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ADMINISTRATIVE LAW, by Morris D.
Forkosch. *The Bobbs-Merrill Company, Inc.*,
Indianapolis, 1956. Pp. xiv, 856. \$12.00.

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Certainly a careful reading of this volume should serve to break down many of our inhibitions against change. We can laugh at the violence of the reaction against Pound's unorthodox suggestions, but we should resolve to exorcise our own minds of every vestige of bias and prejudice which might lead us into the same error.

*George W. Hardy, Jr.**

ADMINISTRATIVE LAW, by Morris D. Forkosch. The Bobbs-Merrill Company, Inc., Indianapolis, 1956. Pp. xiv, 856. \$12.00.

This is the second treatise on administrative law to be published by Bobbs-Merrill in a period of somewhat less than five years. Despite the many special virtues of its earlier publication,¹ it was not a full treatment of the subject; the present volume is more clearly a general treatise and comparable to the 1951 work of Davis.² The arrangement is logical, with delegation problems treated initially in some 180 pages, non-adjudicatory and adjudicatory administrative functions in some 400 pages, and judicial review and related topics in some 380 additional pages.

The author, in his introductory pages, suggests that his treatment may be somewhat radical in that pedagogical techniques are used throughout; in the main the "technique" consists in copious use of charts in the analysis of procedures and powers and in the detailed development of a "twelve question analysis" of an administrative proceeding (questions about delegation, hearing requirements, and judicial review). In addition, however, there is constant and useful reliance upon judicial analogies for administrative practice, a reliance which Forkosch calls "the parallel approach." There is also much homely classroom analogy. Part I is captioned "A Preliminary Outline of Administrative Law." It is followed by Part II, devoted to "The Delegation of Powers: Limitations on and Types of"; Part III, devoted to "Non-Adjudicatory Functioning of Administrative Agencies"; Part IV, devoted to "The Adjudicatory Functioning

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1. *Administrative Law*, by Reginald Parker. The Bobbs-Merrill Company, Inc., Indianapolis, 1951.

2. *Administrative Law*, by Kenneth Culp Davis. West Publishing Company, St. Paul, 1951.

3. § 65.

of Administrative Agencies: Notice"; and Part V, devoted to "Review: Agency and Judicial."

Chapter XIV obviously embodies the results of many years of teaching and practice; it is a substantial harvest. Here, in patient detail, is an analysis of the substantial evidence rule which should lift the spirits of students of evidence as well as administrative law. The section and its sub-parts extend over almost fifty pages or more than five percent of the text; for this reviewer, the inadequacies of blackboard analysis being what they are, it serves particularly well as a library reference for those still puzzled after classroom time has been exhausted.

The charts which Forkosch uses in such profusion are genuinely useful in making his analysis of the substantial evidence rule. No detail is omitted; the student is painstakingly escorted through the pleading in which the ultimate facts constituting the cause of action are alleged, through the hearing and the adducing of evidence, through the process of finding the facts, and finally through the conclusion of law stage in which the determination is arrived at that all ultimate facts essential to the cause of action have been alleged and proved.

The distinction between the substantial evidence rule applicable to agency review and the "clearly erroneous" rule applicable to district court review is presented with competent clarity; perhaps in part this is due to reliance upon the lucid analysis of Judge Frank in his second *Universal Camera* decision,⁴ and upon the analysis of Justice Rutledge (then Judge Rutledge) in the *International Association of Machinists* case.⁵ In any event, the greater limitations imposed upon a court reviewing agency action as distinguished from trial court action emerge in a form readily grasped by the student; with the background laid by Forkosch, the significance of review limited to a determination of whether reasonable men could differ as to the inferences to be drawn from established facts as against the free substitution of judgment possible where review is of a district court decision, is amply apparent as a device for insuring maximum utilization of agency expertness. The limitations of *Universal Camera*⁶ are kept in sharp focus and its effects limited to broadening judicial review only where agency adjudication

4. *N.L.R.B. v. Universal Camera Corporation*, 190 F.2d 429 (2d Cir., 1951).

5. *International Association of Machinists v. N.L.R.B.*, 110 F.2d 29 (D.C. Cir., 1939); *aff'd*, 311 U.S. 72 (1940).

6. *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474 (1951).

discards an examiner's testimonial inferences or fails to consider the whole record.

Under scope of review in Part IV, there are excellent sections devoted to the many-faceted problem of distinguishing between questions of law and questions of fact on review. Here there is not, however, the same lucid analysis which Forkosch displays in the sections devoted to the adjudicatory processes proper; he almost contents himself with such timeworn, quotable clichés as "the distinction between questions of law and questions of fact has been found a will-of-the-wisp" and "the knife of policy alone affects an artificial cleavage." Not quite, however. There is useful discourse, interlarded with illuminating quotations from the decisions, on judicial review of the rule-making or law-making function of the agencies when Congress has legislated but has not defined except in broad abstractions; there is little analysis of the difference between adjudicatory and legislative facts, however, and consequently insufficient allusion to the reasons which render a simple "rational basis" test a sufficient limitation on the fact finding processes incident to rule-making whereas fact finding in adjudication is made subject to the "substantial evidence" test or even, in some instances, to a complete reweighing of the evidence.

It seems to this reviewer; also, that, even at the risk of belaboring the obvious, the author should stop and explain such statements as one finds under a section devoted to distinguishing "matters of law" from "matters of fact" that "the substantial evidence rule is a rule of law *though it deals with facts.*" Thus, it would be useful to note that generally a rule of law consists in an attempted verbal description of a category of conduct or phenomena (facts) to which legal consequences have been attached and that such categories of conduct (facts) include procedural conduct during the course of an administrative adjudication as well as categories of conduct (facts) in everyday affairs. The student may then discover for himself whether a court is using "matter of law" in reference to deciding what refinements of meaning are to be attributed to the words used in a substantive rule of conduct or is using "matter of law" in reference to the application of such a rule governing review procedure (i.e., the substantial evidence rule); the latter "matter of law" obviously entails fact finding by the court despite the nomenclature, since the court must satisfy itself that the evi-

dentiary facts in the record it is reviewing do in fact support the inference that reasonable minds could differ as to the substantive inferences to be drawn from such facts. But it is nonetheless called a "matter of law." Perhaps the terminology "matter for the court" in this latter instance would be preferable to "matter of law," if fact finding and law-making or law interpreting are to be kept adequately disentangled. The *Dobson* case,⁷ which is analyzed under a section devoted to mixed questions of law and fact, would have been an excellent case with which to point up more sharply the anomalousness of this use of the labels "matters of law" and "matters of fact" and to note that the real meaning may be "matters for the agency" as distinguished from "matters for the court." Conceivably, the *Dobson* holding on scope of review might not subsequently have been reversed by Congress if the issue therein had been candidly labelled a question of law but one properly within the province of the agency, the solution to which would not be disturbed since the agency solution had a rational basis in legislative fact; certainly the mere fact that the solution dealt with an accounting problem would be an insufficient basis for removing it from the realm of "law" since on this basis a good part of the Internal Revenue Code would lose its status as law. The decision in *Gray v. Powell*⁸ rather candidly recognized such agency "questions of law" (as have several decisions since that case) and has never been reversed by Congress. It can be persuasively argued that the APA now allows for only a limited, "rational basis" test of agency law-making; the opening sentence of Section 10 excepts from the general provisions of judicial review "agency action . . . by law committed to agency discretion." There seems hardly serious question that a Supreme Court determination that limited law-making has been "committed to agency discretion" has been committed "by law." At one point the author seems persuaded that such law-making or *ad hoc* rule-making, at least in *Chenery*,⁹ is not really making new law but is merely "action within delegated authority";¹⁰ this rather obviously unsatisfactory characterization is not sought to be defended or maintained, however, and is abandoned as the analysis of judicial review progresses.¹¹

These are minor protestations, however; the very fact that

7. *Dobson v. Commissioner*, 320 U.S. 489 (1943).

8. *Gray v. Powell*, 314 U.S. 402 (1941).

9. *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947).

10. § 256.

11. § 341.

they can be made adds rather than detracts to the value of the work as a teaching aid. Substantially everything of importance in administrative law is touched upon after all and an analysis completely satisfactory to every devotee is hardly attainable.

The format is conventional and good; some, to be sure, would prefer the paging to be given its usual place and the sectionizing relegated to lesser dominance. Likewise, reference to pages in the index and case table, rather than to sections, though more laborious, would have given readier access to the author's analysis and documentation. However, this deficiency is in part compensated for by a detailed table of contents referenced to sections and pages.

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CASES ON THE LAW OF TORTS, by Leon Green, Wex S. Malone, Willard H. Pedrick, and James A. Rahl, West Publishing Co., St. Paul. Pp. xxvi, 855.

In 1931, Dean Leon Green published his *Judicial Process in Tort Cases*, and in 1939 his second edition appeared. If imitation is the sincerest form of flattery, Dean Green was quite churlish to prior compilers of torts materials. His materials expressed ingenuity and did not follow what had evolved to be the classical structure of torts casebooks. Adopting what has been called a functional perspective and viewing the subject matter from the eclectic approach of sociological jurisprudence, Dean Green pointed to the work environment of rule and doctrine. It was a unique collection of materials.

This year, in collaboration with able assistants, an even finer if less novel collection of tort materials has appeared under the new title *Cases on the Law of Torts*. The current edition, although it features a sparkling collection of recent cases and new text, follows the same outline and general organization of the earlier editions except for the addition of new materials on "injuries resulting in death" and "conversion" and the elimination of materials on defamation and privacy which have been incorporated into a separate volume to be used in a separate course in relational interests. But it is not the details but the structure of these materials and their impact upon students of torts which warrants our examination.