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Book Reviews

BOOK REVIEWS

The Struggle for Judicial Supremacy. By ROBERT H. JACKSON. New York: Alfred A. Knopf. 1941. Pp. xx, 361.

The Attorney-General of the United States and a protagonist in the latest phase of "the struggle for judicial supremacy", Mr. Jackson concerns himself, in the main, with the initial failure and ultimate success of the New Deal in its attempt to impose its views concerning the Constitution upon the Supreme Court. By way of background, he sketches in those previous constitutional crises which are called to mind by the catchwords "Marbury v. Madison", "Dred Scott", "Legal Tender", "Income Tax". He writes, however, not as an historian; events are selected and marshalled to support his theses as to the attitudes the Supreme Court has taken and should take toward the other departments of government.

The general lines of his thinking are clearly indicated by the title of his book: it is in terms of power and of a struggle for power, in accordance with the fashion set by Messrs. Corwin and Haines. The fact that a large number of thoughtful persons in positions of influence, have come to regard the Supreme Court in this aspect may have played a decisive part in shaping our recent constitutional history. We should be thankful, therefore, that Mr. Jackson's views—views shared, as we know, by many of his colleagues —should have been so carefully and thoughtfully expounded.

Whether one happens to share it or not, it is impossible to doubt the reality of the author's conviction that the retreat of the Supreme Court in and since 1937 has been to and not from or beyond the Constitution. With his final conclusion that the Court ought, because it must, give way before the political departments whenever it becomes clear that they refuse to acquiesce in its decisions, one is likewise forced to agree. But although one who is not a member of the administration might be content to say, that if the administration prove obdurate the Court has no choice but to yield; a member of the administration itself must answer the further question: what circumstance will justify such obduracy? One may venture to suggest that an assurance of one's own rightness (plus knowledge that one holds ultimate command) can hardly be enough, once the basic premise of constitutionalism is accepted: the doctrine of self-restraint ought to apply, *mutatis mutandis,* to the legislative and the executive as well as to the judiciary.

Yet it would be too much to expect the political departments of government always to succeed in tolerance, where the judiciary have often failed. Nor is tolerance always to be accounted a virtue. It is a virtue only if the views we tolerate are morally indifferent. We lawyers generally fight shy of moral issues, and Mr. Jackson is no exception; in consequence he lumps together slavery, legal tender, and the income tax, due process and the commerce clause as involving the same kind of question. In this reviewer's opinion, he has thereby obscured some important distinctions.

It seems clear that Mr. Jackson's chief concern is peace, secured through compromise, in the legislature, the arena of compromise. He sees the Court closing the door to one compromise after another, which the legislature has worked out, from the *Dred Scott* decision down to the *Jones and Laugh-*

lin case. But it seems hard to see how many of the issues of which he writes could have been compromised: slavery was either right or wrong, protection of property rights under the due process clause was either a safeguard against or an instrument of oppression and, on an entirely different level, an income tax was necessarily either direct and subject to the rule of apportionment or an excise and subject to the rule of uniformity. It seems to this reviewer that the part played by the New Deal in forcing its views as to "due process" on the Court cannot be justified at all on the ground urged by Mr. Jackson, that they represented a compromise, but are to be justified, if at all, on the precisely contrary ground that the issue involved was one which could not be compromised and that acquiescence in the Court's views would perpetuate a grievous wrong. For each of us, of course, the answer to the question whether this is a justification depends upon whose views we share—the old Supreme Courts' or the New Deal's.

*Theodore S. Hope, Jr.**

Ithaca, New York

Corporate Dividends. By DONALD KEHL. New York: The Ronald Press Co. 1941. Pp. xi, 367.

The subject of corporate dividends may be approached from many points of view. Mr. Kehl writes primarily from the lawyer's standpoint. He has traced the law of dividends to its earliest sources, illuminating many doubtful questions by his researches into the past. Old corporate charters and old statutes are alike used to clarify present-day problems. Statutes now in force in every state are carefully analyzed and their development explained. The case law is discussed with precision and intelligence, the chapters on "Relative Rights of Preferred and Common Stockholders" and on "Choice of Law in Determining Validity of Dividends" being particularly worthy of mention. Other chapters of perhaps equal interest and value are those relating to remedies against directors and stockholders. The entire work, in fact, seems characterized by thoroughness, discrimination and care.

Accountants as well as lawyers should find the book useful. The author's discussion of accounting problems is clear and well-informed, though containing little which can be described as novel. A valuable summary is presented of the views now generally accepted in the accounting profession, with ample documentation to aid the reader who wishes to make further researches. There is no attempt to explore the economic aspects of the valuation problem, or to consider dividend policies in their larger implications. Emphasis is placed on the practical decisions to be made by courts, lawyers, and accountants.

In the list of subjects treated certain omissions are noticeable. There is no discussion of the problems arising when shares are sold between the dividend declaration date and the payment date. No mention is made of the rules of the stock exchanges on dividend matters. The subject of the

*Assistant Professor of Law, Cornell University.

consolidated balance sheet is dismissed in two paragraphs—though it would seem to deserve extended discussion. Only passing mention is made of problems relating to the declaration and payment of dividends by subsidiary companies.

On the mechanical side, the printing and proof reading are excellent. A table of cases is lacking, though there is an index and a table of contents. Cross-references are not as numerous as they might be. For example, the discussion of "Original Consideration Received" is to be found at § 22.1; that of "Paid-in Surplus" at § 29; and that of "Premium on Stock" at § 45.2. The value of these discussions would be greatly increased by adequate cross-reference and comparison. Similarly, on page 241, the 1939 amendment to § 58 of the New York Stock Corporation Law is discussed; on page 255, Mr. Kehl argues that directors cannot safely rely on this amendment, since there has been no corresponding amendment to § 664 of the New York Penal Law. Surely there should be a note on page 241 directing the reader's attention to the subsequent discussion. Other instances of the same sort might be mentioned. The reader who does his own cross-referencing will, however, be well repaid.

Concise and accurate, this book brings together in one volume a mass of material which might have been presented in twice the space. It should prove of high utility to the corporate adviser.

*George T. Washington**

Ithaca, N. Y.

Our Constitution: Tool or Testament? By BERYL HAROLD LEVY. With an introduction by ROBERT H. JACKSON. New York: Alfred A. Knopf. Pp. 315.

To the large collection of critical literature on the "legislative" activities of the Supreme Court, Dr. Beryl Levy adds his book, *Our Constitution: Tool or Testament.* It is a typical liberal treatment. The author argues that the Court, using as its basic guide the "presumption of constitutionality," should "recognize that the lawmaking power resides in the legislature." As so many have done before him, he maintains that a sacrosanct, over-reverential attitude toward the Supreme Court is outmoded and acts as a hindrance to national development. The Constitution should be viewed as a flexible instrument, able to meet the needs of our constantly changing society. Above all the Supreme Court should practice self-restraint in exercising its power of judicial review to insure "a meaningful government of laws—the laws of our duly designated lawmakers and not of unelected, lifetime judicial legislators who are not directly answerable to the legislature or to the people."[1]

These arguments have been voiced before. The descriptions of the judicial careers of four leading Supreme Court justices, Marshall, Taney, Holmes, and Brandeis, contribute no new material to the student of constitutional

*Associate Professor of Law, Cornell University.

[1] P. 246.

history, but attempt "to show the connection between their philosophy, on the one hand, and significantly selected judicial opinions, on the other."[2]

The main value of the book lies in the expression of concern over the apathy of the Supreme Court's recent critics who feel that the crisis has passed and that the Court has been taught never again to stray from its "normal" functions. Despite changes in the personnel and the attitude of the Court which came in the wake of President Roosevelt's defeated Court Reorganization Plan, the author is not satisfied in retaining the status quo merely because the Court now seems to be exercising "due continence." Interested in taking preventive action to forestall similar activities by the Court in the future, Dr. Levy contends that "while the memory of our recent frustrations by the previously constituted Court is still seen," we should limit the Court's power to declare laws of Congress unconstitutional. The statute he suggests "would provide that for an ordinary law, dealing with an economic problem, some number more than five votes . . . . would be required to declare the law unconstitutional. For a law restricting a civil liberty, however, five votes as at present, or fewer, should suffice to declare the law unconstitutional."[3] As the author admits, the suggested law is open to criticism as to practical and administrative difficulties. Would such a Congressional statute be an effective restraint on the Court? Is the differentiation between economic laws and civil liberty laws justifiable? How may laws involving both elements be classified? Who is to decide in what category a particular law belongs? The importance of the suggested statute, however, is not in its content, but rather in the suggestion to provide limitations on the possible return of the Supreme Court to the "legislative" sphere, with consequent usurpation of the rightful powers of Congress.

For the layman, such a book always stimulates thought and discussion on a subject which is usually considered far removed from his day to day existence. The terminology and judicial and philosophical reasoning, although simplified in spots, will cause the average reader difficulty. For the student of constitutional law, the author's main contribution revolves about the warning against a false sense of security from future usurpation of legislative power by the judiciary and the advice to make adequate provision against a possible recurrence of destructive decisions characteristic of the reign of the "Congress of the Nine Old Men."

*Ned Weissberg**

Ithaca, New York

International Law: A Treatise. By L. OPPENHEIM. 6th Edition edited by H. LAUTERPACHT. Vol. II, Disputes, War, and Neutrality. New York: Longmans, Green and Co. 1940. Pp. xliv, 766.

Publication of a new edition of Oppenheim's *International Law* has always been something of an event for international lawyers. The extended biblio-

[2] P. xv.
[3] 250.
*Assistant in Government, Cornell University.

graphical references are of great value and the comments of the editor on current issues are received with interest and respect, if not always with complete agreement. However, the liberties taken with the text of Professor Oppenheim's great treatise by his various editors raise a serious question. Professor Oppenheim died in 1919, after publishing two editions of his work. In 1920 Mr. Ronald F. Roxburgh published a third edition, stating in his preface that it had proved impracticable "to mark each minor change in Oppenheim's words." In 1926 a fourth edition was published under the editorship of Professor Arnold D. McNair. Professor McNair felt that he had no choice but to follow the editorial methods of Mr. Roxburgh. He therefore declined "to indicate the new material by means of brackets," preferring rather "to work in the new matter, freely and where it seems to fit best . . . without giving warning of its presence." In his fifth edition in 1935, Professor Lauterpacht also felt that it was "altogether impracticable to attempt to distinguish between the text of the original version and the changes effected. . . . So much has to be added . . . so much has to be modified, omitted or shortened. . . ." In the present edition Professor Lauterpacht writes that he has "made further progress in the work of re-writing and expanding this treatise. Substantial portions of the preceding edition have been omitted. . . ."

The reviewer will limit himself to but one example of the results of this editorial method. If Professor Oppenheim were living today, he would undoubtedly be surprised to read in sec. 296 of volume II of the sixth edition of his treatise that international law is "primarily" a law between states. He had written that international law is a law "only and exclusively" between states. Certainly nothing happened between 1935—the last edition which carried Oppenheim's words—and 1940, to warrant such a change. If some writers have asserted that there has been a trend towards regarding individuals as subjects of international law, the rise of totalitarian regimes has undoubtedly rendered such a modification of international law less likely in 1940 than even a few years ago. In any case, whether Dr. Lauterpacht is right or wrong in rewriting sec. 296, the views he expresses are not those of Oppenheim, whose book he is editing. The amazing proof of this is contained in a footnote which Lauterpacht has appended to sec. 296, that "for an emphatic expression" of the contrary view, consult sec. 296 of the five previous editions of this work! It is not entirely the march of events since 1919 which causes the reviewer to wonder how long it will be before Oppenheim's International Law contains nothing of Oppenheim.

Dr. Lauterpacht is a brilliant and learned scholar in his own right. It seems high time to leave Oppenheim to his deserved rest. We would welcome a treatise by Lauterpacht.

*Herbert W. Briggs**

Ithaca, New York

*Professor of Government, Cornell University.

Diplomatic Correspondence of the United States: Canadian Relations, 1784-1860. Vol. I (1784-1820). Selected and arranged by WILLIAM R. MANNING. Washington: Carnegie Endowment for International Peace. 1940. Pp. xlvii, 947.

Students of history and international law will welcome this new series of documents edited by Dr. William R. Manning which will provide them with the salient portions of the diplomatic correspondence of the United States with Great Britain concerning her North American possessions. The present volume, the first of four, deals with Great Britain's refusal to surrender the posts, Jay's treaty, the various boundary disputes arising out of the treaty of 1783 and the Louisiana Purchase, the fishing liberties, Great Britain's supposed policy of inciting the Indians living in American territory to hostilities, various aggravating border incidents preceding the War of 1812, the negotiations culminating in the Treaty of Ghent, and the Rush-Bagot Convention.

The collection is divided into two parts: communications to Great Britain and from Great Britain. This classification is somewhat misleading and would not be accurate if Great Britain were understood both in a political and a geographical sense. Letters which might have been included are Jay to Randolph, November 22, 1794, Jay to Grenville, October 13, 1794, and Washington to Jay, August 30, 1794. These have been printed in Cruikshank, *Correspondence of John Graves Simcoe.*

It is not possible to discuss Great Britain's handling of Canadian affairs in relation to the United States during these years as a separate subject unconnected with West Indian matters, the European situation, or the wider field of Anglo-American relations, and therefore the documents, often merely parts of documents, selected for this volume are like a jig-saw puzzle with the more important pieces missing. This of course was unavoidable. As a rule the editor has been generous in printing enclosures but it is tantalizing to find omitted some that related to the vexed question of Great Britain's Indian policy. It seems highly unlikely that "the British Minister probably left with the Secretary of State" Charles Stevenson's letter,[1] which refers to the American people as "vain, & ungratefull, & that viper progeny of Felons." It is more likely that, as Stevenson feared, the "common course of post" had not proved altogether reliable.

Among the more interesting documents in the collection are the letters interchanged by John Quincy Adams and the British Secretary of State for Foreign Affairs on the question whether there is "*no exception* to the rule that all Treaties are *put an end to* by a subsequent War between the same parties"[2] It is amusing to find a lease-lend proposal of 1798, occasioned this time by American unpreparedness for war with France. It was linked with a plan for joint defence by the United States and Great Britain of their North American possessions and Rufus King was instructed to feel out

[1] P. 401.
[2] Pp. 771-772.

Great Britain's opinion on these proposals.[3] If any report was made by him it is not included in this collection.

*Paul W. Gates**

Ithaca, New York

Cases and Other Materials on the Law of Debtors' Estates. By WESLEY A. STURGES. Third Edition by J. Douglass Poteat and Eugene V. Rostow. St. Paul: West Publishing Company, 1940, Pp. XXI, 886.

Law teachers in the debtor-creditor field are fortunate in the recent publication of two fine casebooks—a Third Edition of Professor Sturges' *Cases and Other Materials on Debtors' Estates,* edited by Professors Poteat and Rostow, and a new book by Professor Glenn, entitled *Cases and Materials on Creditors' Rights.* These books, while compiled by teachers whose approach to the study of law is quite different, nevertheless have one great fundamental element in common: both regard the study of the debtor-creditor relationship as a functional process; neither uses the Hanna-McLaughin plan of pouring the remedies of the creditor into separate procedural molds, studied *seriatim.*

While the writer has reviewed Professor Glenn's book in detail elsewhere,[1] a word concerning its author is of interest in studying the Sturges volume. Professor Glenn is fundamentally a scholarly lawyer, with a lawyer's approach to legal problems. He had behind him years of successful practice in New York City, before joining the law faculty of the University of Virginia. He alleges that he is not a statistician and that he does not read "'surveys' of the sort that some of our young research men turn out." He does read advance sheets and law reviews.[2] Therefore, it is not surprising that Professor Glenn has packed his book with judicial opinions to the exclusion of everything else.

Professor Sturges, in contrast, does not have the traditional lawyer's approach to legal problems. His teaching methods are difficult to describe. He delights in cutting out the vitals of a judicial opinion and then subjecting the dismembered parts to various statistical,[3] dialectical, political, and sociological treatments.[4] The result is at first something of a hodge-podge, but order eventually comes out of chaos.

The several editions of Debtors' Estates have in part followed this methodology. Accordingly, in addition to cases and much law review material, the Sturges books have featured both testimony before and reports of legis-

*Associate Professor of History, Cornell University.

[3]P. 136.

[1]89 U. OF PA. L. REV. — (June, 1941).

[2]Glenn, CASES ON CREDITORS' RIGHTS, 2 (1940).

[3]The reviewer knows that Professor Sturges *does* read "surveys" and that he sometimes encourages the writing of them.

[4]Sometimes the new editors are almost as picturesque in their choice of language as is Professor Sturges himself, to wit: "A diet of doctrine, even in refined and subtle formulations, will give students intellectual rickets unless the doctrines are considered in terms of their political and economic import." P. 2.

lative committees, many hypothetical questions, and even an occasional newspaper clipping.

The new edition carries on the best traditions of Sturges, but also shows considerable improvement in the organization and arrangement of material. As presently constituted, the Table of Contents falls into three principal segments: Part 1, "Methods of Terminating or Reorganizing the Insolvent Enterprise"; Part 2, "Administration"; Part 3, "Discharge."

In contrast to the earlier editions, which open Part 1 with an immediate plunge into the cases, the new editors write a brief preliminary chapter on "The Study of Insolvency Proceedings" and introduce Chapter 2, "Non-judicial Settlements", with a textual statement. In the first of these the editors, after emphasizing the "Gargantuan" character of the materials to be investigated, and after noting briefly the several "legal techniques used to settle situations in insolvency", point out that "the student faces the preliminary problem of examining the concept of insolvency, from the point of view of the balance sheet and of the income statement." However, "pending further experiment in the development of appropriate materials for training law students in these fields, the editors adopt the compromise of suggesting the following bibliography, thus deferring for yet another edition the work of radical change in this part of the subject matter of the book."[5] This portent of things to come in future years is followed by a list of pertinent writings in the accounting field particularly and in the insolvency field generally.

The brief text introducing Chapter 2, "Non-Judicial Settlements", concerns the methods employed by credit agencies, particularly the National Association of Credit Men, in reorganizing or liquidating insolvent debtors. The text is new, but the idea of giving at least a passing nod to the insolvency machinery of the credit men came from the earlier editions.

At the place where "Composition and Extension" is reached,[6] Professors Poteat and Rostow pick up and incorporate the series of decisions which open the Second Edition. Directly thereafter follow the principal Sturges cases on "Assignments for the Benefit of Creditors." Two changes now gradually become apparent. First, the arrangement of material is an improvement over that in former editions. The new editors have analyzed thoroughly and rearranged logically the excellent material which constituted the earlier books. But they have done more than this; they have added much valuable material produced by their own independent research. This conclusion applies also to Chapter 3, "Liquidation and Reorganization in Equity," and even more forcefully to Chapter 4, wherein are collected the materials, previously scattered, on "Binding the Dissenter in Non-Bankruptcy Proceedings." In the second place, the volume has quieted down and has become an excellent casebook. The high-powered, streamlined model which streaked through Chapter 1 is now purring contentedly along the road. As the book develops we see less and less of "courtroom dialectic",[7] "diet of doctrine",[8] "intellectual rickets";[9] we see more and more of such ancient

[5] P. 5.
[6] P. 10.
[7] P. 1.
[8] *Supra* note 4.
[9] *Ibid.*

legalisms as "stockholders' statutory liability" and "ancillary receivership."

It is in Chapter 5 of Part 1, "Proceedings Under the Bankruptcy Act", that Professors Poteat and Rostow do their finest original work. As they explain in their preface, the vast number of bankruptcy reorganizations under Section 77B and Chapter X justify considerably more attention to corporate reorganization than Professor Sturges gave in his earlier editions. Furthermore, it is no longer possible to stop where Sturges did, at "the point when considerations involving the formation and execution of a plan of reorganization become of dominant importance."[10] The new editors are quite right when they point out that "the idea of a fair and equitable plan has proved to be a conception of creditors' rights involved in many contexts and for many purposes."[11] Therefore, they tackle courageously and perform well a most difficult task.

The second major division is Part 2, "Administration."[12] This division is broken down into four chapters: (1) "Appointment and Qualification of the Assignee, Receiver, Trustee"; (2) "Continuation of the Business"; (3) "Collection of Assets"; (4) "Proof and Allowance of Claims."[13]

Chapter 1 is slightly changed by the shifting of In re *Federal Mail and Express Co.*[14] Here, as at certain points throughout the book, no attempt has been made to spoon-feed the student by indicating any changes in the law occasioned by the enactment of the Chandler Act. Chapter 2 has been brought down to date and, thus modernized, continues as the only collection of materials on "continuing the business" available in any of the standard insolvency casebooks.

Chapter 3 of Part 2 ("Administration") treats of "Collection of Assets." Section 1 deals with "Procedure." Here the principal changes consist in bringing the material in line with the Chandler Act and in certain rearrangements. In the Second Edition "Set-Off and Counterclaim" followed "Summary Process and Plenary Action". In the Third Edition, "Set-Off and Counterclaim" has been moved to the end of the section and Professor Sturges' short Chapter 2, "Displacement of Compositions, Assignments and Receiverships by Proceedings under the Bankruptcy Act", has been inserted as Subsection (c) of "Procedure." This rearrangement may or may not appeal to teachers of insolvency law. Logically, the material probably belongs where Professor Poteat and Rostow place it. At the same time Professor Sturges made very effective use of his tiny Chapter 2 as a bridge from his introductory descriptive material on "Methods" to his later chapters on "Administration."

Once the revisors have completed "Procedure", they follow the Sturges outline for the remainder of Chapter 3. Little change has been made in

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[10]Preface to Second Edition, III.

[11]Preface to Third Edition, III.

[12]Part 2 of the earlier editions has been dropped and its contents incorporated in Chapter 3 of the Third Edition. It was entitled: *"Displacement of Compositions, Assignments, and Receiverships by Proceedings under the Bankruptcy Act."*

[13]These chapter titles are taken from Part 3 of the earlier editions.

[14]233 Fed. 691 (S. D. N. Y., 1916).

Section 2, "Assets Reserved to the Debtor and/or Dependents."[15] Section 3, as heretofore, concerns "Assets Which May Be Recovered and Retained for the Estate." And, while the revisors have in general followed the Sturges pattern, they frequently have improved the book, as by the addition of *American Surety Co.* v. *Conner*[16] at page 555, an important decision not included in the Second Edition but which appears in full in several of the other standard insolvency casebooks. It should be noted also that the Sturges collection of materials on "Fraudulent Conveyances" and "Preferential Transfers" is quite ample for teaching purposes. Placed as it is near the end of the book, and with only a brief scope-note to identify it, this very important segment of insolvency law seems, however, to be a little too deeply buried.

Chapter 4 of Part 2, "Proof and Allowance of Claims" continues the same pattern utilized in the Second Edition, with important recent decisions by the Supreme Court added.[17]

Likewise little change from the Second Edition has been made in Part 3, "Discharge." The brief final chapter in the Second Edition, entitled "Suspended Discharge", has been dropped, along with several cases, and some substitutions have been made in the material included from Congressional Committee hearings. Otherwise, the chapter remains intact.

Regardless of the individual law teacher's idea of how materials in the debtor-creditor field should be arranged for classroom use, the new edition of Sturges is, as were its predecessors, required reading for all of us. Fifteen years ago, while prosperity still dwelt in the land, Professor Sturges was busy analyzing the process we now call the administration of a debtor's estate. By the time the depression struck he had reached certain definite conclusions as to how the realities of that process should be studied. These conclusions became "Cases and Other Materials on Debtors' Estates", a book whose worthy tradition has been preserved by the highly competent editors of the Third Edition.

*Thomas Clifford Billig**

Washington, D. C.

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*Assistant Professor of Law, Catholic University of America.

[15]This archaic "and/or" is in weird contrast to the breezy, behavioristic language already referred to in Chapter 1 of Par. 1.

[16]251 N. Y. 1, 166 N. E. 783 (1929).

[17]See, for example, Pepper v. Litton, 308 U. S. 295, 60 Sup. Ct. 238, at 699 (1939); Ticonic Nat. Bank v. Sprague, 303 U. S. 406, 58 Sup. Ct. 612, at 755, (1938), and United States v. Marxen, 307 U. S. 200, 59 Sup. Ct. 811, at 776 (1939).