

BOOK REVIEWS

CASES AND MATERIALS ON FEDERAL COURTS. By Charles T. McCormick¹ and James H. Chadbourn.² Chicago: Foundation Press. 1946. Pp. xxvii, 878. \$8.00.

This is a collection of teaching materials on federal jurisdiction and procedure. Chapter I deals with judicial power over cases and controversies and makes neat turns from the constitutional and statutory basis of the jurisdiction, to matters of review of legislative and executive determinations, then to the declaratory judgment problem. The next four chapters cover federal question, diversity, jurisdictional amount and removal, the heart of the entire subject. This is followed by a short treatment of interesting *res judicata* problems which, however, are not particularly federal, and it is not apparent why the two principal cases might not have been tacked on at the end of Chapter I. Chapter VII deals with conflicts between federal and state courts or other state agencies, centering around the use of the injunction but also includes removal of cases against federal officers and habeas corpus of persons confined by state authorities. Chapter VIII covers *Swift v. Tyson*, the *Erie Railroad* case and all of that in an extremely able manner. Chapter IX is a skillfully delineated handling of procedure in the district court, restricting consideration of the Federal Rules to aspects which are federal in nature. The work concludes with treatments of federal appellate jurisdiction and procedure and the original jurisdiction of the Supreme Court.

There is a distinct air of freshness and modernity about the book; almost a third of the principal cases date from 1938, the year in which substantive law and procedure in the federal courts were turned upside down and the approximate time when the change in personnel of the Supreme Court began to make itself felt. The choice of material is excellent and most of the old landmarks are included so that the general scope of the course heretofore given in law schools will not be changed by use of this casebook. The old and the new merge into a complete, up-to-date whole, and occasionally there is a keen hint as to possible future developments.

One test of a casebook is its adaptability to different approaches and rearrangements. Not all teachers approach a subject in the same way; and some like to vary their plan from year to year. The book is flexible enough to permit almost any sort of development. The workaday mind may wish to start with the diversity chapter and this can easily be done. Or one may commence with more jurisprudential aspects, such as the substantive law as applied in federal courts or the conflicts between state and national jurisdiction. If a teacher chooses, he can further develop the latter subject by skipping over to some of the cases on the appellate jurisdiction of the Supreme Court. Likewise, in considering various phases of district court jurisdiction, one could digress into certain of the matters, such as venue, which the editors have placed under procedure. All this is not to say that the editors have not chosen the best all-purpose arrangement, but is merely to suggest that almost any teacher can use these

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materials according to his own plan of development without taking the whole book to pieces.

In the reviewer's opinion, however, the most praiseworthy feature of the book is neither the excellent choice of materials nor the sensible general arrangement of them but rather an extremely skillful job of editing. Here are editors who edit and do not emasculate, who cut paragraphs and sentences from lengthy opinions but preserve the essential arguments and above all the facts of the cases. Here are editors who select the vital statutes and the most worthwhile articles, notes and collateral cases to quote or cite. "Turn to the article of the Constitution . . ." says Chief Justice Marshall on page four of the casebook and one has only to turn to page two to find it. This is illustrative of how the written-law sources have been inserted at the proper places throughout the book. Most of the chapters begin with the key federal statutes but when appropriate the editors commence with a ground-breaking case, a note of their own composition, or an excerpt from Bunn's good little book.³ There is nothing revolutionary, nor indeed new in all of this; rather it represents an intelligent use of established techniques and a rare understanding of the functions of editors.

A most important phase of editing a casebook is to see that the result is of proper length. Few casebooks are too short, many are much too long, and others maintain due bounds only by omitting important topics entirely or summarizing them by notes. To take care of the teacher who is able to go rather fast, a casebook should contain about ten or fifteen per cent more materials than the average teacher will cover. The editors have hit it about right. The 190 principal cases are probably just a little more than the average teacher will cover in the usual course of thirty or so lectures. Perhaps some omissions can be made in the chapter on procedure in the district court though most of the materials on venue, process, parties and joinder are musts and are necessary to round out the picture of the jurisdictional matters in Chapters II to V. If cutting must be done, probably the materials on original jurisdiction of the Supreme Court must go, only because the exercise of that jurisdiction is a small part of the Supreme Court's activity and a mere infinitesimal fraction of the work of the federal courts as a whole. At first consideration one wonders whether this topic deserves eight per cent of the book's space but, if the subject is to be covered at all, there is probably not one of the ten cases selected which one would omit.

There seems to be nothing in the book on the rather important problems of federal jurisdiction—or lack of jurisdiction—over matters of probate, administration and domestic relations.

Perhaps *Hepburn and Dundas v. Ellzey* (p. 140) could have been omitted in view of the quotation from it which occurs in the next case, holding constitutional the statute which extends jurisdictional diversity to citizens of the District of Columbia. The reviewer regrets that the allegation of jurisdiction in Form 2 of the Rules of Civil Procedure was not inserted at page 137 instead of merely being cited. He questions also the frequent use of the unanswered note problem with case citations (pp. 146, 160, 171, 246, 250, etc.). The answer could usually be supplied with no space consumption and a brief statement of the rationale would often take only an additional line or two. Of course a teacher would like to have his students study the cited cases, but do they often do this either with or

3. BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES (3d ed. 1927).

without professorial prodding? Would giving the answer discourage a reading of the cited cases? The reviewer's hunch is "no" as to both of these questions, and that the unanswered problem is justified only in occasional instances where the answer lurks in the principal case, or where the citation, while it throws some light on the problem, is not conclusive.

The matters just mentioned deal with minutiae and probably indicate peculiarities of the reviewer rather than any failing of the book under review. Clearly this is the best casebook in the field. Furthermore, Professors McCormick and Chadbourn have done a model job of editing which will be an example for editors of future casebooks in any field.

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INTERNATIONAL LAW. Volume One. By Georg Schwarzenberger.¹
London: Stevens and Sons, Ltd. 1945. Pp. xliiv, 645. £3.

Treatises on international law have traditionally followed a stereotyped pattern, usually constructed upon a basic division of the subject into the law of peace and the law of war, in which little is added to what others have already written or in which the maximum contribution of a new author consists in assembling the latest evidence (in jurisprudence, diplomatic practice, and the teachings of publicists) of what he conceives a particular rule of law to be. It is obvious that this deductive method of presentation, which uses State practice and the decisions of domestic and international courts to illustrate alleged abstract principles and which involves a more or less subjective analysis of legal materials, may not always afford a reliable barometer of what international law really is, though it may, of course, portray a given scholar's reflections on what the law should be.

It is freely predicted that to practitioners and students accustomed to this orthodox methodology of authoritative writers, Schwarzenberger's treatise will prove a revelation and a fresh stimulus to a subject on which too many unoriginal texts have already been published. It is a completely new approach. In Volume I, the author has provided us for the first time with a work which follows no *à priori* concepts of what constitutes the law of nations, but by the use of the inductive method familiar to Anglo-Saxon lawyers builds up a systematic picture of that law on the basis of what international courts and tribunals actually have done. This first volume—the remaining two volumes are yet to appear—contain a complete survey of the jurisprudence of the Permanent Court of International Justice and the Permanent Court of Arbitration. Points not sufficiently dealt with in that jurisprudence are covered by incorporating representative awards of bilateral tribunals, mixed claims commissions and the mixed arbitral tribunals. He who searches for multiple citations to other writers in the notes to support propositions set forth in the text, will seek in vain; for what Professor Schwarzenberger has woven for us is a magnificent fabric of primary source materials of the highest authority. If additional text references are desired they can be found in such reliable standard works as Oppenheim² and Hyde.³ It is the author's purpose to publish two comple-

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2. INTERNATIONAL LAW (6th ed. 1940).

3. INTERNATIONAL LAW (2d ed. 1945).

mentary volumes utilizing the same legal technique, one dealing with British diplomatic practice and treaties, and the other with international law as applied by courts within the British Commonwealth and Empire. Volume II presumably will undertake for the literature of Great Britain one of the functions which Hyde's work has ably performed for that of the United States. Each of the remaining volumes, as is the one here reviewed, will be complete in itself.

Volume I ("International Law as applied by International Courts and Tribunals") consists of seven major parts dealing with the Foundations of International Law, International Personality, State Jurisdiction, Objects of International Law, International Transactions, War and Neutrality, and the Law of International Institutions. In this enumeration alone a departure is apparent from the usual practice of writers to adopt as major topical divisions such headings as nationality, territory, and treaties. The sub-headings under this seven-fold enumeration further evidences the author's originality of design. Thus under "Objects of International Law" are treated "territory," "land frontiers," "maritime frontiers and the high seas," "individuals" (which includes a development of the law of nationality) and "business enterprises and ships."

In appraising and synthesizing the decisions of international tribunals, Professor Schwarzenberger has done a superb job. He has brought together a mass of material covering a wide variety of points which would require long hours of labor for a lawyer to ferret out *de novo*, and which he has boiled down into highly readable form without an accompanying loss of perspective. The author's painstaking and accurate research, his sound evaluation of propositions laid down in the cases, combine to make this volume an indispensable tool that will long be cherished throughout the profession. It is a lasting tribute to his faith in the future of an international society based upon law that this work was carried to fruition during a time when the defenders of that society were engaged in a terrible struggle which threatened to destroy both themselves and the system for which they stood.

Alwyn V. Freeman.†

AMERICAN FOREIGN POLICY, 1776-1946. By Edwin M. Borchard.¹
Indianapolis: National Foundation Press. 1946. Pp. vii, 69. \$1.00.

This small volume has been published by a foundation whose purpose is to extend a knowledge of the fundamental principles and concepts of American government, with a view of making available to the average citizen an authoritative statement of what American foreign policy has been, in order that he may "be better informed and qualified to discuss and evaluate the current problems of international relations which are now more than ever of great import and which affect the life of every citizen." It is, therefore, the view of a specialist in the field, prepared for laymen, by an outstanding authority in foreign policy and the international field.

In times like the present, this a job worth doing. It is a difficult undertaking, but it has, on the whole, been well done. The difficulty arises

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both from the effort to compress the material on such a complicated topic without distorting some of the important issues involved, and from the fact that Americans have never been accustomed to thinking in international terms, that they have never had any long-range foreign policy that was clearly defined. Americans have, as a people, tended to shrink from the establishment of objectives, preferring rather to live, for the most part, from day to day, dealing with specific problems as they have arisen. In doing this, however, there have been some elements of consistency, and it is with these elements that Professor Borchard's little book is concerned.

The discussion is in three parts, the first of which presents a kind of thumb-nail sketch of a dozen different principles and policies to which the nation has shown some consistent attachment over a period of time—such items as neutrality, de facto recognition, freedom of the seas, arbitration and the peaceful settlement of disputes, et cetera. The list seems reasonably complete and, in most respects acceptable. The Monroe Doctrine is not a policy, however, but a collection of no less than three different policies—non-intervention by the United States in Europe, non-interference by Europe in America, and opposition to the extension of European forms of government on American soil.

More attention might have been given our supposed isolationism. The fact is that we have talked about isolation for home consumption, and have freely practiced participation in world affairs a good deal of the time at least when it served our purposes to do so. One might almost contend that isolation was largely a myth, rather than a reality, as witness the elimination of the Barbary pirates, Perry's mission to Japan, our intervention in the Philippines, our insistence upon the open door in China, and many other instances. Our unwillingness to participate in the League of Nations was largely in the nature of an exception to our usual policy, and was due much more to a clash of personalities than to any real opposition to international cooperation. It may be contended, in fact, that the American policy has been one of cooperation, without alliances, and without assuming a continuing responsibility, reserving always unto ourselves the right to decide our policy in each individual case, as it might arise.

Part II considers the change in foreign policy that has developed since World War I, while Part III deals with the current situation. The distressing aspect of such an analysis as this book contains is the fact that so much of what appears in Part I does not fit into the picture in Part III. In the past, Americans, like the British, have been inclined to "muddle through." In the new world of science, in which no major power can afford to take that chance, the people of this country seem not too well prepared to do anything else.

The book is short and easy to read; from the point of view of its manufacture, it is attractively put together. In so small a volume, the absence of an index is excusable, but considering the purpose of the book, the same cannot be said for the absence of any guides to further reading. It was neither necessary—nor perhaps desirable—that the text be heavily documented, but certainly, if it achieves its purpose, the average citizen who reads it is likely to want to explore further some aspects of the subject. Such a citizen might well have been given leads to a few of the better books on each of the principles and problems discussed.

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INTERNATIONAL CARTELS. By Ervin Hexner.¹ Chapel Hill: The University of North Carolina Press. 1945. Pp. x, 555. \$6.00.

In the fields of law, economics and government no study provokes greater interest today than that of the "competitive system" versus the "managed economy." Obviously, both systems operate within a legal framework: the England of, say, 1850, and/or the United States of, say, 1870, perhaps best illustrate the legal framework of a basically competitive economy; the England of today, perhaps, best illustrates a major effort at a partially managed economy whilst attempting to maintain the personal freedoms traditionally associated with "the rights of Englishmen." Too many of us think entirely in terms either of "competition" or a "managed economy," failing to take cognizance of the truly phenomenal changes that have occurred during the past half century many of which point directly to a "mixed economy."

Perhaps the greatest virtue of Professor Hexner's book is that it opens up the vast complex of affairs that, for lack of a better term, we call "International Cartels." The book makes crystal clear that we do not today live in a wholly competitive business world. And, further, that it is the business men themselves that have created, at least in part, these impediments to the free flow of goods and services through the international lanes of commerce. The business men were reacting, however, to the forces of competition as they existed antecedent to the imposition of cartel controls.

The book can be broken down into three parts: the first comprehends a statement of the problem and a general analysis; the second, case studies based on most of the leading commodities entering into international trade; the third part—appendices—contains some selected documents, mainly cartel agreements from diverse industries and combinations of countries. An excellent and accurate, though limited, understanding of the subject can be obtained from a reading of the first 175 pages which make up the general analysis.

According to Professor Hexner, a cartel is "a voluntary, potentially impermanent, business relationship among a number of independent, private entrepreneurs, which through co-ordinated marketing significantly affects the market of a commodity or service."² It is necessary that there be several independent private enterprises, that the co-ordinated behavior significantly affects the pricing and volume characteristics of the market for the commodity or service, and that the purpose of the potentially impermanent arrangement must be direct or indirect advantage to the participants. Thus a cartel is not an arrangement between governments nor between one government and private enterprisers in its own or another country. Government agreements may create a legal *milieu* in which cartels will germinate; they may in effect drive private business into an international cartel; but governments *per se* are not eligible for membership in Professor Hexner's cartels. This is an excellent place to draw the line for scientific purposes. Future studies in this field will do well to follow exactly the nomenclature used by Professor Hexner and find a new term for intergovernmental arrangements having to do with the production and marketing of economic goods and services.

A cartel is a vastly different arrangement than the complete control represented by amalgamation or any other form of corporate union. Pro-

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2. Page 24.

fessor Hexner's study shows that the nature of most cartels is centralized management of certain but not all economic functions. The cartel management often is fluid depending in most cases upon the financial and economic power of the participating units (sometimes with the political power of their governments playing a part in the distribution of effective control over the affairs of the cartel).

Most Americans are more or less instinctively critical of cartels. Having had many unfortunate experiences with domestic monopolies on a nation wide scale since Civil War days the intense opposition to cartels by most Americans can easily be understood. An additional factor reinforcing this view is the over all intense belief on the part of most Americans in the so-called "American System" of competitive business conducted within the framework of a political democracy. Professor Hexner does not accept the traditional American position. Cartels *per se* are assumed to be neither good nor bad.

Professor Hexner discussed at considerable length the view that cartels are the source of much of the world-wide restrictionism of today. Undoubtedly restrictionism does exist and leads to a reduction in production with deleterious consequences to standards of living throughout the world. All this Professor Hexner admits. But the pivotal question asked by our author concerns the most likely alternative form of social organization. In Professor Hexner's view too many people assume that in the absence of restrictive cartel arrangements orderly co-ordination of the world's economic resources would be brought about solely through the forces of competition. As Professor Hexner says: "Although it is probable that in the majority of cases a permanently competitive market would result (assuming a fair elasticity of demand) in a larger volume of international trade, it would be most useful to support this assumption by extensive factual investigations. The mere fact of restriction does not necessarily mean that in the absence of restriction the volume would be greater or that prices would in the long run be lower. In addition, the absence of express restrictions of the cartel type may result in a much more obnoxious monopolistic situation."³ Again, "As far as the cartel introduces stability into its price and production policies, it may promote certainty instead of uncertainty, and as far as these policies modify the effects of the business cycle, the consumer may benefit."⁴ Thus Professor Hexner pleads for more light on the subject and more understanding before definite conclusions are reached concerning the effects of restrictionism as practiced by most international cartels.

Another of the most important aspects of the international cartel question is the political issue.

In this country the general attitude of the government toward monopolies is well settled as expressed in the Sherman anti-trust law. The political attitude is developing along the lines that international cartels are the handy men of war-mongers, especially when they are German. This attitude was expressed in a letter of September 6, 1944, from President Franklin D. Roosevelt to the then Secretary of State, Mr. Cordell Hull, as quoted by Professor Hexner in his appendix VI.⁵

3. Page 52.

4. Page 55.

5. Page 406. "Unfortunately, a number of foreign countries, particularly in continental Europe, do not possess such [an American] tradition against cartels. On the contrary, cartels have received encouragement from some of these governments. Especially is this true with respect to Germany. Moreover, cartels were utilized by the Nazi as governmental instrumentalities to achieve political ends. The history of the

One can hardly refuse to admit that international cartels are institutions of power, and naturally the State as the supreme institution of coercive action will make use of all other collective organizations when the existence of war makes strengthening of the State imperative. One can not deny that Farben and most all other international cartels were used by the Nazis in their struggle for power; but did they not use everything in Germany in like manner?

The fact that our supreme coercive institution—the State—decides to use any and all other institutions it can lay its hands on in the struggle for power—labor organizations, domestic banks and international cartels—does not necessarily condemn these institutions *per se*. But it does lay upon us the necessity of ascertaining the ease or reluctance with which the State took over effective control of the institutions—private or semi-private—which go to make up the social and business fabric of the country. Professor Hexner does make this separation and one is tempted to believe that the American view is a too hasty condemnation of the cartel without adequate information as to the resistance expressed to the constantly enlarging demands for power by the Nazi hierarchy.

Prior to the appeasement period (1934-39) little was known in America concerning international cartels. During that period and the war period succeeding it, American opinion has reacted violently against international cartels largely because of the political connection between the cartels and the German state. The big business men of Germany have been singled out for condemnation second only to that of Hitler. Is this a manifestation of the common impulse to find a whipping boy? Professor Hexner's plea is to study the international cartel on the basis of its economic merits and faults, realizing that the coercive power of the state is supreme over all private and semi-private institutions and that how it is to be used is essentially a political issue.

In the opinion of this reviewer, Professor Hexner's book is an even-tempered exposition of the cartel movement. The subject is treated *in extenso*, advantages and disadvantages are marshalled in full strength. Cautious criticism with a strong undercurrent of the inevitability of the cartel is the *leitmotiv*. It is good reading for a 1946 American. It is, essentially, a European treatment of a World Problem. Undoubtedly, the future will develop along lines giving due consideration to the European as well as the American attitude regarding the international cartel.

Grover A. J. Noetzel.†

use of the I. G. Farben trust by the Nazi reads like a detective story. Defeat of the Nazi armies will have to be followed by the eradication of these weapons of economic warfare. But more than elimination of the political activities of German cartels will be required. Cartel practices which restrict the free flow of goods in foreign commerce will have to be curbed. With international trade involved, this end can be achieved only through collaborative action by the United Nations."

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- INTERNATIONAL CARTELS. By Ervin Hexner. Chapel Hill: University of North Carolina Press. Pp. xiv, 555. \$6.00.
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- STUDYING LAW. By Arthur T. Vanderbilt, Editor. New York: Washington Square Publishing Corp. Pp. viii, 753. \$4.75.
- WAR CRIMES. By Manfred Lachs. London: Stevens and Sons, Ltd. Pp. viii, 108. 30s.