

BOOK REVIEWS

STATES' RIGHTS AND NATIONAL PROHIBITION. By Archibald E. Stevenson. Clark Boardman Co., Ltd., New York, 1927. Pp. 157.

This is a brief but closely reasoned discussion of the question of national prohibition in its bearing upon the constitutional principle of states' rights; and its thesis is that the Eighteenth Amendment has no constitutional validity notwithstanding repeated decisions of the United States Supreme Court to the contrary.

The argument may be summarized under the following propositions. When the thirteen colonies made their declaration of independence they did so, not in their collective capacity, but as separate and independent political entities. The result of their several declarations was the creation of thirteen independent sovereign States whose only bond was "the necessity for common action in the prosecution of the war." The recognized insecurity of such a union, and the lack of any legal authority in the Continental Congress, led to a closer confederation. This confederation was nothing more than a league, "a compact between sovereign states," under which certain general powers were delegated to the central government, that is, the Confederate Congress. The inadequate powers of this confederate government necessitated a further change and the result was the Federal Constitution. This Constitution derived its authority, not from the people of the United States acting collectively as a single nation, but from the citizens of the thirteen states acting separately in their several sovereign capacities, which sovereign capacities the several states retained, at least in part, under the Constitution. Since the people of the United States did not act as a single nation, either in the drafting or in the ratification of the Federal Constitution, they are precluded from taking such action in its operation, and must continue to act in their separate sovereign capacities as citizens of their respective states. This principle is further established by the fact that the amending clause is limited by the Ninth and Tenth Amendments, and that, consequently, the powers then delegated to the Federal Government by the Constitution were the only powers that the sovereign people of the several states intended to grant to it.

The application of the argument to national prohibition is obvious. In its extension to intra-state, as well as to inter-state and foreign business, the Eighteenth Amendment, not only opens the door to progressive centralization with its attendant evils of bureaucracy and absolutism, but it constitutes a clear infringement of such particular reserved rights of the states as the exclusive right to exercise police powers within their own jurisdictions. Another case in point is the limitation which the Amendment places upon the taxing power of the states through its interference with their exclusive right to determine, within their jurisdictions, what are proper subjects of taxation. In all this the author finds a usurpation of state sovereignty which threatens the very existence of the states as sovereign entities.

This is the argument and its application. To the reviewer it seems severely and narrowly legalistic. His chief criticism is that it is not in accord with the findings of contemporary political science; and its fundamental fallacy is to be

found in its concept of divided sovereignty according to which the Federal Government is sovereign in one field and the states in another. This concept has been a source of much confusion in American political thinking. A divided sovereignty is a contradiction of terms. A sovereignty that is limited by or co-equal with another authority is not sovereignty at all. Calhoun was absolutely right when he declared that sovereignty is indivisible, and that being indivisible it must be all in one place. He was wrong, however, when he lodged it exclusively in the states. To this criticism the author would reply that the concept of sovereignty must be understood as the statesmen and politicians who composed the conventions that framed and ratified the Constitution understood it, and not as political science has come to understand it.

The reply is not convincing. For such a doctrine once established would be a constant bar to progress. It would make any change in the distribution of powers between the Federal and State Governments, however imperative, a practical impossibility. The people of the United States cannot make the change for they cannot act collectively as a single nation. The Federal Government cannot make it for it is incapable of assuming powers that have not been delegated to it expressly or impliedly. It remains then for the several states to make such changes. But this requires unanimous consent since no state can be bound in such a matter without its own consent. It follows then that barring such unanimous consent, a most improbable contingency, the dividing line between the powers of the Federal Government and those of the states must remain forever as the representatives of four millions of people drew it nearly a century and a half ago, regardless of the varying political, economic and social circumstances of future generations.

The doctrine also ignores the logic of history. The principle that any change in the distribution of powers between the Federal and State Governments must rest on the unanimous consent of the states is the very essence of confederatism, not federalism. And if the Civil War decided anything at all it was that the United States is a federation and not a confederation. It is worth noting also that the various federations that have been created since the adoption of the Federal Constitution, taking a leaf out of our experience, have drawn the line between the two sets of powers differently from the way it is drawn in our Constitution, giving to the central governments larger powers at the expense of the local or provincial governments. And it is safe to say that if a new Federal Constitution were framed today it would exhibit under our modern complicated social order, with its unparalleled interdependence, its multiplied points of contact between man and man and its far-reaching relationships of every sort, similar tendencies toward centralization.

The foregoing difficulties are avoided by the commonly accepted view of sovereignty among political scientists today. According to that view sovereignty is indivisible, and being indivisible it can be lodged in only one place, and that place is neither the Federal Government nor the several states, but the people of the United States in their collective capacity who drew the dividing line between the powers of the Federal Government and those of the states, in the first instance, and who can at any time change it, as has been done repeatedly by the exercise of the amending power. The wisdom of these changes may be questioned, but not their legal validity, under this concept of sovereignty.

What remedy has the author to propose now that the validity of the Eighteenth Amendment has been affirmed by the Supreme Court? He recognizes the futility of attempting to bring about its repeal. Beyond this there are but two possible lines of action. The one is a decision of the Supreme Court to the effect that the Amendment does not give to the Federal Government authority over intra-state business. But this would involve too sharp a reversal on the part of the Court to hold out any hope of a successful issue. The other is an amendment to the Federal Constitution to the effect that "the powers not delegated to the United States, nor prohibited to the States by the Constitution, are reserved to the States respectively or to their people, unless such powers, or any of them, have been, or hereafter shall be, vested in the United States by Constitutional Amendment." This would undoubtedly clarify the situation and resolve the doubts of not a few as to the relation between the powers of the Federal and State Governments. But would it be worth the effort? For those who hold the commonly accepted view of sovereignty it would be subject to the same objections that the author raises against the Eighteenth Amendment. The one no less than the other would modify the Tenth Amendment, which, he contends, is a limitation upon the amending power. The one no less than the other would deny the sovereignty of the states.

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THE WORK OF CORPORATE TRUST DEPARTMENTS. By R. G. Page and Pason G. Gates. Prentice-Hall, Inc., New York, 1926. Pp. xi, 466.

In their admirable volume upon this subject, Messrs. Page and Gates display that intimate knowledge of their subject which is acquired only in the school of experience, and they have succeeded most effectually in their aim to cover the practical working of the trust department rather than to write a purely legal book.

They give a short but interesting insight into the early history and development of corporate fiduciary functions, as originally confined to the trust companies organized for that purpose, and as followed by the entry of the national banks into the field under the authority granted by the Federal Reserve Act. They explain in detail the numerous types of mortgages usually met with in corporation finance, and the various liens acquired thereunder, differentiating between participating bonds, collateral trust bonds, equipment obligations, *etc.* They make an extensive analysis of the various clauses embodied in corporate mortgages, a typical and most comprehensive example of which is contained in an appendix to the book. This analysis covers the various technicalities to be observed in the authorization of the securities by the corporation, the execution and certification of the bonds, their registry and exchangeability, safeguarding the replacement of lost bonds, the use of temporary and interim certificates and supersession of same by definitive bonds, and also the advantage to be gained by the issuance of bonds in series, which renders the mortgage more flexible and adjustable to varying interest rates. Comparison is made of the purely formal covenants with those which impose obligations upon both the

corporation and the trustee, particularly with relation to the maintenance of the property in order to prevent depreciation or impairment of its value. A chapter is devoted to the subject of sinking funds, the basis for same, their operation, and the manner of retiring bonds thereunder, whether by purchase in the open market, by tender or by call. They explain the handling of securities of subsidiary corporations pledged under the mortgage of the parent company, the right of the mortgagor to receive the income therefrom when not in default under its own obligations, the possession of the pledged securities, their use in qualifying directors, and the voting of same in the ordinary course of business or for special purposes such as the merger of the subsidiaries with one another or with the parent company. Advice is given concerning the methods pursued in the release of mortgaged property no longer useful in the business of the company, the requisite authority, the application of the proceeds, either to the retirement of bonds or for the acquisition of additional property, and in the case of the latter, its substitution on a "utility" basis. While the usual corporate mortgage contains voluminous remedies in case of default, attention is called to the almost impossibility of their performance, owing to the changed attitude of the courts in their endeavors to protect the interests of junior security holders. In connection with equipment trusts, they differentiate between the Philadelphia, or rental, plan and the conditional sale plan. They deal with the appointment of the trust company as registrar and transfer agent, and give an interesting discussion of the various classes of stocks, their privileges and priorities, the intricacies of their registration and transfer in the case of individuals, partnerships, corporations, fiduciaries, joint tenants and tenants in common; and they also devote considerable discussion to the operation of the trust company in the reorganization and readjustment of the capital structure of corporations, the duties of the trust company in connection with the various forms of investment trusts, fiscal agencies and the payment of coupons.

Throughout the book special emphasis is laid upon the duties and liabilities assumed by the trustee and the necessity of looking into the financial and moral responsibility of the mortgagor, as well as that of the bankers underwriting the issue, to guard against unscrupulous persons obtaining standing for the securities of questionable enterprises through the use of the name of the corporate trustee.

Attention is also directed to the advisability of ascertaining whether the trust company is authorized or permitted to do business in the state or states where the property of the mortgagor is located, and where, as trustee, it may at some time be required to act, and the obviation of this difficulty by naming an individual as trustee to act with or under the direction of the corporate trustee.

They touch upon the study to be given by the trustee to the draft of the mortgage to ascertain whether it is practical from an administrative standpoint, as, once it is executed, and bonds issued thereunder, subsequent changes are either impossible or entail considerable expense and delay.

They deal with the trustee's responsibility in the certification of the original issue of bonds, and for further issues under open-end mortgages, where the corporation is permitted to draw down and call for the certification of additional bonds for the payment of the cost of improvements or for subsequently acquired property, and the restrictions imposed in connection therewith, such as the rela-

tionship of the amount of bonds authorized to the cost of the property, character of additions, the earnings of the company as a prerequisite for their issuance, the necessary resolutions of directors and stockholders, certificates of officers or engineers, opinion of counsel and authority of governmental regulatory bodies, where such is required, as in the case of public service corporations.

Stress is laid upon the trustee's responsibility for jealously guarding the interests of the bondholders at all times, especially in the call of bonds for redemption under the terms of the mortgage, the bondholders being as much entitled to retain their investment as the corporation is to free itself of its obligations.

Attention is also directed to the fact that the trustee cannot place implicit confidence in the clauses granting it immunity for its acts performed in good faith, the tendency of the courts being to hold corporate trustees to strict accountability, owing to their extended sources of information and broad experience. The suggestion is made that the trust companies are equipped to accept a much greater degree of responsibility than is at present expected of them, if adequately compensated for the risk assumed. In this connection the fees in general use in New York City are scheduled.

The book is illustrated with more than one hundred forms. While many of them may be found superfluous in the smaller trust companies, they form the basis for a most excellent system of recording and accounting.

The authors have unquestionably made a valuable addition to the bibliography on this important subject. The scope of the book is such that it can be studied with profit not only by the student of law and corporation finance, but by the experienced corporation attorney and trust officer.

James Howard Millar.

Baltimore, Md.

THE LAW OF CHEMICAL PATENTS. By Edward Thomas. D. Van Nostrand Co., New York, 1927. Pp. xiii, 420.

Any book that bears on a special branch of the law, and this is particularly true of books on patent law, is assured of a place in the libraries of those practicing in the special field. The following critical comments accordingly seem justified, based, as they are, not upon a mere casual review of the work in hand, but upon its use or attempted use as a tool for the trade.

The volume in the first place is a compilation, as distinguished from a treatise, consisting of verbatim quotation from court decisions assorted under some eighteen captions, with further sub-captions. A text of this sort is little more than an index or digest of cases and other more inclusive indexes or digests will equally serve the practitioner's purpose of locating the case in point. So far as presenting any ordered statement of the law on a subject, nothing much can be gained from such a work. On the other hand, the rather literal paraphrase of the decisions of our courts found in the successive editions of "Walker On Patents" has made the latter an invaluable text for bench as well as bar.

In the second place, the volume in hand considerably exceeds in the cases collected the limited scope indicated by the title for the author essays to cover

the law of patents rather generally. This is particularly true of cases cited in connection with processes, which latter it has now for a long time been recognized are not limited to inventions involving chemical reactions or the application of the electric fluid. By way of illustration, in the sub-chapter "Process and Prior Art Apparatus" (p. 104) more cases are cited involving mechanical than chemical patents.

In the third place there is or, in the reviewer's opinion, should be no law of chemical patents separate and apart from patent law in general. The statutes do not recognize chemical inventions as constituting a separate class and the same principles obtain or should obtain in the drafting, interpretation and adjudication of a patent relating to a chemical apparatus, process or compound, as to a mechanism, mechanical process or article of manufacture. This in effect is recognized by the author in that, as noted above, he has found it impossible to illustrate a subject without citations foreign to the field.

Further, more careful proof-reading should have avoided typographical errors such as appear on page 251 where "Termit" should be "Thermit," and on page 401 where "diaso" should be "diazo." The important case of *Tyler v. Boston*, 7 Wall. 327, indexed for page 15, is merely a reference in another case and does not appear elsewhere in the text, although it has for many years been one of the stumbling blocks in the proper adjudication of chemical patents because of its interpretation of the word "equivalent" as applied to a chemical action.

J. F. Oberlin.

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FEDERAL INCOME AND ESTATE TAX LAWS. By Walter E. Barton and Carroll W. Browning. John Byrne & Co., Washington, 1926. Pp. xxiv, 707.

This is a third edition of a work the earlier editions of which have filled a substantial need in the offices of lawyers and accountants engaged in tax practice. It is a compilation and annotation of all the federal income and estate tax laws since the organization of the government. It, therefore, includes not only the seven income and estate taxes enacted since the Sixteenth Amendment, but it also includes the acts of 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1870, 1894 and 1909. In addition it includes sections of the Revised Statutes, the Bankruptcy Act, and the Federal Constitution applicable to federal income and estate taxation. All of these laws are copiously annotated, section by section, with references to decisions of the federal courts and the Board of Tax Appeals. The notes are particularly lucid and helpful.

A valuable feature of the work is the correlation of the income and estate tax laws of 1916, 1917, 1918, 1921, 1924 and 1926. Corresponding sections of these six laws are placed side by side in adjacent columns. This arrangement makes it possible to determine without a troublesome reference to other pages whether or not a given section of any one law appears in prior laws or is repeated in subsequent laws. It is likewise readily determinable whether or not a given court or board decision is applicable to a situation arising under a prior or a subsequent law.

To the lawyer or accountant continually engaged in tax practice this third edition is a handbook for daily reference. To the occasional excursionist into tax questions it is a time and energy-saving blessing. It will be even more popular than the earlier editions.

E. Blythe Stason.

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