

## BOOK REVIEWS

HOLMES-POLLOCK LETTERS. (Two volumes). Edited by Mark DeWolfe Howe. Harvard University Press, Cambridge, 1941. Pp. xxii, 275; 359. Price: \$7.50.

Few Americans, if any, other than Washington and Lincoln, have achieved immortality during their lifetimes, when judged by their contemporaries. Mr. Justice Holmes did. His long and distinguished career finds no parallel in the annals of our history. As a judge he stands alone. Known as the "Great Dissenter", he was respected even by those who differed with him, and there were many who did. His *apperçu* (a favorite word of Holmes) is attested to by the fact that so many of his dissents have now become the gospel of the Court. Superior to his colleagues in vision, perspective and judicial temperament, he appears to have been gazing down upon the world below from some lofty intellectual Olympus.

For all this, he was very human. As a young soldier he was carried, gravely wounded, from the battle field of Antietam. Forever after he disliked talking or reading of war. Much about the man was gleaned long since from his judicial opinions. But how fortunate that there are now brought to light the Holmes-Pollock letters, giving us greater insight into Holmes the judge, and a hitherto unknown story of Holmes the man. How unique that two great men should have maintained a steadfast friendship for more than half a century; even more unique that this friendship existed between men of different nations, separated by three thousand miles save for occasional meetings. That the two friends should now give us, in two volumes, the details of their friendship-by-correspondence is little short of manna from heaven.

Philosophically, Holmes is and probably ever will be an enigma. Various schools of thought have for years claimed him as a disciple. But even as the lines of demarcation between schools of thought are never sharply drawn, so is it impossible to place Holmes completely within the confines of any one. He never confessed to a basic philosophy of his own; he was content to toy with a *belief* about man's place in the universe, but this remained always with him no more than a *belief*. Perhaps he reveals himself to be at times philosophically inconsistent, but doubtless he would not have considered absolute consistency a virtue. With Hegel he disagreed vehemently; with William James he was in no greater accord. John Dewey came in for less criticism; Holmes was approving of Morris Cohen and even more so of Santayana. But who can classify Santayana? He reveals his differences with Brandeis as follows:

"Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations. He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don't you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is. I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn. Of course a general proposition is simply a string for the facts and I have little doubt that it would be good for my immortal soul to plunge into them, good also

for the performance of my duties, but I shrink from the bore—or rather I hate to give up the chance to read this and that, that a gentleman should have read before he dies.”<sup>1</sup>

The same man could write that the “life of the law has not been logic but experience.”<sup>2</sup>

But if he did not read facts (or newspapers, a neglect which he lived to regret), Holmes read omnivorously of ancient literature, philosophy, poetry, drama. He read history somewhat reluctantly, disliked biography, but found pleasure in *Gentlemen Prefer Blondes* and even Wodehouse. Ordinary mortals will delight to know that he shared the popular enjoyment of detective stories,<sup>3</sup> which Pollock apparently considered a waste of time. Respect for Holmes increases when we learn that even after the age of ninety, he read with a conscious desire for self-improvement, a practice discontinued by so many after receipt of a college diploma. The letters are replete with discussions of literature by the two men. Here Pollock was the constant adviser—he was the more widely read, his mind was more retentive, even if less profound.

In his vast reading Holmes was quick to perceive ability in others in the incipient stages of their literary careers. In 1902 he recognized Wigmore as “a very deserving and superior man”;<sup>4</sup> in 1911 “I rejoiced that Harvard should have got Pound and wish it had Wigmore as then I should have thought it better equipped than ever.”<sup>5</sup> In 1915 he wrote of Walter Lippman, “Monstrous clever lad, W. L., and only 26 and he has done so much.”<sup>6</sup> He was fascinated by Harold Laski in 1916; admiration continued thereafter through many years of association during which Laski exerted a marked influence upon Holmes’s extra-curricular reading.

Other writers, less fortunate, were the recipients of stinging criticism from the pen of Holmes. Among these were Thomas Atkins Street,<sup>7</sup> the student editors of the *Harvard Law Review*, and even his own brethren on the Court. Particularly in the earlier days of his judicial career Holmes

1. Letter of May 26, 1919, Vol. II, p. 13. On June 27, 1919, he wrote: “I am glad that you don’t treat my proposed excursion into the facts as of the essence of salvation. I have sent for books but ten days have gone by without answer. I think of a Catholic lady who on a fast day called for bass, then terrapin—not forthcoming—and then said, ‘Bring me a mutton chop. God knows I have tried for fish.’ If I am destined to lapse from facts back into ideas, God knows I have tried for the facts.” A footnote indicates during the summer Holmes did read a report relating to the strike of textile workers in Lawrence and another concerning the condition of women and child wage earners.

2. Vol. II, p. 190.

3. Solitaire seemed a regular part of his daily routine.

4. Vol. I, p. 108.

5. Vol. I, p. 187. Less complimentary is the following: “There is a Philadelphian, Bohlen, who is well thought of in Torts. I remember two articles of his—the fact, but not the content, except that he thought he knew more than I did about taking the risk, apropos of a case here, and I thought he didn’t. But somehow the Philadelphians while not infrequently having the manners of the great world have struck me as hopelessly injected with the second rate, when I have seen them in their law, on which they pride themselves—but I would not breathe this aloud.” Vol. I, p. 187.

6. Vol. I, p. 229.

7. The reference is to Street’s *Foundations of Legal Liability*. “There is a big book out on the theory of Legal Liability . . . From a glance it seemed to me on the one hand a thing that would have been a boon 40 years ago, but under present conditions a rather padded piece of work. I discovered no penetration or personal power—and without that a writer on such themes rather irritates one and makes one wish to snub him, as one would snub the young gentlemen of the *Harvard Law Rev.* for their cocky notes, if the latter were not a legitimate part of their youth.” Vol. I, p. 131.

was sensitive to criticism<sup>8</sup> and impatient with mediocrity. There are so few who are brilliant, so many who write well enough but whose contributions to posterity are limited. In their diffident efforts they should receive encouragement, but the criticism of a Holmes might easily drive them to cover. It is therefore better that his comments should have been confined to private correspondence. He was undoubtedly one of that small group who are competent to criticise; occasionally humble himself, he was generally confident of the merit in his own efforts. Someone once said, replying to those who charged Milton with conceit, that the poet was merely confident of his own ability. So it might have been with Holmes.

Much more might be included in a resumé of these letters—of Holmes's long fight for the protection of civil liberties, of his personal views upon labor, of his prophetic disagreement with *Swift v. Tyson*, of his relations with his colleagues, of his delight over honors rightfully bestowed upon him. Further amplification is, however, better reserved for those who read the two volumes. One may be happy to possess them, may feel a warm glow in merely observing them on his shelves. But greatest satisfaction will come from cutting apart the leaves (pity him who does not) and finding for one's self the treasure disclosed therein. For it is a treasure—the private thoughts of one of our immortals who was after all a human being.

John E. Mulder.†

STUDIES IN LEGAL TERMINOLOGY. By Erwin Hexner. The University of North Carolina Press, Chapel Hill, 1941. Pp. vi, 150. Price: \$1.50.

This interesting and stimulating book by Dr. Hexner, formerly of the University of Bratislava, is a series of essays dealing with some legal concepts, which are again, in these times of world-wide crisis, in the focus both of political debates and of scientific discussions. As this is so, it may be questioned whether the title of the book is indicative of its contents: studies in legal terminology? To a certain extent, yes. But primarily, these are not studies in legal terminology, but studies in the theory of law. He who asks what law is, is not occupied with "purely terminological" questions, but with fundamental problems of jurisprudence.

Essentially, Dr. Hexner is a follower of Kelsen's "pure theory of law". We find, therefore, the strict separation of the spheres of "isness" and of "oughtness". Normative systems, in contradiction to the laws of natural sciences, are systems of rules determining human conduct. The legal system is only one of the many normative systems. Notwithstanding the fact that, sociologically speaking, the legal system is interconnected with other rule systems, legal rules can and should be differentiated from other rules of conduct. A legal rule—necessarily a heteronomous rule—expresses the legal consequences of a hypothetically stated fact. Only positive law is law. The law as it is, is a very different thing from the law as it ought

---

8. He chafed at the comments, both favorable and unfavorable, regarding his appointment to the Supreme Court. ". . . the immense majority of them seem to me hopelessly devoid of personal discrimination or courage. . . . It makes one sick when he has broken his heart in trying to make every word living and real to see a lot of duffers, generally I think not even lawyers, talking with the sanctity of print in a way that at once discloses to the knowing eye that literally they don't know anything about it." Vol. I, p. 106.

† Professor of Law, University of Pennsylvania.

to be; the scientific occupation with these latter problems is not legal science, but the science of the politics of law.

A legal rule can be conceived only in the network of a legal system. All legal rules, whether general or individual, are based on the constitution. A legal rule must contain the link chaining it to the legal system during the whole time of its existence. The first constitution of a state must be regarded as a political fact. Such a political fact has to be conceived metajuridically. The law as a whole is constituted of both, general and individual legal norms. The individual rules are the concretization of general rules. While the habitual obedience to the law is necessary, while cases where the necessity of enforcement arises are relatively rare, the enforcement, if necessary, by means of physical force, is essential to the law.

Perhaps the most original is the third essay, in which Dr. Hexner develops his theory that legal rules must be manifested in a human language either by the spoken or written word, or by non-linguistic signs which easily may be transposed into sentences of a human language. The legal rule must be formulated through the expression by a "sign-vehicle"; a legal rule is essentially an inter-subjective act, expressed in and to the external world; an "unformulated" law is a contradiction in terms. The Anglo-American "case-law", by the way, is not "*lex non scripta*" (Blackstone), but written law, and only different from code law, because it is written in a different way (Maine).

The fifth essay discusses the doctrine of separation of powers, pointing to the double sense according to whether this phrase is meant in the sense of a separation of agencies or in the sense of a separation of legal jurisdictions. The author fully recognizes that there is no logical distinction between judicial and executive functions, because both are setting individual legal rules as the concretization of general legal rules. That is why he forcefully rejects Dr. Bodenheimer's fantastic thesis according to which law and administration are two "rival agencies". He clearly shows the theoretical untenability of Bodenheimer's dictum that besides law, there is another instrument of social regulation, called administration. For all agencies, however broad their jurisdiction may be, can be established only by legal rules determining their jurisdiction. Courts, too, are acting as instruments of the legal order. He opposes the Anglo-American legal doctrine, which, fascinated exclusively by the courts, identifies law with court-law.

In the last essay, Dr. Hexner discusses the problem of legal security. While stating that legal security—implying legal certainty and legal predictability—is an essential element of a legal system, he calls attention to the fact that certainty can never be more than a lower or higher degree of probability, that all human knowledge is, at the very best, a system of approximations.

But while Dr. Hexner is in most points a follower of Kelsen, he answers the question, whether the rules of human social conduct determined by present despotic forms of government can be regarded as a legal system, in the negative; in this one point he agrees with Bodenheimer, who holds that the totalitarian states of today have no law. It is, therefore, appropriate to say a few words about this thesis of Dr. Bodenheimer. This author makes a heavy "scientific" attack against Kelsen. And what is his reasoning? If Kelsen were right, there is nothing we would have to defend against the onslaught of tyrants; if Kelsen were right, the free nations of the world would have no valid claim to regard themselves as defenders of the law against despotism. Ergo: Kelsen is wrong. Quite apart from

the openly purely political character of this reasoning, Bodenheimer's thesis is full of mistakes and misunderstandings. First, the word "despotism" does not denote a particular form of government; if we take it in the Greek sense of a rule for the ruler's benefit only, the totalitarian states would decline to be called such, as Hexner recognizes. The real scientific difference is between autocracy and democracy, a difference as to the procedure of *the creation of the law*; a difference which has nothing to do with the possible *contents* of either an autocratic or a democratic legal order; democratic is not the opposite of totalitarian.

Totalitarian is the opposite of liberal; this difference points to the *expansion of competences* by the State, regardless of the form of government. It is, therefore, clear, that an autocratic regime can be benevolent, a democratic majority, as Mirabeau warned, can be more tyrannical than an absolute king. An absolute monarchy can be liberal; a democratic legal order can be totalitarian. The Athenian democracy had strong leanings towards a totalitarian system; the πόλις, the State, is the ultimate value; the individual is wholly subject to the πόλις; the Athenian democracy is the opposite of the democratic conception of the classical natural-law school; nothing is more unGreek than the idea of "inherent rights" of the individual. If Bodenheimer speaks of democracy, he speaks only of the particular brand of liberalistic democracy. Not only does Bodenheimer's thesis lead to the consequence that a great part of the world today is living without law, that human mankind, for nearly all the thousands of years of human civilization, including the period of Greek democracy, has been living without law, but it is clear that Bodenheimer's thesis is not an objective scientific judgment, but a subjective political judgment. An analysis of Bodenheimer's thesis shows that it is nothing but politics or *jus naturae* thinking, that his assertion that totalitarian law is no law amounts in fact only to the assertion that he does not like this type of law. I have, of course, a right to say that I do not like atonal music, but does this subjective dislike justify me scientifically to assert that atonal music is no music?

Now, in agreeing in this point with Bodenheimer, it is clear that an excellent theoretician like Hexner cannot accept Bodenheimer's reasons, although he accepts his result. He is, therefore, trying to base this reasoning on *theoretical* grounds. While he says in one place that the concept of *legal* rules in modern totalitarian states has to be distinguished from "legal rules as conceived in the traditional manner"—a statement against which there can be no theoretical objection—he says in another place that one must differentiate a "despotic" from a "legal" state, that there are states today in which the social control of human conduct is not based on law. He states that the identification of the state and the law has been the main reason why Kelsen, one of the fighters for democratic forms of government, has been attacked as justifying and legalizing absolutistic political doctrines. But, first one must distinguish between Kelsen's theoretical and political writings. Not everything which Kelsen has written is necessarily a writing on the "pure theory of law". Second, Hexner misconceives Kelsen's identification of state and law in the sense, as if there could be only state-law. Hexner is mistaken in his statement that "each legal system relates to the highest form of social organization called the state" and denies, therefore, the juridical character of international law. What Kelsen really means is to identify the law with the legal community; if the legal community has reached a certain degree of centralization, we call it a "state", but if it is largely decentralized, we do not call it a state;

but it remains, nevertheless, a juridical order, e. g. the international juridical order.

What are the theoretical arguments which Hexner brings forward to bolster his thesis that there is no law in the present totalitarian states? 1). That "it is a characteristic of the modern despotic forms of government that the individual is not dealt with as a social and political entity." But neither was it in the Athenian democracy. 2). That in the totalitarian states there is no general knowability of rules of conduct. But the knowability of these rules is always only a relative one. 3). That the totalitarian, despotic regime tends to embrace all human activities. But this argument is clearly theoretically untenable as the degree of expansion of competence is merely a matter of positive law, not a problem of the essence of law. Everything, theoretically speaking, can be made the object of legal rules. Every state has a tendency to expand its competences. The expansion of competences to spheres, traditionally regarded as "purely personal", as well as the concentration of power in the hands of the Executive, is a phenomenon clearly to be seen in our time also in the democratic states. 4). That a state where there is only one rule, vesting in one man the whole power over human social conduct, cannot be a legal system, because legal rules can be conceived only as a part of a system, a multiplicity of legal rules. But with regard to this argument, it is to be said that this example given by Kelsen is only a constructive border-case, nowhere realized in the totalitarian states of today, and further, that even in such a case there is always a multiplicity of rules. Hexner overlooks here what he clearly recognizes in other places, that every legal system is constituted of *general and individual* legal norms.

Let us die, if necessary, for democracy; but let us not defend "scientifically" theses which are scientifically untenable. Science is theory; its only interest is the search for truth. Science cannot deliver political ideologies, science can justify nothing, it can only explain. For the scholar the motto must be Spinoza's word: "non irasci, non indignari, non lugere, sed intelligere res humanas".

Josef L. Kunz.†

CONVEYANCING IN PENNSYLVANIA (Two volumes; second edition). By Grover Cleveland Ladner. Clark Boardman Company, Ltd., New York, 1941. Pp. xxxiv, 495; xxviii, 496-933. Price: \$15.00.

"The business of a conveyancer", said Justice Sharswood in 1868,<sup>1</sup> "is one of great importance and responsibility. It requires an acquaintance with the general principles of the law of real property and a large amount of practical knowledge, which can only be derived from experience." Even though title insurance companies may have largely replaced the old time conveyancer who not only drew the papers but made the title searches, so that, as Judge Ladner says,<sup>2</sup> "the profession of conveyancing as once understood no longer exists", Justice Sharswood's statement is still an apt measure of what is required of the modern lawyer or real estate broker who assists a client in the transfer of title to real estate. "If from want of proper knowledge, from a failure to use proper means,

---

† Professor of Law, University of Toledo.

1. *Watson v. Muirhead*, 57 Pa. 161, 167 (1868).

2. Page 534.

or from carelessness in applying those means to the matter in hand, loss results to his client, the fault is his and he will be responsible."<sup>3</sup>

In this Second and Revised Edition of a work originally published in 1912, Judge Ladner might have written with the foregoing requirements constantly before him as his specifications. He has clearly and concisely set forth the general principles of the Pennsylvania law of real property, described and illustrated the means to be selected to accomplish the desired result and, out of a long and varied experience, he brings to the reader a large number of invaluable suggestions and aids in applying the means to the matter in hand.

After a brief discussion of the kinds of estates in land and their respective characteristics, the acquisition of title is considered. The method of treatment may be illustrated by the author's handling of Agreements of Sale which, to this reviewer, seem to be the most important and difficult of the instruments which the conveyancer is called upon to prepare. Too often is the agreement prepared in haste from a printed form, with too little thought to the various special contingencies which ought to be provided for and without adequate consideration of the suitability of the form selected. For this Judge Ladner provides an antidote which is not only effective but is so well presented as to be instantly available to the practitioner, no matter how hurried he may be.

Judge Ladner's method is to begin with an agreement of sale, printed in full, and to follow with a detailed discussion of each separate clause of the agreement so as to bring out its purpose and its operation in the light of the relevant decisions. Sometimes local custom is a factor, as for example, the custom in Philadelphia to apportion taxes and water rents to the date of settlement,<sup>4</sup> and in each such case the reader is properly warned. Finally, Judge Ladner devotes a section<sup>5</sup> to his "Suggestions in Drawing Agreements of Sale". Here he sets forth fifteen specific suggestions in which knowledge and experience are applied for the guidance of the reader. For example:<sup>6</sup>

"6. When purchasing a property occupied by a tenant, examine the property and determine what fixtures the tenant placed in the property and what he claims the right to remove (*McKay v. Meyer Co.*, 44 Pa. Super. Ct. 293—1910). Do this especially where the premises about to be purchased is a store, for great liberality is shown the tenant in the matter of trade fixtures (*Lindsay v. Curtis*, 236 Pa. 229—1912; *McClintock & Irvine Co. v. Aetna Explosives Co.*, 260 Pa. 191—1918)."

By similar methods of illustration, analysis, comment and suggestion, the reader is taken step by step through the preparation, execution and recording of the various other necessary instruments such as deeds, mortgages, assignments of mortgage, ground rents and the like. Title by descent and by will, including the powers of administrators and executors over real estate, are thoroughly considered. Other chapters are devoted to examinations of title, real estate brokers, agents and salesmen, and settlements and title insurance, together with a most comprehensive collection of modern forms of all kinds.

---

3. Charge of Judge Hare in *Watson v. Muirhead*, 57 Pa. 161, 166 (1868), repeated by the Superior Court in *Bodine v. Wayne Title & Trust Co.*, 33 Pa. Super. 68, 75 (1907).

4. Page 91.

5. Sec. 50, page 104.

6. Page 105.

Judge Ladner's approach to his subject is from the practical side. Without in any way belittling the sound scholarship which has gone into the preparation of this work, it may be said that the author has written primarily for the benefit of persons who assist in actual conveyancing or who advise clients as to their rights and liabilities in this field of the law. In performing this task, Judge Ladner has carefully collected the acts of assembly and the most important decisions. Where, as sometimes happens, he finds the law in a more or less confused state, he points out the confusion and, where possible, charts a safe course for the reader. The reviewer has read the text with critical care but has been denied the malicious pleasure of pointing out the omission of any important act or decision which the author could reasonably be expected to cite.<sup>7</sup>

Needless to say, this book fills an acute need. The first edition of this work, like most other books on the subject, was prepared under conditions totally unlike those under which we now live. War, "prosperity", a boom, a panic and a depression have succeeded one another. Values of real estate went up like the sky rocket only to come down like the stick. Great profits were followed by great losses with their accompanying train of bankruptcies. Governmental regulation has increased. The results are apparent in almost every volume of our Pamphlet Laws and reported decisions of Pennsylvania courts. The field of real estate and conveyancing reflects these events, not only in changed law but in changed policies of large lenders on real estate security. Judge Ladner has followed all of this closely and, where relevant, he sets it forth concisely and accurately. However, writing primarily for the practitioner, he is concerned with the law as it is, rather than the law as it ought to be.

Indeed, the only outstanding exception to this approach is found in the author's discussion of the subject of the mortgagee's deficiency judgment after foreclosure.<sup>8</sup> He earnestly protests against rules of law which enable a mortgagee to foreclose the mortgage, purchase the property at sheriff's sale for a nominal sum and later proceed against the mortgagor for the entire debt without giving any credit for the actual value of the mortgaged property. Under this state of the law, he argues, the mortgagee is not only given both his penny and his cake but may even be allowed to collect several times over for the same debt.<sup>9</sup> It is no answer to say that the mortgagor may protect himself by bidding at the sheriff's sale and thereby assure himself that the sale price will approximate the real value of the mortgaged property. Requirements such as the rule in Philadelphia that all bidders except the mortgagee must deposit ten per cent of their bids in cash usually prevent the mortgagor from registering an effective

7. Subsequent to the date on which Judge Ladner's book went to press, the legislature of Pennsylvania enacted several acts which affect or modify statements made in the text. Among them, the following may be noted:

<i>Ladner Page</i>	<i>Act of 1941</i>
333	June 5, 1941 #46, giving the Municipal Court of Philadelphia exclusive jurisdiction over adoption.
174	June 18, 1941 #73, authorizing the taking of acknowledgments by certain officers of the armed forces of the United States.
95, 516	July 2, 1941 #104, making fiduciaries liable for commissions to a real estate broker whose contract of sale was rescinded on receipt of a higher offer.
16, 52-53	July 3, 1941 #124, authorizing husband or wife to convey to husband and wife by entireties.
269-274	July 16, 1941 #151, relating to Deficiency Judgments.
164 ff.	July 24, 1941 #188, Uniform Acknowledgment Act.

8. Pages 265-275.

9. As apparently happened in *Lomison v. Faust*, 145 Pa. 8, 23 Atl. 377 (1892).

bid. After discussing the several ill fated attempts of the legislature to provide relief for the mortgagor, Judge Ladner concludes that the trouble is caused by the rule, now firmly imbedded in Pennsylvania law, that the price realized upon the foreclosure sale is ordinarily conclusive of the value of the property, subject only to certain exceptions from which the mortgagor cannot usually derive adequate relief. Inasmuch as this rule is based entirely upon judicial decision, Judge Ladner suggests that the Supreme Court has the remedy in its own hands and, by overruling the decisions upon which the present doctrine rests, could substitute the rule that the price realized at the sale shall be merely prima facie evidence of the value of the property. In any event, the problem appears to be difficult of solution by the legislature, under existing constitutional requirements, for Judge Ladner, who has devoted himself to this question for many years does not suggest a statutory solution. The legislature, however, did not despair and by Act No. 151, approved July 16, 1941, has attempted to provide the legislative relief for which, says Judge Ladner, there is still a strong demand. Whether, and to what extent this act meets the constitutional objections to previous acts, is a matter which at this writing has not been finally determined.<sup>10</sup>

While it is not within the province of a book on conveyancing to discuss exhaustively the rights and liabilities of mortgagor, mortgagee and terre tenant, a modern treatise on Mortgages in Pennsylvania is urgently needed. If Judge Ladner could find the time to prepare such a treatise on the present high standard, it should receive the same welcome reception deserved by the present work.

*Robert Brigham.†*

**BUSINESS AND GOVERNMENT (Fourth edition).** By Charles C. Rohlfing, Edward W. Carter, Bradford W. West, and John G. Hervey. The Foundation Press, Inc., Chicago, 1941. Pp. xvi, 803. Price: \$4.00.

Relations between government and business have been changing so rapidly that the authors have found it necessary to issue four editions of *Business and Government* within the past seven years. Their book is designed as a textbook for college students intending to follow business as a profession. As such it serves as a valuable orientation in that mystifying wonderland of constitutions, statutes, and court decisions within which business activities must now be carried on. Constitutional doctrines and governmental policies are treated at length as they affect monopolies and competitive practices, securities, public utilities, governmental proprietary enterprises, transportation, credit, prices, housing, governmental revenues and expenditures, agriculture, cooperatives, debtors, social security, labor, and war. Comprehensiveness, indeed, is one of the principal virtues of the volume.

A textbook must be judged by criteria that emphasize its value as an aid to the educational process. Two groups of persons are qualified to

---

10. In *Fidelity-Philadelphia Trust Co. v. Allen et al.*, C. P. #7, June Term, 1941, No. 3852 (C. P. Phila., September 18, 1941), the court in an excellent opinion by Flood, J., reluctantly held that the act was unconstitutional as applied to foreclosures which were completed prior to its passage. The reasoning of the opinion indicates the same result as to a mortgage executed prior to the passage of the act, even though the foreclosure takes place subsequently. For a brief discussion of the constitutional questions involved, see Ladner, pages 269-274. For a discussion of the most desirable course of action to follow pending a final determination of the constitutionality of the act, see *FIDUCIARY REVIEW*, August, 1941.

† Member of the bar, Philadelphia.

testify as to this value: students and teachers. Through the courtesy of a colleague who has prescribed *Business and Government* as the textbook for his course, I have obtained his students' over-all rating of the book and their comments on its good and bad features. For the teacher reaction to the book, my own remarks will have to suffice.

Of forty students participating in the rating, 5 rated the book "excellent", 18 "good", 10 "fair", 4 "poor", and 3 "very unsatisfactory". In other words, slightly more than half thought the book excellent or good, and slightly less than half thought it fair, poor, or very unsatisfactory.

The favorable comments by the students emphasize the fact that the book is well-arranged, comprehensive, interestingly, clearly and concisely written, and up-to-date. It adequately explains all unfamiliar legal terms, and uses a large number of court cases. It is well constructed for text purposes, using bold-faced paragraph headings and problem questions at the end of each chapter. Large print eases the eyes of study-weary students. The index, table of cases, and Constitution (printed as an appendix) give the book added value as a reference work.

Students thinking in terms of the book's defects say that it lacks any integrating theme or style, and worse, that each chapter seems to be merely a spattering of details that leaves the student with a jumbled impression. No threads run through a chapter to be neatly gathered together at its end. The court cases are not satisfactorily handled. Those that bear on the same issue are not sufficiently compared and distinguished. The thumbnail sketch of each court decision is too brief to give the student an adequate grasp of the decision's significance and logic. Legislation is treated in a misleading manner. Bills introduced but not passed, and statutes passed but declared unconstitutional are often discussed in detail and in the present tense without sufficient note being taken of their present legal nullity. Students also objected to the full citation of cases in the text; this could have been better handled by footnotes.

If my judgment is correct, the teacher would make many of the comments that students make, but would further appraise the book in this fashion. The outstanding feature of the book is its broad scope and its wealth of detailed information. Its greatest defect is stylistic. In some chapters there is a curiously involved style, which possibly reflects the author's over-exposure to the terminology of legal documents. At other times the style appears so undisciplined as to convey the opposite meaning from that intended, and occasionally, it is ungrammatical. Greater care by the authors, and revision by an editor, should have eliminated the stylistic difficulties, the errors of grammar and spelling, the inaccurate bibliographical citations, the variable resort to footnotes, the inexact quotations, and the inconsistent use of tenses.<sup>1</sup> There must be some way, also, to reduce the astonishing range of style from Chapter II's grammar school discussion of the Magna Charta<sup>2</sup> to Chapter VII's phrasing of the court decision in *Jones v. Securities and Exchange Commission*.<sup>3</sup>

There are inaccurate statements of fact. Examples from the first fourth of the book will suffice. "The application by the Supreme Court

1. The entire chapter on pressure groups is in the past tense!

2. "King John signed a written document promising fairness and justice to all."

3. 298 U. S. 1 (1936).

"The Supreme Court held that the Commission was without power to refuse the registrant to withdraw his statement before it became effective, where there was no possibility of any prejudice to the public or investors, and the Commission had challenged the integrity of a registration statement by inviting the registrant to show cause why its effectiveness should not be suspended."

of the 'Flow Theory' in the National Labor Relations cases"<sup>4</sup> was in reality the application of the "direct effect" theory, and the court specifically declined to use the flow theory. Not all "officers appointed by the President . . . must be approved by the Senate"<sup>5</sup> I doubt that during the New Deal "the civil liberties guaranteed by the Bill of Rights seemed to lose stature"<sup>6</sup>. The unemployed would be delighted to discover, as the authors have, that the right to work (as distinct from the freedom to contract, which is separately referred to) is guaranteed by the Fourteenth Amendment.<sup>7</sup> Justice Miller's statement that a party has not been deprived of his property without due process of law if he has had a fair trial in a court of justice is scarcely the best quotation to prove "that the due process clause guaranteed substantive rights as well as procedural rights"<sup>8</sup>. And most political scientists will be startled to find that the due process of law clauses of the Fifth and Fourteenth Amendments have the status of a "seldom used power of judicial veto" of arbitrary Federal and state statutes.<sup>9</sup> It is inaccurate to say, "The Sherman Act's prohibition of restraints of trade and price fixing have been permitted by the National Recovery Act and the Miller-Tydings Acts [sic]." Imagine a student puzzling over that statement on the night before an examination! Finally, "Senator Patman"<sup>10</sup> is Representative Patman.

It is not my desire to do a good book an injustice. My complaint is that the authors have devoted much time and talent to preparing a manuscript that, despite its being in a fourth edition, shows little evidence of having been subjected to critical editorial revision. Textbook writers have an unusually heavy responsibility to submit their books to college students only after factual inaccuracies, grammatical errors, and stylistic eccentricities have been carefully eliminated. They do both themselves and their students an injustice in releasing a book before it is really ready for use with confidence. For there can be no doubt that *Business and Government* in a well-edited form would be an excellent aid to the educational process.

James W. Fesler.†

---

4. Page 11.

5. Page 22.

6. Page 36.

7. Page 54.

8. Page 81.

9. Page 82.

10. Page 170.

† Associate Professor of Political Science, University of North Carolina.