BOOK REVIEWS

Cases on Oil & Gas. By Victor H. Kulp. St. Paul, West Publishing Co., 1924. pp. xix, 512.

The reviews of this book already printed illustrate nicely the difference of opinion existing today in the law school world toward the addition of new subjects to the law curriculum. According to one reviewer, "This book is a departure from the announced purpose of the series of which it is a part", because "the original announcement promised a series of scholarly case books 'on the fundamental subjects of legal education'," while "there is nothing fundamental in the subject of this book."[1] In the opinion of another, "the subject-matter . . . could be dealt with possibly to better advantage in a special chapter in a case-book on real property" and "a glance at the list of books . . . published in the American Case-Book Series raises a serious doubt as to whether the case-book idea is not being overworked."[2] On the other hand, a third reviewer declares, "Most teachers of Real Property have felt the inadequacy of the treatment which they are able to give to the various ramifications of the subject" and concludes that "the law of oil and gas . . . seems to be quite properly a subject for special treatment",[3] a statement with which three additional reviewers seem to agree.[4] Thus the law school world seems to be entertaining a "fundamentalist" controversy all its own.

The principal arguments of the "fundamentalist" reviewers are epitomized as follows in one of the reviews just quoted:—"Necessarily the required courses must cover the great and fundamental principles of the common law; and when these have been thoroughly covered there remains little time for what Professor Gray used to call 'the frills of the law'".[5] This statement seems to assume that all "fundamental" principles of the common law have already been developed by judges, discovered by scholars, and classified with finality into a wholly unexpandable category, that all law students encounter these "fundamentals" in certain "required" courses, that attempts to create new pedagogical classifications are mere "frills", and that the time available for law study today is too little to permit further curricular additions. To the present writer only the last contention seems at all tenable, and even that ought not to prevent the offering of certain courses of limited appeal, such as oil-and-gas law, in many schools.

In the first place, what are the "great and fundamental principles of the common law", or of any branch thereof, such as the law of real property? The "fundamentalist" reviewers whose comments are here under review fail to supply any definition. To the present writer this phrase, as used by the "fundamentalists", means substantially such principles of common law as run through any given branch in all states whose jurisprudence is based on English common law. Tested by this definition alone the principles of oil-and-gas law are probably not "fundamental" real property law; *first*, because petroleum and natural gas are not found in all common law states even today; *second*, for the reason

[1] John Stokes Adams, (1925) 73 U. PA. L. REV. 333.
[2] Peter H. Holme, (1925) 38 HARV. L. REV. 705.
[3] Claire T. Van Etten, (1925) 25 COL. L. REV. 390.
[4] L. P. W. (1925) 10 CORN. L. QUART. 413. Unsigned Review, (1925) 11 A. B. A. JOUR. 245. James A. Veasey, (1925) 23 MICH. L. REV. 930.
[5] Peter H. Holme, *supra* note 2.

that such ductible minerals were unknown to any considerable extent while the greater portion of the common law of real property was developing. The nearest approach to such minerals known to the great era of development of real property law was water. But water law does not solve oil-and-gas law problems, and today any adequate classification of "fundamentals" of real property law in states where oil-and-gas litigation cuts much of a figure must include the unique principles of judge-made law worked out in oil-and-gas cases. The "fundamentalist" reviewers seem to forget that certain principles may be "fundamental", in the sense of being of great practical importance in one state while actually non-existent in others. Perhaps, however, the "fundamentalists" will claim that even such unique legal principles as those developed in oil-and-gas law cannot be regarded as "fundamental" unless the problems calling these principles forth are likely to arise and exist with considerable permanence in a substantial number of states. The best answer to this argument is to point out that Professor Kulp reprints oil-and-gas cases from twenty-two states, and to call attention to the constant discoveries of new oil-and-gas fields and the recent rejuvenation of certain old fields by "deep-sand strikes", three or four thousand feet down.

In the second place, "required" courses, outside the first year of law school, are not encountered very generally. Can even the "fundamentalists" contend seriously that all their "fundamentals" can be taught in a single year? In the third place, if every course based on a re-classification is to be regarded as a "frill", one seems forced to the conclusion that Mortgages, Future Interests, Insurance, Taxation, Labor Law, Public Utilities, and Trade Regulation are ornamental rather than useful.

The contention that time is insufficient for new courses cannot be dismissed so summarily. It is true that the law school curriculum today offers more courses than students can study in three years and that by a large preponderance of opinion a four-year course cannot yet be required. Why, then, should any new subjects be added, or any case-books in new subjects be printed? Simply, thinks the present writer, because new fields of law, highly important and resulting in justifiable new pedagogical classifications, are constantly developing as the complexities of modern life multiply, and because law schools can hardly claim to be filling their place adequately without giving their students an elective opportunity, at least, to familiarize themselves with what is going on in these new fields.

It does not follow that every new course should be introduced into every law school. Courses in oil-and-gas law or the "appropriation" rules of "water rights" would ordinarily be superfluous "frills" in schools aiming principally to meet local needs in states where petroleum and natural gas have not been discovered, or where "appropriation" water-law has never taken root. But it is hard to see how a state school in oil-and-gas or "appropriation" territory is fulfilling its mission unless it offers its students as adequate courses in these topics as available pedagogical material will allow. As to the so-called "national" schools, a reviewer already herein quoted contends that ". . . a law school, drawing its students from all sections of the country, must devote itself to general rather than specialized training in the law".[6] If this statement means that "national" schools should not teach, even as electives, subjects of great importance in far-distant areas from which the "national" schools deliberately seek students, merely because these legal problems do not arise everywhere, the present writer disagrees flatly. To him the very notion that a school is "national" in scope carries an implication that the school is in a position to give its students the opportunity to study, in elective courses at

[6] *Ibid.*

any rate, any body of law of substantial importance in any considerable section of the nation, and to study such law under instructors of the calibre one expects to find in "national" schools. Certain "national" schools themselves seem to recognize an obligation of this nature by engaging, from time to time, special lecturers to give a few lectures on "water rights" and "oil-and-gas law." But such lectures, although given by able attorneys of high standing, amount to homeopathic doses at best, and cannot compare with full-time case-system courses. Nor can the matter be shrugged off, as the above-quoted reviewer attempted to do, by stating that "the student trained in legal reasoning will later perfect himself in the specialized branches as the needs of his own local practice may dictate." [7] The student may thus "perfect himself" indeed. But he is far less likely to do so at the expense of clients if he has received some law-school training in these so-called "specialized branches." It seems strange to encounter this line of reasoning advanced in the magazine of the "national" school which has done, perhaps, more than any other to advance the cause of legal education by demanding, establishing and maintaining high standards on the very theory that the law student ought to be well enough trained to make it unnecessary for him to learn at his clients' cost.

In summary, then, the present writer believes there is plenty of need for a case-book on oil-and-gas law and that since one is now in the market we may expect to see case-system courses in this subject introduced more and more. Professor Kulp and the publishers are to be congratulated for braving the adverse criticism of the "fundamentalists". Incidentally, occasional publication of such case-books in new fields may have a beneficial effect in encouraging ambitious instructors eager to attempt research off the beaten track, but unwilling to venture for fear of inability to secure publication.

The writer wishes he could wax as enthusiastic over the book itself as over the need for teaching its subject-matter. Several other reviewers have pronounced the volume well-adapted for classroom use.[8] Unfortunately, however, the book did not prove very satisfactory, especially with respect to the first 132 pages, when tried out for a semester in the writer's oil-and-gas law course. Certain parts were "teachable" with great difficulty. A few required practically new case-compilation.

The difficulties encountered seemed to fall into three classes; inadequate statement of material case-facts, including the outcome of the case in the trial court; insufficient development of important topics; and, to the writer's notion, poor arrangement of case-extracts, necessitating constant reconstruction of the framework. The first difficulty was most exasperating of all and compelled the writer to turn repeatedly to original reports for facts that should be clearly set out. This was most noticeable in the first 132 pages, especially in Chapter III, Section 5, but occurred occasionally throughout the book.

The topics slighted with insufficient material, in the writer's opinion, include the "surrender clause"; the sections dealing with "Married Woman as Lessor" and "Life Tenant, Remainderman and Co-Tenant"; and the experimental forms of "leases" used before and leading up to the "or" and the "unless" "leases." Professor Kulp admittedly excluded historical matter from his book; but in dealing with "or" and "unless" "leases" he would have gained, in the writer's opinion, by following the lucid historical outline employed by Professor Veasey in his splendid article in the Michigan

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[7] *Ibid.*

[8] Claire T. Van Etten, *supra* note 3. L. P. W., *supra* note 4.

Law Review.[9] As to the "surrender clause," Professor Summers' recent article in the Yale Law Journal,[10] shows that this clause has raised many points for adjudication. Professor Kulp dismisses this topic, however, with only one case (p. 67). The writer wishes that the topics discussed in this paragraph had been expanded by additional cases at the expense of certain other opinions, scattered through various parts of the book, which seem too obscure to lead to definite conclusions without free assumptions by the instructor. If this had been done, however, instructors who like to find judicial "smoke-screens" in case-books would be disappointed.

The order of cases in any case-book is likely to be varied for teaching purposes by each instructor, so that a criticism on the ground of poor arrangement is necessarily highly individual. The writer finds Professor Kulp's arrangement unsatisfactory in several ways. *First;* Chapter II seems incoherent, because its material is not grouped consistently by points. Consequently, while the treatment of some points proceeds logically enough, other points are covered by extracts which are widely separated, with wholly unrelated case-extracts intervening. Though some may prefer this sort of treatment, the writer dislikes it. *Second;* the "or" and the "unless" "leases" are not contrasted sufficiently, by direct juxtaposition of adjoining case-extracts. To secure proper contrast the instructor has to cull out cases from different parts of the book, rearrange them, and put them all together again by himself. *Third;* the cases involving the interpretations given "unless" "leases" are similarly scattered. Thus the cases on pages 266, 222, 224 and 281 seem really to belong together. *Fourth; Prowant v. Sealy,* p. 310, should, in the writer's opinion, follow immediately the cases treating the two phrases "produced in paying quantities" and "produced." Perhaps other instructors will not suffer so much inconvenience, however, from Professor Kulp's arrangement.

The compiler has had to blaze the difficult way of the pioneer; and it is only fair to emphasize that the book became much more "teachable" and generally satisfactory with the first 132 pages out of the way. The footnote references are copious, clear and well-arranged. On the whole the writer would like to see the first 132 pages completely revised, and certain re-arrangements, to overcome the difficulties described above, carried out. Such a revision would make room, also, for the addition of such important cases as have been decided since the book was published, like the "casing-head gas" decisions in *Musselam v. Magnolia Petroleum Co.*[11] and *Pautler v. Franchot.*[12] With such alterations the work could lay claim to excellence, whereas at present, in the writer's opinion, it is merely fair. Notwithstanding its limitations the book seems headed for substantial success, as it is the only vehicle available in a new, highly interesting and increasingly important field. Both compiler and publisher deserve success for their vision in discovering and materializing case-book possibilities in oil-and-gas law.

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Genesis and Birth of the Federal Constitution. Edited by J. A. C. Chandler. New York, The MacMillan Co., 1924. pp. xii, 397.

Judge Beverly Tucker said to his law class in 1845: "The function of a sovereign citizen is an affair not of right alone but of duty also". It is a deplorable fact that too many sovereign citizens fail to perform their

[9] (1920) 18 MICH. L. REV. 652–660.
[10] (1925) 34 YALE LAW JOURNAL, 383 *et seq.*
[11] (1924) 107 Okla. 183, 231 Pac. 526.
[12] (1925) 108 Okla. 130, 235 Pac. 209.

duty, by reason of either ignorance or indifference. This book embodies an attempt both to enlighten Americans, and to stir them to a new interest in their Constitution. The names of the authors of the essays here brought together—Hampton L. Carson, Alton B. Parker, J. E. Heath, Robert M. Hughes, William L. Marbury, Lyon G. Tyler, Oscar L. Shewmake, James Brown Scott, Frank W. Grinnell, R. T. W. Duke, Henry Campbell Black, Harrington Putnam, Randolph Harrison, James M. Beck, Rosewell Page—distinguished, learned and practical lawyers, professors, publicists and statesmen—afford evidence of the value and interest of the work. The various authors, in describing the sources of the Constitution, the workings of the early State Governments of Virginia and Massachusetts, the Congress under the Articles of Confederation, and the incidents of the framing of the Constitution, have been remarkably successful in avoiding undue repetition, although a certain amount of overlapping was inevitable.

Two criticisms may be made, however, of this book, as well as of most other works on the history of the Constitution. Incessant stress is laid by all the authors on the degree to which the Constitution was developed from English sources. It is true that the first ten amendments, constituting the Bill of Rights, were chiefly derived from rights established in England for English citizens (although several of these amendments contained purely American rights which did not exist in England in 1788). But the draft of the Constitution itself, as signed on September 17, 1787, was derived to a very small degree from English sources. It was, in fact, almost entirely American. It was derived (and in many parts copied) from the State Constitutions adopted from 1776 to 1780, and from the Articles of Confederation. The fundamental principle of the Federal Constitution, viz., the dual system of National and State Governments, was purely an American invention; and the mechanism by which this was worked out was largely American, owing little to English precedents. The clauses imposing restrictions on State and Federal powers came entirely from American experience.

The other criticism that may be made of this, and of other similar books, is the entire disregard which is paid to the fact that the Constitution, as signed on September 17, 1787,—wise, beneficial, promotive of the interest of the Union as it may have been,—never was, and never would have been, accepted as a Constitution by the people of the states; for it contained two defects and omissions which rendered it impossible of acceptance. It lacked a guaranty of individual rights, and it lacked a guaranty of the reserved rights of the states. Unless these two guarantees had been assured to the people of the states, we would never have had this Constitution. The first ten amendments were the essential part of the Constitution; for they were the result of the insistence of the more democratic and radical part of the community; and it was their adoption alone which made the Constitution satisfactory to the radicals. Writers who assert the Constitution to have been solely the work of the conservative and propertied classes fail to note that such a statement is true only of the Constitution of Sept. 17, 1787; it is *not* true of the Constitution with its ten amendments. It is unfortunate, therefore, that books like the one under review should omit to describe fully the part which the first ten amendments played in the drama of the Constitution, and in reconciling all classes in the community to its final acceptance.

In a book which will be published this autumn entitled, "Congress, the Constitution, and the Supreme Court", the writer has endeavored to supply this deficiency.

CHARLES WARREN

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The Dominion of the Sea and Air. By Enid Scott Rankin. New York, The Century Co., 1924. pp. 339.

This is an essay of diagnosis, protest and warning against the present international order, its organization, its principles and its policies. It offers suggestions of a solution for the amelioration or avoidance of the conflict, open or incipient, which international relations of the present day make, in the author's view, inevitable. The author assumes the premise that in international relations the rule of the jungle more or less prevails; that in time of war law is set aside and that the growing destructiveness of the weapons of war, with the growing contempt for established legal doctrines protecting the rights of neutrals and non-combatants, threaten the existence of civilization itself. The old state craft, she says, must go. Her suggested solution is to establish a "commonage of the sea and air" by which the sea and the air shall be free from appropriation or attempted appropriation by any power in time of peace or war, and that the area of war shall be confined strictly to the territory or waters of the belligerents. War should no longer be conducted on the high seas or in the air, which shall be under the control of all the nations, particularly neutrals. Neutrals shall have a certain right of asylum and shall be unmolested on the seas and from the air. This she believes—by confining the conflagration, if it comes, to narrow limits—would stifle war in short order. She deprecates the increasing power which belligerents have arrogated to themselves and which the neutrals seem to have tolerated. She is very positive in her prediction of future wars and of the devastation they will effect.

The author's horizon is broad. She examines the political constellation throughout the world and draws some startling conclusions. She finds that Great Britain, in order to maintain her maritime supremacy, the value of which is challenged by the control of the air, has brought into the orbit of British policy the United States in the Atlantic and Japan in the Pacific. She denounces the Four Power Treaty as a scheme for the subjugation of China. She has a good deal to say about modern imperialism and the struggle for oil. She maintains that the "enforcement of peace" is essentially tautological, and pleads for a cooperative peace, to be effected by taking the mastery of the seas out of the possible goal of national ambitions. She is fearful that Italy will incite war through her policies in the Mediterranean. She considers the League of Nations and the so-called World Court, if regarded as instruments of peace, as essential hypocrisy. She says that nations now, as heretofore, are interested in an imposed peace, which is inconsistent with genuine or continued peace. She sees mainly the desire and policy to increase war weapons and not to diminish them, an assertion in which she is confirmed by the fact that the Radio and Aircraft Conventions of 1923 have not been ratified by a single power. One of her main objections to international law is founded on the belief that it does not rest on "natural law". While opposing the League as in part a professed superstate, interfering with the freedom of each state, she nevertheless demands a "common superior"; and this "common superior" she sees in a "justiciable code" and similar codes which shall obey the "teachings of the jurist Seneca", the "law of nature" of Burke, Hegel's "first cause", Hill's "perpetual law" and the "higher law", whatever that may mean.

The book is interesting. It exemplifies a peculiar combination of realism and romanticism, disillusionment and hopeful aspiration. It will stimulate thought. It exhibits curious lapses, however, which excite some doubt as to the adequacy of the author's background in the field of international law and relations. What is the principle of "demesne" upon which rests the English common law, a principle which she desires to see adopted in international

law? Neutrals have not always been abandoned to the unrestrained violations of belligerents, as witness the Russo-Japanese war and many wars of the 19th Century. She is over-impressed by the fact that the United States abandoned its trusteeship over the rights of neutrals in the late war and by the violation by both sets of belligerents of the rules of maritime war. She gives to international law practically no weight whatever; in this she adopts a popular lay error. On the one hand, she decries the power and propriety of any superior dictating to any nation what it may do; on the other hand, she demands a "justiciable code of law" with the power of enforcement "such as will gain the respectful obedience of nations". What and whose power of enforcement? These questions are unanswered. Who is to be the "common superior"? The League? She says the League has stultified itself in too many ways, notably by its inability to maintain the "principle of compulsory jurisdiction as a condition of membership", the term "jurisdiction" being used in the sense of compulsory adherence to the League. Yet the "common superior", she avers, must be recognized, otherwise war is the only recourse. Her alleged reliance on "natural law" and the "higher law" as a guide for nations probably means little more than regard for the principle of "live and let live" in international relations, noteworthy, as she correctly indicates, by its absence from the policy of industrial nations. She has an exaggerated view of the place of treaties in American constitutional law.

That there is value in the suggestion that the sea and air should no longer be within the area of belligerent action and that this would aid in diminishing war will hardly be denied. She condemns the League theory that hereafter neutrality shall be a thing of the past and that the whole world should go to war against the politically condemned pariah. The phrase "aggressive war" probably comes from the vocabulary of propaganda, and not from law or political science. The author demands "law and order" in international relations as it approximately exists within the nations. The freedom of the sea and air in the wide sense in which she uses the term she wishes to see enforced by the "common superior", but is vague as to who that shall be, and how the enforcement is to take place. She would deny to every belligerent the privilege of sitting at the peace table, but would have peace terms declared and enforced by the neutral nations acting through the "court of commonage". She concludes that peace will not be possible until nations act on the principle of *"sic utere tuo ut alienum non laedes."*

She pays more attention to the immediate political firmament and the psychological factors governing policy than to the underlying economic factors. Emphasis upon these would not have changed her conclusion that the world is now organized on a more distrustful and competing basis than for some time, and that the growth of armaments reflects the growth of distrust. Perhaps experience alone will convince of the unwisdom of the present policies and bring about the result that the author desires to see adopted. Her book serves the useful function of stimulating thought along lines of possible solution without necessarily gaining adherents for the proposals advanced, or winning confidence in their practicability.

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The Economics of Taxation. By Harry Gunnison Brown. New York, Henry Holt & Co., 1924. pp. xxi, 344.

Written with the avowed intention of producing a purely deductive, theoretical study of the shifting and incidence of taxation, this volume by Professor Brown is remarkable for its comprehensive range and its felicity

of presentation. In the preface the author boldly justifies the appearance of an abstract study that is entirely devoid of any factual verification, and scathingly denounces the economist or statesman who is scornful or intolerant of a theoretical treatment of cause and effect relations in taxation. Early in the work we are assured that the author has no intention of advocating a special program of taxation or public policy; and this declaration is scrupulously adhered to throughout the chapters which follow.

Before the more familiar types of taxes are considered, monetary inflation is convincingly branded as an insidious and unconscionable form of taxation, and in turn government borrowing has its immediate and ultimate effects laid bare. Much space is devoted to the incidence of commodity taxes; and it is here that the theoretician may revel in hypothetical assumptions of constant cost, elastic supply, fluctuating price levels, decreasing cost, long run and short run shifting, competitively made goods, monopolistically produced goods, etc. Suffice it to say that the analysis here proceeds in a highly lucid and incisive manner, generously reënforced with orthodox demand and supply curves and supposititious buyer and seller schedules. Since each new set of assumptions brings its own conclusions, these chapters fairly bristle with results, the more important of which are assembled in a summary. There follows in rapid succession a chapter devoted to each of the following: the incidence of taxes on labor incomes, of workmen's compulsory insurance, of taxes on capital, of taxes on land, the shifting of taxes on loans, and finally a consideration of import and export tariffs.

The relentless insistence with which the tax burden is always pursued to its furthermost lair, is best appreciated by sampling the method of treatment in a chapter such as that on the incidence of capital taxes. Taxes may be levied on capital discriminatingly, that is, on some capital to the exclusion of others, or on capital in general. Each of these possibilities is considered in turn. But there are further alternative assumptions of the tax affecting the supply of capital or of the aggregate volume of capital remaining intact. The incidence of a discriminating tax on capital in some uses is shown to bear on all capital owners, assuming that the tax produces no effect on the supply of capital. If, however, this assumption is unwarranted and the volume of capital is impaired, then allowance must be made for this effect manifesting itself either in terms of the volume of capital in a given taxing jurisdiction or in terms of the sum total of existing capital. If we choose to follow the latter of these two alternatives, we find ourselves confronted with another choice between (a) a possibility of the volume of capital being affected with no change in the rate of saving (*e. g.* through a decrease in the importation or an increase in the exportation of capital) and (b) a possibility of the change in capital volume as a consequence of a change in the saving habits of those who bring capital into existence. Again, preferring the second of the two assumptions, we discover our way obstructed by the well-nigh insoluble question: does a low rate of interest conduce to less saving than a higher rate? On reaching this quagmire of conjecture only tentative and highly qualified conclusions may be essayed—a difficulty readily conceded by the author. A tax which reduces the net returns to owners of capital, however, might conceivably result in a reduction of accumulated capital with a consequent rise in the interest rate, thus tending to shift part of the tax burden to capital users and laborers, but not to consumers as such. Of course, every implied ramification in this argument is subsequently explored; and the appended summary clinches the impression that the topic, if not exhausted, is at least satisfactorily surveyed.

Similarly the chapter on workmen's insurance is developed. Dissenting from the common conclusion, the author contends that the burden of the

premiums rests ultimately not on the consumers of the goods produced by the insured employees but upon the laborers themselves in their capacity as wage-earners. This conclusion is approached by distinguishing four possible cases: (1) when insurance is required in all trades or occupations; (2) when insurance is required in some lines and its advantages are realized by the workmen; (3) when insurance is required in some lines and its advantages are not realized by the workmen and where the demand for the products of these lines is inelastic, (4) as in the case preceding, but with the demand elastic. In general ". . . demand for labor, with an insurance premium added to wages, decreases as compared with what this demand for labor would be with the same wages directly paid and without the premium. Only as the additional expense for insurance is offset by decreased wages, can demand for labor be as large as it would be in the absence of the premium. The cost of the insurance may, in certain contingencies, fall on wages-in-general rather than on the wages of a specific group of insured workmen in an especially dangerous trade. But the cost tends to fall either on the particular wages of the insured employees or on wages-in-general." (Pages 176–7).

The sub-headings within the chapters, the sections, and the chapter summaries assist the reader materially in following the author's reasoning. Objections are skillfully forestalled and counter presumptions rebutted at strategic points in such a way as to lend considerable force to the argument. Unfortunately the income tax seems to merit no special treatment. This much-advertised and spectacular tax qualifies, like the general property tax and the sales tax, as a compound tax, and as such has its respective parts analyzed in the chapter on capital, or that on wages, or that on land incomes, etc. Even at the risk of repetition these scattered references might well be assembled in a special section or chapter and their treatment amplified. The student of economics will have no difficulty with the technical phrases used throughout the book; but such concepts as "the marginal physical productivity of capital" and "increased marginal labor efficiency" may disturb the layman. Much in the book can be appreciated, however, without any knowledge of these.

The validity of certain of the author's premises must inevitably provoke some disagreement. His assumptions are boldly, but not recklessly, handled, with frequent recognition of the doubtful certainty of some of his conclusions. Yet soritical reasoning frequently and extensively applied with no reference to empirical induction is bound to arouse the ire of the thoughtful but more mundane reader. Moreover, with insufficient data to guide the way, differences of opinion are traceable to differences in guesses, and as such are not to be reconciled. In spite of such apparent difficulties, there is a prominent place in the literature of taxation for just such a study as this. Until quantitative investigation can demolish theoretical conclusions, the latter are our sole means of progress and intelligent understanding. Without seeming to eschew the inductive approach, we can, in all consistency, utilize and appreciate the thoughtful theoretical study. Professor Brown's book is justly entitled to such critical consideration. And it can face it quite unabashed.

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The Permanent Court of International Justice and the Question of American Participation. By Manley O. Hudson. Cambridge, Harvard University Press, 1925. pp. ix, 389.

While the Permanent Court of International Justice is an institution of very recent date, the amount of literature which relates to the Tribunal is

extensive. Official publications alone fill fifteen volumes or more; and controversial and legal discussions regarding the Court would form a small library; but there has hitherto been no standard work of reference on the origin and functioning of the Court. This need is now supplied by the work of Professor Hudson.

In the first part of his volume, the author gives a clear and complete account of the events leading up to the creation of the Permanent Court, and describes its procedure and actual working. The advantages in the conduct of international affairs generally, which may well be realised from the existence of a Permanent International Court, are clearly shown by Mr. Hudson; and, as he points out, the almost unanimous views of American lawyers and publicists are in accord. Perhaps more might have been said of interest to the Bar regarding the procedural advantages of such a Tribunal, alluded to on page 24; for, particularly in connection with the already extensive and growing obligatory jurisdiction of the Court, the advantages of permanency and of known rules of procedure are so great as to become necessities.

Of course, in the last analysis, the extent to which the Permanent Court will be used depends upon the attitude of governments toward it and its work. The usefulness of the Permanent Court of Arbitration established by the Hague Conventions of 1899 and 1907, as well as of other tribunals, general or special, is rightly admitted by the author. But the tendency of the present time is to extend the jurisdiction of the Permanent Court of International Justice by clauses in treaties giving to that Court the solution of international differences of a legal character; and certainly the actual results of the work of the Permanent Court since its creation, as shown by Mr. Hudson, justify this growing tendency. Despite some of the carping criticisms to which allusion is made in the work, there has been no well-reasoned complaint as to what has been done.

Of particular interest in this regard is the course of the Court with reference to so-called advisory opinions. Mr. Hudson rightly concludes that there is nothing in the record to show that these advisory opinions lack the quality of "judiciality" (page 168). As Judge Moore says, they have been assimilated "as far as possible to judicial proceedings" (page 160). Indeed, to an American lawyer, the chapter on Advisory Opinions of National and International Courts will be found perhaps the most interesting. It is a real contribution to the legal history of the subject. The place of advisory opinions in American jurisprudence, the American attitude toward declaratory judgments, and the power of the Supreme Court to declare statutes unconstitutional are considered in the discussion. American lawyers are prone to think that a Court should not make a decision except in a case raised by the litigants before it and affecting them. In reality, however, as Lord Birkenhead observed in a remark quoted by the author on page 141, a decision of the Supreme Court of the United States on a question of constitutionality goes further than merely the decision of a litigated case between the plaintiff and the defendant. Mr. Hudson might have cited in support of this the procedure in such a famous case as *Pollock v. The Farmers' Loan and Trust Company*,[1] where the Supreme Court held a federal taxing law unconstitutional in a case where the plaintiff stockholder sought to enjoin the defendant corporation (both parties to the record being *really* opposed to the taxing law) and the Attorney General of the United States appearing in the Supreme Court only "by leave of Court" (page 499). Certainly such a decision is something more, or other, than the determining of disputed issues between litigants; a decree *pro confesso* would have accomplished that.

[1] (1895) 157 U. S. 429, 15 Sup. Ct. 673.

Indeed the analogy between the power of municipal courts or judges and the power of an international court to hand down advisory opinions is not a very complete one. If we look at the international power realistically, the vital question is whether the states concerned actually accept the advisory opinion as ending the question of law between them. The answer is that they do; and since they do, such advisory opinions should be used as a means of promoting international concord.

Mr. Hudson well says (page 169):

"The device should not be thrown away until we have had time to see how it may be made to work. A political shibboleth, built upon an American conception of separation of powers, should not be permitted to wreck a sound experiment launched in a world which is but slowly emerging from the bankruptcy of war."

The other part of Mr. Hudson's work will perhaps be of more interest to the general reader. On the question of American participation in the Permanent Court of International Justice, Mr. Hudson holds a brief for the affirmative. He has been one of the outstanding advocates of American participation since the question was raised. His arguments here are very timely, since the discussion of American participation is to commence in the Senate next December. Those who wish to know the "pro" of the controversy should read what the author says.

In the work as a whole, and particularly in its latter part, there is more or less repetition, as the volume is a collection of papers previously written and here presented with some slight revision. It is to be hoped that Mr. Hudson will find occasion before the next session of Congress to recast his conclusions on the subject of American participation in the Permanent Court in one complete, continuous and reasoned argument.

All the physical features of a standard work of reference are present in this volume; it is sufficiently documented; the bibliography seems complete, and the index excellent.

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Cases on the Law of Sales of Goods. By Frederic Campbell Woodward. Second edition. St. Paul, West Publishing Company, 1925. pp. xxii, 851.

This is the second edition of a casebook first issued by Mr. Woodward twelve years ago. Perhaps, therefore, the reviewer should be primarily concerned with the editor's skill as a reviser. On the other hand, the work as a whole challenges investigation and criticism. In this connection, even at the risk of being thought presumptuous in venturing to comment upon a book that has set the standard for students in this field of the law for more than a quarter of a century (and whose present form has been widely current for six years), the reviewer has been drawn inevitably into frequent comparisons between this volume and Mr. Williston's casebook on Sales, of which the 1919 edition is now the third. That book, however, has not been thoroughly revised for many years. The edition just referred to was substantially a reprinting of a much earlier work with the addition of a new supplement. This fact causes certain aspects of the comparison to redound to the advantage of Mr. Woodward's book. The comparative device has not been resorted to, however, for the purpose of criticism of Mr. Williston's casebook. It has been adopted, with admitted limitations, as a method of delineating more accurately the characteristics of Mr. Woodward's work.

The book contains two hundred and forty-nine cases, covering eight

hundred and fifty-one pages. It is thus larger than the first edition by nine cases and sixty pages. Mr. Williston's casebook, however, exceeds this size by a margin of seventy-six cases and three hundred and forty-five pages, having a total of three hundred and twenty-five cases spread over eleven hundred and ninety-six pages. Although many teachers prefer a collection that permits a wide range of individual selection of cases for class-room discussion, others will be relieved, as the reviewer has been, to find that Mr. Woodward's material just fits a three hour course for one semester.

A certain amount of duplication of cases was perhaps inevitable. One hundred and seven, or two fifths, of the cases in Woodward will also be found in Mr. Williston's casebook. The great proportion of these, however, are those classics without which no casebook could present adequately either the history or the literature of the subject.

The collection is distinctly American. Mr. Woodward has mixed American and English cases in the ratio of three to one. That is to say, one hundred and eighty-eight of his cases are from courts in the United States, sixty are English decisions, and one is Canadian. Mr. Williston's ratio is six to seven. One hundred and forty-seven of his cases are American and one hundred and seventy-eight are English. Sixty-four of the American cases in the new Woodward have been decided since 1900. This was made possible by the withdrawal of thirty-four cases which appeared in the first edition, and the insertion of forty-three new ones, most of them decided under the Sales Act. On the other hand, Mr. Williston has only twenty-eight American cases from the same period. And twenty-two of these are in a supplement at the back of the book, without preface, table of contents or index to integrate them with the main part of the book.

Only four of the English cases in Woodward have been decided since the enactment of the Sale of Goods Act in 1894, and only twenty-three are of the period between that date and 1850. On the other hand, Mr. Williston has put into his book only eight English cases dated since 1894 (three of these are in the supplement), and only sixty-five from the period between that date and 1850. This means that while Williston has three times as much English material as has the new Woodward, both compilers have allotted substantially the same proportions of their English cases to the historical and modern phases of the subject, respectively.

When the annotations are included, however, it will be seen that Mr. Woodward has done more than Mr. Williston to present modern English law. His annotations carry citations to ten important English decisions under the Sale of Goods Act during the last sixteen years, accompanied in most instances by references to American periodical literature discussing their significance; two to articles in English periodicals; eight to English treatises on Sales; and forty to sections of the Sale of Goods Act, thirty-three of them paired for purposes of comparison with designated sections of the American Sales Act. One wonders, however, why Mr. Woodward's references to Benjamin's treatise on Sales are to the fifth English edition, when the sixth English edition, containing views on a number of old problems at variance with those expressed in the earlier work, has been available since 1920.

It is in connection with this proportion of American to English material that teachers on Sales will be most likely to disagree. The present reviewer is admittedly enthusiastic over the layout just described. The great proportion of the classic English cases which have had an influence upon the development of the American law of Sales are here. On the whole, there is adequate material for the study of how a sister jurisdiction is handling problems akin to our own. After all, the important thing is to train our students to examine critically the way in which American courts have

dealt, are dealing and ought to deal with Sales problems. English cases must of course constitute both background and approach. But if American commercial life has not produced enough important and difficult problems in the law of Sales to warrant their inclusion as the principal part of a casebook on this subject, then the course should be abandoned by American law schools. If the increasingly widespread adoption of the Sales Act has not necessitated study of decisions construing and applying that statute, then the second edition of Mr. Williston's treatise, as well as the third edition of his casebook, was unjustified. Moreover, in view of the characteristics of these two books and of Mr. Williston's unique relation to the Sales Act and to modern American law, one cannot help feeling that if a thorough revision of Mr. Williston's casebook were to be issued today, it would contain a number of contemporary American cases more nearly approximating Mr. Woodward's sixty-four than the twenty-eight which Mr. Williston printed six years ago.

Whether Mr. Woodward has selected his American cases on the proper pedagogical basis is likewise a matter concerning which teachers will differ. The present reviewer borrowed frequently from the new Woodward during his course in Sales last spring as a basis for class discussion of problems not raised by Mr. Williston's casebook, and as the nucleus of various mid-semester and final examination questions. He has been over the work pretty carefully both in connection with this review and in preparing to use the new Woodward as the adopted casebook in his course this fall. As this goes to press he has had a slight seven weeks taste of the way the cases work out in actual performance. He believes that Mr. Woodward has put together an interesting array of problems for training in analysis in the form of cases which, stripped of unnecessary sources of confusion, challenge thought and stimulate the development of the student's critical faculties. The editor has not gathered mere illustrations of typical situations, or examples of approved judicial reasoning. He has not attempted, even in the footnotes, an impressionistic panorama of the state of the law in many jurisdictions. Nor has he made an effort to select late cases as such. The intimation of one reviewer[1] that the American cases are little known and of doubtful influence is belied by the importance attributed to most of them in the better periodical literature and in Mr. Williston's treatise. And the suggestion that they make for ease of class room presentation merely because they are American and therefore less difficult and complicated than English cases, is as unwarranted by the actual facts as it is amusing.

The very early English law of Sales has been presented in Woodward through excerpts from the writings of the late Dean Ames and from the second edition of Mr. Williston's treatise on Sales. It is believed that this is an eminently more satisfactory basis than the obscure passages from ancient cases and texts which Mr. Williston has used for this purpose. The student's comprehension of such material has inevitably depended upon information and interpretations furnished by the instructor in lecture form, and taken by the instructor from just such sources as Mr. Woodward has here given the student for study in the first instance.

The arrangement of Mr. Woodward's second edition, so far as the chapters and sections are concerned, remains substantially the same as that of the first. A checking over of the cases themselves, however, reveals a rather thorough overhauling of all the sections save five. The most important changes are the following. In the section relating to documents of title, three cases that appeared in the first edition have been withdrawn, four new ones have been added, all of the cases have been rearranged and the section divided into two parts to distinguish the effects of issuance from the effects of the negotiation of the document. The section on implied

[1] Mr. W. E. McCurdy, (1925) 38 HARV. L. REV. 1131.

warranty of quality has been augmented by the addition of seven new cases to the original eight. The memorandum section in the chapter relating to the Statute of Frauds has been diminished in size by the withdrawal of eight cases and the insertion of one new one. And in the section on appropriation, four of the original twelve cases have been eliminated. Material on bulk sales statutes has been added to the section on effect of fraud on the seller; the importance of trust receipts as a security device has been emphasized in connection with the sections on documents of title, conditional sales, and sellers' remedy on the contract; and cases on c. i. f. contracts have been made available in the section on appropriation. Incidentally, Mr. Woodward's manuscript was possibly completed too soon to include a reference in this connection to Mr. A. R. Kennedy's valuable little book on the English law relating to *Contracts of Sale C. I. F.*, issued in London in the spring of 1924. On the whole, however, if Mr. Llewellyn's list[2] of new matter in Mr. Williston's second edition of his treatise on Sales may be taken as a criterion of the important new problems in that field, it will be found that the new Woodward excels in timeliness.

The classification of problems in the new Woodward follows that of Williston in broad outline with differences in detail. The former has eight chapters, divided into a net total of thirty-two subdivisions; the latter has six chapters and twenty-eight subdivisions. Both start with the subject matter of sale. The equitable side of this topic, however, to which Mr. Williston devotes a section, is dealt with by Mr. Woodward in a long note. Both close their books with a chapter on the Statute of Frauds. Woodward has consolidated most of the title problems handled in Williston's second and third chapters on executory and executed sales and the effect of fraud, retention of possession and delivery, into one long chapter (his second). Mr. Woodward, unlike Mr. Williston, has isolated cases on the risk of loss in a separate chapter. Where Mr. Williston has grouped into his fourth and fifth chapters the rights and obligations of the seller and buyer, respectively, both in connection with the goods themselves and under the contract, Mr. Woodward has made of the same branch of the subject four distinct chapters. These are concerned with the obligations of the seller and buyer (warranties, delivery, inspection and acceptance), the rights of the unpaid seller against the goods (lien, stoppage in transitu, resale and rescission), and the remedies of the seller and buyer, respectively, on the contract. Here, again, there will be disagreement. If this were a first edition, one might be more tempted to quarrel with the plan of classification adopted, particularly in connection with the matters last mentioned. The benefit of the doubt, however, must be awarded to the reviser, in view of the presumption that twelve years' use demonstrated the inadvisability of a change. Then, too, classification is so dependent upon personal taste that one finds difficulty in making his reactions articulate. The most one should hope for, perhaps, is that the editor will furnish a comprehensible and fairly workable outline, so as to facilitate first use of the book. And Mr. Woodward has done that job well.

Mr. Woodward's second edition carries more than twice as many annotations as the first edition. Exclusive of necessary indications of the relation between the case as reprinted and as originally reported, there are two hundred and three annotations as compared with ninety-five in the first edition. They furnish the student with a remarkable supply of material collateral to the text, including eighty-five references to various sections of the Sales Act, Sale of Goods Act, Conditional Sales Act, Warehouse Receipts Act, Bill of Lading Act, and Pomerene Act; ninety-eight statements of suggestive questions and problems based upon designated statutory or case material or quotations from cases and texts; twenty-seven references

[2] (1925) 34 YALE LAW JOURNAL, 454.

to treatises on Sales; and one hundred and sixteen citations to articles and editorial notes in periodicals. In passing, however, it should be noted that the list fails to include an interesting article by Dean M. L. Ferson, on *Fraudulent Bills of Lading*.[3]

The reviewer is unable to appreciate the suggestion[4] that because these annotations are so rich in collateral material and library-helps as to make an excellent book for teachers, it is bad for the students. Most well informed instructors would cite the bulk of the material here included anyway, and the editor's work saves that time. Little if any of the references are to what would serve as "ponies" in connection with the cases in the text. Instead, most of the questions and problems in the notes stimulate comparative criticism of the principal case. And if a before-class reading of some of the literature does result in the student acquiring a point of view toward the day's assigned cases that he might not have derived from the cases alone, it also results in a richer class discussion for that very reason. Moreover, the plan adopted here is in keeping with that followed in the preparation of the best of recent casebooks, notably Scott's *Cases on Trusts*, Costigan's new book on the same subject, Chafee's *Cases on Equitable Relief Against Torts*, Cook's *Cases on Equity*, and Maguire's revision of Thayer's *Cases on Evidence*.

The index in the new Woodward has been increased from five to seven pages by the insertion of eighty-two new items and twenty-four additional cross references. Unfortunately, Mr. Williston's casebook contains no index.

The appendix has been enlarged from the text of the Sales Act and Sale of Goods Act (which is all that Mr. Williston's contains) to include, in addition, the text of the amendments to sections 32 and 38 of the Sales Act submitted by the Conference in 1922, the text of the Conditional Sales Act, tables of contents of the two American Acts, and a table of states which have adopted them, showing statutory citations for each section thereof. The present writer, however, would have preferred that the space taken for these elaborate tables of local citations (after all of little value to the student) had been appropriated, instead, to the more immediately useful text of the Warehouse Receipts Act, Bill of Lading Act, and Pomerene Act.

Perhaps this is as opportune a time as any to express a hope that the West Publishing Company will soon eliminate from the volumes of the American Casebook Series the long preface to the Series which dominates the opening pages. Its usefulness as advertising for so well known a Series must have passed, it obscures the importance of the preface by the editor of the particular volume, and is a source of frequent irritation as one daily paws through its five pages looking for the table of contents or table of cases.

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[3] (1923) 21 MICH. L. REV. 655.
[4] Mr. W. E. McCurdy, *op. cit. supra* note 1.