BOOK REVIEWS

APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS. By
Joseph Henry Smith, with an Introductory Essay by Julius Goebel, Jr.,

Dilettante speculation has given currency to the notion that the English
common law was not received by our several states until after the Revolu-
tion. According to this notion, there prevailed during the colonial period
"a layman law, a popular, equitable system," fostered by frontier condi-
tions. Such views have infected even serious legal scholars, who have
asserted that the common law in the colonial period "remained a subsidiay,
supplementary law," or who have attributed the advent of the common
law to the publication of Blackstone's Commentaries or to the genius of
James Kent. Thus, it has been stated that at the time of the Revolution
America was expectantly awaiting the introduction of a legal system and
that Blackstone's work "appeared with no rival to dispute its claims; Black-
stone mounted a waiting and empty throne." A similar point of view has
frequently been adopted by judges, with the result that rules and doctrines
have been siphoned out of the English reports without reference to the
colonial practice or aberrance which may have been made applicable by
constitutional reception provisions. Encysted in the tissue of judicial pre-
cedent, such views have ceased to provoke further investigation or analysis.

Lack of familiarity with legal fonds d'archives, and an unwillingness on
the part of historians to explore beyond the conventionalized boundaries of
their fields of specialization, have in the main been responsible for the
notions outlined above and account in large measure for their persistence.
In generalizing about colonial legal development, historians have not only
misprized the rich resources of legal records but they have ignored or mis-
understood the effects of the conditions of settlement, of economic growth
and change, and of the particularism prevailing in the several colonies.
Moreover, the effect on colonial law of English administrative policies has
hardly received the attention which it merits. So accustomed are historians
to think of our institutions as grown from the good seed of democracy that
they tend to ignore what is owed to the strain of the royal prerogative.
Only in recent years have a handful of legal scholars been able to begin to
clarify the nature of American law in the colonial period, and so far the
results of their work seem hardly to have percolated into standard historical
texts. Close study of the records of the colonial courts has brought out that
even at the enterprise stage of settlement much of the law was imitative of

1. Reinsch, The English Common Law in the American Colonies in 1 SELECT
ESSAY IN ANOLO-AMERICAN LEGAL HISTORY 367, 370 (1907).
REPORTS STATE BAR ASSN. OF WISCONSIN 474 (1919-21).
Colonies in 2 LAW, A CENTURY OF PROGRESS 404, 427 (1937).

(1265)
or responsive to English law, and that at the second stage, in the eighteenth century, the procedures and substantive rules of English law are clearly reflected, especially in such colonies as New York and Pennsylvania, where practice was on a high professional level. In the face of such evidence, it is impossible to give support to an hypothesis which is based on misconceptions growing out of inconclusive and unexamined data.

Preliminary problems of definition beset attempts to delineate the character of American law in the colonial period. Chief among them is the question of what is meant by the expression "the common law." Considerable confusion has been created by views expressed by the colonists who, on the eve of the Revolution, asserted that the basic policies of the common law were their birthright and who identified therewith specific rights claimed against the crown. At a later time, Alexander Hamilton argued in People v. Croswell that "the common law is natural law and natural reason applied to the state and condition of society." Even Kent defined the common law as including "those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." More recent judicial utterances suggesting the existence of a "common law" apart from decided cases, or referring to the "common law" of particular jurisdictions, have not tended to clarify the question. To lawyers of the 17th and 18th centuries, however, the term "common law" had a clear and definite meaning. It was the custom of the English central courts, and a recognition of that fact is basic to an understanding of the entire reception problem. A second fact of basic importance relates to a matter of which the significance is frequently misunderstood. The royal patents and charters describing the terms under which the colonies were to be settled customarily contained a provision that no laws should be made "contrary to the laws of England," or a phrase of equivalent import. Although the phrase gives rise to certain difficult questions, its significance in certain directions is plain. Despite occasional assertions to the contrary, it seems entirely clear that no wholesale introduction of the common law was intended by such provisions. In the first place, it should be emphasized that the expression "the laws of England" had a much wider signification than if the expression "common law" had been employed, for in the seventeenth century England was a honeycomb of diversified jurisdictions in which the custom of manorial, borough and franchise courts existed side by side with king's law, i.e., the common law administered by the central courts. Taken in its largest sense, therefore, the expression "laws of England" included both the local and general usages of the various courts, and it also included acts of parliament. However, lest it be supposed that the crown intended a general introduction of

5. 3 Johns. Cas. App. 337, 344 (N.Y. 1804).
6. 1 Comm. *471.
7. References may be found in Pope, The English Common Law in the United States, 24 Harv. L. Rev. 6 (1910).
English law and statutes, attention must be drawn to an aspect of royal policy of which the significance has too often been missed. In 1608 the famous case of the Postnati, otherwise known as Calvin's Case, was decided. Argued by all the great mastiffs of the law, the case became a landmark in fixing the future constitutional status of the plantations. There it was laid down, inter alia, that once the law of England had been introduced into a conquered or pagan country it could not be altered except by act of parliament. Since the charter provisions above referred to constituted a declaration of royal policy, they could hardly be taken to direct an outright introduction of the law of England which would have divested the crown of its prerogative. Provisions in commissions to governors respecting the law-making power, and subsequent decisions rendered in the English courts, substantiate this position. Calvin's Case provided a contemporary judicial carte blanche with respect to the law and government of new lands, subject to the caveat that the power of alteration passed to parliament once the law of England was introduced. The charter provision may therefore properly be regarded as setting a standard for colonial action, particularly in the field of legislation, which enabled the crown to control unpalatable innovation.

The attitudes of the crown and of the English courts must not, however, lead the unwary to the conclusion that the colonists were prohibited by this policy from introducing English procedures and rules of law. On the contrary, the position of the crown was to promote the adoption of English law on all points which did not infringe upon the prerogative. Within the standards set by the charters, it was not only possible but entirely natural that the colonists should bring with them such parts of English law as they were familiar with, just as they brought with them forms of architecture, religious doctrine and methods of farming. Legal records of the seventeenth century reflect not only local customs of the borough and manorial courts in the districts from which the colonists came but also those doctrines of the central courts with which they had become familiar. Their resources, in the beginning, were largely their recollections, and these laws and customs suffered a sea-change in the course of transplantation. Nevertheless, the adaptation seems to have been intended to be an accommodation with the laws of England. The precise amount of the common law ingredient introduced at the start in particular colonies depended upon a number of factors, such as the social strata from which the colonists were drawn, the accidents of settlement, and the nature of their ties with England. With the passage of time and the advent of English law books, the common law ingredient was very considerably enlarged, and in the eighteenth century there can be observed a continuous and progressive reception of the doctrines and procedures of the English central courts, especially in the superior courts of the colonies. Goebel's detailed study of criminal law in colonial New York amply bears out this statement. The
records there examined reveal a very complete introduction not only of common law forms, indictments and writs, but of the substantive rules as well. A similar reception took place in Pennsylvania and other colonies.

If intended compliance with charter provisions explains in some measure the initial introduction of practices imitative of various parts of the laws of England, it does not explain the acceleration of the process whereby precise procedures and substantive rules of the common law courts were adopted in the period following the first decades of settlement. A number of factors, including political and economic developments, colonial attitudes and English administrative policies, explain that further development. Among the most important of those factors was the policy of the crown which, in the period following the Navigation Acts, began systematically to supervise the law of the colonies through review of colonial legislation and appeals from colonial courts. It is with this policy, and more particularly with the rôle of the Privy Council in cultivating acceptance of the English common law and statutes, that Mr. Smith's *Appeals from the Plantations* is principally concerned.

The foregoing paragraphs have been written to afford a better indication of the importance of the author's general subject than the title of the book might otherwise suggest. Not only is the subject of basic importance to an understanding of the development of American law and institutions, but it is one which has never been so comprehensively treated or dealt with in so detailed and scholarly a fashion. For the first time, a successful effort has been made to integrate the mass of manuscript records on both sides of the Atlantic. The author has a broad familiarity with the secondary historical works as well as with the primary sources, and his conclusions have been tested by exhaustive research in colonial and British archives. The fact that his scholarly equipment includes a sound and apparently comprehensive knowledge of English law and procedure has enabled him not only to clear up basic misconceptions perpetrated by the uninitiated, but to deal authoritatively and definitively with some of the most important problems relating to colonial legal development. Those problems are not dealt with from the standpoint of the American colonies alone; they are treated from the broader viewpoint of English policy as it related to all the plantations and overseas dominions, including the West Indies, Gibraltar, Minorca and East India. The general scope and importance of the book accordingly merits a more lengthy discussion than might otherwise seem appropriate in a book review.

Of the several important topics dealt with in the book, only a few can be singled out for detailed comment. Material relating to the rise of appellate jurisdiction in the Privy Council commands special attention because the author has elaborated a theory that the appeal was a projection of the mediaeval practice of hearing causes from the Channel Islands.

Section 5 of chapter 10 of statute 16 Charles I provides that:

"Neither his Majesty, nor his Privy Council, have or ought to have any jurisdiction, power or authority, by English bill, petition,
articles, libel or any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of the lands, dominions, hereditaments, goods or chattels of any of the subjects of this King-

dom; but that the same ought to be tried and determined in the ordi-
nary courts of justice, and by the ordinary course of the law.”

Although this statute would seem on its face to preclude wide-spread exercise of appellate jurisdiction by the Privy Council, it should be noted in the first place that the statute did not affect the Crown’s large administrative powers over foreign trade and consequently that there was precedent for Council directives in this field. In the second place, it should be observed that the statute refers to the “ordinary course of law.” At the time the statute was enacted, the “ordinary course of law” embraced appeals to the King and Council from the courts of Jersey and Guernsey, two ancient dominions of the Crown. As a result of careful study of the appellate procedure in the Channel Islands, Mr. Smith has been able to demonstrate the creative force of that precedent upon the general structure of conciliar appellate procedure. It appears that the force of the precedent impressed itself in the Restoration period upon lawyers who used it as a legal basis for conciliar power in developing a colonial empire in America and elsewhere.

The Privy Council’s extensive authority over the administration of justice in the American Colonies appears to have been the result of slow accretion. In the early seventeenth century no endeavor was made to reserve an appeal to the King for the reason that such appeals were not a customary element in the trading company charters which were the precursors of the colonization patent. Further, as a practical matter, appellate review was a judicial luxury that few litigants in the plantations could afford. Relief from the judicial acts of colonial governments could be obtained in many instances by application to the directing body of a company or to the individual patentee in England. Several episodes, notably the Child Remonstrance in Massachusetts Bay in 1646, brought to the fore the desirability of having established crown agencies of colonial administration, and from time to time the Privy Council appears to have interfered in colonial matters in the first half-century of settlement. However, no recognizable appellate system to supervise colonial administration emerged from such efforts. Not until 1664, in the patent given to the Duke of York, was an express provision for direct appeals to the King reserved. With the Restoration there appeared an increased awareness on the part of English officials of the importance of colonial administration. The enforcement of government policy involved in the Navigation Acts played an important part in the development of this attitude. Mr. Smith has examined at length the problem of how appellate jurisdiction over the chartered colonies was asserted and how the companion policy with regard to the regulation of appeals from the royal provinces was launched. In the seventeenth century two bodies were primarily concerned with colonial
appeals—the Council Board and the Committee of Trade and Plantations. The work of those bodies was supplemented by means of commissions and instructions. However, no systematic policy seems to have been pursued in this period. The real significance of the seventeenth century developments lay in the foundations which it provided for building the machinery for appellate review in the next century.

The latter part of the seventeenth century witnessed an intensification of mercantilistic and imperialistic trends in England. Discontent among the trading classes had been stimulated by the heavy losses sustained by English trade as a result of hostilities with France. In order to meet demands of the merchant classes and at the same time to forestall parliamentary action, the entire supervision of colonial administration was reorganized by the crown in 1696. In that year, by Order of Council, were created, first, the Board of Trade, which was given important supervisory powers over colonial courts and legislation, and, second, the Lords’ Committee of the Privy Council, which was charged with the hearing of appeals from colonial courts. Despite statements of such historians as Dickerson and Washburne to the contrary, the Board of Trade had no power over judicial appeals; in every instance in which application was made to it to exercise judicial power, jurisdiction was declined. However, its important inquisitorial duties enabled it to report on ancillary questions in the appellate field to the Privy Council. The Board of Trade lacked executive authority in important matters, and its decisions had to be given force by the Privy Council. By the same token, the Lords’ Committee, after hearing an appeal, made recommendations to the Privy Council, whose Order was required to give it effect.

Mr. Smith is concerned only incidentally with the administrative functions of the Board of Trade. His chief interest, as already stated, is in the rôle of the Privy Council in extending English law in the eighteenth century, more particularly its rôle in developing, through appellate review and supervision of the Board of Trade, certain basic problems of what may be termed public law. However, he does not slight the ancillary problems of appeal regulation, procedure, and the scope of review. The basic declarations of policy were the instructions to colonial governors. In addition, regulations were provided by proprietary instructions, by autonomous rules of court and by colonial enactment. In essence, the regulations provided for appeals in civil causes under circumstances which would have justified a writ of error in the common law courts. However, certain minimal monetary requirements, ranging from £100 to £500, were laid down. In a few colonies, e.g., Jamaica and Bermuda, appeals were allowed in misdemeanors when the fine exceeded £200. Mr. Smith’s treatment of procedure makes plain the precise course of a colonial appeal from the presentation of the petition through hearing, argument and deliberation. Based on detailed study of hundreds of cases, his discussion of that matter is definitive. In one respect it is subject to criticism in that it requires reference to a footnote to discover one of the essential
aspects of an appeal, namely, that it was addressed to the crown and not to the Privy Council or to the Lords' Committee. That fact explains the advisory nature of the Committee report, for the prerogative of adjudication resided in the crown. The Order which issued from the Council resembled a chancery decree in form and flexibility, but there was a marked practical difference between them in that nothing so effective as the chancery *in personam* decree was available to implement the Order. Consequently, there was considerable room for colonial recalcitrance to conciliar determinations. A classic example of such recalcitrance is provided by the case of *Leighton v. Frost* in Massachusetts.

Fruitful as the records are on matters of regulation and procedural detail, it appears that they have little to yield with respect to substantive private law. Jurisdiction of the Privy Council was largely exercised in *ad hoc* fashion from appeal to appeal; in form and content the Orders had little influence as precedents for colonial courts. However, the records do provide important evidence of the extent to which common law procedures and rules had been adopted by the colonies. Mr. Smith's extensive examination of briefs in appellate proceedings shows a consistent reliance almost exclusively upon English cases and form books which were close adaptations of English exemplars. The ever-present possibility of an appeal from a colonial court appears to have been partially responsible for the increased absorption of the common law. Conformity to English standards was also undoubtedly fostered by the general viewpoint of the Lords' Committee, which included such important men as Holt, Parker, Hardwicke and Mansfield among its regular members. In view of the Committee personnel, it is hard to accept the view occasionally advanced that the Privy Council reviewed the judgments of colonial courts by the light of natural law, unhampered by common law technicalities.

To Mr. Smith the real significance of the work of the Privy Council was, first, in the extension and restriction of acts of parliament, and, second, in interpreting, confirming and avoiding colonial acts. With respect to the first, it is customarily said that acts of parliament made prior to settlement were in force in the colonies, whereas those made after settlement extended only if the plantations were expressly named. This generalization is based upon certain rules enunciated by the English courts and acted upon by crown officers, but it is subject to a number of qualifications, the most important of which results from doctrines elaborated in *Calvin's Case*. That case, it will be recalled, had the effect of limiting the charter provisions respecting laws not contrary to the laws of England to a mere standard for colonial behavior. The intendment of the holding was that the crown will not diminish its prerogative by an outright introduction of the law of England. Since judicial handling of parliamentary acts presumed an extant common law base with reference to which they were to be construed, it followed that where the common law did not obtain, enactments made with reference thereto were not applicable, since

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standing alone they would be meaningless. The consequence of these doctrines was that pre-settlement acts were regarded as having force only as adopted locally, and even then such adoption was subject to control by the prerogative. For example, in *Dunbar v. Webb* (1753), it was determined that the Statute of Charitable Uses (43 Eliz. c. 4) did not extend to Antigua, and in 1762 the Council, upon Lord Mansfield's report, held in *Rickards v. Hudson* that the bankruptcy statutes did not bind the plantations. The significance of these doctrines lay in the fact that, in conjunction with recognized distinctions between statutes general and statutes particular, they furnished the crown with a basis for denying to the colonists the benefit of acts which ran counter to English trade and shipping interests. To the extent that the colonists regarded such acts as declaratory of basic common law "rights" or constitutional guarantees, a declaration of non-applicability provided a source of friction in the constitutional struggle which culminated in the Revolution. It is important to note, however, that, unless a case raised points which directly put in issue the extension of an act of parliament, such statutes were constantly cited in colonial lawyers' briefs, together with English judicial opinions, as the law prevailing in a particular jurisdiction.

With respect to what in Mr. Smith's view is the second significant aspect of the Privy Council's work, namely, in the field of judicial and legislative review of colonial acts, it is necessary to make certain preliminary distinctions which many historians have failed to note. Colonial acts were subject to several processes of review, two of which are especially pertinent. In point of sheer bulk, the most important was the process of legislative review by the Board of Trade, which recommended to the Privy Council confirmation, rejection (termed "disallowance") or nullification of colonial acts. Acts which were disallowed became inoperative upon notice to the enacting colony; acts which were nullified were declared void ab initio. The second type of review occurred in the exercise of the appellate jurisdiction by the Privy Council. No mere disallowance was of course possible in the course of a judicial proceeding, so that an unfavorable determination was a declaration of nullity. With these distinctions in mind, Mr. Smith turns to the general subject of judicial and legislative review. His discussion of this topic is one of the most important in the book because of his exhaustive treatment of such celebrated cases as *Winthrop v. Lechmere, Phillips v. Savage, Clark v. Tousey*, and the *Parsons' Cause*. Although it has generally been supposed that no phase of conciliar activity was fraught with greater future significance

10. P. 487.
11. P. 490.
12. Despite this holding, the case is of first importance in the development of conflict of laws in bankruptcy, for Lord Mansfield went on to say that where an assignment had been made in England, it would include all personality (but not realty) wherever located. A creditor abroad who gained priority would not be ousted by the mere assignment under the bankruptcy acts. See Nadelmann, *A Report on The Montevideo Conference and Creditor Discrimination*, 100 U. of Pa. L. Rev. 994, 996 (1952).
than that which had to do with the judicial testing and rejection of colonial statutes, Mr. Smith suggests that the outlines of the problem are far less sharp and considerably more confused than historians have heretofore concluded. *Winthrop v. Lechmere*, he says, is the only case which can be pointed to in which a colonial act was specifically declared null and void *ab initio* upon judicial review by the Privy Council. Neither the implications of judicial review, nor the dimensions of the general problem of repugnancy, nor such subsidiary questions as to whether the repugnancy to the laws of England had reference to common or statute law or to the common law as altered, enlarged or explained by statute, were grasped or understood in either England or the colonies. There was little or no theoretical exploration of the two basic factors—the crown's power of control over colonial legislation, or the status of this legislation in relation to English law. Mediaeval conceptions perpetrated by the decisions of the English courts were of controlling importance. As Mr. Smith says,13 "Beyond describing the lawmaking of provincial assemblies as inferior legislation, in the nature of corporate by-laws, and beyond some vague intimations respecting the supremacy of the crown, little progress in juristic clarification was made." To Mr. Smith the importance of *Winthrop v. Lechmere* lay in the fact that it "remained a specter that was never laid." 14 Apparently he has in mind the minatory effect of the decision and means to imply, as to its significance, that fear of further declarations of nullity were partly responsible for bringing about further conformity with English law.

In assessing generally the work of the Privy Council, modern preconceptions with respect to appellate power and judicial review must be set aside. In eighteenth-century England, appellate review was still a matter of particularization dependent upon the nature of the writ and record by which the proceeding was brought before the superior tribunal. Traditionally, the basis of review power was the conception that mistakes of law in inferior jurisdictions must be corrected in the superior court. Implicit in this notion of superintendence was also a justification for assuming political responsibilities not properly judicial. These conceptions permeate the work of the Privy Council. More precisely, two principles can be seen in the exercise of its appeal jurisdiction: the maintenance of the royal prerogative overseas and the maintenance of the trade policies of the English merchant class. Mr. Smith observes pertinently that when neither of those considerations was involved in an appeal, the judicial superintendence exercised by the Privy Council was no different from that exercised by the highest court of the realm. Indeed, it seems clear that the Privy Council must be accorded the status of a court. The most important single criticism which can be made of the Council's approach to the problem of supervising by way of appeal the administration of law in the dominions is that the premise upon which it proceeded was essentially

mediaeval. Mr. Smith notes\textsuperscript{16} that "the crown's interests as they were seen at Whitehall could not be put second to anything except what was specifically enacted for these dominions by the King in Parliament." Mediaeval doctrines with respect to the crown's prerogative to determine the law of dominions acquired by conquest were never shaken. Consequently, no real effort was made to acquire an understanding of colonial economic and social conditions or of colonial opinion. By the same token, in the case to case settlement of disputes there was no adherence to deliberately evolved policies, and no formulation of doctrine in the piecemeal declarations of nullity upon judicial and legislative review. No consistent body of learning was developed which could be utilized in later times in connection with analogous problems relating to the powers of modern colonial legislatures. One result of this lack of policy was that the colonial courts in America were not too hampered in their growth and attained considerable maturity before they were severed from the jurisdiction of the Council.

Only a few of the many matters dealt with in Mr. Smith's monumental work have been discussed in the course of this review. Brief reference should be made, however, to his careful treatment of appeals from royal commissions, Vice-Admiralty courts, and courts of chancery, as well as to his discussion of review of criminal causes. As a reference work for these and other topics the book is indispensable. Moreover, throughout the book, Mr. Smith has given considerable and welcome attention to the state of colonial opinion, not only as it related to particular controversies but as it related to the policies of the crown and the royal governors. This material helps to put into perspective the legal and administrative policies by emphasizing some of the human elements which affected the development of those policies. It is particularly interesting to note the legalistic attitude of the colonists, and it could be wished that Mr. Smith had given some considered attention to this matter. In part the explanation of that attitude is that the political life of the colonists branched off from that of England in the seventeenth century, when political questions were approached from a dominantly legalistic angle. The late John Dickinson has observed that the colonists' legalistic turn of thought was emphasized by the fact that the powers of the colonial governments were derived from charters and deeds, and "questions of politics were thus inevitably questions of the law of ultra vires as well."\textsuperscript{16}

Some comment must be made both by way of criticism and by way of warning, on a feature of the book which detracts in some small measure from its general excellence. The breadth of coverage and the detail in which the subject matter has been presented have resulted in an unevenness of style and treatment which is distracting and at times confusing. Many a reader will be lost as he is forced to trace his way through the minutiae of case after case without the guidance of an occasional signpost

\textsuperscript{15.} P. 657.  
\textsuperscript{16.} DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 95, n. 49 (1927).
of generalization. No doubt the author's commendable desire to overlook no pertinent fact and to cite chapter and verse for every conclusion accounts for his manner of presentation. But much of the detail is wearisome, and there are many instances of lack of organization. For example, the author interrupts midway the thread of his discussion of procedure before the Privy Council to dilate upon Channel Island appeals. The book has plainly not been written for the uninitiated, and it is feared that its important conclusions may not reach those who most need to study them. The non-lawyer will find it assumed, for example, that he is familiar with error procedure, general and special verdicts, interlocutory motions and _ex parte_ hearings. However, intelligent use of the excellent index will make the road easier for those who might otherwise be discouraged by the technicalities of legal procedure and proof.

In conclusion, it is important to refer to the sixty-page introductory essay, "The Matrix of Empire," by Professor Goebel. In this essay, Professor Goebel has sought to trace the beginnings of the British overseas empire in the thirteenth and fourteenth centuries. Space precludes extended discussion of his valuable contribution, but fortunately the known excellence and perceptiveness of his scholarship require no comment. The particular value of the essay is in its emphasis on the mediaeval conceptions which permeated crown doctrines in the seventeenth and eighteenth centuries as a result of the decision in _Calvin's Case_. An appreciation of the mediaeval precedents helps to explain the narrow and limited basis of English official action _vis à vis_ the colonies. Too many historians, intent on partitioning history into ages, eras and periods, have failed to understand the extent to which the bounds of the past continually overrun those of the present. It may not be inappropriate to remind them of the words of an English poet who wrote six centuries ago:

> "And out of olde bokes, in good feith,  
> Cometh al this newe science that men lere."

__George L. Haskins†__


Mortimer Adler once said, "No casebook is a great book." I think Professor Schwartz's new casebook might well qualify as an exception to that observation.

Here is a casebook that gives the student the clearest insight into the basic issues facing our oft-discussed and infrequently understood system of "free enterprise" that I have yet come across. The trade regulation

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17. P. 282.  
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1. I should note at the outset that I have taught a course in trade regulation this past semester, using Professor Schwartz's casebook.
course\(^2\) that will be taught through this book is not the one that has been traditionally taught; but it is, I believe, precisely the one that needs to be taught.

Professor Schwartz has first of all excluded the materials on unfair trade practices. There has been a growing feeling among many law teachers that the combination of anti-trust and unfair competition in our curricula and casebooks has been a misjoinder.\(^3\) Problems of allocation of power in a competitive economy are not the same as those concerning misrepresentation of merchandise, appropriation of a competitor's goodwill and similar abuses of over-competitive entrepreneurs.\(^4\) The former is a question of community structure, the latter a sort of police problem with overtones of tort and equity.\(^5\)

The second and most important aspect of this casebook lies not in what is excluded but in what is integrated along with the anti-trust cases. Professor Schwartz believes that the very perception which requires anti-trust laws to be segregated for study from unfair competition seems also to require that they be studied together with the sanctioned restrictions on freedom of trade. Thus, the laws pressing for decentralization of power are studied along with those favoring centralization. The anti-monopoly principles of Messrs. Sherman, Clayton and Celler are considered with the monopoly principles of private patents and public utilities. The practices prescribed by the National Recovery Act are compared with the practices proscribed to trade associations, and the anti-price fixing pronouncements of the courts are presented along with the pro-price fixing pronouncements of "fair trade," agricultural marketing agreements and government stabilization programs.\(^6\) Professor Schwartz believes that only through this kind of integrated and comparative study can the student deal comprehendingly with the basic economic, legal and political issues of our troubled competitive system. Stated more colloquially, to know what the forest looks like, it is not enough to study a few trees.

\(^2\) The course passes by a variety of aliases. "Trade Regulation" and "Government Regulation of Business" are two of the more frequently used titles.

\(^3\) E.g., Rahl, Book Review, 3 J. LEGAL ED. 654 (1951); Schwartz, Book Review, 58 YALE L.J. 198 (1948); Redden, Book Review, 3 J. LEGAL ED. 651 (1951). For a contrary view see Levy, Book Review, 1 J. LEGAL ED. 139 (1948).


\(^5\) There may of course be an overlap. E.g., as legal restrictions on the abuse of patents tighten it may be expected that there will be an increased use of trade marks. See pp. 247-248 of the casebook.

\(^6\) The scope of the book can be seen from a listing of the chapter titles. The casebook is divided into two parts. Part I deals with the Control of the Right To Do Business and includes chapters on: (1) Agreements Not to Compete; (2) Elimination of Competitors by Purchase (Merger, Consolidation, Stock Control); (3) Elimination of Competitors by Control of Access to Markets or Materials; (4) Exclusion From Trade by Patent or Copyright Monopoly; (5) Monopolies Granted by the State in the Exercise of the "Police Power"—Franchises and Certificates of Public Convenience and Necessity. Part II deals with Control of Prices and includes chapters on: (6) Price Control by Private Agreement; (7) Trade Associations and Prices; (8) Resale Price Control by Manufacturer or Distributor; (9) Price Control Under Patents and Copyrights; (10) Economic Controls by Labor Unions; (11) Public Utility Rate Regulation; (12) Discrimination in Rates, Prices and Services; (13) Agricultural Controls; (14) Controls in a Defense Economy; (15) Government Enterprise.
There are of course formidable difficulties and dangers in attempting so broad a synthesis.\(^7\) Whole sections of important material must be compressed, and materials selected which permit far more rapid coverage than do cases. There is the danger of ignoring the lawyer's skills and making the casebook "a discourse on political economy";\(^8\) and there is the danger of superficiality—of seeing the forest, perhaps, but not realizing that it consists of trees.

Has Professor Schwartz succeeded in overcoming these obstacles? I think he has; for while he has had to compress some of the traditional areas, he has by no means been superficial, nor has he ignored the relevant skills and techniques. For example, the chapter dealing with elimination of competitors by purchase (merger, consolidation, stock control) is treated in 59 pages. This chapter is divided into two sections: merger under the anti-trust laws and merger under the regulatory statutes. The first of these sections begins with the *United States Steel* case,\(^9\) which I have found to be more than ample to raise the various factors that courts seem to have considered in merger cases: size, position in the industry, intent to monopolize, indulgence in predatory practices, existence of competition after the merger, potential combination, form of combination and so on. Other casebooks have given the problem a more extended treatment, including at least excerpts from such cases as the *Sugar Trust* case,\(^10\) *Northern Securities*,\(^11\) Oil and Tobacco trusts,\(^12\) or the *Terminal* cases.\(^13\) I do not see that those cases raise any significant points that cannot be as well made in a discussion of the *Steel* case.

In examining the frequently urged defense that mergers are necessary for purposes of efficiency, Professor Schwartz includes an excerpt from the TNEC Monograph concerning the relative efficiency of large, medium sized and small business.\(^14\) Should the latter tables not prove sufficiently iconoclastic, the student is presented with FTC tables indicating the degree of concentration of productive facilities,\(^15\) followed by the provisions of Section 7 of the Clayton Act as amended by the 1950 Anti-Merger Act, and a series of questions designed to make the student painstakingly and critically examine the language of Section 7 as well as the policy behind it. The judicial technique of handling such phrases as "substantially to lessen competition" is then studied through the medium of *International Shoe Company v. Federal Trade Commission*.\(^16\) Finally, there is an excerpt from the

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8. Ibid.
15. The Concentration of Productive Facilities, 1947 (Federal Trade Commis-
    sion, 1949).
TNEC recommendations regarding corporate mergers, and the question is raised whether the enactment of these recommendations would further tighten the law against mergers.

On merger under the regulatory statutes the student is again asked questions that require critical statutory analysis and policy probing: Why should it be necessary to exempt from the anti-trust laws transactions under Section 5 of the Interstate Commerce Act? Could a transaction meet the requirements of Section 5 and yet violate the Sherman or Clayton Acts? Is it in the public interest to support weak lines from excessive rates and earnings of strong lines? Would the public interest be better served by direct subsidy from the public treasury?

But policy questions are not considered alone. The student is presented with the McLean case giving an insight into the significance of matters such as burden of proof, the form of administrative findings, the weight a court will give to such findings and the problem of what happens when a judge and agency disagree on which of conflicting "national" policies should govern a particular situation.

The casebook next sets out the merger control provisions of the Civil Aeronautics Act of 1938, followed by a case illustrating a CAB approach to merger quite different from the ICC approach. The student is given the opportunity to compare the phraseology of the Anti-Merger, Interstate Commerce and Civil Aeronautics Acts to decide which provisions are more or less favorable to amalgamation and why. Finally, Section 11 of the Public Utility Holding Company is presented as the method designed to meet uneconomic concentration of control of public utility companies, the obvious point for discussion being whether a similar solution could be worked out in other fields.

Can the above treatment, despite its compression, be considered as superficial or a gloss of the relevant techniques and skills? I hardly think so. Indeed, my one criticism of the casebook is not that it compresses too much but that it does not do so quite enough. The course will normally be offered in three hours. Twelve hundred pages for a three hour course requires too much student enterprise for a competitive curriculum. The tendency will be for teachers to omit one or two chapters as

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19. Schwartz's questions here are a fine example of his use of socratic questioning to bring out the real points at issue. Thus, he asks the student whether the McLean majority and dissenters differ as to: (1) the finality to be accorded administrative determination of fact; (2) the authority of the Interstate Commerce Commission to approve a merger which would violate the Sherman Act, but for the exemption in Sec. 5(11); (3) whether the burden of proof on the issue of public interest is on the proponent of the merger; (4) whether the merger is in the public interest; (5) the standard of legality by which the Commission shall judge the public interest. What preliminary finding, deemed essential by the dissenters, does the majority refuse to require the Commission to make as a pre-requisite to approval of mergers which impair competition?
21. Comparative statutory analysis is stressed throughout the casebook.
a whole rather than eliminate material from within chapters. This would detract from the broad integration intended. I think that in a second edition some two hundred pages might be eliminated without any serious detriment from the scope of his synthesis.  

Professor Schwartz is aware of the necessity of bringing the relevant social science materials (in this case economics and politics) to bear on the case materials in the course of the classroom discussion. The problems here lie, first, in the difficulty the student has in handling concepts and jargon foreign to his training, and second, in determining the appropriate uses for the available economic materials.  

The simplification problem has been handled by selecting cases which themselves contain fairly lucid economic analysis; by using non-case materials which, while pointing up the economic and political considerations, are written with a minimum of technical economic language; and by simple and carefully worded questions which raise the economic considerations that he deems relevant.

22. There are some other minor points relating to rearrangement of some of the material; e.g., the Robinson-Patman materials might have been fitted into better focus as a chapter following resale price control. But such rearrangement can be easily made to suit the preference of the teacher.

23. To offer a suggestion or two: In the chapter dealing with discrimination in rates, prices and services, Schwartz presents both the Robinson-Patman cases and the analogous Interstate Commerce Commission cases. I think the comparative lesson here can be taught as well without such extended excerpts from the ICC cases. A few other cases, e.g., Oliver Bros. v. Federal Trade Commission, 102 F.2d 763 (4th Cir. 1939), and Frost v. Corporation Commission of Oklahoma, 278 U.S. 515 (1929), might have been condensed without serious loss. Even if the course were offered in four hours the suggested condensation might be helpful, leaving the additional time to concentrate more fully on the economic issues Schwartz raises in his questions.


25. E.g., Valuation of San Pedro, Los Angeles and Salt Lake Railroad, 25 ICC 463 (1923) (dissent); Potts v. Coe, 145 F.2d 27 (D.C. Cir. 1944); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).


27. Schwartz's use of the socratic method of questioning to raise economic issues is most effective. For example, after the Cement case, 333 U.S. 683 (1948), Schwartz asks such questions as: "Why should standardization of the product be thought to make competition unsuitable to the cement industry? Does the belief of the industry that competition is unsuitable to trade in a standardized product mean (a) that price competition is likely to be too rigorous (cutthroat) where individual sellers cannot claim a quality superiority, so that measures must be taken to restrain the rivalry, or (b) that trade rivals selling a standard product will have no incentive to cut prices, since they know that their competitors will have to match the price immediately, so that it is useless to rely on competitive controls. In the latter case must prices be administered either by the industry or by the government?" (P. 476). After the A & P case (173 F.2d 79 (7th Cir. 1949)) he asks: "If A & P uses its mass buying power to obtain special discounts from suppliers, will those suppliers be compelled to load a disproportionate share of their costs on independent grocers who buy from them? Will the suppliers be able to do that if they are in competition with other suppliers? . . . Where a wholesaler is also engaged in retailing, what benefits do competing retailers get from a requirement that the wholesaler charge its own retail stores the same price as it charges the other retailers?" These few samples cannot, of course, do justice to the excellence of Schwartz's questions.
In dealing with the second problem, Professor Schwartz has stressed three appropriate uses of economic materials. One use is to clarify the economic concepts behind the theory upon which suit is brought or defense offered. For example, the anti-trust agencies are now attempting to cope with a type of economic power that is derived not from domination of a particular market and a particular product but from bigness and multiplicity of market interests. This type of economic power does not seem to fit into the traditional legal concept of monopoly. But is it necessary that it should? Should not the traditional legal concept change to accommodate new understandings of the nature of economic power and its abuses? 28

A second use is to help understand which patterns of competition are the desiderata of our system of free enterprise and to decide whether we are employing the means best suited to achieve those patterns. For example, to the extent that the Robinson-Patman Act prevents the exercise of economic power through which smaller enterprises may be eliminated regardless of their efficiency, the Act is encouraging what may be a desirable pattern of competition. But insofar as it results in rigidity of price structure and discourages price lowering among sellers, it reveals that the wrong means may have been chosen to effect the desired end.

The third major use of economic materials in the casebook is to clarify some of the marketing relationships involved in trade regulation problems. An understanding of such matters as cost-price relationships, distributive relationships, price leadership and similar market data, seems basic to any understanding of the evidentiary material. 29

It should be emphasized that this type of course does not seek to develop specialists in the field. Professor Schwartz's casebook is based on the "premise" that "broader integrations rather than more and narrower specialties are the needs of today's law students." 30 I agree wholeheartedly. I fail to find a proper perspective in having students take a specialized course in one particular branch of trade regulation while whole areas of vital import are ignored. 31 If the lawyers are to continue to play leading roles in the formulation of our system of free enterprise and economic organization, should it not be obligatory for law schools to give their students some insights into that system? Is it not time for Professor Schwartz's "premise" to become axiomatic?

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28. See Edwards, The Place of Economics in the Course on Trade Regulation, 1 Jour. of Leg. Ed. 1, 6-12 (1948).
29. Id. at p. 8-9.
31. That does not mean that the Schwartz-type course cannot be followed by specialized seminars in public utilities, the trial of technological issues, particular industries and so on. I should like to see a five hour course, three hours of which is devoted to Schwartz's casebook, followed by two hours in which a particular industry was studied in detail. For the latter two hours, use might be made of the excellent series of Industry Studies published under the auspices of the Committee on Auxiliary Business and Social Materials of the Association of American Law Schools. E.g., Ralph S. Brown, Jr., Readings on the Petroleum Industry (mimeo. ed. 1950); Norman Bursler, The DuPont Industrial Group (mimeo. ed. 1950).
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