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Book Reviews

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BOOK REVIEWS

OBSCENITY AND THE LAW. By Norman St. John-Stevas.[1] London: Secker & Warburg, Ltd., 1956. Pp. xxii, 289. $5.00. Though Great Britain has no first amendment, it has recurrent agitations over censorship similar to those in the United States and the positions taken by the warring British factions are surprisingly akin to those with which the courts are concerned in this country. Mr. St. John-Stevas, barrister, writer and teacher, fell into one of those British "swirls of trouble" in 1954 when he joined an unofficial committee of authors, publishers, and lawyers, and with them drew up a bill which sought to define obscenity and to regulate censorship.[2] The bill, which has been formally "read a first time" before Parliament though not discussed as yet,[3] seeks to prevent the sale, distribution, and circulation of obscene matter, with a correlative object of allowing writers some liberality in the subject matter of their works by not condemning writings merely because they may not pass the very strict standards set by an extremist minority.[4] These views as to the role of censorship in the world of literature coincide completely with those of Mr. St. John-Stevas, and thus, they naturally provide the structural foundation upon which this interesting little book is written. Before conviction, the bill requires that a writer, distributor or seller of matter charged to be obscene be proved to have intended to corrupt the persons reached or likely to be reached by the publication, or to have been reckless in his consideration of whether or not the writing would have a corrupting effect.[5] One wonders how such an "intent" could satisfactorily be proven in court and whether the concept of "intent" or "recklessness" would not provide a convenient escape hatch for any seemingly respectable writer or publisher.

While paying lip service to the idea that only "dirt for dirt's sake" should be proscribed, the author allows a theme of an upper and nether world of publishers and authors to run throughout his book. Though admitting that the quality of some writers' work is not affected by society's conventions,[6] the author believes that " . . . literary reticence and obscenity laws can be destructive"[7] of the works of many writers. It is for this reason

1 Barrister and Lecturer of Law at King's College, London, England.

2 Introduction at xv-xvi.

3 *Id.* at xvii.

4 See text of the bill in Appendix II.

5 *Ibid.*

6 Text at 193.

7 *Ibid.*

that he seems to infer that authors should be accorded "a special position in society though they must realize that . . . they are not writing in a vacuum . . . "[8] In other words, Mr. St. John-Stevas is of the opinion that those who belong to the true fraternity of art and literature should be forgiven their lapses into lechery while others should receive more severe treatment. Mature consideration of this laissez-faire theory seems to provoke this question: is that not really the position of the most eloquent of our American foes of censorship?

Whenever one is dealing with obscenity and censorship, the inherent difficulty encountered is in drawing the line, in deciding what is enduring in literature and what is pornography. It is for this reason that in a democratic state with its mandate of equal protection of the laws, it would be improper for any self-constituted group to license themselves and those they admire to write as they will. Undoubtedly, such groups are effective in making all literature available to all readers, but, in doing so, they are apt to overstep the bounds of their considerations. As an illustration the author, while condemning the "extreme puritanism of Irish Catholicism,"[9] admits that the Irish Board has "succeeded in keeping out of Ireland a great mass of pornography of a filthy and corrupting kind. . . ."[10] Still he accuses Irish censorship of succeeding in keeping from the people much valuable contemporary literature,[11] something which British and American censors have only attempted. This familiar charge, however, may seem less accurate when one compares the list of books banned in Ireland[12] with the "Selected List"[13] of books banned in many countries in the last few centuries. Some books on the Irish list may seem to us harmless, but all are ephemeral, and however unfair to the authors and publishers the exclusions may seem, the loss to literature and to the public is de minimis.

Mr. St. John-Stevas joins, of course, in the excoriation of the *Hicklin*[14] rule. But a great deal of reading and study of all the proposals for dealing governmentally with obscenity has not presented, in this writer's opinion, a sounder test than that enunciated in the *Hicklin* case:

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8 *Ibid.*

9 *Id.* at 187.

10 *Id.* at 184.

11 *Ibid.*

12 *Id.* at 183.

13 Appendix V.

14 The Queen v. Hicklin, L.R. 3 Q.B. 360 (1868).

> . . . [T]he test for obscenity is . . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.[15]

As I tried to point out at a recent (1956) conference at Marquette University concerning problems of communication in our society, the *Hicklin* rule, with the qualification which time has engrafted onto it that there must also be taken into account the general purpose, scheme, and effect of the literary work, and with the exception written into the rule regarding works of genuine literary merit, is neither absurd nor benighted.[16] Admittedly, it is not a precise mathematical test for obscenity, but then such a precise test is impossible. Not even canon law writers attempt complete preciseness. Rather, they say, in language much like that used by Chief Justice Cockburn in the *Hicklin* case, that to be obscene a book must have an essentially impure theme or content and the writer of the book must have placed active emphasis on the element of obscenity.[17] The search in such a test, then, is the author's subjective intent as expressed externally in the book itself. Indeed, Mr. St. John-Stevas does not seem too unreceptive to such a test, for in distinguishing pornography from obscenity he seemingly forgets his hatred of the *Hicklin* approach, and defines obscenity in a manner undistinguishable in application from the rule set out in the *Hicklin* case:

> A pornographic book can be easily distinguished from an obscene book. A pornographic book, although obscene, is one deliberately designed to stimulate sex feelings and to act as an aphrodisiac. An obscene book has no such immediate and dominant purpose, although incidentally this may be its effect.[18]

This book is brightly written and has a sprightly introduction by the brilliant A. P. Herbert. Its history of the attempts made by different nations to ban obscene works is sketchy but sufficient. Its comparisons of the present legal positions in various countries is unique and valuable. The book includes some surprises such as the banning in England and many other countries of horror "comic books"[19] and the statement that there is little or no literature in England on the law of obscenity.[20] There is cer-

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15 *Id.* at 371.

16 Desmond, *Legal Problems Involved in Censoring the Media of Mass Communication*, 40 MARQ. L. REV. 38, 53 (1956).

17 *Id.* at 55.

18 Text at 2.

19 *Id.* at 122-24.

20 Author's Preface at xix-xx.

tainly no such shortage in the United States!

In total impact, this book adds little to the permanent literature on its subject. Its central theme is really no more than this: competent literary men should be let alone. As to the immediate problem of obscenity and the public necessity of controlling it, the author offers little in the way of solution.

In considering a solution, it seems that one must realize that any method used in a democratic society must not be corrupted by blind adherence to the view of an extremist minority. Above all, a powerful group like the Catholics must not, in the American pluralistic society, use extra-legal pressures to keep distasteful things from the public merely because of the distastefulness of those things.[21] It is submitted that an effective plan for controlling obscenity can be carried out either by moderate and cautious use of democratic process on a high administrative state level, under control of the courts, or by the courts in the first instance.[22]

*Charles S. Desmond**

THE PRESIDENCY IN THE COURTS. By Glendon A. Schubert, Jr.[1] Minneapolis: University of Minnesota Press, 1957. Pp. xi, 391. $5.50. This is a book that should be welcomed in a number of quarters, both academic and otherwise. It presents a new approach to a subject which has intrigued writers for many years. As the author states in the introduction, the purpose of the book " . . . is not to describe what the President can do and does, but rather what the judges *say* he can do. It is, therefore, primarily an analysis of judicial behavior, even though its unifying theme is executive behavior."[2] Primary sources of the author include the decisions of the courts of the land, not only those of the Supreme Court of the United States, but also of lower federal and state courts. To a lesser extent dependence is placed on journal articles and secondary publications.

The material is presented under four headings. Initially, the author concentrates his remarks on the role of the President as

21 See Commonweal, Feb. 15, 1957, vol. 65, no. 20, pp. 499-500, concerning the "forced" cancellation of a Chicago telecast of the film "Martin Luther."

22 See Brown v. Kingsley Books, Inc., 1 N.Y.2d 177, 134 N.E.2d 461 (1956), *probable jurisdiction noted,* 352 U.S. 962 (1957).

* Judge of the Court of Appeals of New York.

1 Associate Professor of Political Science, Michigan State University.

2 Text at 3.

chief administrator, together with his powers of appointment and removal, loyalty executive orders, executive "rule-making," and the transfer and subdelegation of presidential powers. A separate chapter within this section is devoted to the management of the public domain, with discussion of military reservations, the conservation of natural resources, and Indian reservations. The second category presents a discussion of the President as chief of state, the sole organ of the nation. In this classification the author inspects and reviews the President's powers in the international realm, chiefly those of recognition, executive agreements, the regulation of commerce, acquisition of territory, and his executive control over immigration, as well as his powers under the present tariff laws. The third division deals with the President as commander in chief, and involves such subjects as the calling of troops, conscription, military justice, martial law, military government, "the enemy in our midst," and presidential power of property seizure and emergency regulation. The final section deals with the President as the chief magistrate. Herein are covered such activities as executive-legislative relations in the exercise of power by the President, the place of executive orders in our legal scheme, and the role of the courts in directly determining the scope of presidential power.

In each of these areas the author's treatment of the subject matter follows a basic pattern. He returns to the foundation of our nation under the Constitution, or to whenever the matter in question first became evident, and follows down to the present era. As he proceeds, he covers in concise fashion the reactions of the various courts to the presidential activity in point. For all of this there is excellent documentation with complete case citations and, occasionally, a brief explanation on some point about the case that the reader should know. However, the author has committed the unpardonable sin of placing the notes at the close of the chapters. Most readers should find this most inconvenient, especially where, as here, the number of such notes runs to more than one hundred for some chapters. The notes are most interesting and most valuable, but how one wishes he could simply glance at the bottom of the page for the information rather than to read with one finger poised at the next "Notes" section.

The book exhibits very real scholarship and a painstaking attention to detail. One cannot praise too highly this aspect of the work. Of course, in a work such as this, anything less than the highest standards of scholarship would simply serve to confuse rather than help. The reliability of a running summary of what the courts have said over the years on the matter of presi-

dential power is the most valuable single aspect of such a study and in this regard the present work seems to qualify completely.

The author is objective in his presentation. He does not have a thesis to prove. On rare occasions he departs from the strict accounting of events and the judicial aftermath, but only briefly. Occasionally, this takes the form of a subtle word or phrase or possibly only an exclamation point; at other times a casual observation bears the mark of subjectivity, *e.g.*, "It is significant, however, that this was the first time that such discrimination had been linked to the concept of political crime and assumed overtones that bore a remarkable resemblance as a concept to the 'thought control' enforced by the Japanese police upon Japanese citizens."[3]

The book contains some "universals" which scholars normally avoid, such as, "No reported case holds invalid a retroactive delegation of authority to the President to do anything that was within the original competence of the Congress. . . .,"[4] and "The courts have never invalidated a presidential order where authority has in fact existed because of a mere defect in form. . . ."[5]

Perhaps the greatest use of this book will be as a reference work. It must be said that the style is not "easy." In fact, it is rather uninviting. For one thing, the text is too cluttered with statutory and other references that could very well, and with resultant improvement in the readibility of the book, have been concentrated in the footnotes. There is too much of "Section 9, subsection F, of Executive Order No. 8405" scattered liberally through the body of the book. These things should be available in the book, but should not intrude as they do.

The final chapter is superb. Entitled "Recapitulation," its ten pages constitute as fine a statement of the extent of presidential powers as can be found anywhere. Here Doctor Schubert summarizes his findings and does an excellent job of it. If one has time to read only this section of the book, he will put it down well rewarded.

The appendices of the book contain a table of cases in which presidential decisions have been held unconstitutional, a table of cases to which reference has been made in the text of the book, and a "Subject Guide." The last-named is used as a substitute for an index, and serves passably well, although one cannot refrain from wishing for a "full-dress" index.

*Paul C. Bartholomew**

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[3] *Id.* at 219.

[4] *Id.* at 290.

[5] *Id.* at 305.

* Professor of Political Science, University of Notre Dame.

COLLAPSIBLE CORPORATIONS. By Robert Anthoine.[1] New York: Tax Lectures on Records, Inc., 1957. Approx. one hour. $2.00. Musicians, poets, actors, orators, announcers, and reporters are now joined by the flourishing group of tax lecturers in having their performances preserved for posterity and for the potentially vast unseen audiences of their own time. The seemingly unquenchable avidity of bar associations, societies of accountants, and other groups of alert professional and business men for lectures explaining the various intricacies of the internal revenue laws indicates a great demand for the wares of Tax Lectures on Records, Inc. Tape recordings of lectures and panel discussions have become almost routine practice in our time. Why not put the recordings on discs and make them available to all who wish to buy them? Even better, why not make a studio recording without the background noises of actual meetings? These ideas have been competently capitalized upon.

This recording, containing a lecture by Professor Anthoine of Columbia University, deals with collapsible corporations and their treatment under the present internal revenue laws. It is the introductory record in a series of recordings concerning similar topics.[2] This sample recording was made by the lecturer without the background noises referred to above and the speaker sounds as if he were in the same quiet room as the listener. His talk occupies both sides of a long-playing (33 1/3 rpm) record.

For the uninitiated it should perhaps be explained that the term "collapsible corporation," despite its slangy flavor, is a statutory expression found in section 341 of the Internal Revenue Code of 1954. It is common knowledge that the federal income tax on very large incomes may be considerably in excess of twenty-five per cent of the income. However, in the case of gains on the sale or exchange of so-called long-term capital assets, the tax may not exceed twenty-five per cent of the gains. As a natural consequence of this great disparity in treating different kinds of income, taxpayers and their advisors have frequently striven with might and main to convert ordinary income, wherever feasible, into the kind of income that can be treated for

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[1] Professor of Law, Columbia University and Executive Editor of the Practising Law Institute Tax Monographs.

[2] Other tax topics presently recorded include the following: (1) collapsible partnerships, and constructive ownership of stock, on different sides of the same record; (2) current problems on depreciation, and exclusions from gross income, on different sides of the same record; (3) profit-sharing plans for small companies, and stock options, on different sides of the same record. Each of the above is a one hour long-playing record, and may be obtained for $3.95 from Tax Lectures on Records, Inc., 550 Fifth Avenue, New York 36, New York.

federal income tax purposes as gain on the sale or exchange of long-term capital assets.

A fairly common device for accomplishing this purpose is to have a corporation organized to carry out a particular business venture, such as the production of a motion picture. After a picture is produced, but before the corporation has realized any considerable profits, the corporation is dissolved. The potential earnings of the corporation will naturally be represented by the assets distributed to the stockholders in liquidation. The excess of the value of the corporate assets distributed to the stockholders over the amount paid for their stock will be taxable, but the stockholders hope that the tax will be limited to twenty-five per cent. In very sketchy outline, this presents the workings of the collapsible corporation.

Professor Anthoine's lecture is concerned with the litigation and the statutory provisions intended to prevent what Congress considers abuses in this area. The general problem is to continue capital gain treatment (twenty-five per cent limitation) with respect to the ordinary run of the mill corporate liquidations while at the same time to prevent the organization and dissolution of a corporation merely for the purpose of treating ordinary dividend income as capital gain.

The lecturer discusses many significant cases in this area, as well as the application of section 117 (m) of the Internal Revenue Code of 1939 and section 341 of the present Code. There are many areas of uncertainty, as he points out, and he suggests several courses of action which can be utilized by taxpayers. In fact, a considerable portion of his talk is devoted to tax planning.

This record should be a valuable aid to all members of the bar, especially those concerned with tax counseling and advising. It is accompanied by a pamphlet outline of the lecture which indicates the most pertinent of the points covered. It also points out certain pauses in the record which are readily seen on the playing surface. In this way the listener can, if he wishes, easily choose for replay a portion of the lecture which provides special interest, eliminating the necessity of playing an entire side.

*Roger Paul Peters**

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BOOKS RECEIVED

ACCOUNTANTS

PROFESSIONAL ETHICS OF CERTIFIED PUBLIC ACCOUNTANTS. By John L. Carey. New York: American Institute of Accountants, 1956. Pp. xiii, 233. $4.00. A comprehensive study of the ethical standards of the profession, with an explanation of their meaning, necessity, and application to various specific phases of professional activity.

BUSINESS

BUSINESS ETHICS. By Herbert Johnston. New York: Pitman Pub. Corp., 1956. Pp. xiv, 354. $4.75. Mr. Johnston, a professor at Notre Dame, seeks to aid businessmen in the recognition of the moral dimensions of their transactions by illustrative cases in addition to textual material.

BUSINESS LAW

TODAY'S BUSINESS LAW. By Kennard E. Goodman and William L. Moore. New York: Pitman Pub. Corp., 1956. Pp. xviii, 526. $3.12. With a view toward acquainting the reader with the application of the law to the complex situations of modern business, the authors present a wide pattern of materials in clear, understandable terms.

CIVIL RIGHTS

THE BLESSINGS OF LIBERTY. By Zechariah Chafee, Jr. Philadelphia: J. B. Lippincott Co., 1956. Pp. 350. $5.00. A tracing of the fundamental liberties which stem from our American heritage and the benefits derived therefrom, and an indication of the gradual weakening of our safeguards to liberty through adherence to loyalty oaths and security acts.

THE LIBERTIES OF AN AMERICAN: THE SUPREME COURT SPEAKS. By Leo Pfeffer. Boston: Beacon Press, 1956. Pp. xi, 309. $5.00. Mr. Pfeffer presents a reminder to every American that this country was founded on liberty and freedom from oppression and that these cherished legacies must be thoroughly understood to be protected now and in the future.

* Reviewed in this issue.

CONSTITUTIONAL LAW

*THE PRESIDENCY IN THE COURTS. By Glendon A. Schubert. Minneapolis: University of Minnesota Press, 1957. Pp. xi, 391. $5.50.

CORPORATIONS

NON-PROFIT CORPORATIONS AND ASSOCIATIONS. By Howard L. Oleck. New York: Prentice-Hall, 1956. Pp. xvi, 460. $10.00. A prominent corporation counsel provides the procedure for the formation, operation, and dissolution of a non-profit association, together with the accompanying rights and liabilities of the organization and its members.

DOMESTIC RELATIONS

FAMILY CASES IN COURT. By Maxine Boord Virtue. Durham: Duke University Press, 1956. Pp. xxxvii, 291. $4.00. An analysis of the present legal structure and its adequacy in disposing of family problems, and a detailed study of the consequences of divorce.

EVIDENCE

THE RULES OF EVIDENCE. By Marshall Houts. Springfield: Charles C. Thomas, 1956. Pp. xi, 133. $3.75. A concise presentation of the fundamental rules of evidence, uncommented upon by the author, which serves as an adequate review of the law of evidence and a reference book for the observer of trial procedure.

FEDERAL TAXATION

*COLLAPSIBLE CORPORATIONS. By Robert Anthoine. New York: Tax Lectures on Records, Inc., 1957. Approx. one hour. $2.00.

CONSTRUCTIVE TAXATION FOR FREE ENTERPRISE. By John R. Fuchs. New York: Exposition Press, 1956. Pp. 159. $3.00. An interesting, new suggestion is made for revision of the nation's taxation system whereby governmental operations would be financed by taxing the rental value of all land, without consideration of existing improvements.

* Reviewed in this issue.

INSURANCE

ADVANCED LIFE UNDERWRITING AND TAX PLANNING. By William J. Bowe. Bloomington, Illinois: State Farm Life Insurance Co., 1956. Pp. xv, 231. $1.00. A handbook designed for the underwriter in order that he will be able to arrange the business and personal insurance of his clients, as well as the planning of their estates. This third revision was written in accordance with the provisions of the 1954 Internal Revenue Code.

MODERN LIFE INSURANCE. By Robert I. Mehr and Robert W. Osler. New York: Macmillan Co., 1956. Pp. xvi, 747. $6.90. This revised volume gives expression to the modern tendency to treat life and disability insurance as complementary elements of the broad field of income insurance.

INTERNATIONAL LAW

INTERNATIONAL GOVERNMENT. By Clyde Eagleton. New York: Ronald Press, 1957. Pp. xxi, 665. $6.50. Considering the United Nations Organization, Mr. Eagleton discusses the tendency of the nations of the world to evolve a world government and presents the problems which will be encountered in the economic and political relations of the several countries.

JURISPRUDENCE

EXPERIMENTAL JURISPRUDENCE. By Frederick K. Beutel. Lincoln: University of Nebraska Press, 1957. Pp. xvi, 440. $6.00. A comprehensive and intelligent insight into the nature and function of experimental jurisprudence and its application to different legal problems.

THE LAWYER'S TREASURY. Edited by Eugene C. Gerhart. Indianapolis: Bobbs-Merrill, 1956. Pp. 520. $7.50. A compilation of some of the most praiseworthy articles which have appeared in the American Bar Association Journal, presenting a valuable anthology to the legal profession.

LEGAL ETHICS

OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE

* Reviewed in this issue.

NEW YORK COUNTY LAWYERS' ASSOCIATION. New York: Columbia University Press, 1956. Pp. xii, 905. $10.00. *Legal Studies of the William Nelson Cromwell Foundation.* A comprehensive collection of opinions by two of the country's leading bar associations interpreting the Canons of Professional and Judicial Ethics.

OBSCENITY

*OBSCENITY AND THE LAW. By Norman St. John-Stevas. New York: Macmillan Co., 1956. Pp. xxii, 289. $5.00.

TREATIES

TREATIES IN FORCE. By the Department of State. Washington: U.S. Government Printing Office, 1956. Pp. viii, 250. A list of treaties and other international agreements to which the United States is a party and which were in force as of October 31, 1956.

* Reviewed in this issue.