

## BOOK REVIEWS

WHAT RIGHTS ARE LEFT. By Henry Alan Johnston. The Macmillan Company, New York, 1930. Pp. x, 177.

The title of this book is much wider than the subject-matter. The discussion of what rights are left as applied to the American citizen covers a very wide scope and there is room for a treatise on these vanishing rights which would be most instructive and bring before the thinking people of the country a clear picture of the abyss into which the American people are sliding. The author has, however, confined himself solely to Prohibition. He has clearly and compactly set forth the particulars in which the Prohibition Amendment and the legislation enacted in pursuance thereof and the methods of enforcement adopted by the Prohibition bureau have infringed on the constitutional rights and liberties of the American people.

It is to be hoped that sometime Mr. Johnston will expend his energy and talents in presenting us with a similar discussion of the entire vanishing rights of the American people.

On page 67, Mr. Johnston expresses the opinion that Congress probably has power to make the purchaser of intoxicating liquor guilty. In Chapter 7, however, beginning on page 125 his argument appears to lead to the contrary conclusion. It is believed that the true view is that Congress cannot under the Amendment make the purchaser of liquor guilty of a criminal offense.

Mr. Johnston has added in the end an appendix containing what he describes as an Annotated Constitution of the United States. The text of the Constitution is there but the annotations are not much in evidence.

One minor defect might be noted. Mr. Johnston frequently, as on page 67 when referring to the case of *Lambert v. Yellowly*, fails to add a citation of the report. This is very annoying when it is desired to look up the case and deprives the book of some of its value to the practicing lawyer.

The book is apparently written as a manual of instruction to the citizen advising him exactly of the manner in which he is affected by the Prohibition law. This book, however, will not be read by the man in the street. Democracy, unfortunately, has little respect for expert opinion and small patience with the close reasoned sagacity which is essential to the best conduct of governmental affairs. The people are actuated more by their hopes, by the persuasiveness of the demagogue and the politician than by any intellectual process. The American people appear to be started toward a catastrophe of the first magnitude. There is nothing in the aspect of the affairs at the present time which leads us to think that there is among the people any realization of the course to which they are headed. The eyes of the citizens are turned toward the great sun of the Federal power which, rising in the political sky, beats with increasing heat upon every part of the country. Like the insects in summer which fly into the light and are destroyed by the thousands, they, magnetized by that power, are rushing to a similar fate. The rights of local self-government are little under-

stood and rarely practiced. The power of the states is declining day by day. The Federal Government is taking unto itself every branch of activity. Amendments are being offered constantly to increase that power. Enthusiastic advocates of those amendments little dream of the damage they are inflicting upon the people. The increase in the Federal power will finally lead to vast executive despotism at Washington which will finally become so intolerable that it will destroy and stifle the economic and intellectual activity of the country. By that time this bureaucracy will have acquired such tremendous force that it can only be destroyed by force. Revolution will be the only escape and the country will break into smaller units and we will then have before us the difficulties which now confront the people of Europe; the division of the country into a number of independent powers with frontiers, tariff, jealousies and all the unlimited possibilities of war which arise from that situation, to say nothing of the great damage which will be inflicted upon the economic life of the country.

The Prohibition Amendment with its attendant evils is only one aspect, although an important one, of this political tendency of the country. It is well worth while to set out clearly as Mr. Johnston has done, the deplorable consequences of that most unfortunate experiment in moral legislation. No one who has considered the history of Prohibition enforcement in this country in the last twelve years can fail to be astounded at the sheep-like submissiveness of the American people to these violations of their dearest constitutional liberty.

It is, however, now considered unfashionable and not the thing to raise constitutional questions. The citizen who has been insulted and outraged by an unlawful search, is supposed to smile politely, thank the officer and go his way. This, however, is not the attitude of mind of the men who founded the republic. Let us suppose for instance that this law had been passed in 1810 or thereabouts and the Prohibition agents spread over the country with similar activities. Hundreds of them would have been shot dead in their tracks. The hardy, liberty-loving citizen of that day would have stood on neither ceremony nor compunction in defending his rights. It has been well said that "eternal vigilance is the price of liberty." The courts in this country are constituted as a means of affording the citizen an opportunity of defending his rights by orderly process. The citizens, however, fail to avail themselves of this privilege and the experience of history teaches that unless the powers of the executive and legislature are constantly challenged by an alert and liberty-loving people that they will gradually expand and develop into a despotism. Power has a way of rolling up like a snow ball. He who exercises power feeds on the power and consciously or unconsciously is constantly increasing the scope of his official activities. His motives may be good and he may be actuated by a sincere desire to benefit the people. If, however, we accept this as the principle by which official acts are to be tested, then we are abandoning the fundamental principles of our government and consigning ourselves entirely to the benevolent action of an executive despotism.

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CASES AND MATERIALS ON THE LAW OF SALES. By Karl N. Llewellyn. Callaghan & Co., Chicago, 1930. Pp. xxxv, 1081.

One comes from the reading of this thousand page book with the conviction that Professor Llewellyn has here made an important contribution to the teaching of the law of sales. Study of it is bound to influence for the better one's ideas about the problems involved in the process of getting goods from one person to another.

It would be difficult to collect a more stimulating and informing collection of cases. This feature of the book stands out with distinct excellence. Anyone who has made a reasonably serious effort to keep up with the cases during the last ten or fifteen years, and at the same time to continue the study of those of the nineteenth century will feel an assurance that Professor Llewellyn has worked long and faithfully and with keen insight on this mass of material. The result is a testimony to a selective capacity of a high order.

The author's familiarity with studies on marketing shows to distinct advantage throughout the book, not only in comment but in the selection of cases. Those in Chapter I dealing with various types of clauses in contracts of sale under which each party attempts to provide for his future economic interests with respect to the price and credit terms are a welcome addition to a case book on sales. Treating place, manner, quantity and time of delivery on a plane with that of warranty is desirable, not only because of the individual value of the cases but because it brings the law of sales as a whole into better focus. The added treatment of conditional sales is commendable. The cases on the financing agency are of great merit. The book as a whole thus speaks the language of business. The student, who may never have seen a book on marketing or had business experience, sees goods move from farm, mine, and forest to factory and on to consumption. At the same time his attention is centered primarily on the controversies which competition, fraud, accident, misunderstanding, lack of foresight and desire for gain bring about during this long journey. Penetrating questions throughout the book keep clear the existence of problems of business technique, legal rules and policy, and make one curious to know more of the problem of their adjustment. A by-product should be the stimulation of further investigations along these lines, such as that so ably represented by Finkelstein's study of the *Legal Aspects of Commercial Letters of Credit*. The working out of this general idea is a contribution of major proportions. Professor Llewellyn's book will influence the teaching of the subject for years to come.

The allotment of space to individual topics is well proportioned. The cutting down of the statute of frauds cases to fifty-five pages is wise. The author's apparent special interest in warranty has given the book an illuminating collection of cases, though to devote two hundred pages to this topic is possibly to overstress it. The doctrine of *bona fide* purchase seems understressed. The short collection of forms will prove helpful.

The organization and general editorial policy serve rather prominently as a vehicle for the author's ideas about law in general. This seems to introduce an element of confusion as well as enlightenment. Topics are partially introduced, then withdrawn, reintroduced and disappear only to rise again. In Section D of Chapter I isolated cases from various departments: actions for the

price, property questions, statute of frauds, conflict of laws, order and straight bills, inspection, *f. o. b.* and *c. i. f.* shipments, etc., are tossed to the student. The student's first introduction is through the excellent *Dow Chemical Co.* case, which quotes from and uses Sections 18, 19, Rules 1, 2, and 5, Sections 42 and 46 of the Sales Act. But lest his vision may be blurred by the absence of perspective and comprehension dulled by the sweep of the panorama, the author recommends the use of the lens provided in the introduction to Chapter VI for refocusing. But the student's optic nerve still quivers from the stress.

But the student is further aided by the information that this collection is designed to undermine his possible belief in the all sufficiency of the concept of legal title. This stalwart figure of the law has finally met his David and is terribly punished throughout the book. In the place of this ruthless giant of our law school days we now enjoy "title" as a dancing "marionette, whose strings are pulled by contract off the stage." But old fears return and we shiver with our author as he detects, here and there, the work of "some mystical conception of title", relentlessly crushing out the very vitals of the law.

In most of Chapter IX the cases are articulated with marked precision. This is true also of the first three sections of Chapter I of most of Chapter III and so on. But many of the problems of the law of sales stalk through the thin partitions of the book like lost souls in a future state.

The author uses abstracts instead of full reports: 600 of the former, 108 of the latter. The ledger shows gains and losses. It enables the author to bring into one volume an astonishing amount of material of the greatest value. But an abstract insulates student and instructor alike from the basic material. An abstract remains an abstract and despite the joy of possession some uneasiness settles over the reader.

The author's introduction goes a long way in explaining the ideas which underlie the structure of the book. This becomes peculiarly important because, more than is usually the case, the organization, the abstracts, and the frequency of editorial comment and questions, clothe student and instructor with the toga of Professor Llewellyn's own conceptions, a policy contrary to what the author, on another occasion urged when he remarked, that "one can only think within the mold of his own thought."

Professor Llewellyn tells us that "what we need is to widen and fructify the field of study," that "we can no longer" do thus and so; that a teacher, "if he wishes to train a student to foresee or to influence decisions, must take full account of the effect of facts upon the court"; that "an opinion is often a mere justification after the event"; that "law teachers cannot afford to disregard" the fact that a decision may stand "either for the narrowest point to which its holding may be reduced or for the widest formulation that its *ratio decidendi* will allow", etc. During the past two decades this symphony has borne many a law student "into the realm of clear thinking and perpetual disillusionment."<sup>1</sup>

Professor Llewellyn intrigues us with the idea that the study of all the sciences which deal with man, from psychology to anthropology will "deepen the student's insight into the law." To get these facts, he says, will require a "vast body of descriptive and statistical material which is as yet lacking." Verily

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<sup>1</sup> Preface to *Select Essays on Science of Legal Method*.

the task of becoming a lawyer is a heavy one. The author adds that a law student "whose first year is behind him, and who has not learned to read a case has no place in the second year." Is a legal education to be acquired while in the first year and in the second is the student to germinate, nurture and reap a matured philosophy of law?

Questions following cases send the student scurrying hither and yon through the volume in search of an elusive something—he may not know what. Even the author admits on page eighteen that these cross-references "in the beginning may well confuse." Interrogation, undoubtedly, is a stimulus but carried too far, may the learner not be caught by the law of diminishing returns as it affects this pedagogical device? And if the student does think he has discovered something and is compelled "to eat his words" as a steady diet, may he not cease to hunger for the thoughts of others or to have thoughts of his own? The student is reminded of difficulty in terms needlessly discouraging. He is warned that certain distinctions set a "treacherous procedural trap", page 147. After referring to the *Bills of Lading Act* and *Warehouse Receipts Act* he is informed in italics that "to attempt to consider documentary sales cases without intensive study of these other Acts, is utter folly", page 81. The student is told that "if he finds the mass of material too heavy to work through unaided, all the better. The more pressure to consult the literature." If the student covers from one-half to two-thirds of this book he will be doing well. And if he attempted all the things which the author suggests, what would happen to his other courses? And won't he feel it an undue burden to be sent to consult the literature of the ages on the law of Sales?

Of course, it really isn't so serious as this. The safety valve through which this cumulative discouragement runs, is the fact that the average law student doesn't take life as seriously as Professor Llewellyn would have us believe that he himself takes it. Hence when the average junior reads on page 98 that "the overseas culture-complex is a strong center of diffusion" and that "out of that complex we derive not only our law of domestic order bills of lading" and a lot of other things, he isn't going to be stampeded into a study of psychology nor to check up on the author's history. He will enjoy the statement for its poetic imagery. Or again, when he reads on page 133 that "the editor strongly suspects a greater likelihood of an action for the price (as contrasted with damages for non-acceptance . . .) being allowed (a) in courts of manufacturing states and commercial centers; (b) in cases not involving agricultural produce," he isn't going to rush for the census reports to find out what states can fairly be called manufacturing and what states agricultural. On the contrary, he will be encouraged by the idea that possibly there isn't any law, and that if there isn't, he is saved the bother of learning it and also its philosophy, and that if there is, it takes too many books to tell about it, and that perhaps after all it might be simpler to practice law on personality and connections than on the printed pages of the past.

I refuse to believe that Professor Llewellyn is entirely serious. He is thoroughly human. For while he greets his reader with apparent serious mien he chats familiarly with him. He "dickers" with him here and "hammers" on him there. He frowns on "bottle feeding" but delights in "giving tongue."

He brings in "contracts by the back door", takes "detours over title," "squares" cases and "rimes" cases, notes "flat rulings" and "iron rulings" in passing, but shies away from "blindfold payment." He queries "how come" this and "how come" that, whether this or that will "get by the court". This bluntness is but a surfacing for underneath, our author's esthetic soul, like that of Shelley's, in the quiet contemplation of "beautifully adapted standardized contracts", "pretty cases", "the practical beauties of Section 49 of the Sales Act" and kindred harmonics, soars majestically to dizzy heights of poetic fancy. Verily, do stark realism and soothing mysticism embrace each other in a glorious philosophic climax.

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JUDICIAL REVIEW OF FEDERAL EXECUTIVE ACTION. By Patrick H. Loughran. Pp. 809. The Michie Company, Charlottesville, Virginia.

The author of this book, who is a practitioner at the Bar of the District of Columbia, and in contact with the daily work of the departments and independent establishments of the United States Government, has been engaged in attempts to secure judicial reviews of some part of that work as it affected the interests of his clients. Impressed, as he must have been, with the lack of literature on this vital subject of increasing importance, he has drawn upon his scholarship and experience to make this contribution to that literature.

The activities of the Federal Government intimately concern every individual in the United States. Each individual should be as much concerned that the public rights be preserved as he is that individual rights be protected. There are many who question whether the courts are better equipped to preserve public rights than are the administrative officers of the Government and Congress, including the Supreme Court of the United States which said in *United States v. Guthrie*,<sup>1</sup> where there was an attempt by mandamus to require the Secretary of the Treasury to pay a certain claim, that:

" . . . it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a regime, or, rather, under such an absence of all rule, would, if practicable at all, be administered not by the great departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts, in the enforcement of their views of private interests."

The proof of these statements is contained in the history of a line of cases mentioned by the author in this book—a line of cases in which this reviewer represented the Government defendants in the more recent ones. These cases

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<sup>1</sup> 17 How. 284, at 303 (1854).

were based upon a misapplication by the courts of *Smith v. Jackson*,<sup>2</sup> decided by the United States Supreme Court. There Jackson was a judge of the Panama Canal court and Smith, the Panama Canal Auditor, attempted to withhold a part of Judge Jackson's salary to pay the Government for public quarters which were occupied by the Judge and for which he had refused to pay. It will be noted from reading the lower court's opinion in that case that : (1) there was a special statute which conferred jurisdiction on the trial court of the Canal Zone to issue mandamus as an original process ; and (2) it was shown as a matter of fact that Judge Jackson was under no obligation to pay for the quarters in question. Under these circumstances the writ very properly issued.

Some years later the two United States district courts in Florida, one of whose judges had heard the Jackson case in the lower court, issued similar writs, as original processes, against Navy disbursing officers to require them to pay to other officers who were held by the proper Government officer in Washington to be indebted to the United States in amounts equal to the sums withheld.<sup>3</sup> The fundamental error of these two courts was demonstrated shortly thereafter in *Emerson v. Baker*,<sup>4</sup> and *Barber v. Hetfield*.<sup>5</sup> Notwithstanding the fact that all this was shown in *Alexander v. Mare*,<sup>6</sup> the writ was nevertheless issued contrary to the unanimous decisions of the Supreme Court of the United States from the early case of *McIntyre v. Wood*,<sup>7</sup> to the comparatively recent case of *Covington Bridge Company v. Hager*,<sup>8</sup> to the effect that district courts of the United States were without jurisdiction to issue mandamus as an original process and not in aid of jurisdiction acquired by other processes.

This rule does not apply to the District of Columbia courts whose jurisdiction has been very carefully traced by the learned author of this work ; such courts having acquired such jurisdiction to issue the writ in proper cases. However, it would seem to be clear that when the claimants learned they could no longer prosecute similar cases in the district courts and resorted to the courts of the District of Columbia, the latter courts should have re-examined the question and not relied upon the *Dillon*,<sup>9</sup> *Howe*,<sup>10</sup> and *Alexander*<sup>11</sup> cases where the district court neither had jurisdiction to issue the writ nor inquired whether the *Jackson*<sup>12</sup> case applied when the claimant did not show, nor attempt to show, that he was not indebted to the United States. However, the District of Columbia courts did neither of these things, as its opinions demonstrate.<sup>13</sup> The reader

<sup>2</sup> 246 U. S. 388, 38 Sup. Ct. 353 (1918).

<sup>3</sup> See *Dillon v. Gross*, 299 Fed. 851 (D. C. Fla. 1924), and *Howe v. Elliott*, 300 Fed. 243 (D. C. Fla. 1925).

<sup>4</sup> 3 Fed. (2d) 830 (D. C. Ga. 1925).

<sup>5</sup> 4 Fed. (2d) 245 (C. C. A. 9th, 1925).

<sup>6</sup> 5 Fed. (2d) 964 (C. C. A. 1st, 1925).

<sup>7</sup> 7 Cranch 503 (1816).

<sup>8</sup> 203 U. S. 109, 27 Sup. Ct. 24 (1907).

<sup>9</sup> *Supra* note 3.

<sup>10</sup> *Supra* note 3.

<sup>11</sup> *Supra* note 8.

<sup>12</sup> *Supra* note 2.

<sup>13</sup> See *McCarl v. Cox*, 8 Fed. (2d) 669 (Ct. of App. D. C. 1926) ; *McCarl v. Pence*, 18 Fed. (2d) 809 (Ct. of App. D. C. 1927) ; *Baker v. McCarl*, 24 Fed. (2d) 897 (Ct. of App. D. C. 1928).

is requested to compare the last two paragraphs of the opinion in *Hines v. Cavanaugh*,<sup>14</sup> decided by the court of the District of Columbia. The only reason for the suit was that the Comptroller General had decided that the claimant could not have two retired pays and as indicated in the opinion of the court, this issue was not mentioned either at the original argument or in the briefs of the parties.

It is not to be understood from the foregoing that the reviewer takes issue with the author as to the desirability of a method of judicial review of the decisions of administrative officers in so far as they affect private rights and do not involve political discretion. This reviewer stated in an article entitled *Federal Administrative Law*,<sup>15</sup> among other things, that:

"As a government attorney who has had occasion to be concerned both with the details of administration and with judicial reviews thereof, the writer is convinced that such reviews are necessary in order to keep administrative officers within the ambit of the law. However, it is equally clear that the courts of general jurisdiction are not sufficiently familiar with the intricacies of government law and regulation and the antecedent history thereof to make their reviews entirely satisfactory to both the government and the aggrieved plaintiff or defendant."

As this review has indicated, the courts of the United States outside of the District of Columbia either lack jurisdiction in mandamus or jurisdiction of necessary parties in injunction to review the decisions of administrative officers of the Government. They do have certain jurisdiction to review by *habeas corpus* such decisions in deportation cases and in a few other limited instances, which the author has ably considered under Title II entitled "Review of Federal courts in proceedings for those remedies under the adoptive law of the United States that have not been superseded by special statutory remedies."

The jurisdiction of the District of Columbia courts has been considered under Part I of the book, and the author has attempted to show by quotations from the various cases, the situations wherein those courts will issue either injunction or mandamus or certiorari to review decisions of the administrative officers of the Government. This is a difficult task when we observe the fact that in one of the very first cases to arise, *Kendall v. Stokes*,<sup>16</sup> the court held that the act was ministerial and mandamus would issue to require its performance; and when it came up again, the same court held that the act required was not ministerial.<sup>17</sup> The uncertainty after nearly one hundred years is not quite so great!

If public rights are not always protected in such reviews, one may agree with the author that the jurisdiction in many cases is not broad enough to do justice to the aggrieved claimant. It should be possible, as under English procedure, to review many of these matters on their merits but only in a court composed of a number of judges equipped to properly determine the dispute.<sup>18</sup> The

<sup>14</sup> 39 Fed. (2d) 517, at 519 (Ct. of App. D. C. 1930).

<sup>15</sup> McGuire, *Federal Administrative Law* (1926) 13 VA. L. REV. 461.

<sup>16</sup> 12 Pet. 524 (1838).

<sup>17</sup> *Stokes v. Kendall*, 3 How. 87 (1845).

<sup>18</sup> See *Rex v. Roberts*, [1925] A. C. 578.



anomaly of a single trial judge sitting in review of a decision of a cabinet or other important officer of the Government who has acted on the advice of trained subordinates should no longer be permitted—reviews affecting not only the interests of the claimant but the public interests sandwiched in between motions in a couple of divorce cases, for instance!

There are a few passages in the book concerning the steps that should be taken to remedy the existing situation with which one may not always agree, but the line is clearly apparent between such statements and the statements concerning the law and the procedure as it now exists. It is not too much to say that the author has made a most valuable and scholarly contribution to a little understood but most important, if narrow, field of the law.

The book has a splendid index after each of the two titles and the first title is followed by an exhaustive table of cases, arranged under the name of the plaintiff, relator, or petitioner and under the name of the defendant or respondent. The titles of the sections are printed in bold-faced type and are generally followed with the comments of the author and quotations from cases in point. The book also contains a statement as to the scope and contents of a second volume which is in manuscript with the publisher and which will be published in event the demand for the first volume justifies it. The publishers have done a splendid job of printing and binding.

A copy of the first volume should be in the library of every one concerned with the administrative law of the United States and interested in attempting to secure judicial reviews of decisions of the administrative officers of the Federal Government.

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*Washington, D. C.*

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- CASES ON CREDIT TRANSACTIONS. By Wesley A. Sturges. West Publishing Company, St. Paul, 1930. Pp. xi, 1228.
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- CRIME AND THE CRIMINAL LAW IN THE UNITED STATES. By Harry Best. Macmillan Company, New York, 1930. Pp. xvii, 615.
- JUDGE AND JURY. By Leon Green. Vernon Law Book Company, Kansas, 1930. Pp. iv, 429.
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- TEN YEARS OF WORLD COOPERATION. Issued by the Secretariat of the League of Nations. Hazell, Watson, and Viney, London, 1930. Pp. xi, 467.