

legal expert is called on to direct. Dr. Cohen is quite right in believing that the legal expert had better clarify his ethical ideals before he undertakes this difficult and delicate task.

MAX RADIN.\*

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CASES ON CIVIL PROCEDURE. By James P. McBaine. St. Paul: West Publishing Co. 1933. Pp. xx, 1008. \$6.00.

A few years ago teachers of pleading and procedure were regretting the lack of general pedagogical interest in their subjects and the comparative dearth of teaching materials therein. Lately, however, casebooks in this field have become increasingly numerous, and even though disagreement as to the teaching of the subjects is, if anything, sharper than ever, yet the interest shown is a healthy sign in view of the very great practical and theoretical importance of the whole field. Procedural casebooks generally tend in one of two directions: one towards the old historical approach, beginning with common-law pleading, the other to an emphasis upon modern American practice. This new casebook, offered as providing a first-year course, is unique in that it employs the historical approach as to pleading, starting off with the forms of action in common-law pleading, but changes to the modern law in the materials on trial practice, comprising about two-thirds of the book.

Since I have so definitely committed myself to a different approach to the teaching of pleading, even to the extent of preparing casebooks of another type, perhaps I may proceed at once to give my own reactions to this plan and omit the customary reviewer's gesture (before he proceeds to state his own convictions) that no review is possible until after a casebook has had classroom trial. I have not yet found a law teacher, even the most distinguished, who has been successful in teaching common-law pleading to first-year law students, and if I ever do, I shall be ready to believe that there is something wrong with the students. They ought to resent, as they do, the presentation of ancient and now misleading material as not, as it actually is, history, but as having some direct connection with their professional training.

Two arguments are currently given for the practice. The first is that the material is a necessary background for the later procedure subjects. But it is now infinitely more important, for both the student's professional training and for his education for bar leadership, that he should know and recognize the significance of the differences than that he should pick out the rather obvious similarities. The automobile is, of course, a later development from the horse-drawn carriage, but slavish imitation of the earlier model has held back automobile designing. Both run on a highway on four wheels; so both modern and earlier forms of pleading are designed broadly to present an issue to a court. But inculcation of common-law pleading doctrines is the worst possible approach to modern pleading conceptions, for it gives the student so much more to unlearn. Of course, this does not mean that modern teaching of procedure should reject all history; only that history should be given its proper place, as in other courses, as explaining how modern rules developed, not as an end in itself.

The other argument is that the course affords a helpful explanation of the

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other first-year courses. But procedure is important enough both vocationally and socially that a fifth or a quarter of the first year may well be spent upon it, and it should not be employed merely to provide a background for other subjects. Moreover, such background, so far as is needed, is much better obtained by the use of a good law dictionary along with the other courses than by separate study of these technical doctrines.

The pleading materials of this casebook show an unusually deep commitment to the historical method. Part I, consisting of over 200 pages, is devoted to the common-law forms of action. After three pages of quotations from Stephen, Maitland, and Chitty on the original writ, we come to trespass. The chapter on Trespass consists of the reprint of some old writs and declarations and of the Statute of Westminster II, of 1285, with fourteen cases in the text and thirty-four in the footnotes, all decided from 1589 to 1857, and — until we reach Section 4, entitled *Modern Significance* — with only four recent cases, cited in the footnotes, from New Hampshire in 1870, England in 1901, Alabama in 1919, and Rhode Island in 1930. Section 4 sets forth one Connecticut case of 1916 and cites a California case of 1920. The other chapters on the forms of action apparently have at least a like emphasis upon old cases.

When we come to Part II, dealing with Pleading and containing about one hundred pages, the historical approach becomes, if anything, even more striking. Beginning with materials on the demurrer the latest case in the text is from Alabama in 1851; in the next chapter on the declaration the latest is a Vermont case of 1878; the section on the general issue has a Pennsylvania case of 1851 and in the entire Part all the reported cases are earlier than 1870 — usually very much earlier — except one Vermont case of 1908, one Virginia case of 1882, one New Jersey case of 1885, another of 1875, and one Illinois case of 1887.

This Part, in beginning in the traditional way with consideration of the demurrer, again follows the theory of providing material supposedly most useful in other courses and in later courses of the procedural field. But five minutes of explanation by the instructor at the first class in contracts is a much better preparation for the other courses. So far as procedure is concerned, study of the demurrer emphasizes the worst elements of the subject: the rules of the game and particularly the chief use of the demurrer, to provide delay. From the modern viewpoint, this is all unreal, for, as lawyers generally know, outside of attempts to delay the case the demurrer is little used. All our recent statistical investigations demonstrate that the total proportionate number of cases in which the demurrer is filed is small, and that the number in which it affects the result is still smaller. After repleading, the case goes on as before. Hence one of the main points of modern procedural reform is to do away with the demurrer and to allow a substitute to be used in advance of trial only in those rare cases where the judge rules that a decision upon it is likely to end the case. A procedural device which is thus going into the discard is hardly the means whereby the whole important subject of law administration may be opened up for the student.

It may be suggested that the editor has obviated some of the difficulties here stated by adding to each chapter on the forms of action a section on *Modern Significance*. I do not think so; in fact, I wish he had not attempted this departure from what otherwise would have been history pure and simple. The single added case in each chapter appears to be merely an argumenta-

tive attempt to show that the forms of action are not quite dead, an attempt of which a mature student can see the futility on the evidence presented, but which is likely to confuse the beginner who may regard these cases as samples of others and not as selected and isolated phenomena. Thus the modern significance of trespass is shown by a Connecticut case brought under a statute to recover damages for unlawfully cutting trees. The court ruled that to recover the plaintiff must prove he was in possession of the land, and referred, among other things, to common-law analogies under the action of trespass. The modern significance of covenant is shown by the recent New York case which holds that an undisclosed principal, on behalf of whom a sealed contract has been executed, cannot recover upon it. The modern significance of debt is shown by a recent New York case upholding the granting of a motion for summary judgment — most modern of remedies — upon a note providing for an allowance of attorney's fees for collection, since the court, in considering the requirement of the summary procedure that there must be "a debt or a liquidated demand", included a learned historical discussion of the meaning of debt. And so on. Perhaps the common-law pleader's heart may be delighted by these examples which indicate that some judges have delved into his subject, but one wonders what idea of modern pleading in New York and Connecticut the beginning student in law receives from this material.

It is, therefore, refreshing to find that the bulk of the book, which is devoted to trial practice, gives a picture of the subject as of the present day. One may differ, of course, as to the details of the presentation, but there is no doubt that from it the student can get a reasonably adequate idea of what the courts are doing today with venue and jurisdiction, judge and jury, verdicts and judgments, even if not of appellate procedure. The question may then occur whether this is the most desirable material for first-year students. The order of presentation of a general subject is much a matter of the taste of the instructor, and at least there is this much logic to the choice here indicated that a considerable portion of the materials deals with the first step in commencing a law suit.

Nevertheless, I believe that it is more desirable to begin the student work in law administration with the subject of pleading proper and to postpone trial practice until later. The latter involves a multitude of small details individually important but emphasizing the trees more than the forest. Many of them depend for their decision upon matters considered elsewhere in the law, notably in constitutional law, and a greater background for the student than is had in the first year is helpful. Again, except as they deal with trial mechanics, the topics are disconnected from one another. On the other hand, it is common knowledge that civil law suits are brought to settle disputed points and the manner in which the question gets before the court is a natural and an important point of departure for the student. The development of the issue by the pleadings, the separation of it from non-essentials, the use of the pleadings to determine the bounds of the combat, the location of the burden of proof, and the relation of proof at the trial to the pleadings are all important and essential problems which at once occur to the students. Moreover, these in turn open up basic problems as to the meaning of law in general. What is this law which is to be decided by the court and which must be distinguished from the facts which the court is to get from the parties? Why does one side have the burden of convincing the court and

how is it determined which side has that burden? How does one decide what facts he shall present to the tribunal, a question opening up the problem of logical and legal method in general? These are all vitally practical matters, yet ones which throw light upon the whole subject of jurisprudence. And with them go naturally the attempts to speed up and modernize the procedure and in fact the entire field of modern law reform. Thus, with this course the student may receive professional training of the most practical sort along with the foundations of a necessary philosophy of the law.

A course in modern procedure aimed primarily at showing the development of the issue in the modern civil action seems, therefore, both the most fruitful initiation into work in the field of law administration and a desirable beginning course in law.

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OIL CONSERVATION THROUGH INTERSTATE AGREEMENT. By Northcutt Ely. Washington: Government Printing Office. 1933. Pp. x, 398. \$1.00.

THE OIL AND GAS CONSERVATION STATUTES (ANNOTATED). Compiled by Northcutt Ely. Washington: Government Printing Office. 1933. Pp. vii, 432. \$1.25.

The problem of the petroleum industry has not been due to depression of general economic conditions. It arose much earlier. As with other industries, promise of control of over-production and of any relief from the anti-trust laws should be welcome. As this is written, the industry is looking to the code approved under the National Industrial Recovery Act. The interstate compact idea, as outlined by Mr. Ely, is out-moded, at least for the present. But the problem is so grave that any comprehensive plan is deserving of attentive and respectful consideration. The usefulness of Mr. Ely's book is not limited to the interstate compact plan. In other particulars it will be found of more general, and perhaps of more enduring, value to the oil conservationist.

Disregarding the author's classification, we may divide the book into three parts. In the first, he examines the problem of restricting oil production to demand, and the "artificial" factors that must be dealt with. But it is not artificial factors alone that make the problem so refractory. There are also the human qualities of distrust, unwillingness to coöperate, lack of the vision to decide fairly and promptly the innumerable specific issues which depend upon conditions differing enormously and changing almost overnight.

In the second group of chapters, the conservation legislation of the several states is studied. These chapters and the second volume are complementary. Together they are invaluable, not only as showing the actual text of the various statutes, but for a development of the principles, for a reference to the adjudicated cases, and for a catalogue of unsuccessful defenses. The author assumes that it is politically possible to enact further measures. Principal attention is given to questions of law. Where the need is so desperate, experiments in legality are certainly justified. It is the practical difficulties of just enforcement that have led to the successive experiments.

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