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## Book Reviews

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## BOOK REVIEWS

LIFE AND LAW. By Samuel Williston. Boston: Little, Brown & Co. 1940. pp. ix, 347. \$4.00.

The title—Life and Law—is aptly chosen. Professor Williston unites in this intimate autobiography the story of his life and his contributions to the law. From either point of view the autobiography is worth telling.

Here is unfolded the story of one of America's greatest law teachers and legal writers—an unusual combination, let it be noted. Often the legal scholar is able to set down clearly in writing his matured views. But he frequently lacks the same flair in oral presentation. Not so with Williston. One of the outstanding qualities of his leading texts on Contracts and Sales is the clarity of expression which pervades his written text. Those who were privileged to sit in his classroom as pupils will agree that the same simplicity of style and clearness of expression characterized his teaching technique.

There is no mistaking the character of the man. It appears in his dedicatory preface when he states that "This volume is affectionately dedicated to my former students and the many friends who have come to me through a long life." "My" students came first with "Sammy" Williston while he was actively engaged in the teaching of law and they come first at eventide as he looks back over his scholarly career. Many of his former students would likewise place him first in their remembrances of law school days. His uniform kindness and even temperament combined with the humility of the true scholar made him an outstanding law teacher even though he competed for professorial honors with such intellectual giants as Ames, Gray, Beale, and Langdell. He spoke with convincing authority but not with arrogant finality. Pupils left his classroom with the conviction that the master had endeavored to persuade them by the soundness of his argument rather than by the sheer force of his reputation.

It is difficult to select particular chapters for specific reference. They synchronize smoothly into a composite whole and are evenly divided between those personal matters which describe the man and his professorial and professional activities which interest the lawyer. He tells an interesting story of Cambridge in the days of high-wheel bicycles and torchlight processions, when heavy drinking, "handle-bar" moustaches and even whiskers were *de rigueur* among Harvard students.<sup>1</sup>

To the lawyer the most interesting chapters will doubtless be his account of the work of the Commissioners on Uniform State Laws in the drafting of such Uniform Acts as Sales, Bills of Lading and Warehouse Receipts,<sup>2</sup> and the story of his masterful and pioneering labors as Reporter of Contracts for the American Law Institute.<sup>3</sup>

In these days when law and life are again tossed between many conflicting political and governmental *isms*, it is interesting to observe the position of Williston regarding Old and New Jurisprudence. His maxim is *stare principiis* rather than *stare decisis*; and he recognizes the importance of concrete facts in the solution of legal problems. His former pupils will remember how often he trotted forth his fictitious horse "Dobbin", afflicted with spavin or colic, and used the animal as an example to drive home some question of warranty or risk of loss.<sup>4</sup>

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1. Ch. 3.
  2. Ch. 14.
  3. Ch. 19.
  4. P. 205.

While Williston's philosophy of law indicates "neither worship for the past, nor a heart open to each new-comer",<sup>5</sup> his appraisal of the new school of "legal realism" leaves no doubt about his strong opposition to the current juristic movement in American law.<sup>6</sup>

One of the attributes of realistic jurisprudence against which Williston makes "a direct frontal attack"<sup>7</sup> is the belief of the realist in the desirability of "narrower categories" of law than the legal concepts which now obtain in the common law. Williston convincingly attacks the claim of the new "jurisprudes" that each fact-situation should have its own particular rule or principle. He argues: "Mistakes are likely to be frequent because a competent knowledge and recollection of so numerous disconnected rules is difficult to acquire. Aside from this, complexity is always accompanied by uncertainty. Wherever there are numerous lines of distinction it becomes increasingly plausible to argue that the case at bar falls on one side or the other of some of the lines. Law tends to become a game in which logomachy plays too great a part."<sup>8</sup>

The simple philosophy of life underlying Professor Williston's inspiring career is concealed in the last pages of the book: "My early ambition in the legal profession was chiefly to study, teach, and write, and whatever interruptions there may have been in my efforts, I may say that I have pursued at eve what I pursued at morn."<sup>9</sup> In the words of the learned Justice who penned the Foreword: "This book in which he tells us of himself is for all of us a fortunate occasion: once more it gives us an opportunity to salute our master."<sup>10</sup>

WALTER B. KENNEDY†

LAW AS LOGIC AND EXPERIENCE. By Max Radin.\* New Haven: Yale University Press. 1940. pp. ix, 171. \$2.00.

After finishing this book some people would be a little puzzled. Others would be sure that Mr. Radin is more than a little puzzled. The reviewer belongs in the second group. One must give some mead of praise to the author's considerable erudition, to his urbanity and kindness of heart, to his obvious desire to please a great number of people, most of whom have been fawned upon altogether too much for their own good and the good of the legal profession and mankind in general. But with this matter taken care of, there is precious little else one can say by way of commendation.

The problem which the author sets before him is whether the life of the law is logic or experience. He stands with Holmes in opposition to Sir Edward Coke that it is experience and not logic or reason, which to Mr. Radin are synonyms. In upholding Justice Holmes he shows himself a mild edition of Mr. Jerome Frank,<sup>1</sup> differing from

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5. Foreword by Learned Hand, p. viii.

6. Pp. 209-216.

7. P. 213.

8. P. 213.

9. P. 303.

10. Foreword by Learned Hand, p. ix.

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1. FRANK, *LAW AND THE MODERN MIND* (1930).

him in nothing relevant. The one spreads it on thick, the other is more moderate and restrained. But it's the same picture when they have finished. Why does the modern mind insist that there is only one order, the real? Why do they forget that mankind perishes without ideals? Why should anyone prefer Radin's picture, Radin's world, to the world of Hitler? Neither Max Radin nor any other Positivist will ever tell you.

Some of his friends ought to tell the author that he is not getting any where in trying to convince us that Hitler is wrong. If the human mind is just a treadmill and cannot "possibly move an infinitesimal fraction of an inch ahead of the starting post,"<sup>2</sup> or as "Cardozo so brilliantly puts it, 'the movement is best described as backward and not forward,'"<sup>3</sup> they had both better be silent before they have us all on Hitler's side.

One wonders if there is any connection between the difficulties of modern men, they hardly deserve the name of philosophers, in understanding the essential role in law of both reason and experience and the old controversy about faith and good works. Martin Luther tried to convince the world that faith was sufficient without good works. The great part of mankind disagreed with him both before and since. The part that agreed has now gone to the opposite extreme, and considers that faith is no help at all. Could it be that Positivists and Pragmatists are secularly minded Protestants who transfer their new doctrine to the field of law? In any event there is a close analogy and for Mr. Radin's benefit, the old answer is the true one, in each case both are essential.

Talking about truth will seem very naive to Mr. Radin. There is no truth, and even if there were, the mind could not advance one inch on the road to it. The mind in the Positivist sense may not be so crude an instrument as Mr. Hitler's blood but one fails to see why its product should be any better. It is in fact likely to be worse. What Hitler means by thinking with his blood is that Germans should adhere to the policy of the German race, should follow German racial thought. Mr. Radin thinks there is no thought. As for improving the law with that kind of cerebral activity, it won't work. God knows the law could be improved, especially in this country, and there are many men capable of improving it, but none of them are Materialists and Positivists. Mr. Radin and his ilk might better spend their time on improving lawyers and judges. They seem to be able to appreciate, at least in some vague way, men like Martin Manton, whose reason told him what the law should be, but was overruled by something else in him which preferred the opposite opinion, for a consideration, of course. They might be able to help us on this problem and we would not reject that help because they would still insist that Manton's decisions were "the law". We're very broadminded in practical affairs. I remember Mr. Pound complaining that it was hard for a Communist to understand an honest man. Would some Positivist undertake the task of interpreting him to us?

In the beginning of the book<sup>4</sup> the author speaks of reason as proceeding from the mind of Zeus according to the definition of the Greeks and he refers to that origin time and again throughout the book. One must wonder if Mr. Radin ever heard of Jehovah, and why he speaks of that definition as being a definition of law instead of natural law to which it is obviously confined. Ever hear of "natural law", Mr. Radin? There is some discussion of it in many of the sources to which you refer in the foot-

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2. P. 7.

3. P. 9.

4. P. 2.

notes. And by the way, concerning those references; if ever there was a useless parade of the apparatus of scholarship, it is in this book. It refers to everybody, Pound, Cardozo, St. Thomas, Kant, Aristotle, Frank and dozens of others just as wide apart, as if by some alchemy in the alembic of Mr. Radin's mind they had all been made to reach an agreement and advance the thought of his thesis.

There are many minor matters to which exception could and perhaps should be taken if one had time. One however cannot be omitted. It occurs in the section where decisions applying to groups are considered in their bearing on the subject. The author refers specifically to the case of the *Sisters of the Holy Name v. Pierce*, the *Oregon School* case, and he reaches the conclusion: "The point is, of course, that the characteristically legal machinery, consisting of a court and its variously differentiated lawyers, was never devised for such questions. They are essentially matters of social, political, and economic policy, and it is a policy-forming machinery that should handle them."<sup>5</sup>

If this is not saying that the Supreme Court erred in upholding the right of parents to choose schools for their children, and this in several cases, what is it intended to say? And significantly enough almost identical words used by Mr. Justice Frankfurter in a recent case<sup>6</sup> are never referred to, though dozens of unnecessary citations are given, and it is hard to believe that the author is unaware of that decision. Heretofore this reviewer has been loath to credit that by its recent decision the Court wished to overturn those former cases, though the language surely is plain enough, but this repetition in the book under discussion has made him more than a little doubtful. Are we coming to a time in this country when every act of the legislature is to be upheld no matter how much it may trespass upon individual and family and group rights? We knew that this doctrine was held at Harvard, Yale, and Columbia. It appears now to have reached the Supreme Court of the United States.

JOHN P. NOONAN, S.J.†

CASES ON THE LAW OF REALTY TITLES. By John A. Blake.\* New York: Privately Published. 1940. pp. xi, 561. \$6.00.

Professor Blake's new volume of selected cases is designed for a two-hour course for one semester. It is a very interesting, practical and efficient compilation which should give the student a good understanding of the fundamentals of the subjects treated. The cases selected include many of the old favorites all of us who teach Property must use, and also many of the later cases which are selected for clarity and simplicity of statement in the opinions and without undue complexity of fact. There seems to have been a definite effort not to set up barriers and complexities for the student to overcome in his struggle to get a working knowledge of the law, in marked contrast to the works in vogue in many of our very best law schools in which the student is subjected to a barrage of unanswered problems with references to cases in such numbers that any general reading of the cases by most of the class would destroy the pages in the

5. P. 130.

6: *Minersville School Dist. et al. v. Gobitis et al.*, 310 U. S. 586 (1940).

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volumes referred to, and any expectation that such reading will be done must be based if it exists on a high degree of over-optimism.

Nevertheless Professor Blake should have taken the chance of possibly "discouraging" his students with a greater use of notes. No doubt he will fill this lack by citations and discussions in class. In the chapter on adverse possession several important problems are sketchily treated, and would be greatly strengthened by notes discussing cases involving very considerable and important conflicts of authority. It is a bit odd to find *Doe d. Carter v. Barnard*, the discredited English case holding that the *jus tertii* may be set up in ejectment by the later wrongful possessor as the leading case on tacking, even though tacking is discussed. The first course in Property usually contains a treatment of possession in its relationship to ownership—indeed the nature of property ownership in its relation to possession is the fundamental basis on which the law of property, *viz.*, the law of ownership, depends, from the inception of the common law and the assize of novel disseisin in 1166 down to the present. It seems to me that the law of adverse possession should be given as part of that study in the first year rather than in the second year course on Titles.

These cases should be liberally supplemented by assigned readings in legal history. No student can acquire a really adequate understanding of property law without a genuine understanding of how the different rules developed. The creation of easements by prescription, the subject-matter of Chapter III, is a topic which demands a careful study of the history of that law.

The cases on Recording are particularly well selected. However, all the cases and their arrangement in the chapters on Modern Statutory Conveyances, The Description, and Covenants of Title are almost equally deserving of praise. The inclusion in this book of Estates Less Than Freehold, Chapter VII, seems odd in a work on Titles. This law is definitely part of the law of Estates, not of Titles as such. However, the attempts to split up the law of property which should be treated as a single subject necessarily result in this kind of illogical arrangement.

WILLIAM F. WALSH†

THE PRESIDENT: OFFICE AND POWERS. By Edward S. Corwin. New York: New York University Press. 1940. pp. ix, 476. \$5.00.

This book is the outgrowth of lectures which Professor Corwin delivered at New York University in the autumn of 1937 on the Stokes Foundation. His main purpose is to trace out the development of the Presidential office in terms of its powers. The story is one of an admixture of powers, policies and legal concepts, all stemming from Article II, "the most loosely drawn chapter of the Constitution."<sup>1</sup>

The subject is an important and timely one. It concerns an office which expands or contracts according to the strength and leadership or the humility and caution of the incumbent. The President may be like Roosevelt I, an advocate of the "stewardship" theory<sup>2</sup> or he may hold with ex-President Taft that the presidential office is restricted

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1. P. 2.

2. "My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his

to those powers which are specifically granted or justly implied.<sup>3</sup>

These are the contesting theories and Corwin apparently agrees with Theodore Roosevelt that "executive power is residual power, Mr. Taft to the contrary notwithstanding."<sup>4</sup> Indeed the position of the author regarding the true nature and scope of the presidential office may be surmised from the quotation which adorns the title page of his book: "We elect a king for four years, and give him absolute power within certain limitations which, after all, he can interpret for himself." This quotation, derived from Secretary of State Steward, accurately describes the viewpoint of Professor Corwin regarding the real office and powers of the Chief Executive.

Through the chapters moves the unfolding story of expanding presidential powers, either actual or implied, patent or latent, which may be called into being according to the inclination and the will of the individual occupant of the White House and the gravity of the problems facing him. As the author states it, "what the Presidency is at any particular moment depends in important measure upon who is President."<sup>5</sup> Advancing to establish his proposition that the history of the Presidency is a history of aggrandizement, Corwin deals with various phases of the Presidency. One of the first questions he faces is the matter of tenure and herein he considers the timely question of the "Third Term." Written before the election of 1940, the writer seems somewhat restrained in his discussion and judgment on this issue, less sure-footed than usual. But in view of the outcome of the "Third Term" issue, the following statement is worth repeating: "One thing is nevertheless fairly certain: if the anti-third-term taboo is once set aside, it will take a long time for an anti-fourth-term or anti-fifth-term taboo to develop. In a word, the presidential term will become indefinite—just what in 1787 it was expected to be!"<sup>6</sup>

As Administrative Chief<sup>7</sup> the question arises whether the President may remove all administrative officers in his discretion and without question. Professor Corwin analyzes at great length *Myers v. United States*<sup>8</sup> and *Humphrey v. United States*,<sup>9</sup> he concludes that "(1) as to agents of his own powers, the President's removal power is illimitable; (2) as to agents of Congress's constitutional powers, Congress may confine it to removal for cause, which implies the further right to require a hearing as a part of the procedure of removal."<sup>10</sup> Perhaps we may find here at least one temporary barrier to increasing executive authority; for the *Humphrey* case indicates that the Supreme Court had executed a turn-about-face "from the ideology of the *Myers* decision."<sup>11</sup>

In the chapter dealing with the duties of the President as Chief Executive,<sup>12</sup> a talents undamaged in a napkin." THEODORE ROOSEVELT, AUTOBIOGRAPHY, quoted in CORWIN, p. 131.

3. "The true view of the executive functions, is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary." TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS, quoted in CORWIN, p. 132.

4. P. 133.

5. P. 29.

6. P. 28.

7. Ch. III.

8. 272 U. S. 52 (1926).

9. 295 U. S. 602 (1935).

10. P. 96.

11. P. 110.

12. Ch. IV.

lively present-day question is considered, namely, the degree of legislative power which may be transferred to the President. Despite the attempt of the Supreme Court to hold back such legislative delegation to the national executive in the *Hot Oil*<sup>13</sup> and *Poultry*<sup>14</sup> cases, Professor Corwin contends that this stoppage was "in transitu" only. He believes that "the importance of the holdings in the *Hot Oil* and *Poultry* cases is today moral rather than legal." Cases like *United States v. Rock Royal Cooperative*<sup>15</sup> disclose a trend in the direction of enlarging delegated authority in the Executive.<sup>16</sup> Professor Corwin next reviews the duties of the chief executive as Commander-in-Chief of the Army and Navy.<sup>17</sup> Even in time of peace, it is asserted that the President has a residual power which gives him military authority whenever the normal processes of law enforcement break down.<sup>18</sup> In time of war all applicable powers are centered in the person and in the office of the Commander-in-Chief. Accepting the common belief that the "President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"<sup>19</sup> a viewpoint which is clearly present in the decision of *United States v. Curtiss-Wright Export Corporation*,<sup>20</sup> the present condition of world affairs renders the following statement most important: "What is of vastly greater importance, however, is the ability of the President simply by his day-to-day conduct of our foreign relations to create situations from which escape except by the route of war is difficult or impossible."<sup>21</sup>

What is the summary of the office and powers of the Presidency as it exists in our day? In the *Résumé*<sup>22</sup> Professor Corwin says: "The Presidency of this present year of grace, so far as it is explicable in terms of American constitutional law and theory, is the product of the following factors: (1) social acceptance of the idea that government should be active and reformist, rather than simply protective of the established order of things; (2) the breakdown of the principle of dual federalism in the field of Congress's legislative powers; (3) the breakdown of the principle of the separation of powers as defining the relation of President and Congress in lawmaking; (4) the breakdown of the corollary principle that the legislature may not delegate its powers; and (5) the enlarged role of the United States in the international field."

It is submitted that the above catalogue of "factors" is incomplete in one respect. He fails to note herein that one of the most significant "factors" of the moment is judicial subservience to the Chief Executive and to Congress. This abdication of the Supreme Court impelled a former President of the American Bar Association to remark that "reliance against the exercise of arbitrary power must be placed by the people henceforth in the legislative rather than in the judicial department of national government."<sup>23</sup> More startling is the view of a distinguished Professor of Constitutional Law who states that "a dislike, and even fear, of incurring popular hostility if the Court were an obstructive force to economic security through Government, may

13. 293 U. S. 388 (1935).

14. 295 U. S. 495 (1935).

15. 307 U. S. 533 (1939).

16. Pp. 122-123. *But cf.* *United States v. Rock Royal Cooperative*, 307 U. S. 533, 574-578 (1939).

17. Ch. V.

18. P. 197.

19. P. 208.

20. 299 U. S. 304 (1936).

21. P. 253.

22. Pp. 309-316.

23. Hogan, *Important Shifts in Constitutional Doctrine* (1939) 25 A. B. A. J. 629, 638.



likewise be an 'inarticulate major premise' in many of the decisions of the Court upholding legislation."<sup>24</sup> I suspect that Professor Corwin would not object to the inclusion of the additional item of judicial dependence, for he concludes his book by a brief reference to the "rapid relegation of judicial review to a secondary role. . . ."<sup>25</sup>

One last matter deserves particular mention. It is pointed out that "the expansion of the President's role as legislator has provoked a serious revival of the talk that the President is a potential matrix of dictatorship."<sup>26</sup> While he concedes that "the President has no judicially enforceable responsibility either for nonperformance of his duties or for exceeding his powers" and that "impeachment is . . . a 'scarecrow',"<sup>27</sup> Professor Corwin nevertheless finds strong grounds for the belief that such presidential leadership is not in defiance of democratic institutions but in response to the popular demand that the Chief Executive take a more active role "in matters of general concern, and especially in matters affecting the material welfare of the great masses of the people."<sup>28</sup> Other writers argue that the New Constitutionalism may lead to a Dictatorship.<sup>29</sup>

Whether the views of Professor Corwin or of other writers prevail regarding the survival of Democracy or the possibility of a Dictatorship within or without the Constitution, the present book stands forth as an adequate and timely analysis of the office and powers of the President of the United States.

WALTER B. KENNEDY†

CONTEMPTS BY PUBLICATION. By Harold W. Sullivan. (second edition) Boston: Privately published. 1940. pp. xiii, 212. \$10.00.

The vicious practice known as trial by newspaper, despite its unofficial, irresponsible character, has become a firmly established incident of the administration of justice in America, particularly in important criminal cases. Publications tending to prejudice the trial of pending cases and influence or obstruct the course of justice are a prominent daily feature in the newspapers; none of the thinking public denies the existence of the phenomenon, most of them deplore it, yet like the weather no

24. Albertsworth, *The New Constitutionalism* (1940) 26 A. B. A. J. 864, 868.

25. P. 316.

26. P. 297.

27. P. 298.

28. P. 300.

29. "Whatever it is or may be, the new Constitutionalism calls for a maximum of government in economic life, and before our economic maladjustments are completed it may call for a Dictatorship." Albertsworth, *The New Constitutionalism* (1940) 26 A. B. A. J. 864, 869.

It is not asserted or believed that Professor Albertsworth favors a Dictatorship. On the contrary he has elsewhere pointed out clearly that he regards certain trends in that direction as unfortunate. Albertsworth, *Cancers in the Constitution* (1940) 28 GEORGETOWN L. J. 723. My only objection to the conclusion of Professor Albertsworth is that he seems to be of the opinion that this change to a dictatorship could be accomplished *under* the Constitution. It seems to me that the full transfer of dictatorial powers to the President could not be wholly accomplished without an overthrow of our constitutional form of government.

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one does anything about it. This book is a plea for the suppression of this "great American institution" by the exercise of the judicial power to cite for contempt. More than this, however, it is a comprehensive exposition of the law of contemptuous publications; the authorities collected within its covers bearing eloquent testimony to the extent of the author's research. As a worthwhile text on the law of contempt by publication it recommends itself to the careful consideration of any member of the legal profession who is seriously interested in journalistic tampering with the business of our courts.

Adhering to Bentham's counsel that before we can determine what the law ought to be, we must first ascertain what it is, the author devotes the first two sections of the book, entitled "American Adjudications" and "English Adjudications", to a survey of the law of contempt by publication as it exists today at common law. No discussion of the statutory modification or elimination of the power to cite publications as contemptuous existent in many American jurisdictions is included in this survey; such discussion is reserved for the final section of the book. Publications which constitute a contempt because they scandalize the court are also excluded from consideration in this section of the book because they are not within the scope of so-called "trial" by newspaper, although in one well-known English case<sup>1</sup> discussed the publication in question undoubtedly offended on that score. The material contained in this portion of the book is set forth in conventional text-book fashion confining itself to statements of rules of law and refraining for the most part from comment or argument from the data presented. This method of presentation cannot be too highly commended for it provides the reader at the outset with the knowledge required for an intelligent understanding and appreciation of the question involved.

A careful reading of the portion of the book devoted to discussion of the body of law, both English and American, dealing with contempts by publication reveals the surprising extent to which journalistic tampering with the judicial machinery can go. Any publication which fairly tends to prejudice or influence the trial of an action in any way constitutes what we call "trial" by newspaper. Thus in the section entitled "American Adjudications" the author deals with cases of publications tending to intimidate or influence a grand jury, publications impugning the motives of a grand jury in returning indictments or in failing to do so, others calculated to embarrass judges or influence their decisions in cases pending both in trial courts and appellate courts, as well as the more familiar and widespread type of publication which tends to prejudice trial juries or intimidate witnesses. Since the general rule is that a publication is not contemptuous if it does not refer to a pending case,<sup>2</sup> a section is devoted to the question of when a case is considered to be pending. The effect of the intent of a publication or its truth is also discussed. There is also a section which considers inaccurate reports of court proceedings or testimony given in court. In addition to a consideration of the power of the court to punish for contempt publications which have already been made, there is discussion of the power of the court to forbid in advance the publication of contemptuous matter.

The second part of the book, dealing with the English cases and cases reported from various British dominions and colonies, is concerned to a large extent with publications having an effect on the course of the trial proper, as distinguished from the entire course of the action. After discussing publications held to be contemptu-

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1. P. 58. The case referred to is *Rex v. The Editor of the New Statesman* (1928) 44 T. L. R. 301.

2. *Ex parte Green*, 46 Tex. Cr. Rep. 576 (1904); *Craig v. Hecht*, 263 U. S. 255 (1923).

ous in criminal actions, the author then goes on to civil actions generally, with separate sections on libel actions and on petitions to wind up corporations. Publications which have been held *not* to constitute contempts are then discussed. Advertisements, election petitions and patent proceedings are also treated separately. The English cases on inaccurate reports are discussed.

The cases discussed and cited by the author have been taken from the reports of thirty-nine of the United States, the Federal courts, Hawaii and the Philippine Islands, as well as England, Ireland, Scotland, Canada, Australia and India. The value of the book, as a text, therefore, is not limited or narrow. The cases cited are listed in a table by jurisdictions as well as alphabetically—a device which makes for convenience in reference.

The final section of the book takes up the historical development of the law of contemptuous publications in both England and the United States and the present day functioning of that law in both countries. In the last two centuries a comprehensive body of law with regard to contemptuous publications has come into being in England, whereas in the United States there is scarcely any case law having to do with publications constituting genuine "trial" by newspaper. With regard to such publications the author asserts that there are five hundred adjudicated cases in England, as compared with a mere fifteen in the United States. In analyzing the reasons for this disparity the author divides American jurisdictions into three groups: first, those jurisdictions in which the common law power to cite publications for contempt still exists unimpaired; second, those in which statutory modifications or eliminations of this power have been accepted by the courts as limiting their power to cite for contempt; and third, those in which statutes setting forth the instances in which courts may cite for contempt have been construed as merely supplementing the common law power and not superseding it. For the failure of the courts of those jurisdictions where the power to cite for contempt is unhampered by statute—either because of the absence of such statutes or because of the construction put upon them by the courts—the author assigns various reasons. In one state, Mississippi, the courts have construed the constitutional provision guaranteeing free speech as a restriction upon the use of the power.<sup>3</sup> Fear of taking action which might lead to a hue and cry against judicial abuse of power, reluctance upon the part of an elective judiciary to antagonize the press and a total lack of any body of law on the subject in any one jurisdiction are other factors in the opinion of the author.

The reluctance of judges to use a feared and hated power and the action of legislatures in curtailing that power is attributed to fear of a too powerful federal government, particularly a too powerful federal judiciary, and to the determination of legislatures to control the courts and curb their powers. To this reviewer the shackling of the contempt power of American courts early in our history seems to have a more fundamental and underlying cause. Dean Pound has attributed the American attitude toward arbitrary power in the hands of courts to the Puritan distrust of arbitrary magistrates and the consequent leaning toward detailed, rigid legislation to be administered by judges shorn of all but a bare minimum of discretion,<sup>4</sup> as well as the desire of frontier communities to have government, and particularly the courts, kept within limits which would prevent irksome interference with the individual.<sup>5</sup> Thus in an age when "trial" by newspaper was unknown the courts were

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3. *Ex parte Hickey*, 4 Smedes & M. appendix (Miss. 1841).

4. POUND, *THE SPIRIT OF THE COMMON LAW* (1921) 32.

5. *Id.* at 112.

deprived of a weapon with which they could have strangled this monster in its infancy.

Freedom of the press is not absolute, as the author points out citing Blackstone<sup>6</sup> to the effect that freedom of the press means only freedom from previous restraint on publication and not freedom from criminal or civil liability for matter which has already been published. We live in a time when the doctrine that no man may exercise his rights to the detriment or harm of another enjoys wide acceptance. The press should enjoy no greater or no lesser freedom than any other element in the nation. A free press is essential to free government when it purveys the truth and exposes corruption and incipient tyranny in the nation's councils. It was not given freedom to trample underfoot the rights of others in order to swell its own coffers and satisfy the morbid and prurient tastes of the idly curious. When the press interprets liberty as meaning unlimited license and threatens the higher interests of the fair administration of justice and the right of every man to a fair and impartial trial it is high time that it be called upon to submit to some reasonable restriction in the exercise of its rights.

The author deals with the advisability of using the summary procedure of citation for contempt as used by the English courts. Since publications constituting "trial" by newspaper do not involve the personal element as do publications which scandalize the court he feels that the objection that the judge is sitting on his own case is not tenable. To refer such cases to a separate trial before a jury would succeed only in further complicating the machinery of justice and lengthening already overburdened calendars. Since the case affected is already before the court it can best be handled by quick action on the part of the court whose workings have been tampered with. The author argues that a judge trained in the law is better able to handle such a question than a jury would be and more likely to adequately protect the constitutional rights of the publisher. The judge handling the case concerning which the publication was made would be better fitted for judging whether the publication was in fact prejudicial or merely a technical contempt productive of no substantial harm. However, the English practice of allowing any party interested in the action to apply for a writ of attachment for contempt has been condemned as unsound by various English authorities who are in favor of altering the law so as to permit such applications to be made only by or with the permission of the Attorney-General.<sup>7</sup>

That the press is in need of some restriction is obvious. Every important criminal case in this country provides an excuse for another journalistic Saturnalia. "Confessions" are spread across the pages of the daily newspapers. In cases where the identity of the accused is a vital issue his picture is published on the front page; should the paper happen to be one of the tabloid variety his picture in most cases is the front page. Important evidence is not only published before the trial but is commented on with regard to its probable truth and weight. "Experts" qualified by the editor learnedly hold forth in pseudo-scientific feature articles on various phases of the case. Of what possible avail can a rule of evidence which forbids the prosecution to present testimony regarding a defendant's prior criminal record be, when the prospective jurors are provided with a complete and detailed biography of the defendant covering his every action from the cradle to the day of trial? With the advent of the gossip column even the dark hint and the wild rumor have

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6. 4 BL. COMM. \*152.

7. *Legal Restrictions on the British Press* (1938) 72 U. S. L. REV. 568, at 573.

their place. The more respectable elements of the press are guilty only in less degree than their more unrestrained brethren as the author points out in an interesting note.<sup>8</sup> By prejudicing jurors and inflaming their minds, by intimidating prospective witnesses and by nullifying to a great extent the wise provisions of a law of evidence tested by centuries of practical experience, the press has gone a long way toward making the constitutional guarantee of a fair trial a mere high sounding phrase signifying nothing.

"Trial" by newspaper is one home-grown product which the United States could well do without. Anyone seriously interested in its suppression cannot fail to be interested in Mr. Sullivan's book.

JOSEPH R. KELLY†

HANDBOOK FOR CHEMICAL PATENTS. By Edward Thomas. New York: Chemical Publishing Co., Inc. 1940. pp. x, 270. \$4.00.

While inventions in the field of chemistry are subject to the same statutory provisions relating to the obtaining and enforcing of patents as are inventions in electrical, mechanical and other fields, the very nature of chemical inventions has resulted in a different approach to and treatment of some of the problems implicit in inventions that are so largely concerned with compositions of matter and the production and use thereof. In recognition of the need for a new work on chemical patents, Edward Thomas has written a "Handbook for Chemical Patents" which has a dual purpose: to bring to date the summary of the cases contained in his "Law of Chemical Patents" (1938), and to instruct the chemical inventor wherein his problems lie and how they may be met.

To supplement his earlier work he has included rulings from several hundred recent decisions in the field of or bearing on chemical inventions. The brevity with which the holdings of the cited cases have been introduced, however, coupled with the lack of classification of the subject matter involved, except under very general headings, and the lack of any explanation of unifying principles, is not conducive to any clear understanding of why the courts have held some acts to be inventive, and others not; some inventions satisfied by prior developments and others not; some departures from a patented disclosure an infringing appropriation of patented subject matter, and others not. It is unfortunate that an effort has not been made to correlate the decisions with general statements of principle, because, to the chemist, the terse account of what has happened in these many cases cannot but lead to confusion and a feeling of arbitrariness in court decisions that is not justified.

To the lawyer, on the other hand, this brief summary of cases may serve as a useful index, since in determining whether a question in which he is interested has been a subject of adjudication he may scan the expressed conclusions in the text and hence obtain a lead to a relevant case that may prove to be more expeditious than a search through a more elaborate digest.

In its function as a handbook for chemists, and more particularly as a guide to

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8. P. 37, note 17 in which are listed certain publications in the New York Times with regard to the Hauptmann case which constituted contempts according to common law standards.

† Book Review Editor of the FORDHAM LAW REVIEW, 1939.

what problems may confront a chemical inventor who seeks patent protection, this volume should serve a real purpose. It reflects the author's ripe experience in the field of chemical patents and thus is entitled to weight. While again sacrificing accuracy in some respects in the interest of brevity and simplicity, it constitutes a clear warning of the dangers with which a chemical inventor may be confronted if he fails to seek expert advice in disclosing and claiming his invention, in prosecuting his application and in exploiting or seeking to enforce his patent. The work does not purport to be a manual of procedure, but summarizes what complexities of procedure may arise. In brief, its implication as a handbook is largely concerned with: do not fail to obtain competent legal advice.

LOYD HALL SUTTON†

NEW YORK CASES ON BUSINESS LAW. By Joseph V. O'Neill and Bernard J. O'Connell. New York: Fordham University Press. 1940. pp. 691. \$4.00.

As our business and social structures become increasingly complex, a basic knowledge of business law becomes increasingly imperative. The business student must, if he desires to cope successfully with these conditions, equip himself with a knowledge of the law and a knowledge of the legal significance of these complex conditions. For years, non-professional law students, desiring to acquaint themselves with the rudiments of the law particularly suited to their respective business needs, have been introduced to the law through the medium of abstract legal principles. Law was taught to them as an empty system of unrelated legal concepts, to be assimilated by the conscientious application of brute memory. As a result of this "memory" course, most students, after having proved themselves adept at memorizing page after page of "Law", very often proved themselves equally adept at hurriedly forgetting what they had hurriedly learned.

In recognition of the need for a new work on business law Messrs. O'Neill and O'Connell prepared this collection of cases for the use of students in schools of commerce and business administration. The authors believe that principles of law under the "case book" system may be learned with much greater facility than under the old system of teaching legal principles alone. The authors hope that, given actual circumstances, business students will learn to extract for themselves the points of law involved, and, by such process, those principles will become a part of their knowledge—not just a line of print to be memorized.

The attempt is made to present law as it really is—a live and stimulating study of our everyday relations to one another; a study throbbing with the practical problem of everyday existence. That is why the authors have emphasized the practical and illustrative, and have discarded anything resembling legal rôle. The student and general reader of to-day are not interested in abstract principles—rules that inevitably fade with the passing of time. They *are* interested in the live problems which bombard them on every hand. Thus the emphasis on actual cases, and the principles are discussed as they relate to those problems, rather than problems relating to principles.

The "case book" system also does much to acquaint business students with a great variety of legal problems common to modern business. This, of itself, should be sufficient to justify the use of this method in preference to the outmoded system of relaying mere legal principles to the legally untrained student of business, in the hope that, while he may fumble some, he will catch a good percentage of the others.

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Further, by presenting actual cases decided by our courts, it is hoped that the non-professional law student will realize that there is a limitless variety of economic and social factors, which combine to make difficult the application of the legal concepts which he has so casually learned. In this manner, too, he may learn that though the law in its essence is simple, in its application, it is multifarious.

The authors further hope that future business men will obtain a sufficient knowledge of the law as will be of value to them in avoiding possible future litigation. It is definitely not intended as a legal panacea for the layman. The feeling is prevalent that following a course of study in business law, our future business tycoons will learn to appreciate when danger lurks in some particular legal situation, with which they are not prepared to cope, and, appreciating the evident difficulty, will be quick to realize that the circumstances dictate that they seek the guidance of competent counsel.

The book itself has been divided into eleven chapters, each chapter being devoted to a separate subject. Accordingly, chapters are assigned to a study of Contracts, Agency, Negotiable Instruments, Partnerships, Corporations, Insurance, Real and Personal Property, Sales, Suretyship, and Wills, in the order named. The various chapters have not all been developed to the same degree. To some has been given a more intensive treatment than to others. Approximately one-fourth of the book is devoted to a study of the general law of Contracts, with Negotiable Instruments, Sales and Agency taking up a greater part of the remaining pages.

Here and there throughout the volume however, the opportunity presenting itself, cases drawn from other branches of the law were availed of, both to illustrate the main subject under discussion, and, in part, to show the existence of other departments of the law not specifically studied in this book. This is to apprise the student that the subjects selected for study do not comprise our entire legal system, but are merely cogs in the wheel of Jurisprudence. *Hamer v. Sidway*,<sup>1</sup> while illustrating the principle that consideration is necessary for a good contract, also serves to introduce Trusts to the student. *Pershall v. Elliott*,<sup>2</sup> another milestone on the necessity of consideration, ushers in the decree of Specific Performance, which is granted in our Courts of Equity.

In the selection of their cases, the authors have attempted to present the most recent of the leading cases in every branch of the law discussed by them. As a rule, the older cases have been omitted. There are two compensating factors for this omission. The more modern cases included in this volume contain excellent discussions of a good number of our more ancient authorities. A second factor is that they present modern business situations existent in our present day economic sphere.

The cases in this volume are drawn strictly from the decisions of the courts of the State of New York. This ought to assure the business student that the principles which he is assimilating are the law of this jurisdiction. Otherwise, the non-professional law student in New York might encounter difficulty in determining whether principles enunciated in other jurisdictions have been endorsed by the New York courts. The authors have also inserted a list of definitions of legal terms, for the convenience of the student, at the beginning of each chapter. Brief footnotes follow almost each case. A table of cases, and a satisfactory index complete the volume.

It is the opinion of this writer that this work will enjoy considerable success and find great favor with our business students.

CARMINE J. CAPOZZOLA†

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1. 124 N. Y. 538, 27 N. E. 256 (1891).

2. 249 N. Y. 183, 163 N. E. 554 (1928).

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TRADE AGREEMENTS: A STUDY IN DEMOCRATIC METHODS. By John Day Larkin. New York: Columbia Univ. Press. 1940. pp. xii, 135. \$1.00.

This important and informative study is the first of a series of small volumes on international economic relations of the United States to be issued under the auspices of the Carnegie Endowment for International Peace. It presents in a clear and lucid manner the procedural side of the reciprocal trade agreements policy. The description of the machinery by which trade agreements between the United States and foreign countries are formulated is unusually clear. The author contrasts this method consisting of inter-departmental committees in the framing of trade agreements with the method by which the various committees in Congress constructed previous tariff acts. His remarkable understanding of both methods amply affords him the opportunity to appraise the present trade agreements policy with respect to the policy of comprehensive tariff acts, such as the Hawley-Smoot Act of 1930. The increase in complexity of tariff legislation is clearly shown by the fact that the Tariff Act of 1816 contained a list of specific custom rates covering four pages while the latest Congressional attempt to write a list of specific custom rates in the Hawley-Smoot Act of 1930 covered 174 similar pages. Proper legislative consideration of such complex problems cannot be attained, whereas an administrative machinery of a more permanent nature can give the myriad problems the necessary time and study to reach sound conclusions. In addition, a trade agreement constructed by the inter-departmental machinery is, as the author indicates, more likely to consider the entire national interest than is shown in the tariff acts passed by Congress. The author presents a stimulating study of the constitutional objections to the Trade Agreements program and concludes that it clearly is constitutional. The ideas and conclusions expressed by the author are particularly challenging to those who have opposed the Trade Agreements program. Every person opposing this program should read this careful analysis. The author presents this highly controversial subject in a dispassionate manner and for that reason the book deserves to be widely read.

WILLIAM C. WARREN†

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 Co. 1940. pp. xxi, 886, Statutory Supplement, p. 247. \$6.50.

The fact that a third edition of a casebook appears within eight years of the publication of the first edition raises, at least, a presumption that the work has merit and is meeting a real need. In this particular case, however, the second revision has been made necessary by the drastic change in statutes covering the liquidation of debtors' estates and reorganization of bankrupt corporations, namely, by the adoption of the Chandler Act.

The revisers of Professor Sturges' casebook have treated their subject under three main heads instead of the four found in the second edition. They have subordinated Part II of the earlier edition to a chapter heading. Part II in Sturges' editions dealt with "Displacement of compositions, Assignments, and Receiverships by proceedings under the bankruptcy act." In other respects their arrangement practically follows that of the earlier editions. Cases, however, have been juggled about, shifted from

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one chapter or section to another and in the same chapter. Nearly fifty fairly recent cases used by Sturges in his second edition have been omitted and an equal number of very recent ones substituted in their places. A majority of these new cases have been decided since Sturges' second edition was published. This change in the order of cases may be accounted for by the fact that many instructors do not follow the order laid down by the compiler of a casebook. They have their own ideas as to the order and as to what cases should be presented to a class.

The words "and other materials" in the title of this casebook are not without meaning for its compilers have made frequent use of excerpts from law review articles and notes and have included sections of statutes, codes and rules of procedure. Quotations from standard texts are also included.

While for the most part the length of cases has been kept within the limits of two to four pages, many of the more recent opinions on bankruptcy law have been cut very little or not at all. *Louisville Joint Stock Land Bank v. Radford* (281-284, inclusive); *Lippitt v. Thomas Loan & Trust Co.* (524-534); *Pepper v. Litton* (699-710); and the S.E.C. report on *In re La France Industries* (349-367) may be cited as examples.

The footnote material in the third edition has been greatly increased over that of the second edition. These notes are very complete and contain a large number of citations of law review articles and notes. In fact, the net result of piling up footnote material has been to create a small reference library within the two covers of the casebook. This is really a departure from the original case system and a reversion to the old text book method of teaching. It may save the instructor research work but at the expense of independent thinking on the part of the student. If the answers to the questions considered are to be found in the footnotes, the average student will take them at their face value and rely more on memory than the process of thinking. This reviewer is in agreement with another compiler of a casebook in this same field when he says: "I propose to let the cases teach rather than present a collection of essay material."

WILLIAM LEWIS ROBERTS†

OUTLINE OF NEW YORK PRACTICE. By Irving W. Berkman. (Seventh Edition). Brooklyn: Harmon Publications. 1940. pp. xv, 331. \$4.50.

This book is frankly an outline. As such it has merit. Although it is not a substitute for thorough preparation for class, it does collect a good deal of useful information, classified in familiar categories.

How best to present procedural materials is a difficult question of law teaching. The literature is vast; so are the problems. It seems clear that the subject cannot be taught abstractly and in a vacuum. Nevertheless, the treatment must be progressive and critical. The procedure of the future must be predicted from past development and present criticism.

This book is a syllabus; it is not a teaching tool. It is useful for review, and therefore it has its function. For this limited use, it has the required virtues: it is short; it states many cases; it relates the decisions to the statutes; it is thorough; it is reliable. In line with its purpose, of course, the book does not attempt to develop fine distinctions in the cases.

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