the publication, one sees that the book was published before the *St. Joseph's Stock Yard* opinion<sup>39</sup> became available, and, if this last section is in a new edition, one feels sure the editors will have to include that case. The omission of other cases on this last topic is probably because of the editors' feeling that it is a problem for more extensive treatment in courses on administrative law and constitutional law. In view of the complaint of teachers of constitutional law that everybody is teaching it under the guise of special courses, it is perhaps a wise self-limitation on the part of the editors here, to restrict this final chapter as they have.

The book is very attractively printed. More of the original case notes would, for this reviewer, give the opinions greater utility, even though it might cut down the number of opinions that could be printed. There is a very excellent table of contents, which not only includes the chapter sub-divisions but indicates the cases and notes taken up under each of these sub-divisions. There is, in addition, a complete table of cases and, at the back of the book, a very good general index. The modern practice of publishing special tables of law review articles used, would increase to considerable degree the value of the indices in this book, particularly because the editors have given those articles a status often equal to that of the court opinions.

Never having used the book in class, this reviewer cannot give a very strong opinion as to its utility for that purpose, but the arrangement appears to be thoroughly suited for teaching and classroom discussion. Although over-long for a one semester course, the use, as far as time permits, of the first sections of the book should provide most stimulating classes.

If additional chapters were possible, this reviewer would like one on Intercorporate Relations and one on Government Operation and Ownership, including the *T.V.A.* case.<sup>40</sup>

J. F. DAVISON†

THE ARK AND THE DOVE. *The Beginning of Civil and Religious Liberties in America.*  
By J. Moss Ives. New York: Longmans, Green and Co. 1936. pp. xi, 435.  
\$3.50.

This book which deals primarily with the Maryland settlement and its significance in American history comes as a much needed challenge to currently "received ideas" about our Constitution and the traditional principles upon which it is founded. As the author himself states by way of summary in his concluding chapter:

A studied analysis of the antecedents of Maryland liberties, which are to a great extent synonymous with American liberties, gives results somewhat upsetting to many preconceived ideas and prevalent notions. Such an analysis will reveal a thread of influence that goes back of the Protestant Reformation back of the Magna Charta, to the cloisters of the Middle Ages and to the ancient Schoolmen whose system of social and political philosophy found reinterpretation by Jesuit scholars in the days of the Renaissance and later, when English monarchs invoked the doctrine of the divine right of kings. This same thread of influence is discernible in the Baltimore policies of government and may then be traced through the dark days following the Revolution of 1688 to the very doors of the Constitutional Convention and the First Congress of the United States.<sup>1</sup>

39. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936).

40. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1936).

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1. P. 417.

In other words the author's contention, which he sustains on strictly historical grounds, is that our Constitution in its most distinctive features is based on principles that derive traditionally in true ungarbled form from St. Augustine, St. Thomas, St. Robert Bellarmine, and Suarez. But this does not give the full measure of originality and importance of the book. Others to whom he amply refers, had called attention to the identity in principle of the teaching of these earlier Medieval and Scholastic philosophers and of the theory relied on by the leading minds among those who wrought at the initial framing and early interpretation of the Constitution. It remained for Judge Ives, in his most telling contribution, to establish, on the basis of thoroughly sound historical evidence, the *de facto* connecting link between that earlier teaching and the more fully intelligible theory presupposed and implicit in the very nature of our Constitution. This he does by presenting for the first time a true and adequate account of the part played by such logical heirs of that earlier tradition as Charles Carroll of Carrollton, John Carroll and (Judge Ives' very special discovery) Daniel Carroll, who, as a member of the Federal Convention, worked in conjunction with James Wilson and, as a representative in the House of the first Congress, is responsible for the present wording of the Tenth Amendment wherein power is reserved not only to the States but "to the people." As this last is peculiarly Suarezian in its implications we might adduce the words of William Hard, who in an article in *The Annals of the American Academy of Political and Social Science* for May 1936, entitled *The Spirit of the Constitution*, gives a very apt summary of Judge Ives' chapter on this point. Treating of the doctrine of the sovereignty of the people as *conventionally* settled in our Federal Constitution he says:<sup>2</sup>

That doctrine cannot be eradicated from the Constitution of the United States without destroying not merely its body but its spirit too. It is a doctrine which in the seventeenth century the Italian theologian Bellarmine stated in the words, "The people never so transfer their power to the King as not to retain habitual power in their own hands." And at about the same time the Spanish theologian, Suarez, similarly said that the people, *if they so please*, (*Italics ours*. It is this and the scholastic doctrine of natural law that distinguishes Suarez from Rousseau) "retain the supreme governmental power in themselves, not having transferred it to any Prince." But this is nothing but "the sovereignty of the people," implying and even necessitating a system of "delegated powers" and "reserved rights."

Such speculations originated in the halls of the theologians of Europe. They grew to constitutional embodiments in the halls of statesmen on these shores. James Wilson, one of the central luminaries of the Constitutional Convention of 1787, denied that Blackstone was right in defining law as a "rule of action prescribed by some superior which the inferior is bound to obey." He said that the origin of human law is in the people. He said that the idea of a superior in the field of human law is "unnecessary, unfounded and dangerous."

That same desire to strip the state of all attributions of primary "superiority" was evidenced when the Tenth Amendment to the Constitution was resolved upon by the Congress, in 1789. As originally reported to the House of Representatives, that amendment stated that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively." The House of Representatives carefully added the words "or to the people." It wished no misunderstanding. The Constitution perfected by our Revolutionary forefathers, consisting of seven articles and ten amendments, might have begun with the words "We the States" and might have ended with the words "the States respectively." It in fact began and begins with the words "We the people" and ended and ends with the words "or to the people."

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2. (1936) 185 ANNALS 12, 13.

All this will sound like news to the many and not very "popular" news at that. To our historians and political scientists and perhaps to most lawyers it will be anathema in spite of whatever pride they may take in what they assume to be their own "open mindedness." Yet the only reason for such an attitude is that this is not what they have been led to believe. Their own position as to the theory of the Constitution is based on nothing more solid than a kind of *ouditology*. They have seen it written and heard it said so often that it all derives from the Mayflower Compact and the contractual theory of the New England churches or from Milton or Locke or Rousseau, etc. As a result they have never even asked themselves whether such assumptions made sense when tested critically and on a truly searching analysis both of what the Constitution itself implies and of what the leading framers of the instrument really had in mind in the way of definite, coherent principles when they undertook to organize it into the complex whole which we know and subsequently, to interpret it, when ratified, as a going concern or living thing.

In respect to all contractual theories outside of the medieval and sound scholastic tradition the very same may be said which C. E. Vaughan has noted in regard to Locke and Rousseau. Of the first he says "To Locke—still more to later individualists—politics are entirely divorced from morals, or indeed from any spiritual need of man. The individual leads his life—moral, religious and intellectual—wholly to himself." While as to Rousseau he points out that "we have it from Rousseau's own lips that, at the time when the Contract is made, man is entirely lacking in all that constitutes the moral sense. And that can only mean that he is incapable of recognizing any moral obligation. The moral sanction, therefore, falls to the ground, as that of brute force had done before it. And the Contract is left with no sanction whatsoever. It might just as well have never been made."<sup>3</sup> How far this falls short of what was originally taken to be presupposed in our Constitution can readily be gauged from Washington's Farewell Address, where, in the words of Hamilton who wrote the original draft he reminds us how

"This government, the offspring of your own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. The basis of our political systems is the right of the people to make and to alter their Constitution of government. But the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all. The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government."

Wilson's estimate of Locke and the dangerous ambiguities of Locke's thought may be gathered from his statement<sup>4</sup> that "I am equally far from believing that Mr. Locke was a friend to infidelity. But yet it is unquestionable, that the writings of Mr. Locke have facilitated the progress, and have given strength to the effects of scepticism." Moreover, when dealing with the subject of the source of obligation of human law Wilson not only rejects Blackstone's definition but those of Grotius, Puffendorff, Heineccius, Burlamaqui and others as well, his own position being, as we have seen, more strictly in line with that of Suarez. Again, Madison, in a letter to Jefferson, with reference to a textbook for law schools declared:

"It is certainly very material that the true doctrines of liberty, as exemplified in

3. 1 VAUGHN, *THE POLITICAL WRITINGS OF JEAN JACQUES ROUSSEAU* (1915) 40, 43.

4. R. G. ADAMS, *SELECTED POLITICAL ESSAYS OF JAMES WILSON* (1930) 226.

our political system, should be inculcated on those who are to sustain and administer it. It is at the same time not easy to find standard books that will be both guides and guards for the purpose. Sidney and Locke are admirably calculated to impress on young minds the right of nations to establish their own governments and to inspire a love of free ones, but afford no aid in guarding our Republican charters against constructive violations."

As to Milton, none of the so-called Founding Fathers, to my knowledge, ever even so much as mention him, with the single exception of John Adams, and then only to repudiate him. In a letter to Samuel Adams he says "By the republican form, I know you do not mean the plan of Milton, Nedham, or Turgot. For after a fair trial of its miseries, the simple monarchical form will be, as it has ever been, preferred to it by mankind." This statement in itself is a fair comment on the thesis most thoroughly adverse to the one maintained by Judge Ives throughout the pages of *The Ark and the Dove*, viz., the assumption that the compact theory upon which our Constitution is founded derives from the Mayflower Compact and the New England Church covenants. Stated in the words of the ablest exponent of this assumption, Andrew C. McLaughlin, in his book, *The Foundations of American Constitutionalism*,<sup>5</sup> it amounts to this

It is necessary now to do something in the way of demonstrating the truth of my assertions concerning the prevalence of the idea of compact, especially among the New Englanders, whose thinking in politics and religion, in church polity and theology, was so distinctly the thinking of seventeenth-century Puritanism. The philosophy underlying the Puritan revolt against Charles I and the philosophy of the American Revolution were similar; we may indeed say essentially identical [*sic*] in character. But this similarity is not enough to satisfy us. An unbroken line of descent can be traced. And the tracing of this line is advisable if we wish to see our indebtedness to the past and how firmly fixed were certain fundamental notions concerning the organization of a state and the establishment of its institutions.

The one fundamental difficulty about this thesis is that politics and religion without philosophy make poor bed fellows. And the history of New England as of Protestantism generally is a clear instance in point. Beginning with Aristotle and taken up again by St. Thomas and the great scholastics of the sixteenth and seventeenth centuries who followed him, it was clearly discerned that the state is a natural institution founded in the social nature of man. In the words<sup>6</sup> of Burke, who can always be counted on to give scholastic teaching in such connections its most practical rendering, "He who gave our nature to be perfected by our virtue, willed also the necessary means of its perfection.—He willed therefore the state—He willed its connection with the source and original archetype of all perfection." But the Church has no such foundations in natural law. As a perfect society distinct from the state it is either a divine *positive* institution or it has no rightful claim to exist. Hence, when Cartwright and the Separatists in England and the Puritans of New England, attempted to organize their covenants on the basis of Aristotle (*cf.* Scott Pearson, *Church and State*<sup>7</sup>) they only succeed in eliminating the true solid foundations of the state in natural law. Both the state and the churches became merely artificial and purely human associations without any ulterior grounds for authority beyond the bare opinion or will of their individualistic members.

How far this falls short of the fundamental principles presupposed and implicit in our Constitution is a matter for the fair minded to ascertain for themselves. In our mind it leaves Judge Ives' historical account and philosophical claims decidedly

5. P. 68.

6. 4 BURKE'S WORKS (World's Classics ed.) 107.

7. Pp. 133-147.

open, to say the least, to the serious consideration of those in quest of a more adequate and intelligible grasp of the sound principles of a Constitution which above all else has made us the nation that we are.

MOORHOUSE F. X. MILLAR, S.J.†

CASES ON FUTURE INTERESTS. By Albert M. Kales. Second Edition. By Horace E. Whiteside. St. Paul: West Publishing Co. 1936. pp. xvi, 781. \$5.50.

Casebooks, as such, are not very juicy morsels. Their perusal is not likely to envelop the epicure in raptures of ecstasy. Even the cloistered scholar struggles valiantly to stifle a yawn. But a casebook on Future Interests defies tradition, for here is embosomed the story of the most bitter, the most unrelenting legalistic controversy in the history of Anglo-American jurisprudence. Here is a tournament ground where many a brave lance has been shattered into fragments.

The coveted prize has been properly unfettered by restraints upon alienation. The struggle had its genesis in man's insatiable desire for power—power that transcends the present and reaches deep into the future. Not content with an autonomous control over the fruits of his labors during life, man has sought assurance that his influence would be felt long after his remains had been laid to rest in the ancestral tomb. This spectre of the dead hand molding the destinies of the living has played no piddling part in the battle of wits whence springs much of the complexity of the modern law of property. It was this spectre also that brought recognition of the need for a rule against perpetuities—a rule which would confine posthumous control of property within bounds consistent with a dynamic social and economic policy.

The area of combat has been wide. While the feudal system of land tenure was still in its formative stage landowners devised schemes to split their ownership into "chronologically successive segments." These efforts were generative of such future interests as reversions, possibilities of reverter, powers of termination, and a variety of remainders. When, moreover, the ingenious artistry of the clergy fashioned the "use", the power of the feudal barons was augmented by the creation of springing uses, shifting uses and powers of appointment. The tenacious efforts of the aristocracy to establish indestructible family settlements through these devices met with the determined resistance of the courts. Neither side hesitated to camouflage its manoeuvres with cobwebs of sophistry. It had been adjudicated as early as 1225 that a conveyance "to A and his heirs" gave the heirs no rights and A could effectively convey the fee.<sup>1</sup> When the lords attempted to evade this doctrine by the conveyance "to A and the heirs of his body," the courts countered with the retort that such a conveyance created a fee simple in A conditional upon the birth of issue, and that if A had issue he could transfer the absolute fee.<sup>2</sup> Violently indignant at this bit of judicial cunning, the landowners enlisted the aid of a sympathetic parliament and procured the passage of the Statute De Donis<sup>3</sup> which, by divesting the donee under such a grant of the right of alienation, created a new species of estate—the estate tail.

This stunned the courts into temporary submission. But when the landowners tried to escape the rule that a conveyance "to A and his heirs" transfers a fee simple absolute to A, by expressly restricting A's interest to a life estate through

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1. D'Arundel's Case, Bracton N. B. 1054.
2. Co. Litt. \*19a.
3. 13 Edw. I, c.1 (1285).

conveyances reading, "to A for life and then to his heirs," the courts retaliated with the doctrine known as the Rule in Shelley's Case which cast aside the restriction and gave the entire fee to A.<sup>4</sup> The courts would not rest content, however, as long as estates tail retained their vigor. An effective curb on these estates was finally found in the fictional device of the common recovery whereby the tenant in tail was enabled effectively to transfer the fee simple.<sup>5</sup> Still reluctant to concede defeat, conveyancers struck back with the plan of annexing to a conveyance in tail a condition that if the tenant suffered a recovery the grantor or his heirs should have the right to terminate the estate. But clever though this device undoubtedly was, it was consigned to speedy martyrdom by decisions declaring such conditions "repugnant" to the nature of the estate and consequently void.<sup>6</sup>

This vibrant story and more is absorbingly told in Professor Kales' book, not by hearsay, but by the testimony of eyewitnesses and participants—the courts themselves, talking through the medium of opinions which have become landmarks in the law of Future Interests. The skeleton casebook which merely reprints judicial opinions in shrunken form has an indubitable value in subjects which lend themselves to such simple treatment. In the field of Future Interests, however, much commentary and an abundance of explanatory and illustrative matter is essential to the presentation of a clear and comprehensive picture. His deep appreciation of this need prompted Professor Kales to include frequent introductory notes and excerpts from the rich writings of such authoritative commentators as Gray, Leake and Williams. In the preparation of the second edition, Professor Whiteside has carried this approach into the footnotes which leave no source of supplementary material untapped. Constant reference to articles and students' notes in law reviews gives ready access to a vast storehouse of advanced critical literature, illuminating many a darksome crevice in the complicated network of the law of property.

In shifting the emphasis from older cases to those of more recent date, moreover, Professor Whiteside has enhanced considerably the value of the book, viewed from the vantage point of pedagogy. Selectivity of this sort is of incalculable aid to the student who too often is unnecessarily befogged by the obsolete and obsolescent terminology characteristic of the opinions of the medieval courts. Students are sufficiently perplexed by the retention in the legal lexicon of numerous terms which do not express the meaning they are intended to convey, without subjecting them to the ordeal of wading, or, as is more frequently the case, muddling through pages of verbiage long since abandoned.

Casebooks usually seek to develop their subject in chronological sequence. This frequently has as an unfortunate consequence the resort to cases which, though having historical and academic interest, hardly offer working material for study and presentation. The present work is not impervious to criticism on this ground. As an illustration, the case which introduces the celebrated Rule in Shelley's Case is the *Provost of Beverly's Case*.<sup>7</sup> The student is rare indeed who can extract the doctrine from this opinion. The reason for the Rule, its significance and historical function are not to be found here. The student would be less likely to approach the subject with the customary trepidation if he were led into it by a case like *Perrin v. Blake*.<sup>8</sup> The opinion of Blackstone in the Court of Exchequer Chamber

4. *Wolfe v. Shelley*, 1 Co. 88b, 104a, 76 Eng. Reprints 199, 234 (1581).

5. *Taltarum's Case*, Y. B. 12 Edw. IV, 19 (1472).

6. *Cholmeley v. Humble*, 1 Anderson 346, 123 Eng. Reprints 509 (C.P. 1594); *Germin v. Ascot*, Moore K. B. 364, 72 Eng. Reprints 631 (K. B. 1595).

7. Y. B. 40 Edw. III, 9 (1367).

8. HARGRAVE'S LAW TRACTS 407, 10 Eng. Ruling Cases 689 (1772).

is a veritable example of a unique combination of lucidity and depth. An abridgment of this opinion to fit the space limitations of a casebook would furnish the student with a genuine opportunity to really grasp the meaning of the Rule.

The section dealing with the Rule Against Perpetuities has an especially timely interest to students and practitioners in New York. Since the abrogation of the common law rule more than a hundred years ago, and the erection of a statutory system to replace it, the precise content of the New York Rule Against Perpetuities has been a dark mystery. Much of the confusion has resulted from the inadequacy of the rule restricting the suspension of the power of alienation or the postponement of vesting to a period of two lives, supplemented by a possible minority. When called upon to relieve against the rigors of this arbitrary doctrine, the courts responded valiantly. A refusal to become enthusiastic over the product of their labors, however, is pardonable. In their effort to evade the pitfalls of the statutory system, the courts have plunged headlong into a conceptual system of labyrinthine complexity. Scores of constructional devices and instruments of judicial surgery have created an enormous amount of learning deposited in a vault to which no one possesses the combination. Even the poet has been moved to complain:

"The law of perpetuities  
Is strewn with technicalities  
Its crotchets and circuities  
Exhaust the best mentalities,  
It involutes inanities,  
The meshes which immure it, tease  
The lips to pour profanities  
Upon its dark obscurities  
Its maddening profundities  
Wake murderous propensities.  
However sage the pundit, he's  
Befuddled by its densities  
Congeries of quiddities  
That tax the ingenuities—  
Such are those drear aridities,  
The rules of perpetuities."<sup>9</sup>

Dissatisfaction with this state of things is widespread. By slow stages lawyers are enlisting in the movement to weave the fabric into a pattern of less intricate design. To this end the Law Revision Commission has undertaken to investigate the subject and has prepared, through Professors Powell of Columbia and Whiteside of Cornell, a valuable study which throws a powerful spotlight upon the stubborn issues. A tentative bill has been drafted but its immediate adoption is not recommended because of the all too obvious need for careful deliberation and guarded advance in this most thorny field. It is in this connection that Professor Kales' casebook can be of real help. A major change suggested by the Commission centers about the abrogation of the arbitrary two lives limit and the substitution of a rule whereby the permissible period for the suspension of the power of alienation or the postponement of vesting would be no longer than for

"1. the continuance of lives of persons then in being together with the minorities of persons in being at the end of such measuring lives, and one or more actual periods of gestation; or, in the alternative,

2. twenty-one years. In no case shall the lives or minorities measuring this permissible period be so designated or so numerous as to make proof of their end unreasonably difficult."<sup>10</sup>

These alternatives will be recognized as similar to the common law period. No evalu-

9. Axiphiles, *Conning Tower*, N. Y. Herald Tribune, Sept. 29, 1931, at p. 19.

10. *Communication and Study Relating to Rule Against Perpetuities*, LEGIS. Doc. No. 65 (H) (1936) 13.

ation of the recommended change can be adequate which fails to compare the functioning of the Rule Against Perpetuities at common law with its operation under the statutory two lives rule. This casebook offers an excellent opportunity for a study of the contrast, for here is reprinted an abundance of cases from common law jurisdictions together with the leading New York cases. When both groups of cases have been studied and pondered, it is difficult to come away with any great reverence for the statutory system now operative in New York.

Rules of construction, we are told, have potency varying with the judges who apply them;<sup>11</sup> but however variable their force, they must still be reckoned with as important factors in the judicial process. Some rules of construction have become so firmly fixed as to have acquired definite and commanding authority. Usually students are left to pick these rules off the hedges as they hurry up the road. But the compiler of this casebook is convinced that "only by a study of the results of numerous decisions by different judges, in different jurisdictions and under varying circumstances and conditions as to time, can the student acquire familiarity with the interpretive process."<sup>12</sup> The result is an excellent collection of cases dealing with the construction of limitations most frequently employed in modern trust schemes. The practitioner as well as the student can profit by their study.

Future Interests is a subject which must constantly expand to meet the needs of advancing generations. New types of settlements and trusts are constantly being shaped by the demands of a commercial age. Acquaintance with the heritage of the past is indispensable to the proper understanding of these instruments of the present and future. Here in one book are assembled the cases which constitute this heritage.

JULIUS APPELMAN†

THE NINE OLD MEN. By Drew Pearson and Robert S. Allen. New York: Doubleday, Doran & Company. 1936. pp. 325. \$2.50.

This is a New Deal book of the "smear 'em" type. The nine old men are the members of the United States Supreme Court. The Court has ruled against the New Deal, and, that it may be deterred from repeating the offence, it must be "smeared." No responsible official of the executive department ventured, during the recent presidential campaign, to ridicule the Supreme Court of the United States as it is ridiculed in this book.

The book is written in the lively newspaper style, and some real information is conveyed to the reader about the XIV Amendment. The story of the Schechter case is well told.

How much reliance can be placed in the statements of fact contained in this book, it is not easy to determine. The authors call Roscoe Conkling a "famous Tammany politician,"<sup>1</sup> while it is a matter of record that he was a Republican, having been elected to the United States Senate on the Republican ticket. The authors declare that when Brewer was placed on the Supreme Court, his uncle, Stephen J. Field, had two votes.<sup>2</sup> Yet Swisher in Stephen J. Field, Craftsman of the Law,<sup>3</sup> declares that Brewer "was averse to being led" by his uncle, and that "on more than one

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11. KALES, CASES ON FUTURE INTERESTS (2d ed. 1936) 195.

12. *Ibid.*

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1. P. 69.

2. P. 68.

3. SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW (1930) 438.

occasion the two men clashed heavily in their decisions." The authors have Polk assuming the Presidency in 1856.<sup>4</sup>

Here is a startling statement: "Four times during the debates in Philadelphia on June 5th and 6th, July 21st and August 15th James Madison and James Wilson, the latter to become Associate Justice of the Supreme Court, proposed that the Constitution contain a provision giving the Judiciary the right to pass on the constitutionality of Acts of Congress, and four times the proposal was rejected. Never did it receive more than three votes."<sup>5</sup>

This statement would be interesting, if true. Is it true?

Just what was the problem before the Constitutional Convention on the dates mentioned? Was the power of the Supreme Court to declare an Act of Congress unconstitutional or was some other power under discussion?

Charles Warren, in *The Making of the Constitution*,<sup>6</sup> writes:

"In Randolph's original Resolution there was a provision for joining the Judiciary with the Executive in this power to reject Acts of the National Legislature. The grant to the Judiciary of such a function was now defeated on this day (June 4th, 1877), and three renewals of this proposal on June 6, July 21 and August 15 were likewise defeated. The general opinion of the delegates was that it was improper to join the Judges in this veto power, since the constitutionality of an Act of Congress might come up before them later in their judicial capacity, and they ought not be given an opportunity to pass twice on such an Act, once in a legislative or executive capacity, and once judicially."

On July 21st the Resolution was adopted to grant to the President the power to veto any Act of Congress which Act could be repassed over the President's veto by a two-thirds vote of each House of Congress.<sup>7</sup>

It thus appears from Warren that the Resolution to grant to the Supreme Court the power to declare an Act of Congress unconstitutional was never rejected by the Convention, because it was never before the Convention. What was rejected was the proposal to unite the Supreme Court with the President in vetoing Acts of Congress, which could again be passed by a two-thirds majority of each House. The reason for rejecting the Resolution is interesting: The Supreme Court should not be empowered to pass twice on Acts of Congress. It was apparently assumed by the Convention that, without any special grant of power, the Supreme Court could pass on the constitutionality of Acts of Congress, when the constitutionality was an issue in a case before the Court.

When the authors make so many errors in matters of public record, what reliance can be placed in their report of back-stairs gossip?

But worse than the substance is the tone of the book. It aims to make the United States Supreme Court look ridiculous.

The ancient Hebrews had so great reverence for the Divinity that they would not presume to pronounce His name. Their rulers, as representatives of the Divinity, shared in this reverence. It was a wholesome attitude of mind. If there is to be law, there must be authority. And if the authority is to be obeyed, it must be respected. Revolt is the sequel to contempt for authority. This book aims to arouse contempt for the highest judicial body in this country. In tendency, it is pronouncedly anarchistic. Are the authors anarchists, or have they merely carried with them into maturity the bad manners of an ugly childhood?

JOHN X. PYNE, S.J.†

4. P. 57.

5. P. 48.

6. WARREN, *THE MAKING OF THE CONSTITUTION* (1929) 186, 187.

7. *Id.* at 454.

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CASES AND MATERIALS ON THE LAW OF SALES. By George G. Bogert and William E. Britton. Chicago: The Foundation Press, Inc. 1936, pp. xxv, 1171. \$7.00.

One cannot be sure that he has fairly appraised a casebook after such an examination as a reviewer is apt to have the opportunity to make, especially if the book contains a considerable proportion of cases which he has not previously used in the classroom. It is only after the book has been thoroughly studied, as though in preparation for the classroom, that its merits and shortcomings will fully appear.

The great work, however, which has been done by the editors of this new casebook in the field of Sales and their reputation for scholarship make it certain that this book has been soundly done.

The editors disclaim any intention to present a novel arrangement of cases. Nevertheless, the order of development which they have chosen is, it seems to this reviewer, better than that in other casebooks on Sales with which he is familiar. The chapter devoted to the transfer of the property rights in goods, for example, opens with cases dealing with goods which were ascertained at the time of the bargain and then, after a short section devoted to the general rule when the goods were not so ascertained, it proceeds to the topics of fungible goods and goods "potentially" possessed. The doctrine of appropriation is then taken up and the chapter closes with a section devoted to sales on approval, or return and "cash" sales. The materials on estoppel, purchases from fraudulent vendees, the Factors' Acts, and retention of possession by the seller are included in a chapter which precedes the one on documents of title on the ground that the materials dealing with the acquisition of property rights by third persons will aid to a better understanding of the bill of lading cases. The remedies of the buyer are considered immediately after the chapter on the seller's liabilities under the warranties. The seller's remedies come last.

This order of development should make the book very teachable inasmuch as the student acquires, as he goes along, the principles and rules which will enable him to explore nearly every angle of each succeeding case. The instructor, probably, seldom will be obliged to say: "That is a point which we will meet with later on where it is more clearly developed." Of course the seller's action for the price as contrasted with his action for damages is bound to pop up at the very beginning in the cases dealing with the transfer of the property rights, but this difficulty is inherent in the subject of Sales and no one would propose placing the cases on the seller's remedies in first place.

The editors state that "recent American cases are favored over the older English decisions." As the examiner leafs through the book he will indeed be struck by the absence of some of the landmark cases from the English courts or will be disappointed perhaps to find them only curtly mentioned in the footnotes.<sup>1</sup> This emphasis on recent American cases does not seem to the reviewer to be of any particular advantage. There is no especial merit in a case, of course, because it is recent. The older English cases, after all, provide the foundation upon which the present law of Sales is built, both in its statute and case form. The court in the classic case usually was approaching a problem presented for the first time and without the aid of statute. It therefore felt called upon to state at large its reasons for the rule adopted. On the other hand, the court in the recent American case on the same point is deciding the case and writing its opinion against the background

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1. For example: *Ogle v. Atkinson*, 5 Taunt. 759, 128 Eng. Reprints 890 (C. P. 1814), omitted. *Bethell and Co. v. Clark and Co.*, 20 Q. B. D. 615 (1888), omitted. *Hanson v. Meyer*, 6 East 614, 102 Eng. Reprints 1425 (K. B. 1805); *Woods v. Russell*, 5 B. & Ald. 942, 106 Eng. Reprints 1436 (K. B. 1822); *Aldridge v. Johnson*, 7 E. & B. 885, 119 Eng. Reprints 1476 (Q. B. 1857), and *Jones v. Just*, L. R. 3 Q. B. 197 (1868) are in footnotes.

of the earlier decisions and with the aid of statute. It is not apt to go so fully into the matter as its progenitor and the opinion will not be so useful for class discussion. In a few instances, also, recent American cases are preferred by the editors to older cases decided on this side of the water which, to the mind of the writer, are more satisfactory for instructional purposes.<sup>2</sup> The cases selected, however, are all interesting and develop the subject of Sales thoroughly. No doubt upon more familiar acquaintance the more recent cases will become just as good friends as some of the old companions.

This casebook contains one thousand and eighty-two pages of case material. The editors, realizing that in many law schools time limitations will not permit a complete coverage of the cases included, have prepared a list of cases which may be omitted. This list includes eighty-eight cases covering a space of two hundred and ninety-nine pages, thus reducing the content to be covered to about eight hundred pages. Assignment of the remaining cases, they state, will give the student an acquaintance with the whole range of topics in the book, with the exception of the first chapter which deals principally with the Statute of Frauds.

The appendix is more than usually useful. The Sale of Goods Act, the Uniform Sales Act and the Uniform Conditional Sales Act are included, as is customary. Included also are the Uniform Bills of Lading, Warehouse Receipts and Trust Receipts Acts, as well as the New York Factors' Act and the New York Bulk Sales Act. The footnotes, besides containing excerpts from important cases and occasional suggestive questions, give references to useful materials to be found in the law reviews.

GEORGE W. BACON.†

THE SALE OF FOOD AND DRINK AT COMMON LAW AND UNDER THE UNIFORM SALES ACT. By Harry C. W. Melick. New York: Prentice-Hall, Inc. 1936. pp. xlii, 346. \$5.00.

A branch of the law of Sales of great interest and of practical importance is the law of warranty in relation to the sale of food and drink. Mr. Melick has chosen this segment of the law for investigation and has produced an admirable and useful study. He has made a very comprehensive survey of English and American cases, of textual writings on the subject and of articles and notes in the law reviews. It seems that hardly a case on the subject has escaped his vigilant eye. About seven hundred cases are cited and nearly a hundred of the important ones are abstracted and commented upon at length.

The author traces the origin of the modern law back to statutes of a penal nature adopted in England in the thirteenth and fourteenth centuries. He discusses the rules that prevailed at common law, which were in some respects more favorable to the injured buyer than is the case under the Sales Act today, at least in New York, and takes up in detail the application of the implied warranty of fitness as defined in the Sales Act. Leading cases from most of the states of the Union are studied. The liabilities as between dealers, the retailer's liability for food in sealed containers, the rule as to defective containers and the divergent views of the courts on the question of privity are dealt with in separate chapters. There then follow chapters on the liability of innkeepers and restaurateurs, on the husband's right of

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2. *Green v. Wachs*, 254 N. Y. 437, 173 N. E. 575 (1930) for example, is placed in the text and *Levi v. Booth*, 58 Md. 305 (1882) is appended as a footnote. *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302 (1895) is brought down to the footnotes.

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action for loss of consortium where the wife is the purchaser, on the applicable law of negligence and on the rule of damages.

It is the author's practice to set out the facts of the leading cases and to state the gist of the courts' opinions. In many cases the author has added important facts which he has found in the trial record but which are missing from the courts' statements. The author then adds his own comment. This comment is penetrating; cases are contrasted with one another; an effort is made to explain apparent inconsistencies and when the cases are irreconcilable the author suggests which are to be preferred together with his reasons. The book distinctly is not a mere paste pot and scissors compendium of cases.

In the chapters on the much debated question as to whether or not the implied warranty of fitness runs to the benefit of the ultimate consumer as against the manufacturer when there is no privity of contract the author advocates adoption of the third party beneficiary doctrine. This was apparently adopted in the Ohio case of *Ward Baking Co. v. Trizzino*,<sup>1</sup> in which the retail purchaser recovered against the manufacturer. Whether or not the result reached in that case is desirable from the standpoint of social policy the reviewer does not undertake to say, but he is of the opinion that the result cannot be soundly reached under the third party beneficiary doctrine. It is of the essence of that doctrine, he believes, that the parties to the contract of which the plaintiff claims the benefit *intend that the promisor shall assume a duty to the beneficiary*. That the manufacturer, in his contract with the retailer, intends and undertakes to be answerable for breaches of implied warranty to the ultimate consumer can hardly be claimed.

This book will save the busy lawyer a great deal of time in research and will be of interest and value to the more cloistered student and teacher.

GEORGE W. BACON.†

#### BOOKS RECEIVED

*A number of the books listed below will be reviewed in the May issue of the FORDHAM LAW REVIEW.*

CASES AND OTHER MATERIALS ON CONFLICT OF LAWS. By Elliott E. Cheatham, Noel T. Dowling and Herbert F. Goodrich. Chicago: Foundation Press, Inc. 1936. pp. xlv, 1148. \$7.00.

CASES ON CREDIT TRANSACTIONS. By Wesley A. Sturges. Second Edition. St. Paul: West Publishing Co. 1936. pp. xiii, 1082. \$6.50.

CASES ON EQUITY. By Henry L. McClintock. St. Paul: West Publishing Co. 1936. pp. xxiv, 1286. \$6.00.

CASES ON INTERNATIONAL LAW. By Manley O. Hudson. St. Paul: West Publishing Co. 1936. pp. xl, 1440, \$6.50.

CASES ON TRADE REGULATION. By S. Chesterfield Oppenheim. St. Paul: West Publishing Co. 1936. pp. lii, 1518. \$6.50.

CASES ON TRIALS, JUDGMENTS AND APPEALS. By Thurman W. Arnold and Fleming James, Jr. St. Paul: West Publishing Co. 1936. pp. xxvii, 869. \$6.00.

1. 27 Ohio App. 475, 161 N. E. 557 (1928).

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CIVIL PRACTICE MANUAL. By Harold R. Medina, Edward Q. Carr and John F. X. Finn. St. Paul: West Publishing Co. 1936. pp. viii, 719. \$5.00.

DESCENT AND DISTRIBUTION. By Samuel W. Eager. Albany: Matthew Bender & Co. 1936. pp. xiii, 289. \$5.00.

EQUITY. By Henry L. McClintock. St. Paul: West Publishing Co. 1936. pp. xix, 421. \$5.00.

JUSTICE OLIVER WENDELL HOLMES. *His Book Notices and Uncollected Papers*. By Harry C. Shriver. New York: Central Book Co. 1936. pp. xiii, 280. \$3.00.

RESTATEMENT OF THE LAW OF PROPERTY. By the American Law Institute. St. Paul: American Law Institute Publishers. 1936. pp. Part I: lxi, 503; Part II: liii, 505-1179. \$12.00.

ZONING. By Edward M. Bassett. New York: Russell Sage Foundation. 1936. pp. 275. \$3.00.