Notre Dame Law Review

Volume 30 | Issue 3 Article 8

5-1-1955

Book Reviews

Edith L. Fisch

Hugh W. Divine

Jerome R. Hellerstein

the entire purchase price. . . ." He reasons that the conditional sales transaction is a transfer to the buyer of the beneficial interest in the goods with title reserved to the vendor solely for the purpose of securing the purchase price. Therefore, there is no inconsistency between an action for the price and subsequent resort to the security by retaking the goods where payment of the price has not been forthcoming through the previous action.

It is apparent from the foregoing discussion that the courts are sharply divided on this controversial question, and the possibility of immediate unanimity among them is highly improbable. The better reasoning is the minority rule, but this has had little persuasive effect upon the majority. Therefore, in the absence of legislative direction, the courts in the majority-rule jurisdictions will continue to apply the "harsh" doctrine of election of remedies.

Thomas R. King

BOOK REVIEWS

THE AMERICAN LAWYER. By Albert P. Blaustein[1] and Charles O. Porter.[2] Chicago: University of Chicago Press, 1954. Pp. 360. $5.50. The authors of *The American Lawyer,* have distilled the essence from the tremendous mass of material assembled by the American Bar Association's survey of the legal profession to produce a remarkably concise, well integrated and extremely readable book. Mr. Blaustein, a professor of law at New York Law School, who obtained first hand knowledge of the problems involved while acting as Special Studies Consultant to the survey, along with his co-author, have thus made accessible information that would otherwise have remained unavailable. Few libraries have complete sets of survey reports and few lawyers or scholars the time to read the thousands of pages that comprise the 175 separate reports.

The book deals with and explores in great detail the process of becoming a lawyer, the status and functions of lawyers in our society, the availability of their services and the ethics of the law. Far from just a compendium of thought provoking facts and statistics, the work is self critical to the extent that the role of the lawyer is evaluated in terms of the needs of the public

[1] Professor of Law, New York Law School.

[2] Member of the Oregon Bar.

and constructive insofar as remedial measures are suggested and discussed.

As a woman member of the legal profession the reviewer was interested to note that the authors found obvious need for improvement in regard to the status of women lawyers. The Survey reports that they are kept in a special category in terms of numbers, opportunities, sphere of professional activity and public relations within the bar. Quoting from the Survey's consultant in this field the authors found that "when it comes to women who enter the law, the majority of large law offices still refuse (short of war) to interview them for jobs. Women must work twice as hard as men for half the pay."

The studiously objective and impartial presentation of facts which characterize every chapter is nowhere more apparent than in the treatment of trial by newspaper. Lawyers almost unanimously disapprove the release by the bar of comments to the newspapers on pending or anticipated litigation but question whether adherence to a Cannon of Ethics commendatory of such practice would be feasible in view of the demands of the press and the public for information.

The issue of trial by newspaper brings into conflict two basic rights — freedom of the press and the right of an individual to a fair and impartial trial; but the problem is not insoluble. A campaign of education to create a public demand for fair play together with increased responsibility by the press and the bar can eliminate an evil that unchecked might well destroy due process of law.

There are certain noticeable gaps in the book. While the functioning of women lawyers has been considered, the degree to which color, religion or race affect the status of lawyers has not been treated. The role of the lawyer as a law maker has been touched upon only in regard to legislative drafting. It would have been interesting to learn the extent to which lawyers as writers of law books and legal articles have influenced the growth and development of the law. These omissions, however, cannot be laid at the door of Messers. Blaustein and Porter as they were not covered by the survey reports.

Beyond doubt, not only will this book be of great interest to every lawyer, but it will serve as a guide to legal educators and bar associations in planning improvements in the administration of justice. It will also serve as an inspiration to the bar for the maintenance of the considerable contribution and achievements of the legal profession.

*Edith L. Fisch**

* Member of the New York Bar.

CONTRACTS, CASES AND TEXT. By George L. Clark.[1] Indianapolis: The Bobbs-Merrill Company, Inc., 1954. Pp. 816. $9.00 This book by Professor George L. Clark is one of a series of casebook-textbooks published by the Bobbs-Merrill Company. The books are available both in combined form, casebook-textbook in one volume, or separately. However, the purpose of the publication is such that the resulting volume varies in many respects from a simple joining between the same covers of the usual casebook and the usual textbook.

Professor Clark points out in his preface that there is adverse criticism of the present methods used in teaching law and that there are many quite diverse views of what and how much should be included in the formal legal education. He believes that the different conditions obtaining today call for a new method of teaching. "Today, in all law schools, students are required to attend classes at least twelve hours a week and every school is conducted on either a semester or quarter basis, so that it is not possible for them to make careful summaries of their courses. Further, the casebooks are much longer; and since there is no summary of the course, the casebooks are discarded as useless. . . . The result is that instead of the case method as it was practiced at the Harvard Law School some fifty years ago, there is, largely, merely the study of cases — an entirely different thing."[2] He thus suggests that the use of this new type of book will help answer these problems.

The size of the new book is proof that Professor Clark is making no attempt to produce a conventional book. Instead of a book as large as a casebook plus a textbook, we find a book smaller than the usual casebook alone. The casebook covers 578 pages and the text about 180 pages. A comparison with one of the longer casebooks[3] indicates that Professor Clark intends no minor change in teaching methods. Because of the difference in size of pages, the new book has only one-third the space available in Corbin's book. It contains 209 cases, whereas Corbin's contains some 450 cases, not to mention many important but short cases showing historical development. That he has been able to include as many cases as he does in the space available is in itself no small accomplishment. This is accomplished in part by the omission of any break between cases except the fourteen chapter headings. The cases are not preceded by textual comment nor are the chapters divided into subheadings. The cases

[1] Former member of law faculties of Stanford University, University of Illinois, University of Michigan and New York University.

[2] Text at iv.

[3] CORBIN, LAW OF CONTRACTS (3d Ed. 1947).

are not followed by problems, questions, or citations. A comparison of the eight cases in the chapter on Offer and Acceptance that also appear in Corbin's book reveals that the space available has been used to the fullest advantage. There has been a very careful and competent omission of sentences, rewriting of a few sentences, and some omission of citations. These omissions have obviously not been made merely to save space, though the saving is from two or three lines to a fourth of a case. The resulting case is completely satisfactory. Moreover, the cases themselves are chosen very carefully: the leading cases are included as well as a sufficient number of recent cases to make the contents reflect current law.

But these statistics are somewhat misleading. Naturally, to clear up the distorted view, it is only necessary to supply a few further statistics. There is agreement in the two books on the importance of a few chapters and disagreement on others. Hence the more than two to one ratio of cases in Corbin's book to those in Clark's is not maintained on a chapter to chapter basis. For example, in the chapter on Offer and Acceptance, the ratio is 65 to 43, on Consideration 84 to 41, on Discharge of Contracts 58 to 9. The casebook-textbook contains no cases on remedies.

The text differs as widely from the average text as does the casebook. Professor Clark says, in discussing the purpose of the text, that "The textbooks of the series are readable and understandable, being written primarily for the student; it is expected that they will to some extent take the place of the summaries made by the students in the days now long past."[4] It will be readily admitted that there is no overstatement in the first part of this description, for the text is certainly readable and understandable. There is no doubt that the students will read the text and will find it useful. It may be doubted that it will serve the purpose of a summary prepared by the student himself.

The 180 pages of text is preceded by a four page table of contents the chapter headings of which are the same as the chapter headings to the casebook. The subheadings are extensive enough to be useful as is the twelve page index that follows the text. It is to be regretted that the casebook itself contains neither the subheadings in the table of contents nor an index of any kind.

Of course the absence of the subheads and index is undoubtedly intended as part of the method of the use of the book. At least it will require the student himself to decide why each case is used. Nor will he obtain much aid from the text in placing the cases, for only about one out of ten — only the leading cases — are mentioned in the text. One part of the author's purpose

[4] Text at v.

seems somewhat doubtful of attainment. The student will still have to organize his notes — and he will probably have more notes — if he intends to use them for review purposes. He will be aided in having the text as a guide and perhaps in having discussed some of the textual material as he goes along. He will also have a much more detailed analysis of many of his own cases than he finds in his text. However, the new book will be a valuable teaching tool in the right hands. It is to be hoped that someone who uses the book will write a review discussing the problems he finds in its use, his method of integrating the textual material with the cases, and the value of the book as shown under actual classroom use.

*Hugh W. Divine**

STATE TAXATION OF INTERSTATE COMMERCE. By Paul J. Hartman.[1] Buffalo: Dennis & Co., 1953. Pp. xi, 323. $7.50.—The old quip that death and taxes are certain is once again belied in the ever changing field of state taxation of interstate business by the recent deaths of Chief Justice Vinson and Justice Jackson, which may presage a new shift in the Supreme Court's approach to state taxation under the Commerce Clause. In 1938 a new liberalization of state taxation under the commerce clause was charted out by the enunciation by Justice Stone of the multiple taxation doctrine. No longer was a tax to be invalidated merely because it was imposed on an exclusively interstate business. The Commerce Clause was found not to create an area of trade free of state taxation, but merely to prevent the risks of imposition on the nation-wide businesses of cumulative burdens of taxation not borne by local business. Under Justice Stone's aegis and after death under the leadership of Justice Rutledge (with the aid of Justices Douglas and Murphy and at times of Justice Reed, while Justice Black followed his own more sweeping view that nondiscriminatory state taxation is valid under the Commerce Clause until Congress acts) the Court began to hew out a new series of decisions. These holdings and the accompanying opinions indicated that fairly apportioned franchise, gross receipts and income taxes could be applied to interstate businesses without violating the Commerce Clause. And at the same time, the area of local activities subject to state taxation — in sales taxation and in some local privilege taxes — was extended. Where the Court found

* Assistant Professor of Law, Wake Forest College Law School, Wake Forest, North Carolina.

[1] Professor of Law, Vanderbilt University.

that a particular, unapportioned levy, if upheld, would subject the taxpayer to the risk of a cumulation of similar levies in other states, if tended to uphold the tax as an imposition on an intrastate activity.

In 1946, however, under the leadership of Mr. Justice Frankfurter, with strong support from Mr. Justice Jackson and the vote of Chief Justice Vinson, at times supported by Justice Reed and more recently Justices Burton and Minton, a reversion to the ancient regime set in. The multiple taxation doctrine and its keystone, apportionment, were cast under a shadow and at times repudiated; "direct taxes" on interstate commerce and taxes on the "very flow of commerce" were declared to be invalid, irrespective of the absence of danger of multiplication of taxation. Perhaps the high point (or low point, depending on one's view of the retrogression to pre-1936 thinking) was reached in the *Spector* case,[2] where a doing business tax measured by net income fairly apportioned to the state, was invalidated as applied to a trucking company maintaining extensive terminals and pick-up facilities in the taxing state. The court relied on the metaphysical dogma that a levy called a tax on the privilege of doing business is per se invalid under the Commerce Clause. This was about the temper of the latest decisions when the author completed his work in 1953.

The first three chapters of Professor Hartman's are devoted to a critical analysis of the broad doctrinal developments through which the Commerce Clause has gone. They provide an excellent introduction for students of state taxation under the Commerce Clause. Two features of this analysis are especially noteworthy, since they have often been neglected. First, there is the author's comparison of the regulartory cases with the tax cases and his criticism of the propriety of the view that in the silence of Congress "interstate commerce may not be taxed at all," while at the same time the Court recognizes in regulatory cases the existence of a concurrent power of commerce by the states and the federal government. Likewise, the author points up the frequent intermingling, often confused and unarticulated, of Due Process Clause issues with Commerce Clause problems.[3]

The author is severely critical of the pre-1938 views of the court, now largely reinstated, as ". . . overzealous in protecting interstate commerce . . . at the expense of local interests . . . ," as

[2] Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951).

[3] Mr. Justice Rutledge made a notable contribution to the disentanglement of Due Process considerations from Commerce Clause issues. See Abel, *The Commerce Power: An Instrument of Federalism in Mr. Justice Rutledge — A Symposium,* 25 IND. L.J. 498 (1950).

placing local business at a competitive disadvantage with interstate business.[4] The distinctions drawn are characterized as "arbitrary," "unrealistic," "unreliable" and "mechanical" and the entire approach as "conceptual."[5] The author is generally sympathetic to the multiple taxation test, which he characterizes as a "pragmatic approach" that avoids the "mental gymnastics" involved in trying to ascertain whether there is a locally taxable event and in which practical consequences become the test of constitutionality in a new "wholesome philosophy."[6] The author's view of the "truth" of the matter is to be found in Justice Clark's statement that interstate commerce "receives adequate protection when state levies are fairly apportioned and non-discriminatory."[7]

The author concludes that two alternatives are open; either the court can ". . . abandon its present position of granting tax immunity to interstate commerce; or Congress, by giving consent, can clear the constitutional path for local taxation."[8] Because he finds the prospects of achieving taxability by judicial decision alone dim, Professor Hartman recommends Congressional action. Without detailing his program, the author advocates Congressional legislation prescribing the permissive limits of state taxation through the authorization of certain types of levies and the prohibition of others, including the establishment of acceptable allocation methods. Such proposals have been more fully examined by other students in the field.

It is the irony of the fates that the ink was hardly dry on Professor Hartman's work before straws appeared in the wind that we may be in for a new swing of the constitutional pendulum in which the majority may again embrace Justice Stone's multiple taxation approach to state taxation under the Commerce Clause. In September, 1953 Chief Justice Vinson died and President Eisenhower made his first Supreme Court appointment by designating Chief Justice Warren as Vinson's successor. Vinson had generally been a member of the old guard on the bench in commerce clause-state taxation decisions. The new Chief Justice appears to have become a part of the *avant garde* by joining in Mr. Justice Clark's dissent (along with Justices Douglas and Black) in *Railway Express Agency, Inc. v. Virginia*,[9] in which, quoting from his dissent from the *Spector* case, Justice Clark reiterated his view that a "nondiscriminatory state tax fairly ap-

[4] Text at 261.

[5] *Id.* at 263-65.

[6] *Id.* at 271.

[7] *Id.* at 274.

[8] *Ibid.*

[9] 347 U.S. 359 (1954).

portioned and not excessive . . . may properly be levied against a corporation which obviously could not engage in interstate commerce in the state without using the facilities and services of the state." Now death has removed Justice Jackson, one of the most effective of the supporters of the pre-1938 doctrine, whose trenchant opinions gave a modern touch to the philosophy of the ancient regime. The appointment of Judge Harlan as successor to Justice Jackson indicates the delicate balance on which may hang the great issues of the limitations on state taxation imposed by the Commerce Clause.

In assessing Professor Hartman's work, it is pertinent to observe that the author set for himself the task of including every case decided by the Supreme Court relating to state and local taxation of interstate commerce. And nothing has been observed in this reviewer's reading of the work to suggest that he failed to achieve that objective. Therein, however, lies the weakness of the work; a 285 page volume (ex tables and index) cannot hope to deal satisfactorily with this vast field (although upwards of 400 cases are cited). It has already been noted that the introductory chapters provide a useful, well thought-out, basic analytical survey of the field. The bulk of the work, however, suffers from the attempt to do too much; chapter by chapter the author deals with the cases covering specific types of levies — property taxes, local activity and privilege taxes, sales and use taxes, gross receipts taxes and capital stock taxes. To illustrate some of the results which flow from seeking to deal with a study of such magnitude within so brief a compass, the author devotes 26 pages to a chapter entitled "Local Activity Taxes." He devotes five pages to a discussion of "multi-state business and occupations" in which he considers in cryptic manner the cases dealing with the intermingled local and interstate business. While at one point he tells us that "[a] tax may be validly imposed for the privilege of engaging in a local business or occupation, even inseparably connected with interstate business, where the tax is not demanded as a condition of continuing to do any business,"[10] at another point he declares that "where local and interstate business are intermingled, and are so inseparable that the taxpayer could not discontinue the local business without withdrawing also from the interstate business, there is some confusion in the opinions on whether a privilege tax may be imposed upon the local aspects."[11] If the business referred to in the first sentence is "inseparably connected with the interstate business," it would seem to fall within the category of intermingled businesses in

[10] Text at 105.

[11] *Id.* at 106.

which the local business cannot be given up without yielding the interstate business. In any event, if there is a distinction between the two situations, the reader is left to find it for himself in the cases. The author declares that the rationale of the cases seems to support the taxation of such intermingled businesses. However, two cases were decided in 1953,[12] both cited by the author, in which there are ominous rumblings that the doctrine established by the earlier cases relied on by the author may be in for re-examination and may be destined to be overruled. These developments are not observed by the author.

In the same chapter, there is a brief reference to *Memphis Natural Gas Co. v. Stone*,[13] in which a divided court upheld an excise tax which it treated as a levy on the maintenance of an interstate pipe line within the state, although it was conceded that the taxpayer was engaged exclusively in interstate commerce. The case is referred to in a pedestrian fashion in the chapter and it is cited at several other points in the work, but nowhere is there a considered review of the case. This was in many ways one of the most remarkable cases in the field in that it allowed a privilege tax in an admittedly exclusively interstate business, while the court was proclaiming that the privilege of engaging in interstate commerce could not be taxed. It was decided two years later than *Freeman v. Hewit*,[14] which the author properly regards as having "shunted aside" the multiple taxation doctrine. Nevertheless, the place of the *Memphis* case in the constitutional scheme of things is at no point seriously considered by the author.

In the 49 page chapter devoted to sales and use taxes, which is one of the most comprehensive studies made by the author of any type of tax, there is an incomprehensible failure to recognize or even to advert to the significant contributions made to the Commerce Clause tax field by Justice Rutledge. His opinion in the *McLoed v. Dilworth; General Trading Company v. State Tax Commission;* and *International Harvester Co. v. Department of Treasury* (a single opinion delivered in all three cases)[15] is one of the most notable pieces of analysis and original thinking in the books. Justice Rutledge's forthright analysis of the alternatives open to the court in dealing with sales taxation, his realistic recognition that the task before the court is one of judicial states-

[12] City of Chicago v. Willett Co., 344 U.S. 574 (1953); Bode v. Barrett, 344 U.S. 583 (1953).

[13] 335 U.S. 80 (1948).

[14] 329 U.S. 249 (1946).

[15] 322 U.S. 349 (1944).

manship, his critical evaluation of the choices to be made and his development of the multiple taxation doctrine deserve a high place in our constitutional annals. It is particularly surprising that the importance of Justice Rutledge's contribution was not discerned by Professor Hartman in view of his preoccupation with the economic and practical results of the Court's decisions.

Such shortcomings may be inherent in a work of vast scope sought to be compressed within severely limited space. Moreover, in the opinion of this reviewer, intensive law review studies dealing with most of the specific aspects of the problems covered by the author have done a more thoughtful, a more critical and a more comprehensive job than is done by Professor Hartman. I should like to press one more point — the weakness of the portions of Professor Hartman's work under discussion lies not merely in space limitations; it requires long and lingering reflection and concentration on the materials and problems within a specific area, along with a broad understanding of the overall field, to do the kind of thinking and analysis that, for example, Professor Powell and Professor Lockhart have contributed through their studies of various specific aspects of state taxation under the Commerce Clause. Perhaps a Powell, after a lifetime of intensive study and teaching and writing in virtually every branch of state and local taxation under the Commerce Clause, could write (doubtless covering several volumes the size of Professor Hartman's) an adequate detailed study of the entire field, which would deal satisfactorily with all the decided cases, but in the absence of such extraordinary talents and study and waiting, I am skeptical about the success of even such an effort.

All this is not to suggest that the chapters dealing with specific levies are pedestrian or without value. On the contrary, the leading cases and many of lesser importance are usually critically analyzed and at every point put in the perspective of their practical and economic consequences. The work is the most complete critique to date of the entire body of decisions from the multiple taxation vantage point. It should have great value to the practitioner and the law teacher in providing them not only with a handy and useful summary as well as a critical analysis of the cases. For the scholar in the field, however, its usefulness will be of more limited value. For Professor Hartman has not written an acceptable treatise in the field of state taxation under the Commerce Clause.

*Jerome R. Hellerstein**

* Member of the New York Bar; author of "State and Local Taxation: Cases and Materials"; Assistant Professor of Law, New York University Law School.

BOOKS RECEIVED

*CONTRACTS, CASES ON. By George L. Clark. Indianapolis: The Bobbs-Merrill Company, Inc., 1954. Pp. xiv, 192. $9.00.

DUE PROCESS ON THE RAILROADS. By Joseph Lazar. Los Angeles: Institute of Industrial Relations, 1953. Pp. ix, 38. $1.00.

INDUSTRIAL RELATIONS AND THE GOVERNMENT. By Wayne L. McNaughton and Joseph Lazar. New York: McGraw-Hill Book Company, Inc., 1954. Pp. xxv, 531. $6.00.

PATENT LAW IN THE RESEARCH LABORATORY. By John K. Wise. New York: Reinhold Publishing Corp., 1955. Pp. x, 145. $2.95.

SAINT IGNATIUS' IDEA OF A JESUIT UNIVERSITY. By George E. Ganss. Milwaukee: The Marquette University Press, 1954. Pp. xvi, 368.

SIMEON EBEN BALDWIN. By Fredrick H. Jackson. New York: Kings Crown Press, 1955. Pp. 291. $5.00.

*STATE TAXATION OF INTERSTATE COMMERCE. By Paul J. Hartman. Buffalo: Dennis & Company, Inc., 1953. Pp. xi, 323. $7.50.

SUCCESSFUL HANDLING OF CASUALTY CLAIMS. By Patrick Magarick. New York: Prentice-Hall, Inc., 1955. Pp. xxx, 495. $6.50.

*THE AMERICAN LAWYER—A SUMMARY OF THE LEGAL PROFESSION. By Albert P. Blaustein and Charles O. Porter. Chicago: The University of Chicago Press, 1954. Pp. ix, 360. $5.50.

---

* Reviewed in this issue.