BOOK REVIEWS

Administrative Justice and the Supremacy of Law in the United States.


The development in recent years of remedial processes other than those available in the courts has produced a progeny of legal questions which, in turn, have engendered various and sundry articles and monographs. But little has been accomplished in the nature of a comprehensive survey of the problems which have arisen and find their roots in common ground. A discussion such as the book here reviewed, which, while disclaiming the character of a comprehensive treatise, undertakes to study in related fashion the various fields of administrative authority, is a welcome addition to the literature on this branch of the law.

Judicial review of administrative determinations is the subject-matter of the discussion; and the twelve chapters of the book, with the exception of the last, find an admirable cohesion in their common relation to this single topic. The last chapter, though plausibly excused, undertakes to include a discussion of certain phases of legal education which are, it seems to the reviewer, rather remotely related to the main theme.

The essential problem involved in the matter of judicial review is traced, as is indicated in the author's choice of title for the book, to the time-honored contrast between a government of laws and a government of men; and the appraisal of administrative activity, as well as the determination of the appropriate measure of court review, is facilitated by reference to this underlying contrast. It is recognized that the administrative function has developed, not so much because of essential congeniality with Anglo-Saxon ideas of law and legal procedure; but because of difficulties encountered in dealing with concrete problems, either on account of the cumbersome character of ordinary judicial machinery, on account of the technical nature of the subject-matter of the controversy, or in view of the fact that government is determining the basis for its own action, as in land-grant and patent cases. Since, however, the growing complexity of affairs has necessitated new methods of accomplishing justice and fair play, Anglo-Saxon theories naturally assign to the courts the duty of seeing that the tribunal created, or the officer appointed, shall keep within the scope of the authority delegated.

With admirable insight the author then points out the source of the principal difficulties: where rests the authority to define? how is the line to be drawn which separates a question of fact from a question of law? To illustrate: is the conception of "unfair competition" one to be defined by the courts, or is it a conclusion of fact from all the evidence? Is the ascertainment of undue prejudice a finding of fact? Does a rule of law decide what facts may and what may not be relevant to a determination of the reasonableness of a
rate? To illustrate further: if the Interstate Commerce Commission finds that a railroad is guilty of undue prejudice, not because it treats two patrons differently, but because it treats one of its shippers differently from the way another railroad treats a competing shipper, is not a question of law involved—a question that requires judicial decision as to whether an essential element of the wrong known as discrimination or undue prejudice is not the treatment of two patrons differently by the same public utility.¹

Obviously, as the author points out—and this constitutes one of the reasons for his justification of court review—such questions should be subject to judicial consideration and determination if the law is to continue to grow as it has grown in the past; so that the question narrows, as he indicates, to the problems of what, in particular cases will constitute questions of fact, or what are essential features of certain concepts or definitions.²

Naturally, there is room for difference of opinion here, and the author's conception of the proper scope of judicial review is a fairly narrow one, especially in those cases where the administrative tribunal has come into being, as has the Interstate Commerce Commission, so that there may be a tribunal "appointed by law and informed by experience"³ for the purpose of passing on questions requiring a substantial amount of technical knowledge and a high degree of technical skill. So he criticises the Ben Avon case,⁴ because it held that the utility was entitled to the "independent judgment of the court" as to its value. But, while the author does not overlook the fact that this case involved judicial review of administrative action, not in its ordinary sense, but for the purpose of determining whether due process had been accorded, he seems to give less weight than is required by the decisions to the necessity for a real review in cases involving constitutional validity.

¹ See Central R. R. Co. of N. J. v. United States, 257 U. S. 247 (1921). The author (pages 174, 207) regards the doctrine of this case as repudiated by United States v. Illinois Central R. R. Co., 263 U. S. 515 (1924); but in this latter case the Supreme Court did not overrule the Jersey Central case, but, on the contrary, pointed out that its later conclusion was not inconsistent with that case (page 520). And the Interstate Commerce Commission continues to apply the rule of the Jersey Central case. See, for example, Minnesota-Dakota Transit Millers v. A. A. R. R. Co., 118 I. C. C. 585, 591 (1926); Virginia Coal Operators' Ass'n v. A. & R. R. R. Co., 120 I. C. C. 283, 293 (1926).

² An interesting illustration is found in the recent opinion of the Supreme Court of the United States in B. & O. R. R. Co. v. Goodman, decided October 31, 1927, where the Court held, as a matter of law, that certain conduct constituted negligence, and, speaking through Mr. Justice Holmes, said:

"It is true as said in Flannelly v. Delaware & Hudson Co., 225 U. S. 597, 603, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts. See Southern Pacific Co. v. Berkshire, 254 U. S. 415, 417, 419."


In similar fashion the author, while disclaiming an intent to “enter upon a critique of valuation theory” (page 220) cannot refrain from a rather partisan treatment of the prudent investment theory; and he dismisses somewhat cavalierly the decisions that have declined to accept this basis for valuation, as well as the cases that have confirmed the principle of the Ben Avon case.

But it seems difficult for any one to enter this highly controversial field with cold neutrality; and, while to the reviewer, portions of the book seem partisan, this may be due to his own bias rather than to that of the author.

In any event, the book is a most helpful contribution to the subject of which it treats. By undertaking a discussion of underlying principles rather than a meticulous review of the cases (though the cases are not neglected) it makes a real step forward in the development of this important topic of the law.

The author's lucid and logical style add much, both to the value of his book, and to the pleasure of the reader.

Henry Wolf Biklé.

University of Pennsylvania Law School.


The preface to Professor Callender's book states its purpose and its limitations. It is a book intended for the general public and the student, rather than the lawyer. Even the lawyer, however, will not object to this simple treatment of an involved and intricate subject, and the layman will, for the first time, I presume to say, find our judicial system in its main outline and methods comprehensible.

Professor Callender has accomplished his purpose by a convincing familiarity with the whole range of his subject and by a simple, direct style. It is a feat to have condensed so broad a field into fewer than three hundred pages and at the same time to have made the book more than a mere outline.

But what sets it apart from most legal treatises written for layman or lawyer is its quiet humor and its daring. Professor Callender takes his readers into his confidence, interests them with apt and often amusing illustrations and, above all, makes them think. Although he is not afraid to point out the shortcomings or the defects of our judicial system, he is even more ready to display its virtues. His chapter entitled “The Problem of Improving Legal Procedure” is a challenge to the profession, and a just one. I wish that every lawyer and every judge might read it. But it is of value to those outside of the profession as well. It impresses upon them the fact that injustice is exceptional rather than usual, and that judges, in spite of their human limitations, are a remarkably able and fair-minded group of men. The high integrity of the book, coupled with its intelligently tolerant attitude, gives it a significance beyond its mere informative value.

To say that the book reads like a novel, that it belongs on the shelf with Mr. Wellman's Gentlemen of the Jury is quite true, but it is more than that.
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It is a legal treatise, valuable as such. Only the supersensitive and finicky will find fault with Professor Callender because, owing to the lack of space, he has had to present the general rather than the particular, and to omit the hair-splitting exceptions so precious to the legal mind. "American Courts" is in general accurate; it is logical, clear and interesting in presentation; and its conclusions are both true and noteworthy.

_Wendell Phillips Raine._


This book is a revision and elaboration of a previous volume published by the same authors on "Procedure and Practice Before the Board of Tax Appeals." Their present edition covers the entire field of procedure in relation to tax appeals embracing discussion on practice and procedure:

1. In the Bureau of Internal Revenue
2. Before the Board of Tax Appeals
3. In the several Federal Courts.

Part I of the edition under review—Procedure Preliminary to Appeal—is well worth careful study by any attorney or tax practitioner, particularly Chapter II, Selection of Remedies. A taxpayer, confronted with an unsatisfactory final determination by the Commissioner with respect to income or profits taxes, gift taxes or estate taxes, has a choice of remedies, which should be exercised with reference to the particular circumstances of his case. Generally speaking, the choice is between instituting a proceeding before the Board of Tax Appeals, and bringing an action at law in a United States District Court or the Court of Claims. Since the enactment of the Revenue Act of 1926, a taxpayer, except in certain instances, no longer has the right to proceed first before the Board and later, after an adverse decision, to bring a suit in court, as was possible under the Revenue Act of 1924. The various considerations which should influence the decision of the taxpayer to avail of one remedy rather than another are fully and clearly set forth in this book, and to the best of my knowledge, this is the only work published dealing with this phase of the Tax Laws.

Part II of this volume is devoted to "Procedure in Board of Tax Appeals." The Board was created by the Revenue Act of 1924 as an independent tribunal to which a taxpayer might resort for a determination of his tax liability before payment. Although declared by the Statute to be an agency of the executive branch of the Government, the Board has functioned under a procedure that has been judicial in form and effect, and in every practical sense is a court in which the taxpayer and the Commissioner of Internal Revenue are parties litigant. A thorough knowledge of the nature and limits of jurisdiction of the Board is of paramount importance to any attorney engaged to any extent in tax
practice. The authors have devoted one entire and lengthy chapter to an exhaustive treatise on this subject. Considerable attention has also been given to the legislative history of the Board, which is not only an interesting study but should be of considerable value in clearing up doubts and ambiguities suggested by the language of the Act.

The Act of 1926 provides that the proceedings of the Board should be conducted in accordance with such rules of practice and procedure as the Board might prescribe. The rules which have been promulgated by the Board, both as to procedure before trial and procedure at trial, are fully and systematically set forth in Chapters V and VI. These chapters in themselves are of sufficient merit to recommend the book to any attorney who has not had considerable experience in practice before the Board. The Act of 1926 provides that the rules of evidence to be followed by the Board are those recognized in the Courts of Equity in the District of Columbia, and the authors have wisely included a complete compendium of these rules, thereby giving their readers a handy reference text on this subject.

Cases heard and decisions rendered after February 26, 1926, by the Board of Tax Appeals are reviewable by the Circuit Courts of Appeals, and the procedure in connection with such review, as well as the procedure for review by certiorari, is also discussed at considerable length. This is a new feature which has not been dealt with in the various tax publications which have come to my notice.

The appendix is voluminous. It contains the full text of all the rules of practice of the Board of Tax Appeals, as well as of the federal courts, including the new rules of the United States Court of Claims effective since February 1, 1927. The appendix also includes a complete list of forms, official and from precedents, for use in practice before the Internal Revenue Bureau, Board of Tax Appeals, and for tax claims and appeals in all of the federal courts, all of which adds greatly to the practical value of the book.

The entire volume is logically arranged, well indexed, and contains fairly copious footnotes with references to the statutes and to carefully selected cases. It is a painstaking and exhaustive effort to cover the entire subject of Federal Tax Appeals.

The Revenue Acts of 1924 and 1926 entirely changed the procedure in federal tax cases and every attorney engaged in tax litigation has felt the urgent need for a book of this character. Although the various "Tax Services" report all rules of procedure as they are promulgated by the Bureau of Internal Revenue or by the Board of Tax Appeals, these "Services" do not satisfy this need. It is inconceivable that any practicing attorney is not at some time confronted with federal tax problems, and this volume should be indispensable to all attorneys having but occasional tax appeal cases as well as being of considerable value to those attorneys making a specialty of this comparatively new field.

Jacob W. Rhine.

Philadelphia.
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The phrase "Maritime Jurisdiction," included by Mr. Jessup in his title, is used to express at least two different things. In the United States it often designates the jurisdiction under the Constitution (Art. III, secs. 1, 2) of district courts sitting in admiralty. With this subject Mr. Jessup has nothing to do, though he of course is familiar with the usage, as witness his acute discussion of The Queen v. Keyn (pp. 124 ff., p. 130, p. 171). The phrase is also often used more broadly, designating the power which a state does, or consistent with principles of international law should, exercise through its courts with reference to occurrences on navigable waters, whether territorial waters or the high seas. With this subject Mr. Jessup wholly concerns himself but mainly only so far as territorial waters are involved. The last part of his title, therefore, suggests that his book covers more ground than it actually does cover and in this respect is a little misleading—at all events it did in fact mislead the reviewer. Again, Mr. Jessup defines the term jurisdiction as referring to the power of the courts to adjudicate, and a discussion of "maritime jurisdiction" ought therefore to include not only what the courts of a state can or ought to do, but perhaps also a discussion of which courts can or ought to do it. He is only incidentally concerned with this last consideration. His title suggests a little more than his book fulfills. On the other hand he goes beyond his title as limited by this phrase, for Mr. Jessup, to our great advantage, discusses not only jurisdiction in the above sense but control, i.e., "the power of administrative or executive officers to govern the actions of individuals or things." In other words he does not at all make the mistake that case system lawyers sometimes make of regarding international law inaction as depending finally on decided cases. With regard to territorial waters "control" is of the greatest importance.

So far as the foregoing paragraph criticizes Mr. Jessup's book adversely, it is only a criticism of his title and is somewhat ungracious, but it will serve to indicate the scope of his actual subject. The book is most interesting, timely and valuable. The reviewer is not competent to judge how complete Mr. Jessup's presentation of authorities is, but it is to be observed in passing that though he has made use of the Revue Internationale de Droit Maritime, he has not made use of its successor, the Revue de Droit Maritime Comparé, which contains some matter germane to his subject. The reviewer can say, however, that Mr. Jessup introduces his readers to a great body of material, judicial, executive, diplomatic and academic. Anyone who has searched in the interstices and footnotes of general textbooks on international law, in decided cases, and in other places for the law of territorial waters to ascertain their extent and to solve problems of jurisdiction and control, knows how very difficult it is to encompass his subject, so to speak. Mr. Jessup's book should enable him to do so. It also does much more. The author analyzes his material acutely and at the
same time, without at all departing from realities, integrates his conclusions throughout, and finally makes his own suggestions in the form of a draft convention, practicable because it makes use of proposals previously made and much discussed. The intelligent practitioner on whichever side of the fence he may be, welcomes a textbook in which the author has ideas that are reasonable and convincing, and finds his own ideas taking a much more arguable form than when he is confronted by a book which merely treats material with no critical observations except that implicit in the phrase: "On the other hand other authorities have held . . ." The practitioner will find Mr. Jessup's work of the former sort. Mr. Jessup is also too much of a realist, too scrupulous and too scholarly ever to mislead the student into believing that what Mr. Jessup and others have thought ought to be, necessarily is. The general reader will also find fascination and charm not only in the material which Mr. Jessup presents but also in the way he handles it and in what he himself suggests.

Austin Tappan Wright.

University of Pennsylvania Law School.


American lawyers may have heard Lord Birkenhead deliver an address in 1923 at the Minneapolis meeting of the American Bar Association on the development of the British constitution or they may have read his books on International Law and English Judges or his biography by Ephesian; all those having an opportunity to become acquainted with the career of this remarkable Englishman from obscurity to the leading position as barrister at the English bar, solicitor general, attorney general, member of the House of Commons, Lord Chancellor and the peerage will welcome from his pen these two volumes of delightful essays.

As the title would indicate, Lord Birkenhead has dipped into various phases of life and thought, some of which have little interest for Americans who, for instance, care nothing for the truth concerning "Margot Asquith." However, his essay on eloquence is particularly good and is an admirable complement to Senator Beveridge's essay on the art of public speaking. Any lawyer could read with renewed determination the essay on the "Milestones of my Life," which Lord Birkenhead names as his winning of a fellowship at Wadham College, Oxford, enabling him to gratify his desire for a college education, his maiden speech at the Oxford Union Society, his meeting with Joseph Chamberlain who took an interest in him and made the way a bit easier in the House of Commons, and his elevation to the woolsack. The virility and determination of the man should be a source of inspiration to us.

All lovers of Sir Walter Scott will appreciate Lord Birkenhead's address before the Scott Society in Edinburgh. Especially good are the lines:
"I cannot doubt that Walter Scott was of the spirit and company of those gay and vivid troubadours who journeyed through the ballad-loving cities of Greece, singing their sweet songs beneath its violet skies. William Deloraine, Roderick Dhu, the Last Minstrel, the Duchess of Buccleuch—name after name springs to mind when one thinks of the remarkable technique, marred here and there perhaps by an element of crudity, but redeemed by an artistry which is only realized after repeated and painstaking analysis."

There are pungent words in his essay on the Gladstone case and cognate topics concerning the modern attempt to drag historic personages from their pedestals and so sensitive was H. G. Wells to the criticism that he devoted considerable space in his article in the Sunday supplement of the New York Times for December 11, 1927, in answer to the strictures. Lord Birkenhead says of Wells:

"But I must confess that where I admire him most is for the extraordinary skill with which he has succeeded in foisting off tiresome pamphlets upon the reviewers and the public in the guise of romances. That he should have done so with success is indeed extraordinary tribute to the kind of chloroforming position to which he has attained."

The essay on the law and the public is of particular interest to us at the present time when there is widespread complaint as to the inability of our judicial process to properly function. Happily there seems to be no situation in England requiring both the prosecution and defense to shadow juries nor any disposition of English lawyers to rush into print condemning the judicial process in particular pending cases. The essay on the King's proctor, whose duty it is to see that the court is not misled in divorce proceedings will suggest to many the desirability of a similar officer in some of our jurisdictions.

In a word, these volumes are easy to read and will afford delightful mental excursions to both the lawyer and layman. Incidentally they show the educational equipment of a brilliant English lawyer, judge, and politician.

O. R. McGuire.

Washington, D. C.
STATEMENT OF OWNERSHIP, MANAGEMENT, CIRCULATION, ETC.

Pursuant to the regulation of the Federal Post Office, revised by the Act of August 24, 1912, herewith is published a Statement of the Ownership, Management, etc., of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW, published at Philadelphia, Pa.:

Name of Post Office Address
Student Editor, David H. Frantz, Philadelphia, Pa.
Business Manager, Franklin H. Berry, Philadelphia, Pa.

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FRANKLIN H. BERRY,
Business Manager.

Sworn to and subscribed before me this thirteenth day of October, 1927.

B. M. SNOVER,
(Seal) Notary Public.
My commission expires April 8, 1929.