
With his characteristic clarity and comprehensiveness Professor Chafee has again illuminated numerous aspects of freedom of expression. The book suffers, however, from the circumstances of its creation. Written as a Report from the Commission on Freedom of the Press, it is both too detailed and too brief. Since other such reports dealing with the radio and the motion picture have either been issued or are in process, Professor Chafee covers these subjects too summarily. On the other hand, he devotes over a hundred pages each to the law of libel and to the Sherman Act and nearly as many to a description of how the Post Office deals with objectionable material. And since his aim here is consideration of the normal rather than the critical situation, he touches on sedition hardly at all.

It is probably the circumstances of the book’s genesis which account also for the lengthy quotations from views of individual but unnamed members of the Commission. On many occasions their opinions are offered in dialogue form with the names of the departed great substituted for their own. It is seldom that what these persons state adds value to the book. Certainly the form in which their opinions are presented makes the book more difficult to read.

Despite these minor defects the work constitutes a very valuable contribution to the subject. From three quite distinct points of view it canvasses the relation of government to the media of mass communications: the role of government as a restrictive force, as affirmative encourager and as active participant. Professor Chafee has provocative things to say about the most common restrictive techniques, such as the laws against libel, obscenity and sedition, as well as about prosecutions for contempt. He discusses at considerable length various proposals for legislation which would protect groups from libelous attack but opposes their adoption, pointing out both the difficulties of administration and the danger of laws of this kind as potential boomerangs: "The remedy for bad discussion is not punishment, but plenty of good discussion."

Professor Chafee thinks that ordinary libel laws might be improved by the adoption, in modified form, of a French practice under which newspapers and periodicals making statements about individuals can be compelled to publish replies. This is a revolutionary proposal in American law because such a practice would not be confined to libelous or even to untrue statements. While the practice might make editors more careful, it might also tend to a great diminution of all personal references, even of complimentary ones, lest these be used as sounding boards for the self-advertisement so common in our time. That diminution may, of course, constitute an improvement in journalism but it is hardly the end aimed at in Professor Chafee’s suggestion.

The section on obscenity praises Mr. Huntington Cairns, who censors the material which passes through the Customs. On the other hand, Professor Chafee expresses great dissatisfaction with the work of a like nature done by the Post Office. He lists eleven problems which have arisen in connection with its activities and he concludes that in all ob-
scenity cases Congress should afford judicial review. For he believes that judges are better guardians of civil liberties than officials, and that the very existence of such review would improve the quality of the censor's job.

One important problem connected with Post Office censorship is but slightly dealt with. While Professor Chafee emphatically asserts that the postal power is subject to the First Amendment, he considers it a "pipe dream" to suppose that all postal censorship is unconstitutional. He thus takes it for granted that Congress has the right to ban obscene matter from the mails. But a strong argument can be made in support of the proposition that obscenity is a matter which concerns the states only (except where federal power is paramount, as in the District of Columbia), not the national government at all. Seditious literature, on the other hand, might be in a different category because every government has the power to protect itself from destruction. In other words, the right to ban written material from the mails should be no greater than Congressional power to ban its publication altogether. It would have been interesting had Professor Chafee indicated his views on this matter in some detail.

Professor Chafee considers the situation of those who, themselves in power, would deny liberty to others in the setting of the proposal by the entire Commission that all sedition laws be repealed which are not limited by the "clear and present danger" test. Their recommendation was based on their belief that existing laws have an intimidating effect. Professor Chafee notes the difficulty of framing any law which might restrict the anti-libertarians and considers the public interest in having all points of view heard and sore sports revealed. He points out, further, the large margin of safety which exists in the United States: "Safety against disloyalty will come from producing the conditions which invoke loyalty in an increasingly large number of citizens."

In discussing contempt of court, Professor Chafee holds up as a "must" for every student, editor and broadcaster, Justice Frankfurter's concurring opinion in *Pennekamp v. Florida*. He asserts that many problems in this field would disappear were the press to show greater understanding of and interest in the work of the courts. He scores the quality of most reporting of legal matters, indeed, the absence of any reporting at all of much which should be covered, notably arguments before the United States Supreme Court.

Moving to the field of affirmative governmental action to encourage ideas, Professor Chafee discusses as a "traffic regulation" the suggestion (largely associated with Mr. Morris Ernst) that there be compulsory disclosure of various matters. He lists three qualifications which, he says, should underlie all disclosure statutes: the information required should be valuable enough to justify the effort involved, the questions should be difficult to evade, and evasion should not be condoned because the community lacks sympathy with the restrictions. On the basis of these considerations Professor Chafee accepts disclosure of foreign affiliations but rejects the suggestion that all propagandists be required to disclose the source of their support. Recognizing that the public might get more truth about the identity of such propagandists, he fears it might nevertheless "get less truth about political and economic questions" because disclosure laws "make it much harder to get any unpopular ideas started and disseminated."

1. 328 U. S. 331 (1945).
After a long and much too detailed account of the anti-trust cases which have affected the press (and here the book deals also at length with motion pictures), Professor Chafee comes to the conclusion that the law can do little to reduce existing concentration of power. He says: “The press should not be responsible for its quality and points of view to the government any more than to the advertiser or to the friends of the owner.” He dreads the suggestion that the government subsidize small papers, either by favorable postage rates or by income tax exemptions: “If the government sets out to coddle infant newspapers as well as infant industries the prospect is terrifying.” Professor Chafee’s fear is that if the government starts out on this road it will treat the press as many a state university is now treated: “so that its output is too often swayed by fears of dismissal and hopes of a large appropriation.”

Analogous to the government’s power under the anti-trust laws is the Federal Communication Commission’s power over radio by virtue of the necessity for allocating wave lengths. While the law expressly deprives the FCC of any power of censorship, the FCC has on occasion taken note of content in considering applications for license renewals. Professor Chafee deals briefly with the 1941 Mayflower decision which restricted propaganda by station owners—which is now being further considered by the Commission. It is too bad that Professor Chafee did not feel free to discuss this matter because the Commission on Freedom of the Press had been unable to reach any conclusion with regard to it. There are three positions which could be taken: that the FCC has no right whatever to restrict propaganda by station owners; that it can compel station owners to give all sides equal opportunities to express their views, and at least penalize a station which is one-sided; or finally that it can completely prohibit one-sided propaganda. Obviously it is in the public interest that radio stations should encourage the fullest discussion of controversial matters over the air. It is doubtful whether such discussion will be encouraged by restricting owners from expressing their own points of view. The more fruitful course would be to permit owners of radio stations, as well as owners of other media of communication, to express their individual points of view as much as they wish, giving the Commission merely the right to say that a license will not be renewed if other points of view are not also fairly represented. This is as far as it would seem to be good policy to go—if, indeed, constitutional objections might not be interposed were the Commission to go any further.

Professor Chafee considers finally the role of the government when itself a party to communications and envisions this role as operating in two directions. The government talks to the people and it listens to the people. Noting the high value of President Roosevelt’s fireside chats and, at least during the war, of the broadcasts by the Office of War Information, Professor Chafee points to the danger that those representing government will really act for the interests of the party in power. He notes also the possibility that the executive arm may by such practices seek to by-pass Congress. Yet our author believes that opportunities for real service exist and can be extended by improving the quality of the material put out by the government and, where this is printed matter, its general physical appearance. He points here to the wide sale of General Marshall’s Report as Chief of Staff. He also advocates the extensive use of the documentary film.

Professor Chafee, however, comes to no conclusion on the vexed point whether government agencies should centralize their various information services or maintain separate ones. But he rejects the view
that they should put out only the facts: "Much more than facts is needed by us citizens if we are to become conscious that we are partners and not just passengers in the difficult enterprise of government."

The book treats less of the work of the government as listener, partly because less has been done. A great many devices exist (other than Gallup polls, not here mentioned) for assaying public opinion. In the early part of the war the Office of Facts and Figures gathered valuable material, but it was heeded very little. Professor Chafee suggests that a report issued by that agency in 1941 might, if acted upon, have headed off race riots in Detroit during the following year. He notes the possibilities of abuse in the secret use of intelligence reports by various parts of the government and suggests that all material obtained by the government be available at least to some group in Congress.

Over and above all these problems of government restriction, assistance or participation, remains, of course, that of getting a better press. Mr. Chafee states that this can be accomplished only by greater responsibility on the part of journalists themselves. He points out that the press is free from the government as is no other profit-making enterprise, but that it must act worthily to justify that freedom. Newspapers and radio operators should not forget that it is not their advertising or entertainment features to which this freedom is given. Danger of government encroachment, Professor Chafee maintains, can come "only if the press neglects its primary task of furnishing news and opinions in the form which society needs."

Osmond K. Fraenkel,†


So many charges have been levelled against the iniquities of the Taft-Hartley Act that it is hard to find one that has not been made. Perhaps a novel one would be to suggest that here the Act has hurt a good book. Dean Vanderbilt's foreword, and the preface, are each dated in May, 1947, when the probability of a sweeping new labor law was of course clear. In page after page of the book, its reader must now recurrently wonder what the author would have said two months later in July. It might seem unfortunate that Mr. Teller could not have waited long enough to rewrite this book in the light of the changes which the statute makes. But this might have meant a long delay. The real effects of such a change as this take years to make themselves clear. And since the book contains much of value as it is, it is probably fortunate, on balance, that its publication was not postponed.

Mr. Teller's survey, though concentrating on the functions of management, presents a broad panorama of the crucial problems of industrial relations. To your reviewer it is a more satisfying book than A Labor Policy for America, written by the same author in 1945. For one thing, it deals more with particular problems of the factory and the job, and less with legal theories. It is impressive that Mr. Teller, foremost encyclopaedist (Labor Disputes and Collective Bargaining, of course) and one of the most authoritative writers on labor law, should also show such

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an intimate knowledge of the intricate facts of labor relations which often do not reach a board or a court.

Mr. Teller makes his most important contribution by his stress on the social interest in a freedom for management's ability to manage—to get out the goods—an interest which has been too often disguised and stultified by being expressed in terms of barren property rights.

In terms of a concrete labor dispute, a problem of management functions might arise in this way, for example, in the negotiation of a contract: the union might demand a provision regulating the right of the company to send some of its work out to be done by other companies on subcontract, instead of having it done by the company's own employees. The union would assert that the company's use, or abuse, of the right to subcontract affects the amount of work available to its own workers, so that restrictions on the right constitute a condition of employment about which collective bargaining is required by law. The company retorts that subcontracting is a "management prerogative" for the company alone to determine as part of its power to manage its own business.

The same sort of problem might arise in a number of different shapes, and on a multitude of possible issues. On the issue just mentioned, the shape of the question might be whether a contract already in existence does, or does not, limit the company's right to subcontract. If it does, may the company initiate subcontracting, either without notice to the union, or upon notice to it, leaving the propriety of the action taken to be settled in grievance procedure upon a union challenge? If the contract does not limit the company's right, or if there is no contract, the same sort of question may have to be answered, though now not as one of contract interpretation.

It is your reviewer's opinion that unless the contract answers the question in specific terms, there ought to be recognition of a gradation, according to the facts and the nature of the thing to be done, from those things which a company is free to do regardless of union approval or disapproval, either without consultation with the union, or, in other cases, upon reasonable notice to it, on through things which a company is free to initiate, either without notice or with notice, but subject to union challenge in grievance procedure, down at last to things which the company is not free even to initiate without union approval. The union is bound, to some extent, to recognize company decisions in such matters as controlling, unless made arbitrarily or in bad faith. But here, too, it is believed no rules can wisely be made, but the degree of such finality ought to be tailored to fit the facts and the particular function involved. (Mr. Teller does not entirely agree with this approach).

A few other typical issues, among an almost infinite number, which may raise questions of management function, are the scheduling of hours of work, the making of shop rules, the imposing of discipline, the award of pay increases for merit, the establishment of group insurance, and the institution of severance pay.

Mr. Teller reacts strongly against the view of the extremists who insist that management functions, (or "management prerogatives" in the "fighting words" of the bargaining table) should be excluded by fiat from the subject-matter of bargaining. Those functions which constitute the shifting, but very real, core of the power to run a successful business, must be protected. But this is not a matter for legislation, but for building bit by bit an intelligent scheme of cooperation. The clause in the abortive Ball-Burton-Hatch Bill, for example, which would have deprived
unions of any right to interfere with the "functions of an employer's management organization . . . , or to prevent the enforcement of managerial directions or policies . . . or . . . to . . . hamper . . . an employer . . . in exercising the normal and reasonable authority of management," is vigorously condemned. Mr. Teller shows the absurdity of any such approach to a question of functions which must vary from industry to industry. In most industries, for example, changes in day-to-day job assignments would be a matter calling for the unions' approval; whereas in the textile industry, because of changes in fabric construction, this has been held by the National War Labor Board to be a management function.

Mr. Teller argues, as he did also convincingly argue in A Labor Policy for America, that the law courts are not appropriate or competent forums to handle industrial disputes. He reacts strongly, as he has consistently done, against any form of compulsory arbitration of the merits of labor disputes. He suggests again, as he did before, a series of "labor courts," which would be more administrative agencies than courts, and which would deal not in the outcome of labor disputes but in the "rules of the game" and the methods by which the disputants might lawfully seek to gain their ends.

Mr. Teller turns to the National War Labor Board and to the labor arbitrators (chapters three and four, respectively) as the only tribunals which have done any significant work in building up the vitally needed body of jurisprudence which must be built for this crucial field. His reviews of their decisions, about what particular subjects should be treated as management functions, form perhaps the most valuable part of the book. The lack of any such body of law (or informed opinion grounded in a knowledge of what has been done in similar cases) is easy to understand when it is remembered, as the author points out, that the issue was never consciously grappled with as a labor dispute until about the time of the establishment of the National War Labor Board.

Mr. Teller's main contention, harmonious with most of the decisions to which he refers, is that in these fields, management should, pursuant to carefully drawn contract clauses, have sole responsibility for initiating changes, with provision that in the event of any complaint, there should be no work stoppage, but the complaint should be handled through grievance procedures with compulsory arbitration as the final step, and with a recognized obligation to support the decisions of management unless they are shown to be arbitrary or done with malicious or illegal motive. Any alternative, he thinks, must present a division of authority which is likely to be fatal to efficiency.

In a brief historical sketch of business management in Russia since the Bolshevik revolution, he shows how the "triangle" system (which distributed authority among three: the plant manager, the workers and the party representative) broke down and had to be replaced by a system which concentrated authority in the hands of a single manager. The treatment is so brief, and unbiased information about industrial Russia so hard to come by, that one cannot but wonder whether the ten pages which Mr. Teller devotes to this subject tell the whole story and, if so, whether the lesson he draws may be based upon such differences between Russia and this country that the lesson itself is less significant than it appears. These are mere random doubts, however, with neither proof nor conviction to back them up.

Mr. Teller analyzes the labor-relations plans of certain special employers; and he discusses several general proposals which have been urged
by persons who are well-meaning but (he thinks) soft-headed. Among these are the proposal that representatives of a company's workers, and of its consumers, should sit on its board of directors, as full or advisory members. He is only less skeptical of the guaranteed wage, although he recognizes the force of some arguments in its favor in the Latimer Report. He grows mildly enthusiastic, at last, over the Employment Act of 1946, which passed at the expense of the more drastic Murray Full Employment Bill. He notes that, in spite of much union sentiment for the Murray Bill, unions have never shown a disposition to submit to such regulations over wages, jobs and the movement of workers as would be needed if the government were to undertake to abolish unemployment in a way similar to that in which it undertook to win the war. Mr. Teller notes that the Beveridge Plan had to grapple with a task much easier than that of insuring full employment in the United States, because of the greater variety of our industries, technological processes and types of worker. (He also notes that Mr. Beveridge never proposed use of the guaranteed annual wage, and that even Mr. Hansen in this country puts small faith in it.)

Throughout the analysis there is hard-headed recognition that what may do good in one way must also be tested by the harm that it would do in other ways.

So much for Part One which deals with these and many other troubles. Part Two proceeds to a more detailed consideration, and an attempted clarification, of what the powers of management must be, to bring forth maximum production. Freedom to exploit new invention stands high on the list of desiderata, so that any interference with this, along with all sorts of "featherbedding," ought to be outlawed. Profit sharing comes in for a trouncing as an idealistic scheme which evinces a fundamental misconception of union thinking and union objectives. Wage incentives and piece work plans, on the other hand, are recognized as fairly valuable, and these are analyzed and discussed in some detail. Next we have the closed shop, which Mr. Teller would make illegal and the union shop, which he would allow. This reviewer is of opinion that he gives too little weight to the successful functioning of the closed shop in many segments of our industry, but Mr. Teller's view has prevailed in the Taft-Hartley Act and it will, within the next year, receive its baptism of fire. Whether the new law's prohibition on closed shop will work, or whether it will prove to be one of those ill-conceived and vindictive legislative proposals which Mr. Teller condemns in other connections, the near future will decide. For the country's good we must all hope that Mr. Teller is right.

The troublesome problem of the jurisdictional dispute is to be settled by Mr. Teller's "labor court." Under Taft-Hartley the Board will decide such disputes and thus give a trial to the idea of "compulsory arbitration" (which Mr. Teller appears to favor in this particular field).

Mr. Teller's discussion of supervisory employees is one of the most interesting parts of his interesting book. The changes made by the Taft-Hartley Act contrast sharply with the author's realistic appreciation of a foreman's position and problems in our new mass-production industries. The fact that a simpler approach has here prevailed promises to furnish more explosive material for the near future.

There follows the highly debatable subject of industry-wide bargaining. Mr. Teller shows, by way of example, what the experience with it has been in England and in Sweden. In this instance Mr. Teller does
suggest that the experience of other countries, with a different history and different kinds of union, may not be a safe guide here.

The rest of the book urges responsibility upon both sides of the bargaining table, with the sharpest digs and the most exhortation reserved for the labor side of it.

The writing is marred by occasional carelessness or clumsiness, but in general is clear and easy to read. And it would be ungracious indeed to be captious, where the slips occasionally furnish such pleasure as does the reference (p. 357) to an infant labor movement "in dawdling clothes." Nor are the gems all inadvertent, either, for Mr. Teller was inspired when he referred to Hunt v. Crumboch, (325 U. S. 821) a case arising out of a murder, as "the culmination of the homicide committed upon the courts by the Norris Act."

Like all Mr. Teller's writings, this book is a thought-provoking contribution to a vitally important field.

Bertram F. Willcox.


In traditional style, Professor Grismore has carefully and thoroughly treated in the traditional way all of the traditional principles of the law of Contracts. Here, then, is a book tailor-made for the traditional review. The reviewer has only to make the traditional assumption that any such meticulous restatement of a body of concepts is automatically a contribution to legal literature and his plan of attack is clear. An appreciative recognition of a painstaking piece of work, an involved disagreement or two with the author's statement of some insignificant bits of doctrine (inserted both to prove he read the book and to preserve his reputation for independence of thought) and the reviewer has added to his bibliography another evidence of his productivity as a scholar.

There is, unfortunately, an insurmountable obstacle to my use of such a technique: I cannot bring myself to make the necessary basic assumption. For I doubt, in the first place, whether any text which sets out to clarify the law by carefully constructing a card house of concepts can ever do more good than it does harm. The seeming stability of such a logical structure—achieved only by divorcing doctrine from the reality of the individual case—pulls too many students into a false sense of security. That most students admittedly and understandably yearn for such security makes placing such a book in their hands all the more hazardous. Such a card house can safely be used only if constant classroom exposure clearly demonstrates that factual jars and drafts make card houses collapse. Employed by able and understanding teachers, the structure has some utility in introducing students to the way courts and lawyers talk about the solution of disputes. In the hands of unimaginative teachers, who themselves believe that such a restatement contains the answers to important questions in the law, it is a dangerous instrument. The competent teacher has no need of it. The incompetent teacher cannot teach without it.

But even conceding that such a carefully built card house has some pedagogical value, the need is scarcely great enough to justify row housing.

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The law of Contracts has already been stated and restated. Unless, therefore, Professor Grismore's structure (1) is built on new conceptual ground or (2) adds a more attractively designed unit to the old row of pasteboard fronts, it is a needless piece of construction. How does the book stand up when measured even by these limited standards?

Since Professor Grismore states in his preface that his sole purpose has been to "present the fundamental principles of the law of Contracts as clearly and concisely as possible," and that "the choice of topics has been determined very largely by the conventional basic Law School course on the subject,"¹ his book could hardly be expected to break new conceptual ground. And any hope that this statement of his objectives might perhaps be overly modest is dashed once the book is examined. So far as subject matter is concerned, Professor Grismore has done exactly what he set out to do. Except for some rephrasing and rearranging of already established concept patterns, he has nothing to offer which is not already supplied in too great abundance by the Restatement of Contracts and Williston's Students' Edition.

How, then, does the book stand up on the second count? For any book that presents even well worn doctrine in a refreshing and interesting way, that really manages to clarify the subject by explaining the traditional concepts in simple and down-to-earth language, that is—in short—a useful textbook, still deserves publication. Personally I should rate any such book a genuine contribution if it did no more than help dispel the notion that law must be presented as dull and big-worded stuff. How about Professor Grismore's book? A sample of the text gives the answer. Here, for instance, is the author's explanation of the difference between a contract and a sale:²

"At other times the word [contract] is used to designate a certain transaction, such as a sale or a conveyance, which arises out of an agreement and results in new legal relationships, but does not involve any undertaking to do or to refrain from doing anything in the future. Thus, if A sells and delivers an automobile to B and is paid a price therefor, it is sometimes said that a contract has been created. This is not a contract in the sense in which the word has been described above, but a sale. Such an agreement creates no outstanding obligation but effects at once a transfer of rights in rem. However, it is otherwise when there is coupled with such a transaction one or more undertakings for the future, as when the future delivery of the goods, or the future payment of the price or a warranty is provided for. In such a case a contract in the sense indicated results, as well as a sale."

Ten pages of passages like this, complete with footnotes, were more than enough to spike my hope that here I might find—at last and at least—a simply stated textbook. Not merely unreadable, it is comprehensible only to one who already understands the subject and is searching, not for clarification, but for ways of stating a position or for additional case ammunition to bolster that position. Devoid of examples with flesh on their bones, full of the majority and minority rules in traditional "most jurisdictions . . . many courts, however . . . but a few cases hold . . ." style, achieving compactness by cryptic statement rather than by elimination of non-essentials, it has all the imagination and fire of

¹. P. iii.
². P. 2.
the average law review note. It is miles away from the type of text for which Karl Llewellyn has been beating the drum—a text which "seeks to reduce a difficult matter to a deep but simple presentation, the kind of thing a student needs (1) to introduce him to the subject; (2) to help him, while he is studying the subject, and (3) to solidify everything when he reviews the subject. Or to save him the need of taking a course in the subject." 3

Can a text such as Llewellyn describes be written in the field of Contracts? I concede that it would be a difficult task. I also concede that it could be achieved only at the expense of systematic statement of every aspect of every "fundamental principle." But that it can be done in a field of equal difficulty is demonstrated by such a rare article as Fred Rodell's A Primer on Interstate Taxation. 4 If it can be done there, it can be done here.

Such a textbook could accurately be titled: Fundamental Principles of the Law of Contracts. For it would present meaningful principles in a meaningful fashion. It would explain one principle—not in terms of another principle, equally confusing and meaningless—but in terms of how men behave and institutions operate and courts respond to societal pressures. It would be content to state "rules" which covered less than the totality of situations, leaving dissimilar situations to be covered by different rules. It would, in other words, refuse to construct or to support a complicated system of generalizations merely to extend the illusion of inevitability to the maximum number of questions on which courts have spoken. Unencumbered by inconsequential detail and unobscured by senseless verbiage, it would enable a student to get a real grasp of what courts are doing and why. That is the sort of job Professor Griswold might have done. Until a text writer is found who is willing to do it, further publication of textbooks in the field of Contracts should be discouraged.

Addison Mueller.†


At the turn of the century John Chipman Gray ruled over the realm of Property with undisputed sway. His six-volume casebook on Property was accepted as the standard text wherever the case system had found its way. Formidable as it looked, it made no attempt to cover the wide field of property on which equity based its jurisdiction nor to include

4. 44 Yale L. J. 1166 (1935).
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such familiar property landmarks as Trusts, Vendor and Purchaser, Mortgages, or Landlord and Tenant. The field of Trusts had already been appropriated and possibly the other subjects smacked too much of the practice. The law was to be treated as a science and not as an art. In pursuance of this end, real and personal property were brought under one head and an orderly arrangement followed throughout the six volumes, although Volume VI was more or less of a miscellany. This scientific arrangement has very largely dominated the field of Property ever since. Trusts has maintained its independence, although the attempt has been made to bring it and Future Interests and Wills together. Vendor and Purchaser and Landlord and Tenant have been made the subject of separate casebooks, but without great success. Mortgages has been a good deal of a lost soul.

When Gray died and his kingdom fell apart, its various fragments remained more or less intact but received names that were none too happy, while Property became the name of a series instead of a single casebook. Personal property was detached from the rest of property and made into a separate volume. Volume II of Gray became Rights in Land, which would seem to have been as broad as real property itself. Volume III became Titles or Conveyances. Neither of these heads was a familiar title in the law though the words were common enough as legal terms. Volume IV became Wills and Administration. In student parlance the corresponding course has become known as Wills. To the profession at large, Wills means the field covered by the classic text on Wills—Jarman. This and other standard texts on Wills are largely taken up with the construction of limitations and the law of property incident thereto. With these matters Volume IV of Gray and its successors have had very little concern. Such matters were taken up in Volume V. As concerned wills, Volume IV dealt in the main with the minutiae of their execution and revocation rather than with their dispositive provisions. If Wills leaves out most of what the profession would suppose it to include, on the other hand it includes the field covered by the old canons of descent which, of course, is not testamentary at all. As matters of descent have long been largely statutory, they were given scant attention by Gray notwithstanding their great intrinsic importance. Volume V became Future Interests, a title which Professor Leach with masterly understatement has called an “unfortunate label.” Family Settlements or Settled Property, although somewhat English, would have been far more descriptive and accurate. Future interests proper were contingent remainders and executory interests, but not reversions, nor vested remainders nor powers. All these together with possessory interests went into the making of the family settlement. To study settled property under the heading of Future Interests is to get a wrong slant on a subject whose outstanding characteristic is not futurity, but solidity and permanence.

Of the three books under review, that of Mechem and Atkinson has followed most closely the traditional lines marked out by Vol. IV of Gray. Not long since, its second edition was used in a majority of the 101 law schools using the leading casebooks on Wills. That speaks volumes for its usability, its teachability. Although the scope of the book is that of Gray, its method of approach is distinctly up-to-date. The introduction has the rather forbidding title: The Rationale of Succession. Descent and Distribution are treated much more adequately than in Gray; there are a few introductory notes and frequent, carefully worked-out footnotes. The third edition presents no marked departure from the second. Provisions of the Model Probate Code prepared by a committee of the
Probate Division of the Section of Real Property, Probate and Trust Law of the American Bar Association are added. The case law is brought up to date; the total bulk is somewhat reduced. In general, the editors stand pat on what they feel has been a successful venture. Granted the name, a course of three or at least two hours, and that a casebook should be a teaching tool only and not a source book, this casebook leaves little to be desired. But all three of these are big grants.

Professor Leach’s casebook is cut down for a course of twenty class room hours or approximately a one-hour semester course. This was occasioned by the change in the Harvard curriculum some years ago, but is in accord with Professor Leach’s convictions after fifteen years of teaching the subject. This also accords with the writer’s views after twenty years of teaching Gray and Warren. The time they gave to the making and revocation of wills seemed indefensible in an all-too-crowded schedule. A one hour course, however, is a misfit, and Harvard has met this by combining Wills with what is generally known as Future Interests. Some years ago Columbia went even further in combining Wills and Future Interests and Trusts, to get an all-around picture of estate-planning. Taxation would now have to be added as well. Clearly there is work for the curriculum-makers to do. The effort at Columbia some twenty years ago enriched the curriculum, but the effort spent itself and now the same old need is felt, but more insistently than ever, for some vital change that will make the law schools of today do for our times what the law schools of the Middle Ages did for theirs. Courses can’t be too long, but a vital subject like property can at least be integrated so that it is not a mere collection of rules, but a living thing. For this purpose the group system recently inaugurated at Northwestern offers many possibilities.

The second edition of Leach differs in the main from the first in the addition, as chapters, of two law review articles which have attracted wide attention: Chapter X, Perpetuities in a Nutshell, and Chapter XI, Planning and Drafting a Will for a Particular Middle-Aged Man with a Family and Considerable Wealth. These chapters represent a wide break from the traditional routine in Wills but are understandable with Wills as a part of the course in Future Interests. Furthermore, they represent a wide departure from traditional case-book theory and discard the outmoded cliché dating back at least as far as Story that law should be studied as a science and not as an art. Perpetuities in a Nutshell was recently commended by Professor Llewellyn as a brilliant example of the sort of thing he has been urging as necessary to round out the case-method technique. Vivid legal writing has never been too common in our country and the case system and the Restatement have tended to lessen what little we have had. We may hope with Professor Llewellyn that Perpetuities in a Nutshell is a harbinger of better things.

Professor Leach has long been a proponent of getting to the student the point of view of the draftsman or perhaps more broadly, the point of view of counsel. This is admittedly only one of many points of view, but is in many ways the supreme point of view, for the constructive element in the law has probably been not the courts nor the legislatures, but the legal profession. The courts have adopted the views of successful counsel and worthwhile legislation has at least been shaped by lawyers. How to get something more of this point of view to the law student is one of the problems that faces the law schools today. The study of the cases alone is inadequate for, wonderful teaching tools that they are, they represent but one point of view, that of the appellate judge. The law teacher may
supplement this somewhat but very likely he too is removed from the practice. His is still another point of view.

Professor Leach sums up his and Professor Casner's experience in "trying to find an effective method of introducing students to the art of planning estates and drafting dispositive instruments." He dismisses (b) the discussion of "cases in the courtroom with a view to evaluating the draftsmanship of the instrument being litigated" as "useful" but "largely negative" and pronounces (c) the "classroom criticism of instruments drafted by students—an unmitigated failure—the process—extremely dull and prohibitively time-consuming". (a) Lecturing and writing on segments of the problem, e.g. Chapter X, he evidently thinks worthwhile. The experiment (d) started in 1946 by Professor Casner of "presenting documents, some good and some with intentionally planted errors, to the students, directing them to analyze the documents, and in an examination calling for criticisms of specific portions of the documents and analysis of the effects of specified clauses he regards as promising." Chapter XI is an attempt to supplement (a) and (b). It treats the specific problem of one client in its entirety in contrast to type (a). It gives an affirmative and constructive approach, in contrast to type (b).

This frank appraisal of the experiment in the draftsmanship approach is most enlightening. It does not show that the oldsters were wrong in excluding draftsmanship from the law school curriculum but it does show a courageous attempt to prove they were wrong and an honest report on the results so far attained. Whether very much can be done with present-sized faculties and present organization of faculties and present organization of the curriculum seems very doubtful. But that the planning of estates will occupy an honored place somewhere in the law school curriculum in the not too distant future would seem almost inevitable.

Professor Rheinstein's book avoids the misleading title, Wills, but substitutes another, Decedents' Estates, likewise misleading but with much less glamour. The title is not Administration of Decedents' Estates but that is what the profession is likely to take it to be. In fact there is no good technical common law term to indicate the whole field of succession at death. And yet this field is one of the most significant in the whole law. Its importance goes back to the beginning of things and has not lessened but rather increased with time. Its significance will continue to be world-wide as long as private property persists. This is no subject to be treated along narrow and technical lines. Here is no place for a narrow case law treatment. All the light that history and comparative law and philosophy can throw on the subject should be made to bear on it. For this purpose Professor Rheinstein's training makes him particularly suited and his book is more adequate than either of the others.

Professor Rheinstein also tackles the matter of collateral reading. He integrates much of the law review material into his text. He does not expect a good part of it to be discussed in class but it is there to be read and pondered over and to be really available. In this sense his book is a source book. Others before Langdell had urged the study of the cases but he made them physically accessible by careful selection and inclusion in a casebook. Professor Rheinstein has performed a similar task for law review material. It should help solve the problem of collateral reading.

**Percy Bordwell.†**

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1. **Leach**, preface, pp. v-vi.

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Just how much effect the first edition of this book had in stimulating and shaping the procedural activity of the past twenty years cannot be accurately determined. The part played by its author is easier to appraise. Judge Clark has been the dominant figure in a period of intense nationwide procedural reform. It is generally thought, although so far as I know the story has not been told authoritatively, that it was largely his influence which moved the Supreme Court to proceed under that section of the basic statute which authorized united rules for law and equity in the federal district courts. He has served as Reporter for the Advisory Committee of the Supreme Court from the outset, and the Federal Rules bear unmistakably his imprint. Time and events made necessary a new edition of his book, and it is fortunate that Judge Clark was himself able to prepare it.

Basically the book is unchanged. Coverage and chapter arrangement are identical with the first edition. With very minor exceptions, the sections also are the same. This edition seeds into the appropriate places all of the lively legislative and judicial history of the intervening years. That job has been done without sacrificing the historical miniatures which introduced each major topic and which contributed so much to the usefulness of the earlier book. Here, too, is the same remarkably skillful exposition under the most severe limitations of space which marked the first edition. The authoritative treatment of the Federal Rules in conjunction with parallel state provisions enhances the usefulness of the new edition to the profession and to students.

Not only is the book unchanged in basic coverage. More important, the philosophy of the book remains unchanged—almost, one might say, aggressively unchanged. In none of his writings in the field of procedure has Judge Clark been just an observer. Always his writings have been stamped with his own philosophy of procedure, and particularly of the function to be performed by pleadings in a modern system. And that is as it should be, for procedure, dealt with simply as a colorless exposition of a mass of detail is deadly dull; and worse, such a treatment augments the danger of excessive introspection and refinement from which no procedural system is ever entirely free.

The work as a whole is excellent, and the field covered is so broad that specific criticisms seem petty. Yet the author's positions are so firmly taken and so much advocacy is mixed with exposition that the temptation is irresistible. The stature of the author, too, makes important even those statements which, made by another, might be dismissed as of minor significance.

It seems to me that advocacy carries too far when Mr. Justice Cardozo's decision in United States v. Memphis Cotton Oil Co.¹ is treated by Judge Clark, as it has been by his adherents in the past, as affording support to his concept of a cause of action as "such an aggregate of operative facts as will give rise to at least one right of action." It is true that a somewhat similar approach was applied in the Memphis Cotton Oil Co. case where the specific problem was amendment after the statute of limitations. But Mr. Justice Cardozo was far from adopting the Clark concept for general application in all situations. He expressly stated, "This

¹. 288 U. S. 62 (1933).
court has not committed itself to the view that the phrase [cause of action] is susceptible of any single definition that will be independent of the context or of the relation to be governed." And his view was made even more explicit in Gully v. First National Bank in Meridian 2 where he said, referring to the Memphis Cotton Oil Co. case, "This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context."

Judge Clark's approach seems fundamentally different to me. His definition of a cause of action does not depend upon the problem involved. It remains steadfast despite the context. Whether the problem is one of joinder (p. 455), splitting (p. 477) or amendment (p. 731), the same concept is insisted upon. The notion of a cause of action as a group of operative facts viewed from a layman's point of view operates admirably in the field of amendments. But when this loosely outlined concept of a cause of action is moved bodily into the field of res judicata and applied to the problem of splitting a cause of action, the results become less satisfactory. The doctrine of res judicata operates with finality; its thrust is mortal. The rigidity of the common law at the pleading stage exacted an extremely heavy toll in terms of costs and delay, but even its severity did not result in the complete extinguishment of the rights of a litigant.

Judge Clark recognizes but minimizes this difficulty (pp. 144-5, 478). He speaks of "a fear of shutting off action by a party who may seem not to have presented his case any too well in earlier litigation he has lost," (p. 144) and of "judical tenderness toward defeated litigants." (p. 145). But of course the rule against splitting a cause of action is not confined to defeated litigants. It operates just as drastically upon the successful litigant whose only sin may be that his original estimate as to the limits of trial convenience does not coincide with the later estimate of the same or another court.

In discussing criticisms of the operation of his concept of a cause of action in the field of res judicata, Judge Clark expresses his readiness to believe that the direction of procedural reform should be toward compulsory joinder—apparently meaning compulsory joinder of "all items of dispute between litigants." The treatment here is casual, and perhaps not intended to be taken too seriously. The idea is advanced as one suggested by others, 3 and it is discussed only in terms of difficulties anticipated in securing its general adoption. There are, of course, far more basic considerations.

A rule which forces the present assertion of all claims between litigants upon peril of forfeiture for non-assertion certainly provides an automatic solution for the problem of splitting causes of action. But the historic policy of discouraging litigation has roots which lie deeper than considerations of procedural convenience. If that policy is to be disturbed, it should be because the philosophy upon which it is based is unsound and not because it complicates the operation of a procedural doctrine. Private litigation is conducted largely at public expense. That fact may be thought to justify the intrusion of considerations of trial convenience into the operation of the rule against splitting a cause of action.

3. It does not seem to me that either Prof. Blume (The Scope of a Civil Action, 42 Mich. L. Rev. 257 (1943)) or Mr. Schopflocher (What is a Single Cause of Action for Purposes of the Doctrine of Res Judicata?, 21 Oregon L. Rev. 319 (1942)), the critics referred to by Judge Clark (pp. 144-146) takes the position ascribed to them. Their suggestions as to compulsory joinder are bounded by identity of transaction or existence of common question.
But trial convenience at most extends no farther than the common question situation. It has no relevance in considering a rule requiring indiscriminate joinder of all matters of dispute between litigants.

To eliminate delay, Judge Clark urges a single hearing for the disposition of the case and expresses a distinct antipathy to multiple stages of argument and decision before trial. He advocates the English "objection in law," to be filed with the answer and considered in advance of trial only if the judge feels that a decision will substantially dispose of the entire case. Apparently he contemplates that the trial judge will independently select for hearing in advance of trial those cases in which a decision will substantially dispose of the entire case; the suggested rule of the American Judicature Society is criticized because "there would seem possibility of delay for a hearing as to whether the objection should or should not be heard before trial." (p. 539, n. 137).

Judge Clark has effectively diagnosed the past fault of overloading the pleading stage of a lawsuit—of placing upon the pleadings a greater stress than they are capable of bearing. It seems to me that there may be a similar possibility of overloading the trial stage. There is an essential practicality in the common law effort to dispose of a case, where possible, upon the law without a trial, which should not be lightly abandoned. Of course, the demurrer and its substitutes can be and have been abused. But always, until we go frankly to a system of notice pleading, there will remain a group of cases susceptible of disposition upon the pleadings. Apparently Judge Clark's position and the amended Federal Rule 12—which moves in that direction—are based upon statistics indicating that a relatively small percentage of cases (about 9%) are disposed of upon demurrer and similar motions and objections. Even considering, as these statistics do, only those cases in which final judgment results, the percentage does not seem negligible.

As a practical matter, I should doubt that postponement until the trial stage is going to cause lawyers to abandon matters in abatement and objections in point of law. I suspect that the ardor of the advocate is going to survive the delay. But unless postponement does result in a substantial diminution in the number of such matters presented, there will be net loss instead of gain. All the cast of characters necessary for a trial parties, witnesses, jurors, etc.,—will await, at public and private expense, the presentation and determination of a matter which requires only the presence of court and counsel. The atmosphere, one may suspect, will hardly be conducive to deliberate presentation and consideration. And the litigants will be compelled, in an undetermined percentage of the cases, to pay counsel for his preparation of phases of the case which ultimately become academic.

Many would not agree with these reactions of mine; others would find their faults with portions of the book to which I subscribe enthusiastically. That sort of reaction is unavoidable when so broad a field is discussed and when positions are so firmly taken. In no sense does that reaction detract from the quality of the book or from its usefulness. Such is the significance of Judge Clark's book that within the foreseeable future no procedural change of consequence is going to be made without reckoning with it.

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4. P. 561.

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BOOK REVIEWS


Macaulay once said that the history of the world is the history of its great men. At least telling the stories of great men is one way of writing history. In his earlier volume on the history of law, Mr. Seagle confessed that a biographical approach to the subject presented very strong temptations. Fortunately for the pleasure and edification of the bar, Mr. Seagle did succumb to temptation. Men of Law, written in his graceful and lucid style, traces the world-lines of some fourteen heroes of law, and does for the history of law what Will Durant did for the history of philosophy. The book avoids many of the limitations of the biographical approach by inclusion of considerable institutional background, and by treatment of men whose lives and work formed the foci of legal developments.

Mr. Seagle's introduction is concerned with a short history of Ug, primitive man, responsible for the two greatest of all legal advances, the Court and the Word. Ug left us no records, but with the invention of the written word it became possible to promulgate codes of law. The Code of Hammurabi, full of such interesting features as price-fixing, was inscribed in cuneiform on a stone pillar in the Temple at Sippara for all men to see. The philosophy of Hammurabi is attractively simple: "The oppressed who has a lawsuit shall come before my image as king of justice. He shall read the writing on my pillar, he shall perceive my precious words. The words of my pillar shall explain to him his cause, and he shall find his right." But can the oppressed be protected so simply from the cunning of the strong? Solon of Athens, although known to generations as the Law Giver, is more rightly distinguished for his attempts to reform Athenian democracy. While he probably had the simple faith in law that Hammurabi possessed, Solon sought to preserve justice for all men by better administration of law.

In Rome, we find for the first time the "fictions, evasions, duplicities, and subtleties" which betray the activities of a professional class of law men,—advocates and jurists—the latter answering legal inquiries as they strolled about the Forum. Our knowledge of the law of the classical period derives, however, not from a lawyer, but from the lectures of one of the first law teachers, the Institutes of Gaius. The law had now become old enough for jurisprudence; lawyers sought to set up against the letter of the law, ratio verborum, the life of the law, ratio legis. Gaius tells us, for example, of the interesting use of a property concept in the family law field. In Roman law a wife could avoid the subjection to her husband which arose from a marriage based upon customary cohabitation, by absenting herself from his house for three nights each year, thereby breaking the prescriptive period. The great compilation of Roman law, the corpus juris civilis, was completed under the orders of Justinian, Emperor of the East, and he is also responsible for the textbook, the Imperatoris Justiniani Institutiones, which was really nothing more than a revised edition of Gaius. These works formed the fountainhead of the laws of the modern European states, but the origin of law between states is found in the great work De Jure Belli ac Pacis of the Dutchman, Hugo Grotius. Grotius was fired by the revolutionary concept that nations as well as men should be under law. As Hammurabi had wanted the rights of the oppressed to be protected by law, so Grotius believed that the destinies of all nations should be subject to the higher, the natural law.

1. Seagle, The Quest for Law, xiii (1941).
While the laws of the continental states were being worked out on the Roman model, in England meanwhile a body of law was struggling to become common to all Englishmen, not merely the law of the churchmen, merchants or lords. It was the dream of Lord Coke, Chief Justice of the Common Pleas, and "one of the most arrogant and avaricious of men" that even the King should submit to the charms of his Lady, the Common Law. Coke's expositions of the common law are so much a part of the fabric of our modern life, that we no longer recognize his Institutes as the source, for example, of the phrase "Every man's house is his castle." But even before the work of Lord Coke, the three great courts of Common Law had been fashioned, the King's Council had grown into the Parliament, the Frankish device of the sworn inquest had been transmuted into jury trial, and the Statutes of Westminster First and Second, the Statute of Mortmain, and the Statute of Merchants had been passed, in the reign of Edward Plantagenet. Finally, the Court of Chancery was forged out of the crucible of the King's conscience, which court under Thomas Egerton (later Baron Ellesmere) emerged the victor from the war between law and equity.

By the time of Sir William Blackstone, the common law had become, as Gibbon put it, "a mysterious science and a profitable trade." Blackstone's Commentaries, his lectures as the first Vinerian Professor of the Laws of England at Oxford, sought to explain the mysterious science to the gentlemen of England. Most of the mysteries, of course, concerned the sacred institution of property. Unfortunately the liberties of men were in neglect; so much so on the continent that one judge in Saxony, during office, imposed twenty thousand capital sentences. Such brutal conditions impinging upon the sensitivities of a young Italian nobleman, Cesare Bonesana, Marchese di Becarria, inspired him in his essay, Of Crimes and Punishments, to create the subject which we now study as criminal law. Becarria's work in crimes is very naturally juxtaposed to the writings of a man of whom Maine once said: "I do not know of a single law reform effected since Bentham's day which cannot be traced to his influence." Jeremy Bentham, indeed the greatest law reformer of all time, sought to make the science of legislation the supreme panacea. The law for him, too, had become a mysterious science and with Hammurabi he attempted to delineate and set out men's rights in comprehensive schemes of legislation, based on the postulates enunciated in his Principles of Morals and Legislation.

For an American lawyer, the struggle of Chief Justice Marshall to make the sovereign subject to law is a twice-told tale. Marshall's two absorbing devotions were to his invalid wife, "dearest Polly," and to the concept of judicial review. With bold strokes in Marbury v. Madison he accomplished what Coke had failed to do. Nor was Marshall averse to defending his many unpopular decisions by writing anonymous tracts in their support. While it is even probable that he wrote the opinion in M'Culloch v. Maryland months before he heard the oral argument, he is reported to have said: "The acme of judicial distinction means the ability to look a lawyer straight in the eyes for two hours and not hear a damned word he says."

To Coke we owe the doctrine of the rule of law, and to Marshall that of judicial review, but it is to the German legal philosopher, Rudolph von Jhering, that we owe freedom from the algebraic jurisprudence to which these concepts may lead. In his Law as a Means to an End Jhering considers the law not formalistically but as the practical instrument for
the reconciliation of conflicting social interests. In his other works, such as *The Heaven of Juristic Concepts*, he displayed a keen talent for satire, attributing to theoretical jurists the use of a machine which he found in their heaven, a machine capable of splitting a hair into 999,999 accurate parts.

Mr. Seagle, although at present an Assistant Solicitor in the Department of Interior, was at one time law editor for the *Encyclopedia of the Social Sciences*. He writes always with deep sensitivity to the limitations of law, and insight into social problems. Man's struggle for law was a struggle for peace, the peace of the tribe, of the market place, of the king, through the reconciliation of conflicting interests. But they cannot be so reconciled except by a man above the fray. Laws and opinions are words, and words are nature filtered through a personality. It is in the personality of a man such as the late Justice Holmes, that Mr. Seagle sees one of the hopes for achieving peace through law in the atomic age. Holmes' greatness according to Mr. Seagle, lies in the fact of his objectivity in the face of every inclination to the contrary derived from birth and training, in his toleration, for example, of social experiment, while he privately opined: "The notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug."

Mr. Seagle sees the other hope for man's avoidance of a blood-feud on the national level in the removal of the causes of economic and social conflict which it is the task of law to reconcile.

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BOOKS RECEIVED


