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BOOK REVIEWS

AMERICAN ARBITRATION. By Frances Kellor. New York: Harper and Brothers, 1948. Pp. xiii, 262. $3.00.

Miss Kellor's devotion to the cause of arbitration is well known,[1] and her latest effort serves to enhance her reputation as an informed and earnest advocate.

That litigation often entails a largely useless expenditure of time, money and energy will be granted by most. From Dickens' time to the present, critics have attacked the legal red tape that hampers the satisfactory resolution of private disputes by the regular course of litigation. The ever-increasing complexity of our economic system and the consequent rise in the number of commercial disputes has made more acute the need for a simple swift means for settling commercial differences that is acceptable to the parties. Indeed, Miss Kellor points out,[2] it has been said that next to war, commercial litigation is the largest single item of preventable waste in civilization.

With the realization that recourse to the courts was becoming increasingly slower and more expensive, attention turned, some three decades ago, to the device of arbitration as an alternative to constant use of overcrowded courts. Miss Kellor shows that disputes had been arbitrated for centuries before in all parts of the world. Arbitration, then as now, was considered essentially as an agreement by parties in dispute to submit their differences to judges of their own choosing for final decision. There arose the problem, however, of adapting the age-old arbitration technique to serve the needs of the modern industrial age. A formidable barrier was presented by the hostility of the common law to arbitration. Long regarded as ousting the courts of jurisdiction, its use had been confined to disputes already in existence, and an award was deemed only a cause of action, which had to be sued on for enforcement by a court.

The New York Arbitration Law of 1920, first of its kind, discarded the basic limitations of common law arbitrations by providing, among other things, that contracts to arbitrate future as well as present disputes were enforceable, and by establishing a summary method for enforcement of awards by the courts. However, the mere enactment of enabling legislation would not have made arbitration the widely accepted means that it is today for settling disputes, had it not been for the formation of the Arbitration Society of America, formed shortly after the bill's passage, which was the forerunner of the present American Arbitration Association. This truly remarkable organization, of which Miss Kellor writes at length, has been of inestimable help in establishing and spreading the useful doctrine of arbitration in the areas of business and labor both here and abroad. The Association's achievements in research and in the furnishing of its services for the processes of arbitration have turned what could have been some minor paragraphs of the statute books into a reformative law of the first rank.

Miss Kellor's latest book is in the nature of a history of the American Arbitration Association and its offshoots, the Inter-American Commercial Arbitration Association and the Canadian-American Commercial Arbitration Association, and a description of their accomplishments and aims. The organization and practice of these institutions are presented in minutest detail and with abundant enthusiasm. The spread of commercial arbitration in other republics of the Americas and abroad, methods

1. Miss Kellor is First Vice-President of the American Arbitration Association, the author of numerous articles and of ARBITRATION IN ACTION (1941).

2. P. 169.

of arbitration in labor disputes and practice under the motion picture consent decree[3] are some of the highlights of this encyclopaedic review. We are reminded that new methods of arbitration (there are now arbitration laws in fifteen states as well as a federal act) have "substituted prevention for cure, foresight for hindsight, planned reference by way of clauses [in contracts] for casual submissions of existing disputes, and organization for the historic disorder."[4] These contentions are unassailable, for it will be everywhere granted that the use of arbitration, especially through the American Arbitration Association system of standard rules of procedure and picked panels of expert arbitrators, has been of untold aid in providing a just, efficient and more practical alternative to litigation for several large categories of disputes. Bench and bar have joined in welcoming this method which facilitates settlement through a method so consonant with the democratic virtues of self-regulation, self-discipline and self-reliance. It may be added parenthetically that bench and bar have recognized as well that the spread of arbitration does not eclipse the practice of law to any degree, and that on the contrary, parties to an arbitration practically always retain counsel. Further, since attorneys' fees are generally measured by the amount of the recovery and since an arbitration requires far less preparation by an attorney, usually, several arbitrations can be handled by a practitioner in the time it would take to prepare one case adequately for court.

If there is anything with which this reviewer would take issue, it is with the author's rather over-optimistic view of what arbitration can accomplish on an international level. With an initially commendable emphasis on the wider implications of the arbitration device in teaching habits of cooperation, Miss Kellor goes on to deduce that it can lead to pacific settlement instead of war. It is her contention that the preventive power of organized arbitration has not yet been fully tried, and that a system of promises to arbitrate future disputes, with appropriate machinery, could effectively settle the conflicts that, unchecked, lead to war. Cited as examples are the arrangements of the American republics. The reviewer would respectfully submit that, pleasant as this may appear, such an easy solution hardly seems probable. Past experience and present facts show that while national states guard their sovereignty, it is unlikely, and has so been recognized since the Hague Conference of 1899,[5] that they will submit any but minor disputes of a legal nature to arbitration. Modern thought tends to find the key to peace or a ruinous world struggle in the partial relinquishment of sovereignty and the sublimation of nationalism through an effective world government, rather than in the mere setting up of arbitration machinery, no matter how well such machinery has proven itself in settling commercial disputes. Surely Miss Kellor does not believe that once Hitler had embarked on his program of conquest, that there was any basis for arbitration with him. It should be borne in mind that, like all decisions and laws emanating from a modern state, its agencies and its courts, trade and labor arbitrations receive the life spark of their existence from the fact that an authority stands ready to force compliance with the award. Important though the factors of self-reliance and self-discipline may be, ultimately it is the outside organized power that keeps potential offenders in line. Until such a force exists, in the nature of an organized and fully implemented government of nations, it appears to be useless to speak of arbitration as a solution in the first instance.

3. This is part of the litigation between the United States government and five of the leading motion picture distributors.

4. P. 24.

5. HAGUE CONFERENCE, Art. 38 (1907). See HERSHEY, INTERNATIONAL PUBLIC LAW AND ORGANIZATION 477 (1939).

This is not to quarrel with Miss Kellor's general treatment of her subject, however. Her emphasis on education as a necessary concomitant to the employment of new techniques and her statements of arbitration's principles and philosophy are altogether admirable, as is her patient chronicling of all aspects of her wide-flung topic. If she tends to press her point too much, to extol, to view arbitration as a panacea,[6] it is perhaps a desirable counterweight to the deep-rooted suspicion with which it was long regarded.

As a narrative of arbitration's past and present activities, "American Arbitration" is praiseworthy and should prove helpful to the student of the technique of settlement. It is especially useful, in spite of a certain looseness of style, as a straightforward, definitive and painstakingly documented history of a significant movement. The practising lawyer, or the scholar requiring a thorough study of the legal aspects of arbitration, however, will do well to follow the author's own advice and consult, in addition, an earlier work, *Arbitration in Action*,[7] an excellent handbook, and Dean Wesley A. Sturges' *Commercial Arbitrations and Awards*.[8]

ADELE GABEL BERGREEN†

THE NATURE OF PATENTABLE INVENTION. By John E. R. Hayes. Cambridge: Addison-Wesley Press, Inc., 1948. Pp. 187. $6.00.

Before proceeding to a review of Mr. Hayes' book, it is important to understand the problem that confronted him in his attempt to present a logical analysis of the nature of patentable invention.

It must first be recognized that there is a difference between the terms "invention" and "patentable invention." Only the latter term is of practical importance to the courts and to the patent attorney, for although a development may be inventive, it is patentable only if it otherwise complies with the underlying statute, which reads in part as follows:

"Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvements thereof . . . may . . . obtain a patent therefor."[1]

In the judicial endeavors to interpret the statute and to determine what is patentable invention, judges have constantly attempted to state rule of thumb formulas. However, although they devise one that seems quite satisfactory for the case on hand, it may not apply to subsequent cases.

The reason why the problem is not amenable to solution by the use of a set of fixed rules is that the question as to whether in any particular case there is or is not patentable invention is somewhat like the verdict of a jury. For although the undisputed facts may in many cases inevitably lead to but one conclusion, more often even undisputed facts justify varying conclusions that can be drawn by different individuals and neither conclusion is demonstrably wrong. Thus, in many

6. It is of course preferable to bring suit in all instances where it is desired to determine a precedent for the future or to settle a question of law. See AN OUTLINE OF ARBITRATION PROCEDURE, Committee on Arbitration, Association of the Bar of the City of New York (1944), a report on the advantages and disadvantages of arbitration.

7. KELLOR, ARBITRATION IN ACTION (1941).

8. STURGES, COMMERCIAL ARBITRATION AND AWARDS (1930).

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1. REV. STAT. § 4886 (1870), as amended, 53 STAT. 1213 (1939), 35 U.S.C. § 31 (1940).

instances no categorical answer can be given in advance as to whether in the particular case a court will hold that there is or is not a patentable invention.

The courts have recognized the difficulty of defining the word "invention." Thus, Mr. Justice Brown, speaking for the United States Supreme Court in *McClain v. Ortmeyer*[2] stated:

"To say that the act of invention is the production of something new and useful does not solve the difficulty of giving an accurate definition, since the question of what is new as distinguished from that which is a colorable variation of what is old, is usually the very question in issue. To say that it involves an operation of the intellect, is a product of intuition, or of something akin to genius, as distinguished from mere mechanical skill, draws one somewhat nearer to an appreciation of the true distinction, but it does not adequately express the idea. The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of inventive faculty or not. . . ."

Although a concise definition of invention has not been found, there are a number of rules dealing with what is not invention. Some of these rules are as follows:

1. The exercise of ordinary mechanical skill does not involve invention.
2. Mere change in form is not invention.
3. A mere aggregation of elements is not invention.

Even these rules themselves are of little value, for the questions still remain as to whether or not the inventor has merely exercised ordinary mechanical skill; whether or not the change is merely one of form, and whether or not it is a mere aggregation of elements.

Confronted with this rather confused situation, Mr. Hayes analyzed the question as to whether or not there is patentable invention in any particular case by first pointing out that invention resides wholly in a mental concept. Thus he quotes with approval *United States v. Dublier Condenser Company*[3] where the court stated:

"Though the mental concept is embodied or realized in a mechanism or chemical aggregate, the embodiment is not the invention and is not the subject of a patent."

The conclusion must not be drawn, however, that a mere abstract idea alone unaccompanied by any way of putting it into effect is patentable. This is clearly not the case, for, as stated in The Revised Statutes:

"Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall . . . file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains . . . to make, construct, compound and use the same. . . ."[4]

This section is succinctly summarized by Mr. Hayes when he states that:

"All patentable invention, whether it be a combination or be otherwise designated, must have a mode of physical attainment."[5]

However, a concept alone even with a mode of physical attainment is not enough for there to be patentable invention. Other factors are required which Mr. Hayes points out in his definition which reads as follows:

"Patentable invention is a mental concept of a new and useful result inclusive of the mode of its physical attainment characterized by an idea or ideas that are

2. 141 U.S. 419, 426 (1891).
3. 289 U.S. 178 (1933); 17 U.S.P.Q. 154 (1933).
4. REV. STAT. § 4888 (1870), as amended, 46 STAT. 376 (1930), 35 U.S.C. § 33 (1940).
5. P. 5.

new, original and creative, and add to the sum of knowledge in the art to which the concept pertains."[6]

Throughout the remainder of the book, Mr. Hayes thoroughly analyzes every aspect of his definition of invention. Thus the succeeding sections deal with such topics as mental concept, new and useful result, mode of physical attainment and additions to the sum of knowledge.

Although Mr. Hayes' book will not enable patent attorneys to give a categorical answer to the question as to whether there is or is not patentable invention in any particular case, and of course such was not his intention, it will be of considerable value in aiding them to logically analyze the question in their attempt to arrive at an answer.

Athough the book was written primarily for the patent attorney, it may well be recommended to the entire legal profession, for it will give them an understanding of some of the problems involved in the patent field and the complexities of this specialized branch of the law.

ARTHUR B. COLVIN†

THE CONFLICT OF LAWS, A COMPARATIVE STUDY. Vol. 2. (*Foreign Corporations; Torts; Contracts in General*). By Ernst Rabel. Chicago: Callaghan & Company, 1947. Pp. xli, 705. $12.50.

At an age at which the typical professor of law in the United States is counting comfortably from the vantage point of retirement the score or so of law review articles and a casebook his life's labors have produced, Dr. Rabel began what will be the most comprehensive study of the Conflict of Laws in English. Planned as a commentary on the Restatement of Conflict of Laws[1] in the light of the conflict rules of other countries, the project burst out of the Restater's homespun jacket early in the planning stage. Dr. Rabel has instead undertaken to describe and, within his limits of space, to analyze Conflict of Laws throughout the world according to comparative law principles. Few would dare so bold a step, but Dr. Rabel's distinguished career as practitioner, judge and scholar on the Continent prepared him for the undertaking. The first volume, covering Family Law, has been received with acclaim verging upon awe, and additional volumes are anticipated.[2]

The first 225 pages of Volume Two discuss conflict rules applied to corporations and kindred organizations. After classifying the types of associations and describing the concepts of nationality and domicil as applied to them, the author turns to the various rules for determining the "personal law of business corporations" and its scope. Unincorporated business organizations, traditionally the orphans of the law school curriculum, are analyzed separately, and then the recognition of foreign corporations is considered. An examination of the concept of "doing business" concludes the corporations material.

6. P. 11.

† Member of the New York Bar. Registered Patent Attorney.

1. RESTATEMENT, CONFLICT OF LAWS (1934).

2. 1 RABEL, CONFLICT OF LAWS (1945). See *e.g.*, Book Reviews: Falconbridge, 25 CAN. B. REV. 318 (1947); Gutteridge, 63 L. Q. REV. 112 (1947); Holt, 35 CALIF. L. REV. 611 (1947); Putnam, 21 N. Y. U. L. Q. REV. 563 (1946); Rheinstein, 14 U. OF CHI. L. REV. 124 (1946); Wolkin, 21 TEMP. L. Q. 73 (1947). See also Rabel, *An Interim Account on Comparative Conflicts Law*, 46 MICH. L. REV. 625 (1948).

Most of the discussion of business organizations concentrates on the non-governmental type of economic association which has been the traditional medium for business activity under Western capitalism; relatively little attention is given to the public association devoted to essentially business purposes which is increasingly used even in the United States and whose activities constantly give rise to conflict problems. Recognition is given, however, to the potentialities of such public international associations as the International Bank for Reconstruction and Development, which are growing up around the United Nations. Dr. Rabel's theme, indeed, is that conflict of law rules in the field of corporations should be directed toward a greater scope of activity throughout the world for the capitalist types of association operating in a nostalgic atmosphere of Nineteenth Century liberalism.

The discussion on Torts analyzes searchingly the dogma of *lex loci delicti commissi,* and the scope of the maxim, as a guide to capacity to commit a tort, vicarious liability, procedure and contractual aspects of tort liability. To the "American rule" that the place of injury is the *loci delicti commissi,* Dr. Rabel compares the civil law rule that selects the place where the tortfeasor acted and the German rule permitting the injured party to choose the law either of the place of injury or of acting. Pointing out that contacts from which the *loci* must be selected should be limited to those where the tortious act is completed and where the injury occurs, Dr. Rabel nevertheless urges that some torts such as fraud and libel by radio require special rules for localization and concludes: "More individual answers to single problems would be desirable. The courts presumably would more readily follow rules appropriate to particular situations than a radical change which, in this country, does not seem warranted."[3]

The final third of the volume is taken up with a searching and exhaustive introduction to choice of law in contracts problems. A well-armed adherent of the principle of party autonomy, Dr. Rabel admits that Beale and other Olympians in the United States deny the existence of a choice of law open to the contracting parties and then, after summoning the encyclopedias and Stumberg to his side, proceeds to find in the cases the free choice of law the other authorities deny. At the end, it may be hazarded, the cases remain in the wild confusion in which many patterns or none at all may be revealed. Judicial choice of law in terms of either *lex loci contractus* or a selection of contact points is discussed, and the rules to govern the form of contracts are set forth. Consideration of the scope of the law of Contracts and a ride on the wild horse of public policy conclude the volume.

It is perhaps presumptuous to offer criticism of a work clearly without a peer in English. Nowhere else can one find in a single work a critical comparison of choice of law rules as they are found from hemisphere to hemisphere. Accustomed as American lawyers are to the overrich resources of more than forty-eight jurisdictions spouting statutes and decisions, the worldwide scope of Dr. Rabel's sources will be almost stupefying to them.

With profound respect for the magnificent scholarship evidenced by the work, some criticism may be suggested. Considerable space is devoted to Conflict of Laws in South and Central America, a region of great interest but limited importance, while conflict rules of the enormously more significant Soviet Union are barely mentioned. Several statutes and half a dozen international agreements of the Soviet Union are cited: of the single treatise and several articles offered as authorities on Soviet law, none at all are Soviet sources.

Although the condensed treatment necessary in a study of such vast scope makes for slow and sometimes toilsome reading, there are flashes of humor when Dr. Rabel

3. P. 335.

demolishes false doctrine with a vigor often missing in American legal literature. The Restatement of Conflict of Laws, for example, is not spared. In discussing the territorial theory of corporate existence he notes that " Taney's and Field's dicta were made the basis of the Restatement in 1934, although each part of the doctrine has been thoroughly refuted and entirely discarded by common opinion throughout the world,"[4] and with respect to corporate directors Dr. Rabel describes the Restatement rules as "sadly incomplete."[5] Section 387 of the Restatement on vicarious liability is dispatched neatly by the footnoted remark: "The black letter text itself is too vague and obscure to be discussed here,"[6] while the Restatement's distinction between substance and procedure results in "statements, vague and contradictory, [which] testify to the draftsmen's uneasiness."[7]

Even the works of the mighty are not immune: Warren's Corporate Advantages Without Incorporation is an "unforunate work . . . [that] seems still to exercise some influence,"[8] and Beale's views on recognition of foreign corporations[9] are "imaginations."[10]

The author's civil law background gives his analysis a perspective hard for the common law lawyer, buried in reported cases, to achieve. Cases decided contrary to what is conceived to be the proper view are dismissed as "without authority,"[11] an "isolated abberation"[12] or "absurd"[13] in the instance of a German, New Jersey and French decision, respectively. In dealing with the civil law rule of choice of tort law Dr. Rebel relies with more confidence than a common law lawyer could on "the great majority of European writers, followed by some courts. . . . "[14] In a brilliant generalization we are told: "Of course, the real theoretical trouble lies in the dogma that the right to be a party is procedural. As in many other respects, the development of American law requires a definite departure from the overextended scope of procedural law."[15]

American lawyers will be astonished by the firm grasp Dr. Rabel has acquired of the case technique as well as the content of the common law. On occasion, however, unfamiliarity with the American background will cause perplexity as in the analysis of a case where a circus with a permanent address in Chicago localized an employment contract in Sarasota County, Florida, "for some reason unfortunately not revealed in the case."[16]

Having selected the modest objective of suggesting a "patient and concerted world-wide discussion determined to relieve the present chaos"[17] of Conflict of Laws rules, Dr. Rabel's work is likely to attain that objective. The Canutes of the American Law

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4. P. 126.
5. P. 172.
6. P. 271.
7. P. 281.
8. P. 94.
9. BEALE. CONFLICT OF LAWS § 166.1 (1935).
10. P. 131.
11. P. 150.
12. P. 82.
13. P. 59.
14. P. 303.
15. P. 121.
16. P. 406, discussing Owens v. Hagenbeck-Wallace Showes Co., 58 R.I. 162, 192 Atl. 158 (1937).
17. 1 RABEL, CONFLICT OF LAWS xxii (1945).

Institute, the original sponsors of Dr. Rabel's project, chose the more grandiose aim of protecting the forty-eight varieties of the "common" law against the tide of codification. Certainly as far as Corporations, Torts and Contracts are concerned, Dr. Rabel's study reveals that the Restaters have failed dismally to provide their "new factor promoting certainty and clarity"[18] in the crazyquilt of American law. Dr. Rabel is too gracious, no doubt, to conclude that had half the effort and expenditure devoted to the Restatements been directed toward codification of American law, the picture today within the United States might not be as confused as it is.

WILLIAM TUCKER DEAN, JR.†

BASIC CONSTITUTIONAL CASES. By C. Gordon Post, Frances P. DeLancy and Fredryc R. Darby. New York: Oxford University Press, Inc., 1948. Pp. xiii, 312. $2.50.

This book includes a small collection of thirty-one basic constitutional cases or opinions of the United States Supreme Court, each case edited with introductory notes by the authors, members of the Department of Political Science at Vassar College.

There is an introduction devoted to a brief statement of how the Supreme Court functions. A table of 207 cases, referred to in the notes and opinions, alphabetically arranged with citations, is inserted for ready reference at the beginning of the book. An appendix containing a list of justices appointed to the Supreme Court with details thereof, and a copy of the Constitution of the United States completes this volume.

Its purpose and limitation are indicated in the preface in these words: "This collection of cases is intended primarily for use in the introductory courses in American government and is designed to supplement the standard texts. Its object is to introduce the student to a study of cases, and to give him a deeper understanding and appreciation of the significance of courts and case-law in the American system of government. It is not the editors' intention to cover or even to touch upon, however briefly, the entire field of Constitutional Law, or to include the last word of the Supreme Court on any particular constitutional question."

The book should well fulfill its defined purpose and, of course, it is definitely subject to very limited use in the hands of the student of Constitutional Law because of its admittedly narrow compass.

The material is organized under twenty different chapter headings. Since there are just thirty-one cases, only one case is allotted to each of the following thirteen topics: National Supremacy and the Implied Powers; Federal-State Relations; Citizenship and Aliens; The Suffrage; The Power of Congress to Investigate; The President's Removal Power; The Delegation of Legislative Power; The Currency; Agriculture; Social Security; National Defense; Military and Civilian Mobilization in Wartime; and Territories and Dependencies. Two cases in each instance are assigned to three other subjects, to wit: The Development of the Constitution; Government and Labor; and Foreign Relations. Only four of the constitutional problems are dignified with three Cases each, namely: The Constitutional Position of the States; Civil Rights; The Taxing Power; and Interstate Commerce.

It is not an easy task to break down the Constitution into twenty, all comprehensive, and easily recognized subdivisions.

18. RESTATEMENT, CONFLICT OF LAWS ix (1934).

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In analyzing the foregoing list of topics, selected by these authors, without more, the student of Constitutional Law would experience difficulty in readily locating such familiar and important subjects as: (1) The Contract Clause, (2) Due Process, (3) Equal Protection of the Laws, (4) The Full Faith and Credit Clause, (5) Police Powers, (6) Search and Seizure, (7) Double Jeopardy, (8) The Ex Post Facto Provision, (9) The Amending Process, (10) The Guarantee of a Representative Form of Government, and numerous other well known provisions of our Federal Constitution. But, in fairness to the authors, these problems have not been entirely omitted, but will be found hidden under one of their more general classifications.

Thus, in Chapter three in the cases and notes devoted to "The Constitutional Position of the States," the contract clause, the full faith and credit clause, and the guarantee to the States of a republican form of government are considered. While in Chapter six, under the caption, "Civil Rights," due process, police powers, double jeopardy, and search and seizure cases are considered. So, too, in Chapter one, under the title "The Development of the Constitution," the cases dealing with the amending process will be found.

It is also a difficult problem to select out of the thousands of opinions handed down during the past 160 years by our Supreme Court, and now filling hundreds of volumes, a mere thirty-one as the content of a book, entitled "Basic Constitutional Cases." No one will dispute that those selected by the authors are basic, because they are the final pronouncement of the highest court in the land, setting forth the fundamental principles of Constitutional Law and their effect upon the millions of people subject to our government and law, in matters touching the life, liberty, property and rights of the individual in his relation to his State and Federal government, and in the relations between the Federal government and the several States. There is no claim made that the cases selected are the most important in the history of our country. But no list of the important and basic constitutional cases would be complete without them.

The thirty-one principal cases selected and constituting the main content of this book will be found in almost any recent case-book of Constitutional Law used in a law school. In fact, the usual case-book on this subject, such as that by Dowling used in Fordham Law School, contains about one hundred fifty principal cases, including generally those set forth in the book under review. From this viewpoint, this book would undoubtedly be of some value in a course dealing with the American system of government, but would be quite inadequate for a course on Constitutional Law for use in a law school since it contains only a small percentage of the basic constitutional cases which ought to be known by the average law school student.

The chief value of the book, in my opinion, to a person interested in Constitutional Law, lies in the well prepared, interesting, and informative notes which precede each of the principle cases. These notes generally point out the factual background or problem which the principal case resolves and at the same time considers other pertinent decisions of the United States Supreme Court concerned with problems akin to the principal case. The book might be improved in these notes by adding thereto other important Constitutional Law decisions which ought to be mentioned in any book dealing with basic constitutional cases. The only reason to justify the exclusion of so many of these other important cases would be the desire of the authors to make the book as concise as possible for their own limited purposes as explained in the preface.

As to the cases selected, I would prefer the case of *Nardone v. United States*,[1] which the authors have mentioned simply in an editorial note at the bottom of page

1. 302 U.S. 379 (1937), 308 U.S. 338 (1939).

92, in place of the principal case of *Olmstead v. United States*,[2] which is set forth in full on page 87. The *Nardone* decisions are later pronouncements of the Supreme Court on the subject matter of the constitutionality of wire-tapping. Furthermore, the Communications Act of 1934 and the several statutory provisions of the various States dealing with wire-tapping would make the *Olmstead* decision somewhat outmoded in view of the statutory changes.

With this exception, the other cases are well selected. The book should prove interesting and profitable to students of the American system of government. The introduction explaining how the Supreme Court functions and the prefatory notes before each principal case will prove helpful to any student of American Government or of Constitutional Law.

VICTOR S. KILKENNY†

COOK'S CASES ON EQUITY, (Fourth Edition). By M. T. Van Hecke. St. Paul: West Publishing Co., 1948. Pp. xxxii, 1192. $8.50.

Undoubtedly no casebook can be fully appraised until one has had the opportunity of using it in the classroom as a teacher or as a student. This reviewer has not had the privilege of so using this volume or its previous editions. However, an examination of the work and frequent reference to it while teaching Equity have abundantly attested to the general excellency of Cook's *Cases on Equity* and has accounted for its popularity in American law schools. Professor Van Hecke of the University of North Carolina, School of Law, a former student of the late Walter Wheeler Cook, has performed a topnotch job in maintaining intact the quality and flavor of Professor Cook's casebooks while at the same time adding recent cases and other material which indicate his own sensitivity to the growth and trends of modern Equity.

The author has in general followed the outline of prior editions with one interesting departure. Part one is an historical introduction to the general subject of Equity. Part two treats of the broad field of Injunction. Part three contains material on miscellaneous equitable remedies including Bills of Peace, Interpleader, Bills Quia Timet and to remove Cloud on Title and Declaratory Judgments. Parts two and three broadly cover that portion of the subject taught as Equity II to third year students at Fordham Law School and to this part of the volume the reviewer's interest has been mainly attracted. Part four deals with Specific Performance of Contracts, Part five with Restitution including Reformation and Rescission for Mistake. The final Part six is concerned with Jurisdiction, Powers and Procedures of Courts of Equity. It is thus seen that Professor Van Hecke has adhered to Professor Cook's position that Restitution is properly treated in Equity and not in a separate course. This is primarily a problem of curriculum convenience but many Equity casebooks have eliminated this matter[1] which is taught as a separate course in Restitution or if you will, Quasi-Contracts. The latter practice is followed at Fordham Law School. It is worthy of note, however, that the author has transferred from Part one to Part six the matter of Jurisdiction, Powers and Procedures of Courts of Equity. This is a departure not only from previous editions of Cook's Cases but from other casebook

2. 277 U.S. 438 (1928).

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1. See e.g., CHAFEE AND SIMPSON, CASES ON EQUITY (2d ed. 1946); DURFEE, CASES ON EQUITY (1928); WALSH, CASES ON EQUITY (1937); GLENN AND REDDEN, CASES AND MATERIALS ON EQUITY (1946) (includes quasi-contractual material).

authors such as Chafee and Simpson, Durfee, Glenn and Redden and Walsh, all of whom adhere to the practice of presenting this material at the outset of the course. The author explains in the Preface that this shift has been made because the "matter seems to have greater significance after the class has seen the various remedies in operation."[2] To those who are unwilling to suspend student inquiry or who frankly believe the author has placed the cart before the horse, the immemorial prerogative of the law teacher is available—Part six can be taken before Part one.

In selecting new decisions to be added to the original case selections Professor Van Hecke has in the main happily avoided substituting a decision simply because of its recent vintage for an older case which may well have presented a sharper issue in a more cogent manner. The traditional cases which you expect and which perforce appear in all Equity treatises are still present. An example of a new case added is *Kenyon v. City of Chicopee*.[3] This is to be commended; the case contains an excellent discussion of the purported rule that Equity will only protect "property" rights and is indicative of a significant trend in Equity jurisprudence. One is further pleased with the excerpt from the opinion of the Appellate Division, First Department, in *Advance Music Corp. v. American Tobacco Co.*,[4] but it is to be regretted that the reversal of the Court of Appeals is not set forth or digested rather than simply noted. The implications of the decision are tremendous.

The present edition makes excellent use of material other than court decisions. For example the excerpt from Professor Chafee's article "Modernizing Interpleader,"[5] serves as an excellent introduction for the student to the intricacies of Interpleader. The author has also made plenary use of the Restatement of Torts, a hitherto untapped source of information on equitable problems. The principal material on laches and unclean hands as defenses to injunctive relief in tort cases in this volume consists of the comments to Sections 939 and 940 of the Restatement.

Despite the increased use of law review, text and other footnote material Professor Van Hecke has still produced primarily a case book and not an encyclopaedic monstrosity. Some recent offerings have seemed perversely intent upon parading the scholarship of the author or more accurately his familiarity with law libraries, with references to everything from Hammurabi to Hitler, forgetting the primary function of the casebook to instruct fledgling attorneys. Professor Van Hecke seems to have struck a proper balance. Moreover he has spared us from the learned personal comments of the compiler which are usually more provoking than provocative. The personality of the teacher has not been submerged and the author is content to let the cases speak for themselves.

Cases on Declaratory Judgments are properly included in this Equity volume and are not relegated to the limbo of a practice course which was unfortunately recommended in one recent Equity casebook. Moreover the cases are interspersed among the older forms of equitable relief emphasizing their fundamental equitable background and at the same time indicating their independence of some of the antique formalisms of the older remedies. The author has also done well in skirting the difficulties inherent in a discussion of equitable relief against some of the more modern tortious interferences with business. It is impossible in Equity to do more than suggest the broad outlines of the substantive law of unfair competition, trade names, trade marks and labor law. This is particularly true today with the Lanham Act and the Taft-Hartley Act. Nevertheless the general necessity for the equitable

2. P. vii.
3. 320 Mass. 528, 70 N.E. 2d 241 (1946). Cited at p. 241.
4. 268 App. Div. 707, 53 N.Y.S. 2d 357 (1945). Cited at p. 208.
5. 30 YALE L.J. 814 (1921). Cited at pp. 318-320.

remedy is presented with some of the early landmark decisions. The leading case of *International News Service v. Associated Press*,[6] is included but the separate opinions of Mr. Justice Holmes and the dissenting opinion of Mr. Justice Brandeis are missing. This is unfortunate in view of the strength of the contrasting opinions and the undoubted influence of Mr. Justice Brandeis in curbing the effect of the majority holding.[7] One might further wish that the author had cut down on the material on Bills of Peace and Removing Cloud on Title but this is no doubt a provincial criticism due to the liberal statutory amendments in New York blunting the importance of these equitable bills.

On the whole this edition is a scholarly and important contribution to Equity jurisprudence. The publishers are to be congratulated in selecting an editor who has maintained the high standing of Cook's *Cases on Equity*. It is surprising that in this most fascinating and fertile field of legal endeavor relatively little literature has been forthcoming.

WILLIAM H. MULLIGAN†

THE FEDERAL INCOME TAX, A GUIDE TO THE LAW. By Joyce Stanley and Richard Kilcullen. New York: The Tax Press Club, 1948. Pp. vii, 344. $6.00.

"This book deals only with federal income tax law. It has been written to make income tax law easier to understand. It has been written primarily for practising lawyers who do not specialize in tax law, for law students, for accountants working in the tax field, and, in general, for all people who in their business or profession need more than a casual knowledge of income tax law." This is the stated purpose of the authors. They have sought to do this in 314 pages.

The arrangement of the book substantially follows Chapter one of the Internal Revenue Code. For the most part, it is a paraphrase of selected sections of the Code and Treasury regulations. At several points there are limited discussions of case law on more prominent problems. For example, seven pages are devoted to reorganization cases,[1] four pages are devoted to Clifford trusts,[2] and two and one half pages are devoted to the *Court Holding Company* case dealing with sales of corporate assets by stockholders.[3]

The authors have embarked on an ambitious project. To compress scores of statutes, hundreds of regulations and interpretations, and thousands of cases into readable and even remotely comprehensive material in 314 big type pages is impossible. The authors recognize this and of necessity there is no editorial discussion of the great majority of the statutory sections other than the statement that such sections exist. To the extent that there is editorial discussion, it is superficial and often too cryptic. For example, in delineating the "business purpose rule" in reorganizations, the authors state: "This rule is set out in part in the Regulations which state that the purpose of the reorganization provisions is to except from the general rule (under which gain or loss is recognized) only those exchanges that are made in

6. 248 U.S. 215 (1948). Cited at p. 222.

7. See *e.g.*, Cheney Bros. v. Doris Silk Corp., 35 F. 2d 279 (C.C.A. 2d 1929), *cert. denied*, 281 U.S. 728 (1930).

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1. Pp. 153-59.

2. Pp. 269-72.

3. Pp. 231-34.

connection with corporate readjustments required by business exigencies; and that a scheme which involves an abrupt departure from normal reorganization procedure and which is devised and adopted in connection with a transaction on which the imposition of tax is imminent is not a plan of reorganization within the meaning of the Code."[4] Following a statement of the facts and holdings in the *Gregory*,[5] *Bazley*[6] and *Adams*[7] cases, the authors conclude: "The case law is extremely important in connection with many phases of reorganizations but because of the scope of this book, it cannot be dealt with here in any detail. . . . The whole subject of reorganizations is complicated and technical; both the statute and the decisions must be carefully studied in considering a particular transaction."[8]

The annual Commerce Clearing House, U. S. Master Tax Guide and the annual Prentice-Hall Federal Tax Handbook would appear to serve the purpose sought by the authors of the book under review. Moreover, these booklets contain references to collections of the cases on the subjects covered. It may well be that the beginner, the accountant, and the general practitioner would derive greater benefit from using these booklets which are revised each year.

GERALD SILBERT†

EFFECTIVE LABOR ARBITRATION: THE IMPARTIAL CHAIRMANSHIP OF THE FULL-FASHIONED HOSIERY INDUSTRY. By Thomas Kennedy. Philadelphia: University of Pennsylvania Press, 1948. Pp. viii, 286. $3.50.

This is number 34 in the series of Industrial Research Studies of the Wharton School of the University of Pennsylvania. The author, at present Assistant Professor of Industry in the Wharton School, writes out of the objectivity of that position but also out of the day by day knowledge he obtained as Impartial Chairman set up by the agreement between the Full Fashioned Hosiery Manufacturers Association and the American Federation of Hosiery Workers in 1929.

The book is a study of sixteen years experience and an analysis of 1566 "cases"—grievances arising under six different Impartial Chairmen, including himself, since the union and a large unionized segment of the full fashioned hosiery industry decided in 1929 to substitute peace for industrial war. This they did by drawing up an agreement providing among other things for no strikes and lockouts and the institution of an Impartial Chairman paid by both union and association to settle grievances arising under the new contract. Despite room for improvement and inadequacies frankly pointed out by the author, the system is an enormous advance over the previous situation and neither side would go back to the old system where economic power with its fluctuations back and forth from one side to the other was the only rule.

The agreement somewhat skeptically entered into in 1929 by both sides has continued to limit the jurisdiction of the Impartial Chairman to the existing contract. He does not take part in the negotiations of renewal or change rates (although he does prepare factual data on which the new terms are based). His rate fixing is secondary rather than primary, that is, he can not order new rates but only deals with rates and relations already set forth in the contract. For instance, under his aegis

4. P. 156.
5. Gregory v. Helvering, 293 U.S. 465 (1935).
6. Bazley v. Commissioner, 331 U. S. 737 (1947).
7. Adams v. Commissioner, 331 U. S. 737 (1947).
8. P. 159.

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there has been worked out a 90% "style development rate" to take care of the situation frequently arising where a change in the product throws off and makes inappropriate, at least temporarily, the pre-existing piece rates.

The jurisdiction has been so precisely delimited that only seven grievances have been held beyond the jurisdiction of the Impartial Chairmen of the 1566 cases covered by the study. One of the interesting by-products of the system has been the "SWD" grievances (settled without decision) in 27.4% of the cases where the Impartial Chairman has been able to mark them closed by settlement of the parties without his filing a formal decision (formal decisions were filed in 69.7% of the cases). This is an illustration of one point made by the book that collective bargaining and direct negotiation have not been discouraged although the author does believe that at times the parties have abdicated their negotiating function by throwing into the lap of the Chairman problems they could well have resolved themselves.

One of the interesting variants in the hosiery arbitration system as distinguished from others which the author usefully points out by way of contrast is the development of a "common law." Reasoned explanations are always given in the arbitrator's decisions so that they become guides to the parties and eliminate submission of identical, or at least similar, questions to him in the future. Full records are kept and all the Chairmen have considered themselves bound by previous decisions on the point, long custom overruling a "logically foolproof request," as one arbitrator put it. This gives stability to industrial relations and is evidence that the parties are not thinking in *ad hoc* terms of an isolated dispute but of the long pull in building constantly better and more harmonious relations. This is notable as some industries (the New York cloak and suit and Illinois coal industries) specifically provide against the use of precedents.

The book has an interesting analysis of the problem described by the author in this way: "is it possible to preserve and extend the guarantees against arbitrary and inequitable treatment [of employees] at the same time that management's rights are being strengthened." The author concludes that "the hosiery industry appears to have successfully accomplished this dual feat." He makes out a good case. Only 4 or 0.3% of the 1566 cases involved union discrimination. The wholeheartedness with which the Association has accepted the principle of unionism as the bedrock on which good industrial relations rest has undoubtedly been the main reason why the union had acquiesced in the preservation and occasionally the creation of management prerogatives which it had previously fought and refused to recognize. For instance, prior to the agreement the union did not concede "administrative initiative" to management whereas now it recognizes that it can only protest and appeal to the Impartial Chairman actions and policies initiated by management of which it disapproves. Three other important rights of management which the Chairman has sedulously fostered and protected are uninterrupted production as a goal, methods of operation and property.

The no-strike-no-lockout clause has been almost universally observed and the sole violations (20), all by the union, were upheld as violations by the Chairman who ruled against the union in all cases. The Chairman's refusal to consider any matter until production interrupted by a work stoppage is resumed has directly discouraged even "wildcatting." A very important "right" of management which the workers too have come to recognize is in their interest in promoting efficiency is the "right" to install new machinery and methods. The fear of so many unions that technological improvements will mean unemployment seems to have been minimized. Here again the Chicago men's clothing industry agreement fails to recognize this right. Undoubtedly one explanation of the union's willingness is its increasing realization

on which its policy is frankly based that its interest lies with the organized employers in making a common front against the unorganized segment of the industry where threats to wage standards may arise. There is therefore a specific pledge in the agreement on the part of the workers to cooperate with one another and with management and not to hold back on production. This is a notable change as prior to 1920 the union "censured" members who did not "hold back."

Quality work is required and discharges upheld and acquiesced in by the union. The Impartial Chairmen have pushed the policy of promotion on the basis of ability rather than seniority alone. No "bumping" is allowed and if a worker moves on to a new and more difficult machine he does so at his peril. If he fails to make good on it he can not return to his old machine by replacing the new operative there. Monetary fines for inefficiency or for disciplinary purposes are not permitted but they have been imposed by the Impartial Chairman for work stoppages or other contract violations. This third party discipline is invaluable in solving the dilemma of each party feeling obligated to "hold up the hands" of and "stand by" its representative and constituents.

The contract has been a definite encouragement also to uniformity of piece rates and as might be expected, over half the total number of grievances were over secondary rates.

A legitimate question is: how far do the decisions of the Chairman represent "splitting the difference" and how far a conscientious determination to do justice and equity, let the chips fall where they may? The record is convincing that the latter has been the policy and both sides agree that this has been both the policy and the result. 29.9% of the cases the union won as against 35.6% won by the association but another 14.8% favored the union as against 9.3% favoring the association. The figures are almost equal in those more favorable to one side than the other but in only 10.4% of the cases was the "difference split" so that neither side was favored over the other.

The author sums up the contributions of the hosiery arbitration system as practically eliminating strikes, as facilitating the introduction of new equipment and techniques, and as freeing the union from worries of insecurity of status so that it can concentrate on organizing the unorganized mills. He is frank to recognize, however, that although the arbitration process compares favorably with the courts it is still too slow as it takes an average of 38 days for a decision. He thinks there has been a regrettable decline in the mediation aspects of the Chairman's function and too much substitution of the Chairman for thorough negotiation. There is still inadequate education of the workers and local union and management representatives in the procedures and value of the arbitration system.

The author's conclusion that "many of the procedures, techniques, and principles developed and tested by the hosiery Impartial Chairmanship could be adopted with profit in other industries" depending "upon the similarity of the economics and industrial relations of those industries or companies to those in hosiery" seems sound. One of the chief values of the book lies in the comparisons made with other industries. This makes it more than just another well-documented and detailed study of one industry which will not be of value to or read by any one outside that industry. This book should be of interest and value to anyone interested in the broad field of Industrial relations as well as the narrower field of industrial arbitration. The Tables, Index, and verbatim text of the basic "treaty," the collective agreement, enhance its ready usefulness.

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BEING AN AMERICAN. By William O. Douglas. New York: The John Day Company, 1948. Pp. ix, 214. $2.75.

This little volume collects some of the speeches of William O. Douglas, Justice of the Supreme Court of the United States. They contain some refreshing ideas and in them Mr. Douglas shows much deeper insight into the purpose and meaning of the American legal order and human society in general, than ever appeared in the writings of his more publicized associate, Justice Oliver Wendell Holmes. Yet, Holmes somehow or other won wide repute as a representative of the American tradition. In Justice Douglas' writings we find, for example, that he believes in the dignity of the individual, in the primacy of the individual conscience and in a personal and provident God. Justice Douglas assumes that there is a moral order to which the legal order must conform and acknowledges the right of the Deity to lay down the rules to which legislators must conform. He even goes so far (in this day of separation of Church and State) as to mention the Christian tradition as the foundation of American democracy. Holmes, on the other hand, saw no reason to accord to man any superior dignity than that accorded to "an ape or a grain of sand," and, of course, Holmes' faith in God did not approach the clarity of the Christian belief. If he had any faith in a Deity, it was in undefined, indefinite and pantheistic "Cosmos." Holmes saw, in life, only a bitter struggle for survival permitting at its end a petition to a blind Cosmos guiding the world to permit the poor human ganglion to "dissolve in peace."

Although Judge Douglas evidences in his speeches the common sense approach of an enlightened Christian to the problems of the day, he is not entirely satisfying in his discussion of some of those problems. For example, his paper on "The Tradition of Equality" seems inadequate. For him the American tradition of equality seems to be the vestigial remains of a policy of cooperation and fair play handed down to us by the pioneers who settled the colonies and developed the West. Of course, to those who proclaimed, when this government was set up, that all men are created equal, the notion of equality had a much deeper meaning. It meant to James Wilson, James Madison and George Washington the possession by every individual, black or white, rich or poor, of a common humanity upon which was placed an obligation to develop and perfect itself according to the plan of the Divinity. And it meant that each individual was entitled to the same opportunities to obtain such development.

Douglas' paper on "Moral Leadership" is also disappointing in the same respect. He pleads for the recognition by Americans of their duty to assume moral leadership but gives us very little hint of the standards of sound morals except in his adoption of the Christian ethic. And so with many of the other papers. Justice Douglas is laboring, as most Americans, without adequate tools. We want to be moral and we want to be Christian but we do not have any very clear conception of the determinants of morality or of the implications of Christianity. Our preoccupation with the cares of the business world has left us little but emotionalism in morals.

With respect to the essays of Justice Douglas on Franklin Roosevelt and Eleanor Roosevelt and some other public figures, we may only say that we should be on our guard against Justice Douglas' personal affection for them. To him, Franklin Roosevelt was a great leader and a great statesman. Whether he was such or, as some claim, a mediocre politician unable to cope with the craft of other world leaders, whose lack of foresight has brought us to the brink of another war to preserve our national existence, is a question which, of course, should not be decided on the testimony of Justice Douglas in this volume.

On the whole we find the book quite satisfying. Justice Douglas does not stoop

to court the fuzzy liberals of the day although he is himself in the liberal tradition. He does not attempt to impress with the pseudo-scientific jargon of many now writing in the field of political philosophy. It is a straight forward little book and we recommend it.

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