

BOOK REVIEWS

BACKBONE OF THE HERRING. By Curtis Bok. Alfred A. Knopf, Inc., New York, 1941. Pp. xi, 302. Price: \$3.00.

Mr. Clifton Fadiman writes in sparkling fashion in the October number of *Harper's* about the business of one who reviews books. Inter alia, he points out the incontrovertible fact that a reviewer cannot be really objective in commenting upon the book of a friend. "If the book has anything to it at all", says Mr. Fadiman, "he is really dealing with the friend himself." One may doubt the universality of the quoted statement. There are books and books with something to them, where the living person that is the writer is pretty far in the shadow of his printed words. *Backbone of the Herring* is not one of them. But one more word from Fadiman before we get to that. He ends his discussion about objectivity with a choice dictum from an unnamed but forthright commentator who is reported as stating: "Any reviewer who won't praise a friend's book is a louse." As of course he is.

Backbone of the Herring is not a fish story. Instead it is about a judge named Ulen; the piscatorial reference comes from the judicial oath of the Isle of Man.¹ This judge had, as judges do, many experiences. The Governor appointed him to the bench and at the next general election the judge had to run for office. In the meantime, he heard a good many cases, saw a great many people. Some of the things they did were very funny and other things that happened to them were very sad. Ulen saw them, heard them and thought about them. In this book appear both the account of some of these experiences and his reflections thereon.

Someone has called Judge Bok's book autobiographical. It is, and it is not. It is not, in the sense of being a written history of a life, related by the liver. It is, in the sense that here is a man, who happens to occupy a seat on a judge's bench, revealing through description, anecdote and narrative his own measure of values, his own reaction to the push and pressure of the cosmos, his own estimate of the function of the occupant of the judicial post in the affairs of men. The method is sharply effective, many times more so than the point by point enunciation of a credo. The result is a highly self-revealing book: to me poignantly and charmingly so. But I make no pretense of objectivity on this phase of it.

Many of the judicial adventures of Judge Ulen have appeared locally in *The Shingle*.² The preparation of these little essays doubtless was the immediate cause of the book. But even the constant reader of *The Shingle* has not read *Backbone of the Herring*. Some of the choicest parts appear now for the first time. And the reading of the compact collection rather than the occasional segments makes the impression of the author's piece of work immeasurably sharper.

There are eighteen segments to the book; they cannot be called chapters. Like a judge's professional life, they cover a wide variety of human experience. All of them are interesting, some are touching, others profound. I was particularly moved by the first, on Ulen's induction into office; the sixth, in which the girl, Artema, gives up a baby she had adopted

1. "You swear to do justice between cause and cause as equally as the backbone of the herring doth lie midmost of the fish."

2. Published monthly by the Philadelphia Bar Association.

because the child's Mother wanted her baby back; and the last, which describes Ulen on election day. This one is perhaps, fittingly enough, the high point of the entire collection. But others might find the "Dark Stream" the most important. It tells of a humble little man whose one revolt against circumstance was to poison his nagging mother-in-law and who was found out in the course of the arsenic ring investigation. But one need not make choices; he can enjoy them all.

Ulen is a lawyer, and is proud of his craft. But Ulen does not think of justice in the abstract nor of the law in a vacuum. He is interested in its operation and the living people for whom it is made, in a society which they have created. It is a good thing to have a Ulen on the bench. I like a judge who knows that animals understand little girls who are too young to remember, as well as the rule in *Shelley's Case* or the rights of a holder in due course.

Herbert F. Goodrich.†

CASES AND MATERIALS ON TAXATION. By Paul W. Bruton. West Publishing Company, St. Paul, 1941. Pp. xxiv, 1228. Price: \$6.50.

This large book, exceeding by one hundred fifty pages Magill and Maguire's latest edition, and by five hundred pages Professor Rottschaefer's third edition of his *Cases on Taxation*, is divided into two parts. The first, comprising over four hundred pages, deals with "Constitutional Limitations" on the taxing power, and the second, "Tax Structure and Administration", gives detailed consideration to Property Taxes, Death and Gift Taxes, and to the Federal Income Tax. A short chapter on "General Problems of Tax Administration" concludes the book. Part One is an unusually comprehensive survey, including not only those subjects ordinarily considered in a course on taxation, such as the permissible purposes of taxation, requirements of uniformity and equality in tax laws, retroactive and confiscatory taxes, and jurisdiction to tax; but also the restrictions on the tax powers of the federal and state governments due to our peculiar federal system and the limitations on the tax powers of the states imposed by the interstate commerce clause of the Federal Constitution. Professor Bruton realizes that the offering of such an amount of constitutional material may impinge seriously on the course on constitutional law and offers suggestions as to possible omissions. In spite of the logical symmetry of Professor Bruton's division of his subject and of the excellent materials collected, the reviewer doubts the advisability of the arrangement. Might not the student with some cause become impatient with a four hundred page constitutional preface to the study of the actual operation of the tax laws themselves? Secondly, constitutional law should, your reviewer believes, be presented as a composite whole and not be divided among several segments, such as taxation, public utilities, labor relations and the like. The last decade has taught us that constitutional interpretation is not so much a process of logical deduction from the phrases of the Constitution, as it is an evolutionary process depending primarily on the Court's fundamental notions as to the proper functions of the judiciary and of the law and government itself. The true effect of these factors cannot be realized by distributing the study of constitutional law among several different courses. Lastly, some of the constitutional problems which must inevitably be considered in the course on taxation, such as that of

† Associate in Law, University of Pennsylvania; Judge of the United States Circuit Court of Appeals for the Third Circuit.

jurisdiction to tax, and that of the retroactive tax, can, it is believed, best be comprehended when the student has become acquainted with the operation of the tax laws under normal circumstances. Professor Bruton has recognized this to an extent, for although retroactive gift and income taxes are considered in Part One, *Coolidge v. Long*,¹ involving a retroactive inheritance tax, is postponed until Chapter 6, which deals with death taxes specifically.

The material on the general property tax is not as extensive as that on death duties and the income tax, nor are the notes as full as in other portions of the book. The usual topics, however, are considered with chief consideration paid to the troublesome problem of valuation. Your reviewer likes the excellent collection of cases on special assessments for improvements. He regrets, however, that more adequate consideration was not paid to the problem of state taxation of utilities which operate as a unit in several different jurisdictions. Also the property exemption statutes are treated but sketchily and that by but one case in the last chapter of the book.

Beginning with inheritance taxes, Professor Bruton shows his mettle, and one feels that he is dealing with a subject which the author regards of greater interest and importance. In this chapter are taken seriatim the different types of taxable transfers. Representative statutes are printed, and there is a good collection of case material. The gift tax is properly considered here, for, as the Supreme Court has pointed out in *Sanford's Estate v. The Commissioner*,² the gift tax is in essence ancillary to the inheritance tax. There is also a good section devoted to the valuation of estates for the purpose of the death tax and to allowable deductions.

The reviewer has always found the teaching of the income tax to be the most difficult as well as the most interesting part of the tax course. Professor Bruton's plan is to present first the general problem of what constitutes taxable income. This is subdivided into two parts: (a) Taxability of a Receipt as Affected by Its Source, and (b) Taxability of a Receipt as Affected by Its Form. Then more detailed consideration is given to two particular types of income, those from sales of capital assets and those from corporate distributions. Then come in order: Deductions; Personal Exemptions and Credits for Dependents; Taxable Periods and Accounting Methods; and lastly, The Taxable Person. In this section are considered Assignments, Trusts and Estates, Partnerships and Business Associations. In general this seems a logical and desirable approach, though the analysis of what constitutes taxable income into its component parts is a baffling problem. The categories that any editor may choose seem obsessed to overlap, and cases placed in one section lie with equal propriety in another. Thus, in Professor Bruton's collection, cases dealing with the taxation of income from trust funds are found both in the section dealing with taxation as affected by the form of the receipt and in the section dealing with the taxable person. Since Professor Bruton has very commendably prefaced most of his sections and subsections with quotations from the applicable provisions of the Internal Revenue Code, the reviewer would like to have seen the section on what constitutes taxable income open with the quotation of Section 22 (a) of the Code, and with the case of *Eisner v. Macomber*,³ which, entirely apart from its specific holding, has the best general discussion of the subject to be found any-

1. 282 U. S. 582 (1931), Bruton, p. 621

2. 308 U. S. 39 (1939), Bruton, p. 656.

3. 252 U. S. 189 (1920), Bruton, p. 838.

where. The cases dealing with types of receipts not constituting income—gifts, property acquired from a decedent, capital contributions—are excellent. *Frank v. Commissioner*,⁴ a Board of Tax Appeals decision of 1927, in view of section 42 of the Internal Revenue Code later enacted and simply cited in the footnote, and the recent case of *Helvering v. Enright's Estate*,⁵ decided since Bruton's Cases went to print, gives a wrong impression as to the taxability of income accrued to a decedent, but not collected until after his death by his personal representative.

The section dealing with income from sale or disposition of capital assets is devoted entirely to quotations from the Internal Revenue Code and to cases dealing with corporate stock. Should there not be cases on the necessity, in ascertaining the profit from a sale, of deducting from cost accrued depreciation? Also, cases on the proper basis of property acquired from a decedent would be interesting and appropriate.

Professor Bruton's material on income from corporate distributions is the best of any that the reviewer has examined. The extremely complicated provisions of the Internal Revenue Code dealing with corporate reorganizations are given substantially in full, and one simple case exemplifying their operation is printed. From experience the reviewer has learned that this is insufficient to present this difficult topic to students. Could not the problem be met by the use of several hypothetical problems illustrating the various types of reorganizations coming within the operation of this particular section of the Code? The remaining sections of the chapter on Income Taxes, which have been listed above, are very adequate presentations of those respective subjects.

It is difficult to present a comprehensive picture of the federal income tax through case material alone, largely because many of its fundamentals involve primarily accounting and not legal principles. While Professor Bruton's collection is as inclusive as any in the field, it is believed that the treatment of the subject would be more valuable had it included some material on such characteristic subjects as inventories, long term contracts, installment sales, "wash sales" and sales between members of the same family and between a stockholder and the corporation he controls. Teachable adjudicated cases on these subjects are difficult to find, but it is hazarded again that the pedagogical problem might be met by printing the sections of the Internal Revenue Code involved with hypothetical problems to illustrate their operation. Unless this is done, the subject is in danger of being inadequately treated.

There are several admirable features of Professor Bruton's Cases that single his book out from others in the field. Taxation is essentially a subject of statutory interpretation, a fact that the student needs to have constantly impressed upon him. The compiler of this casebook has done exceedingly well in prefacing each section of his book with quotations from the representative federal and state statutes involved, quite often with a short history of the legislative development. Professor Bruton also does well in prefacing the chapters on death duties and on the income tax with brief comprehensive surveys of the respective tax systems involved, including tables of the rates of taxation and in the case of the income tax a sample return. Something of this is also done on the various sections in the chapter on the general property tax. He also gives valuable aids to the student by explaining briefly the nature of insurance and of powers of appointment when these institutions become involved with the govern-

4. 6 B. T. A. 1071 (1927), Bruton, p. 837.

5. 312 U. S. 636 (1941).

ment's taxing power. Professor Bruton's collection of materials also far exceeds its competitors in the use of non-judicial material gathered from law review articles, governmental reports and standard treatises. This is most desirable. Taxation is a subject not only for the lawyer but also for the accountant and the tax economist. In the course on taxation the often mentioned desideratum of the union of law with the social sciences finds apt exemplification. The use of excerpts from Arthur Kent's article on capital gains (Bruton, 919) and from Bonbright's valuable treatise on the valuation of property (Bruton, 458, 466, 474, 486) is much to be commended. It is believed that the practice could be extended with profit, to the end that the tax lawyer might be acquainted not only with judicial interpretations on the tax statutes, but with some of the fundamental principles held by the economist as to the proper bases for taxation, and as to the defects and advantages of the various schemes of raising public revenue through taxation. Notably in the present, both law and economics contribute to the shaping of our taxation system, and of both fields the lawyer, as a public servant, should be advised. Professor Bruton's book is an important step in this direction.

Ray A. Brown.†

JUSTICE IN GREY. By William M. Robinson, Jr. Harvard University Press, Cambridge, 1941. Pp. xxi, 713. Price: \$7.50.

It was Judge W. Walter Braham, speaking before the Pennsylvania Bar Association, on June 26, 1941, who called attention to the "Position of the Lawyer in a Changing World". He told us that the lawyer, apart from participation in defense activities, stands ready to fill a special role which awaits him when the world strife draws to a close, a role in a changing world which cannot be performed by autocrat or labor leader, by diplomat or economist, by industrial expert or military genius. It will be, nay now is, the task of the legal profession to take thought for the day after tomorrow and the reconstruction of the institutions of justice, order, and permanent peace.¹

William M. Robinson, Jr., in his timely volume of 700 pages, *Justice in Grey*, gives the results of a scholarly study of the judicial system of the Confederacy, presented in a dispassionate manner. This history of the opening, the operation, and the closing of the local and federal courts of the Confederate States of America, portrays, in documented form, the results of a great experiment of lawyers and judges in the changing world of some eighty years ago.

Somewhere in this brief record may be found mention of the yielding by President Lincoln to the importunities of Attorney General Speed and Secretary of War Stanton, and to his withdrawal of the permission already granted to the General Assembly of the repentant State of Virginia to meet for the purpose of restoring it to normal relations with the victorious United States.² The lawyers in that day just failed to prevent the horrors of the period of reconstruction.

† Professor of Law, University of Wisconsin.

1. Address before the 47th Annual Meeting of the Penna. Bar Assn. at Bedford Springs, Penna., by Hon. W. Walter Braham, President Judge of the Court of Common Pleas of Lawrence County, Penna. Text of address will appear in forthcoming annual volume of the Pa. Bar Assn. and may be found in the Philadelphia Legal Intelligencer, July 11, 1941, p. 55.

2. Page 591. The assurance was given to Gustavus Myers, a Richmond lawyer, and to the Confederate Acting Secretary of War, John A. Campbell.

It is still too soon for us to attempt to appraise the extent to which the failure of the Treaty of Versailles indicates the missing of an opportunity on the part of the American lawyer. But there is an immediate task confronting the lawyers of this country, in helping to shape the institutions of justice, order and permanent peace in the changed world which will arise the day after tomorrow.

As the American Bar Association, or other organized group of lawyers, accepts this assignment, here will be found, ready at hand, a brief, unhurried history of the changes in the judicial system of thirteen states when the Confederacy, without a break in continuity, took over the administration of justice; and also an account of the almost complete disruption which occurred, four years later, when the United States reasserted its responsibility for justice, order and peace.

The author of *Justice in Grey* tells us:³

"So smooth was the transition that writs issued by United States Authority were returned to Confederate courts and the judgments were executed by Confederate marshals. Indictments returned by United States grand juries were tried by Confederate petit juries, and persons convicted of offenses against the United States were imprisoned at Confederate expense."

The suddenness of the changes occurring at the collapse of the southern arms is well portrayed by Mr. Robinson in describing the last case decided by the District Court for the Southern Division of Alabama, in April, 1865:⁴

"On April 3, 1865, Judge Jones held a special term of the court for the southern division of the District of Alabama, on the admiralty side, for the trial of the salvage case *Michael L. Martin v. Six Bales of Derelict Cotton, Josaf Kaufman, Claimant*. On that day the enemy, who had been so long down the Bay as to be taken for granted, closed in and completely invested the defenses of Mobile. The court continued to sit amid the uncomfortably close roar of land and naval artillery of both the blue and the grey. On the fourth day it reached its decision and made a judgment in favor of the salvors. The claimant was given ten days within which to pay \$400 on pain of having his cotton sold by the marshal. By the time that this period of grace was half expired the unbelievable had happened: the Confederate military and naval forces were withdrawing up the Alabama River, leaving the city, with its handsome customhouse and seat of the federal court, to hostile occupation."

Broadly speaking, the restored regime treated as a legal nullity the events, in the South, of the four years interruption of justice as understood in the North. Speaking of Georgia:⁵

"The Constitution of 1868 forced upon the people of Georgia the idea of rebellion. The Constitution of 1865 had referred to the conflict as the *war* against the United States. Now the State, prostrate and at the point of the bayonet, was forced to refer to its late *rebellion*. Furthermore, contracts made during the Confederate regime but not completed, 'and judgments and decrees not fully executed or performed',

3. Page 624.

4. Page 589.

5. Page 605.

were impaired; and the post-bellum contracts which were in renewal of a debt existing prior to June 1, 1865, were outlawed except as to seven reserved classes of debt. Congress was not satisfied with these provisions, and by act of June 25, 1868, forced an amendment to the Constitution of Georgia which was intended to wipe out all contracts and obligations of Confederate origin. But in some way a provision slipped by the Reconstructionists recognizing, by implication at least, the inviolability of proceedings in the Confederate States district court, unless the same were attacked for fraud or unless otherwise declared invalid by the Constitution."

The text of limited recognition of the validity of judicial proceedings is furnished by Mr. Robinson: ⁶

"Art. XI, section 5: 'All rights, privileges, and immunities which may have vested in, or accrued to, any person or persons, or corporations, in his, her, or their right, or in any fiduciary capacity, under any act of any legislative body sitting in this State as such, or of any *decree, judgment, or order of any court*, sitting in this State, under the laws then of force and operation therein, and *recognized by the people as a court of competent jurisdiction*, since the 19th day of January, 1861, shall be held inviolate by all the courts of this State, unless attacked for fraud, or unless otherwise declared invalid by, or according to, this constitution.' (McElreath, *A Treatise on the Constitution of Georgia*, pp. 344-345. The italics are mine.)"

We close this readable volume in the knowledge that others will peruse its pages and find therein a partial answer to the challenge of *Gone With the Wind*. The experience of these four years remains as a permanent part of the heritage of the American lawyer in this ever changing world.

Albert Smith Faught.†

THE LAW OF PICKETING IN PENNSYLVANIA. By M. Herbert Syme. Joseph M. Mitchell, Philadelphia, 1941. Pp. 52. Price: \$1.50.

Picketing has been used as a weapon by labor unions to achieve higher wages, lower hours, and better working conditions from the very inception of the trade union movement. Despite the prevalence of this practice, few attorneys, let alone laymen, know the legal incidents of picketing.

In these times when the labor union has become an accepted part of the American scene, all attorneys should at least have a "working knowledge" of the history and present state of the law relating to one of the chief weapons of trade unions. It is to the vast majority of attorneys, who do not possess this requisite "working knowledge", that this monograph is recommended.

The author gives the reader a detailed historical presentation of the right of picketing and of the treatment accorded persons engaged in picketing by the courts. He takes us from the period when any combined effort

6. Page 606, note 9.

† Vice-Chairman of the Committee on History and Biography of the Philadelphia Bar Assn., and Chairman of the Penna. Bar Association's Committee on Legal Biography and History.

to improve working conditions was regarded as a criminal conspiracy up to the present-day efforts to afford to trade unions full opportunity to make known their side of a dispute. In presenting us with this detailed study of one state the author, in reality, gives us a typical picture of what transpired in other states, since what occurred in Pennsylvania closely paralleled that which occurred elsewhere.

Of course, this author writes from a point of view. Anything written on a field of law still in a state of flux would be valueless unless written from a definite point of view. The author being general counsel for the Pennsylvania Federation of Labor, it is understandable that he sees the picture through labor's eyes.

The main criticism to be levelled at the author's treatment of the law of picketing is that not enough emphasis is placed upon the *Thornhill*,¹ *Carson*,² *Swing*,³ and *Meadowmoor*⁴ cases. It is generally accepted by students of labor law that, by placing picketing within the orbit of freedom of speech, the right to picket has been freed from the complicated rules heretofore used to determine whether or not picketing was lawful.⁵ It is the thought of the reviewer that the historical background should have been explained and interpreted in the light of this new development.

On the whole this monograph affords the reader an excellent survey of the law of picketing in Pennsylvania, presented in a most interesting manner. Its weakness, if weakness it is in view of the recency of the *Swing* case, is its failure to adequately appraise the effect of this doctrine on the law of picketing.

Erwin Lerten.†

1. *Thornhill v. Alabama*, 310 U. S. 88 (1940).

2. *Carlson v. California*, 310 U. S. 106 (1940).

3. *American Federation of Labor v. Swing*, 312 U. S. 321 (1941).

4. *Milkwagon Drivers' Union v. Meadowmoor Dairies*, 312 U. S. 287 (1941).

5. For a discussion of the effect of these cases see Note, *Peaceful Picketing and the Constitutional Guarantee of Free Speech Since the Swing Case* (1941) 90 U. OF PA. L. REV. 201, *supra* in this issue.

† Member of the Bar, Philadelphia.