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## REVIEWS

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# REVIEWS

SELECTED STUDIES IN FEDERAL TAXATION (SECOND SERIES). By Randolph E. Paul. Chicago: Callaghan and Company, 1938. Pp. 447.

FIRST, a description of the contents of this admirable book. Continuing the method adopted in his earlier volume,<sup>1</sup> Mr. Paul has selected several carefully delimited phases of our tax law for scrutiny in a series of essays. The first relates to the effect of local rules of property on Federal taxation. While the underlying base of the Federal income tax is nation-wide uniformity, there are many instances in which the "uniform" rule is that the State law shall be conclusive, so that the application of the rule produces diverse results. Thus, there are situations in which State law is made controlling by express Federal statutory language, as the inclusion of a merger or consolidation pursuant to State law in the definition of a reorganization, or by judicial interpretation of the Federal statute, as in *United States v. Cambridge Loan & Building Company*,<sup>2</sup> applying State law to determine whether the taxpayer was a building and loan association. Speaking generally, in most of the situations in which the Federal statute uses language which would be given a different construction in the various States, the courts have adopted a "Federal" interpretation in the interests of uniformity. But of necessity there are many instances, in addition to those specified in the Federal statute, in which State law must play a part. The owner of property is taxable on its income; *A* and *B* are contesting the ownership of Whiteacre; the State law will determine this controversy and therefore the tax liability. A contrary approach would necessitate either precise definition of hundreds of terms in the revenue acts or the judicial development of a comprehensive Federal common law; the former is fanciful, the latter was in reality rejected in *Eric Railroad Company v. Tompkins*.<sup>3</sup> Where the necessary reliance upon State law results in important economic unfairness, however, it would seem incumbent upon the Congress to restore economic uniformity. The community property situation provides a ready example.

The second essay considers the lack of administrative machinery for the compromise of a tax liability which, though certain, involves sufficient elements of unfairness to move the Government to forego all or a portion of the tax. While Section 3229 of the Revised Statutes, now Section 3761 of the Internal Revenue Code, and Section 3469 of the Revised Statutes, authorize Treasury Department compromise of tax liabilities, the Attorney General has ruled that this authority exists only where there is a doubt as to the "legality of the claim of the Government or the collectibility thereof," so that these provisions are of little aid. The authorization to enter into closing agreements is likewise said to be of no assistance, as it vests the Commissioner with the power finally to close cases but not with any new power of compromise. Finally, attention is called to the provisions of Section 1108(a) of the 1926

1. PAUL, STUDIES IN FEDERAL TAXATION (1937).
2. 278 U. S. 55 (1928).
3. 304 U. S. 64 (1938).

Act, as amended, now Section 3791(b) of the Internal Revenue Code, granting power to make non-retroactive regulations and thereby to grant the relief in question to classes of taxpayers. There is an interesting discussion of the constitutionality of this seldom-considered provision, and analogy is made to the inherent power of a court to provide for the non-retroactive application of its decisions.<sup>4</sup> The author concludes that except for the informal compromise that occurs in give-and-take settlements, there is no adequate device for permitting these equitable compromises and argues that this defect should be remedied.

The subject of *res judicata* is the concern of the third essay. The major portion of this essay is devoted to a detailed exposition of the decided cases. But it is the conclusion, unhappily all too short, which forms the vital part of the chapter, for here is discussed the absorbing question of just what should be the role of *res judicata* in an income tax system resting upon an annual basis. Is the rigid certainty which *res judicata* achieves for the individual taxpayer a desideratum in a field in which judicial interpretation is constantly subject to change? Can it be said that it reduces litigation if it forces the taxpayer or Government to litigate to a finish the case which is to be the binding adjudication? And does it not unmercifully subject taxpayer and Government to the vagaries of "certiorari denied"? *United States v. Stone & Downer Company*,<sup>5</sup> sanctioning a disregard of *res judicata* by the Court of Customs Appeals, stands as a reminder that due process does not demand obedience to the rule of *res judicata*. The author hesitantly, for he is well aware of the uncharted seas, suggests that the courts should be authorized "to relax the rule of *res judicata* in meritorious cases upon a showing of additional or different facts or a new rule of law which might reasonably affect the result." The reviewer without hesitance, for the suggestion is always a safe one, feels that the subject merits hard study before a desirable solution can be adopted. The problem is not confined to judicial litigation; in slightly different form it is perhaps the chief obstacle to administrative declaratory rulings, as a system of binding rulings if widely applied might well produce an extensive and undesirable lack of uniformity.

The fourth essay cautiously ventures into the domain of "earnings and profits." Cautiously, for it deals in the main only with the interpretative questions of whether unrealized appreciation in value of corporate property and realized but not recognized appreciation in value constitute earnings or profits within the meaning of Section 115. The author's answer is in the negative; his analysis of the case law establishes the inconclusiveness of the existing decisions. The complexity of the transactions involved and the judicial failure to distinguish between the constitutional power of Congress and its statutory command have combined to produce this result. It is to be hoped that succeeding essays will probe deeper into the subject of earnings and profits. The taxation of corporate distributions revolves around this

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4. Since the publication of this book, the Supreme Court has apparently indicated its approval of the section, but has given it a peculiar twist in stating that primarily it constitutes the Congressional authorization to the Treasury Department to make its regulations retroactive. *Helvering v. Reynolds Co.*, 59 Sup. Ct. 423 (1939).

5. 274 U. S. 225 (1927).

essentially undefined term. The courts are only now commencing really to grapple with the problems it presents. Perhaps later essays will evaluate the need for the concept. Assuming a corporate tax not concerned with undistributed profits, would abandonment of the concept and taxation as dividends of all non-liquidating distributions achieve a simplicity that is not inequitable to the stockholder?

The fifth essay, on "Step Transactions", considers a phase of tax law which, as in other fields, causes taxpayers and the Government, dependent upon who is victor and vanquished, either to applaud or decry the workings of the judicial mind, though both will unite in marvelling at the subtleties of which it is capable. Should a single transaction, which if looked at as a whole produces no tax, be broken up into its constituent parts and a tax liability thereby determined? Or, from the other perspective, should a series of separate steps be integrated into one transaction? We are here in the realm where one day the god of "form" is in the ascendancy, so that a literal application of the taxing statute is sanctioned, the chips falling where they may, and where next day the god of "substance" reigns, with the result that a broad "realism" is said necessarily to underlie the application of the statute. Recognizing that the traditional form-substance test is unsatisfactory, the author carefully sets forth the various factors which from time to time have played a part in the judicial language used in these cases, and borrowing from a decision of Cardozo in a contract case, urges the test of "interdependency"—are the nominally separate steps mutually interdependent in that while each in another setting would have a significance standing alone, in this setting they are component parts of a different transaction which constitutes the whole of which each step is but a part? The complex situations involved in recent Supreme Court cases on this subject, *Helvering v. Tex-Penn Oil Company*,<sup>6</sup> *Helvering v. Bashford*,<sup>7</sup> and *Helvering v. Groman*<sup>8</sup> are then analyzed from this viewpoint.

The sixth essay deals with the factors of motive and intent in Federal tax law. Appearing originally in "Psychiatry", and thus perhaps offering the converse of Justice Cardozo's remark "Psychoanalysis has spread to unaccustomed fields," it offers a descriptive summary of the instances in the Federal tax law in which the intent or motive of the taxpayer is critical—Section 102 cases, gifts in contemplation of death, the *Gregory* case,<sup>9</sup> and so on. The conclusion cautions those who ask, generally sight unseen, for objective tests to displace this present reliance upon subjective factors. The final essay, by Muriel S. Paul, is a trim discussion of the question whether cash or property received by a successful will contestant is taxable income. The author concludes: probably yes, in both the constitutional and statutory sense, with the scales just about evenly balanced as to the second. After the book was published, the Supreme Court in *Lynch v. Hoey*<sup>10</sup> tipped the scales in favor of the taxpayer by construing Section 22(b) (3), exempting property acquired by

6. 300 U. S. 481 (1937).

7. 302 U. S. 454 (1938).

8. 302 U. S. 82 (1938).

9. 293 U. S. 465 (1935).

10. 59 Sup. Ct. 155 (1938).

gift, bequest, devise, or inheritance, to extend to the receipt of property by an heir consequent upon the compromise of a will contest.

We may turn to the importance of this volume. Along with scattered articles in the law reviews and Professor Magill's "Taxable Income", the two volumes of studies by the author represent practically the entire body of legal literature offering a critical analysis of Federal income tax law. There are to be sure many texts and practitioner's handbooks, but even the best of these are devoted almost entirely to describing the statutory and case law in terms of what Congress and the courts have said, so that the not too informed tax practitioner may read and run. As a consequence, our tax law is woefully in need of searching examination. The present revenue acts are fearsome and wonderful things. Start to tinker with a subparagraph in one section and you will find yourself hanging to a line that weaves in and out of countless other sections. Complexity is all too apparent, and yet even those who preach the stock creed of simplicity can hardly fail to realize in moments of more sober reflection that complexity is necessary, for better or for worse. Changes so frequent as to be bewildering serve to remind us that many of the most important phases of our tax structure are anchorless. Now you take your capital loss, now you can't; now you tax a corporation this way, now that way; now you see it, now you don't. But unlike the barker at the county fair, the Congressional barker is just as much at a loss as the guessing taxpayer as to which shell the pea will be under the next time.

The necessity today for impartial, hard, really scientific tax research is overwhelming. There is hardly an important phase of our tax law that would not benefit from close analysis. Cancellation of indebtedness, assumption of indebtedness, earnings and profits, the reorganization sections, the structure of the estate tax and its relation to the gift tax, to mention but a few, raise problems for which a permanent solution has yet to be found. The Treasury Department is not in a position alone to cope with the problems—the daily grist will not permit its experts to closet themselves for long in tax laboratories. The Tax Committees of the various associations have not been equal to the task. Moreover, the approach must not proceed from preconceived postulates. The taxpayers who believe in the cartoonist's grasping Uncle Sam with his hand in the taxpayer's pocket, and those persons in the Government or elsewhere who are firmly convinced that every little boy or gal is born with the ambition to incorporate a yacht or to organize a foreign holding company must be left behind. It is up to the law school professors and the enlightened tax attorneys (*ex hypothesi* law school professors are enlightened), in cooperation with the Treasury Department, to undertake the job. If they do, much can be hoped for; if they don't, the job will not be done or it will be done badly.

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THE INTERPRETATION OF STATUTES. By Sir Peter Benson Maxwell. Eighth Edition. By Sir Gilbert H. B. Jackson. London: Sweet and Maxwell, 1937. Pp. cxii, 380.

MAXWELL on the Interpretation of Statutes is a "standard" book. That is to say, ever since its first publication in 1875 it has been frequently used by lawyers in England and the British dominions to guide them in what they should say when they wished to persuade a court to adopt their construction of a statute.

It is a "standard" book in another sense. It follows a definite pattern of books on the Interpretation of Statutes. It begins with a chapter that stresses the *ipsissima verba* of statutes and it goes on to successive chapters which discuss the circumstances under which the object in view, justice and reason, principles of strict and liberal constructions, implied intentions and harmony of legislation, may be taken into account, when the *ipsissima verba* are not overwhelmingly definite.

While, therefore, the book may be said to belong to an easily recognizable type, it should at once be said that it is an excellent example of its type. It is concisely written, it is amply supplied with cases that illustrate the points it makes, it has a full index. The pitfalls that Latin phrases furnish to the proof-reader are more successfully avoided than is the case in most American books. Still there is *de circumspecte agatis* on p. 224. There is a table of cases that occupies no less than 104 pages. But there is no list of statutes, which is a curious omission. A table of cases is of doubtful utility in a book of this sort, whereas a table of statutes would be instructive. The book, however, is a useful, compact and well-printed manual—in the literal sense of the word—and doubtless neither its original author nor any of its six successive editors had anything else in mind.

But those who would like really to be guided in understanding statutes or those who seek to determine to what extent a statute does in fact make law, will get as little help from this book as from other books of its class. The fundamental objection to all of them lies in the practice they follow of setting one rule by the side of another that contradicts or qualifies it, and trusting to the mere juxtaposition to secure the necessary adjustments. When Lord Loreburn says: "We are not entitled to read words into an Act of Parliament, unless clear reason for it is to be found within the four corners of the Act,"<sup>1</sup> what the inquiring mind desires is a gauge or test wherewith to discover when the reason is clear enough. And when we have such a statement as "Words in statutes are not infrequently construed in their popular and not in their technical meaning," (p. 50) we are tempted to ask: "How frequently? And when?" Especially since in the illustration the word construed does not have a popular meaning at all.

Examples may be multiplied. A general act does not repeal a particular act (p. 156), as duly authenticated by a Latin brocard. But a few pages later (p. 160) it is declared that if there be good reason to suppose that the particular act was intended to be repealed, "the maxim ceases to be applicable." The rule of *ejusdem generis* is a good rule, but it is to be rejected when there

1. *Vickers v. Evans*, 79 L. J. 954, 955 (K. B. 1910), cited p. 13.

are "adequate grounds" for doing so, discoverable from a "wider inspection of the scope of legislation." (p. 293). The only thing omitted is any hint of a test of adequacy. Flat contradiction does not irk the standardized interpreter. "Statutes which encroach on the rights of the subject," we are told on excellent authority, "should be interpreted, if possible, so as to respect such rights." (p. 249). How can that be done? Again, it is "reasonable to presume" that the same meaning is implied in the use of the same expression. (p. 276). And a few lines further it is declared that "the presumption is not of much weight." May we reasonably presume on the one hand and deny weight to our reasonableness on the other? Apparently this sort of thing is taken in stride by properly trained interpreters.

The difficulty inherent in any theory of statutory interpretation is the difficulty inherent in human speech. We are dealing with words, phrases, sentences, paragraphs, and the least analysis makes evident that these words can never unequivocally describe a situation, either one that is assumed to have existed or one it is hoped will come into existence. Often nothing more is indicated by an elaborate description than a general sense of direction.

In the words that are found in statutes this incapacity of language to take the place of actual experience is even more clearly apparent than in ordinary speech or in literary expression. In both of the latter there is a large context of living facts or—in the case of books—an almost unlimited context of explanation and illustration. But statutes are collections of words torn out of the larger context of life or discourse which occasioned them and only rarely has this fact been compensated for by care in phrasing. It is assumed that there are definite situations which the framers of the statute had in mind. It needs a trained literary capacity to enable these situations to be seen if they are past and it takes a real imaginative power to create them if they are contemplated in the future.

Both types of capacity are often lacking in the framers of statutes. Ordinarily, however, they are aware of the purpose of the legislation although what is called the purpose is rarely more than the direction in which the proponents of the statute wish to move. At various times in the history of statute-making it was customary to declare the purpose in set terms—a custom which has recently been revived in American statutes. But whether the purpose is declared or not, it is surrounded by a great many limiting or enlarging words and while these words are colored by the known or explicitly asserted purpose, they have an independent value.

In ordinary human discourse, the general purpose we announce permits us to disregard any suggestions that may deflect our conduct. But in statutes, since the word is inescapably there, we often get a feeling of a confused mass of sign-boards pointing in a jumble of contradictory directions. This is rendered even more confusing by the fact that the statute normally uses generalities. It is not a single situation involving specifically named men that is to be regulated, but a group, a class, a category, of situations. And these classes are of varying inclusiveness. Sometimes we have an enormously large generality, as when we speak of "acts in restraint of trade", "fraudulent representations", "net income", and sometimes we contemplate a single and unique event, as in many private bills.

"Interpretation" involves the task of determining a maximum and minimum of inclusiveness. Any interpretation that remains within these limits is permissible, even according to accepted canons. Just where the line will be drawn depends on considerations of convenience, of equity, of uniformity of legislation, of harmony of decisions. And once the line has been drawn, Maxwell on the Interpretation of Statutes, or some similar treatise, will furnish rules and cases to justify it according to one "canon" or another.

The interpretation that transcends the minimum or maximum is one that flatly disregards or contradicts the wording of the statute. Such interpretations have been made, although it is vehemently asserted by courts and text-writers that they must never be made. If, however, we do wish to disregard our lines of minimum and maximum inclusiveness, we shall not have far to seek for authority to do so. Maxwell on Interpretation will furnish it. We may turn to p. 110 and find that Section 17 of the Stamp Act of 1870 (c. 97) was disregarded because to enforce it "would introduce the greatest difficulty in the administration of justice." It is regrettably true that the administration of justice is beset with difficulties, but if we take the canons at their word, that ought not be a reason for overriding a statute. Again, a "single woman" (p. 62) has been held to include a married woman living apart from her husband, although on pp. 13-16 we are informed that we may not fill up omissions in statutes even if we think the omission was inadvertent. Once more, a statute of 1869 declares that certain acts are "null and void to all intents and purposes whatsoever." But that does not prevent these acts—following reputable canons of interpretation—from being perfectly good for some purposes (p. 187).

All this merely points the moral that our "canons" can be used only when we have already got our interpretation in mind, *i.e.*, when we have drawn the line of inclusion between the maximum and minimum of generality contained in the statutory statement. We may be sure of one thing. The canons will not draw the line for us, although etymologically that is what a canon ought to do.

Books on statutory interpretation are bound to be misleading except for the practical use which has already been indicated. They cannot help it because they are themselves misled by their most common presupposition. Most of them begin with a statement very much like that of the opening sentence of this book. "A statute is the will of the legislature and . . . is to be expounded 'according to the intent of them that made it.'" This, of course, is pure mythology. A "legislature" is an abstraction which does not exist and accordingly can have as little will as it can have intent. A statute is a statement in a printed book which can be safely assumed in nearly every case to be exactly like a statement on an engrossed parchment somewhere in the public records. Somebody—or some group of somebodies—wrote it out originally, but these somebodies were flesh and blood persons and not abstractions at all. They probably had "will" and "intentions" and it is not beyond the bounds of possibility that their will and intentions are discoverable. Ordinarily—not always—we are warned that their will and intentions are quite irrelevant and that we must substitute for them the imaginary will of a fabulous animal, the "Legislature". This is not an exercise in logic or law but in creative imagination.

The accepted canons of interpretation of statutes are in many instances derived from the rules of interpretation that were originally applied to texts of the Bible. Professor Thurman Arnold in an important and entertaining article has shown how closely the methods of theology and law resemble each other in respect of interpretation.<sup>2</sup> But theologians had an excuse that lawyers do not possess. They were bound to think of their texts as the utterance of an omniscient and infallible Being and were, therefore, justified in assuming that every word—even every letter—was fraught with a vital and subtle meaning. Whatever may be said in defense of modern legislation, there is one thing that will not be said—that it is divinely inspired.

If we attend to realities, we shall take cognizance of the actual process of legislating. A statute is worded by a man or a group of men whose intentions are ascertainable but without much significance. It is then presented to one or more bodies of official persons elected for that purpose, to be approved or rejected by voting "Aye" or "No". It is extremely rare that when the vote is taken, all those who vote in the majority have actually in mind all the words of the statute or even the substance of all the provisions of it. When the statute is finally adopted it exercises a directive force upon the administrators and judges who are to apply it. Every application involves an "interpretation", because it requires the administrator or judge to draw the line between maximum and minimum of generality in such a way as to include or exclude the case before him.

The function of interpreting is part of the duty imposed on the administrator or judge *ratione officii*. He cannot evade or refuse it. And I cannot feel that he will make effective use of books on statutory interpretation until he has, at least tentatively, drawn his line.

What gives this book and others of its class their permanent value is that they supply the lawyer with the language which must be used when he seeks to justify or to reject a particular interpretation. This language is a dialect of English which can be learned like other languages, and for which there should be grammars and dictionaries. It is an essential part of a lawyer's training. The language of realism is offensive to persons accustomed to words like "restrictive" and "liberal construction", "intention of the legislature", "equity of the statute"—incidentally "equity" in this strange but indispensable tongue, is exactly the same as "mischief"! (p. 223)—and many similar locutions. But as far as the practising lawyer is concerned, any other language except this is worse than offensive. It is non-persuasive, and persuasion is his purpose.

The language of interpretation is quite as much a separate tongue as Law-French was and there are doubtless persons who will think as Roger North did of French, that the law cannot be stated in any other language. I should not like to dispute the assertion. Probably the best course is to make a statement privately for one's own benefit in the language of common sense and reality, and then translate it into the terms necessitated by "canons of interpretation." Maxwell on the Interpretation of Statutes may be recommended as an excellent guide for that purpose.

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2. *Apologia For Jurisprudence* (1935) 44 YALE L. J. 729.

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EXAMINATIONS BEFORE TRIAL. By Edward J. McCullen. New York: Baker, Voorhis & Co., 1938. Pp. XXXIX, 1110. \$15.

THE AUTHOR of this book has been for many years the librarian of the Supreme Court of the State of New York in the First Judicial Department, and, therefore, has had an excellent opportunity to study pre-trial procedure in New York. His book is the first treatise dealing solely with the New York practice of discovery and presents a thorough-going work on the subject. Part I is entitled "The Remedy" and considers the nature and development of discovery, the courts in which examinations may be had, the persons subject to examination, the actions or special proceedings in which examinations may be had, and the right to examine before trial under various circumstances. Part II, "The Procedure", deals with the mechanics of obtaining, modifying or vacating an examination before trial. A separate chapter under Part II discusses examinations under the New York Code of Criminal Procedure. Part III, entitled "The Examination", is devoted to the conduct of an examination before trial. Questions are suggested for use on examinations in forty-six different forms of actions. Many of the questions are taken from reported cases and the text contains numerous comments and practical suggestions. The book is also replete with helpful forms culled chiefly from actual cases.

The author has gathered together most of the leading New York cases on the question of discovery and has presented the subject in a very readable style. Several relevant decisions, however, should be added.<sup>1</sup>

Explicit cross references would have been preferable to mere statements that the particular subject is treated elsewhere in the volume. The index, however, is well prepared and little difficulty should be encountered in finding the matter under investigation. In view of the many cases on discovery decided each year, a pocket supplement would have been very helpful.

This book constitutes a substantial contribution to the study of an important subject. It should prove to be a very handy and helpful quick-reference volume for the active practitioner in New York and an exceedingly valuable one to the less experienced or younger practitioner. It should also be consulted in conjunction with Dyer-Smith's recently published "Federal Examinations before Trial and Deposition Practice" when considering the liberal discovery provisions in the new Federal Rules of Procedure.

In studying Mr. McCullen's book, the reader is impressed with the fact that the discovery procedure in New York has changed little since the enactment of the Code of Civil Procedure in 1876. True, the Civil Practice Act adopted in 1921 was hailed as a forward-looking step in procedural reform, but it must be conceded that the changes in the subject of discovery were largely in the mechanics to be used and not in the scope of the examination

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1. See, in connection with the discussion of the question whether an examination before trial of a defendant may be used against a co-defendant (p. 458), *Freisinger v. Reibach*, 254 App. Div. 575 (2d Dep't 1938). Furthermore, *Zecchini v. Mayer*, 195 App. Div. 423 (1st Dep't 1921) (describing the normal sequence to be "the bill of particulars first and examination before trial second"—a rule not followed very often), and *Matter of Meyers*, 158 Misc. 942 (1936) (Surrogate Foley holding the sequence stated in the *Zecchini* case reversed in will contests) appear to have been omitted.

before trial. There have been some amendments but the fundamental principles have remained substantially the same. It is still the so-called general rule that the courts usually restrict examinations of adverse parties to matters upon which the examining party has the burden of proof. This, of course, is a relic of the old chancery procedure which only permitted the discovery, by way of written interrogatories, of such evidence which the pleader would have to obtain in support of his own case, and did not permit a discovery of his opponent's case. The same restriction, with even further limitations, is applied to the examination of witnesses. We still find the existence of the traditional hostility to the "fishing expedition", a term applied to all attempts to discover the evidence which the adverse party intends to offer.

It is true that certain of the judicial departments in New York State have been more liberal in allowing examinations before trial; but the First Department, which embraces the County of New York, where most of the litigation is found, still adheres strictly, as a matter of discretion, to the rule that a party may only have an examination before trial on the matters concerning which he has the affirmative. Such a rule creates a decided inequality of discovery in New York. Thus a plaintiff is allowed far greater rights to discovery than is a defendant since the former usually has the affirmative of most of the issues. Where a defendant only pleads a general denial, he is, in the ordinary case, *ipso facto* denied an examination before trial. This has occurred in many instances in stockholders' suits, which have been brought with increasing frequency in the past few years. The contention usually advanced is that enlarged discovery would encourage perjury. It is difficult, however, to see how an examination which is mutual and broad enough to bring out all the facts would produce such a result.<sup>2</sup>

Mr. McCullen is fully aware of this defect in the New York procedure and is in accord with the efforts of the Judicial Council of the State of New York to revise the procedure for taking depositions before trial so that all parties will be subject, in the discretion of the court, to examinations before trial regardless of who has the affirmative of the issues. Such a procedural reform has been adopted in the present Federal Rules of Civil Procedure, which permit an examination as to all matters, not privileged, relevant to the subject-matter involved in the pending action both for the purposes of discovery and for use as evidence.

In this connection it is not inappropriate to quote from Professor E. R. Sunderland, a member of the Advisory Committee on the Federal Rules of Procedure.

"It is probable that no procedural process offers greater opportunity for increasing the efficiency of the administration of justice than that of discovery before trial. Much of the delay in the preparation of a case, most of the lost effort in the course of the trial, and a large part of the uncertainty in the outcome, result from the want of information on the part of the litigants and their counsel as to the

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2. William Howard Taft said: "There is no objection that I know, why each party should not know the other's case." *Shaw v. Ohio Edison Co.*, 9 Ohio Dec. Reprint 809, 812 (1887).

real nature of the respective claims and the facts upon which they rest. . . ."<sup>3</sup>

Mr. McCullen's book shows that the legislature and the courts of New York have not yet come to this conclusion.

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CASES ON PERSONAL PROPERTY. By W. Lewis Roberts. Chicago: Callaghan and Company, 1938. Pp. 588.

THIS is the first unit in the new National Casebook property series. It is a companion volume to Brown's *A Treatise on the Law of Personal Property*. Both the arrangement of the book and the division of material between it and later volumes are traditional. Much of the book seems to be based on the assumption that teachers, bored, will appreciate having the usual note cases printed in full and the often-taught cases reduced to notes. Professor Roberts does have many interesting recent cases. His zeal for late date lines has, however, tended to make the book informative and descriptive rather than thought-provoking. He has sacrificed the clash of legal reasoning to secure modern variation in fact patterns.

The book is badly out of balance. Out of a total of 585 pages of cases, only 155 pages are devoted to the chapter on fixtures and the four chapters and ten sections on acquisition and transfer of title to chattels, including finding, adverse possession, judicial sale, satisfaction of judgment in conversion, accession, gifts, and so on. But the three chapters in the bailment group, including liens and pledges, are given 435 pages. As much space is given to statutory mechanic's liens, for example, as to the whole subject of fixtures. Professor Roberts justifies this shift in emphasis by citing the change in types of personal property since the horse and buggy days. But the modern courses in torts, sales, negotiable instruments, and security transactions have been framed on the basis of this change, and they embrace most of the problems raised in these three chapters except the basic ones about possession and delivery.

A first course in property, it seems to me, should constitute either an historical or an analytical introduction to the field—or at least furnish a sound basis on which to build. A course based on a book of this length will represent one-half or one-third of the work in property elected by many law students. It is bad enough to spend this share of the time on the hodge-podge which constitutes the usual course in personal property, but it is worse to dilute the property content of the course further by dwelling, for example, on the degrees of care owed by the various bailees, on the intricacies of attorneys' retaining and charging liens, and on the variation in late commercial security devices.

At the 1935 meeting of the Association of American Law Schools, the property group discussed the arrangement of materials. It was the consensus

3. RAGLAND, *DISCOVERY BEFORE TRIAL* (1932) iii.

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of opinion that the traditional course in personal property was not satisfactory. Some suggested its elimination; others its modification or combination with other courses. Since then curriculum changes in several key schools indicate a speeding up in property courses. I am afraid that both the editor and the publisher have missed the trend.

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New York City.

CHAPTER X. By Luther D. Swanstrom. Chicago: The Foundation Press, Inc., 1938. Pp. 473. \$10.00.

IN ONE way this book should prove a useful addition to the library of every lawyer, containing as it does a full reprint of the Chandler Act of 1938 as well as reprints of Sections 75, 77 and 77B, and devoting more than half of its pages to reprinting "The Law", old as well as new. Apart from these features, for which ten dollars seems a disproportionate price, the volume has little to recommend it. Like most books written within a few months of the enactment of a law, it is largely repertorial and historical in style, being in the main limited to reviews of cases under the old act and to summaries and restatements of the new statute. The textual material is primarily concerned with procedure under Section 77B. The availability of antiquarian material, useful as it is because of the continuity of practice and the force of comparison and contrast, has caused the author to omit consideration of vital, pressing problems under Chapter Ten itself. Thus, while more than thirty pages are devoted to the restatement of administrative provisions of Chapter Ten, little analytical reference is made to really fundamental problems, such as the selection of competent, disinterested trustees. Even more glaring is the casual, cursory nod given the Securities and Exchange Commission in a few lines of a chapter on Parties, Pleading and Practices. Significant questions attending the Commission's practices and procedures are completely overlooked or ignored. Shall the Commission be able to conduct hearings? Shall it be able to undertake independent investigations, as it was able to do under the bill passed by the House, or shall the Senate's excision of the word "investigation" be construed as a denial of the Commission's right to investigate? Was the Senate's action simply an expression of allergy to "investigation" or does it reflect a desire to avoid burdening the Commission with mandatory investigations in every case?

Likewise, in the author's discussion of the *Boyd* case<sup>1</sup> and the different priority theories, the attitude of the Commission is not mentioned. The

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1. Northern Pacific R. R. v. Boyd, 228 U. S. 482 (1913). In this review, the term "absolute priority" is used to embrace a scheme in which senior security holders must receive full recognition before subordinate classes are permitted participation; "relative priority" is used to suggest a plan in which the relative superiority of senior securities

S. E. C. had not, of course, at the time the book was written, filed any advisory reports in Chapter Ten proceedings but it had, in cases under the Public Utility Holding Company Act, taken a public stand in favor of the strict priority theory and had relied heavily on the *Boyd* decision.<sup>2</sup> The S. E. C. is firmly convinced that bond holders are entitled to rely on the promises made to them and that stockholders are supposed to bear the brunt of the risks of enterprise. It feels that it has a mission: to establish in reorganization proceedings a practice which will be consistent with the expectations of investors before reorganization. Quite naturally, the simplification of administrative problems also stands as a not unimportant reason for the strict priority theory. Despite the cogency of these reasons, there is yet a bit to be said for the relative priority theory. The fact that stocks and bonds are treated very much alike in the investment mart,<sup>3</sup> the belief of most stockholders that they are investors along with bondholders in a corporate enterprise and that the risks they bear are those attending profit earnings and dividend payments are realities that cannot be easily vaporized. Perhaps of equal significance are reasons which do not lend themselves to expression in conventional legal terminology and which can be articulated only in terms of solicitude for stockholders and a reluctance to freeze them out. After all, a reorganization—and not a dissolution—is involved. In this pathological situation, no one who invested in the going concern should be excluded from some share, however speculative and small, in the rehabilitation. The elimination of junior securities, simply because it smacks of liquidation, seems peculiarly foreign to a rehabilitation enterprise and harsh to stockholders, stockholders viewed as individuals rather than as unidentified masses of risk-conscious corporate owners.<sup>4</sup> The argument that the expectations of stockholders are based on the confusion attending their treatment in reorganizations seems to overlook the changing functional status of bondholders even before reorganization. True, bondholders were once considered creditors rather than investors or owners, but today, they, no less than stockholders, perform investors' functions. While this identity of interest cannot lead to complete identity of treatment, it creates a sufficient kinship to explain the acceptance of the relative priority theory and the refusal to sacrifice stockholders upon the altar of absolute priority. If, consequently, promises to bond-

is maintained either by the issuance of new, senior securities or by an appropriately superior participation in, for example, one issue of stock.

2. See Meck & Cary, *Regulation of Corporate Finance and Management Under the Public Utility Holding Company Act of 1935* (1938) 52 HARV. L. REV. 216, 247. After the enactment of the Chandler Act, members of the S.E.C. voiced their views. Speech of Mr. Abe Fortas, Assistant Director, Public Utilities Division, S. E. C., before "Practicing Law Courses," (New York, July 14, 1938); Speech of Mr. Samuel Clark, Chairman, Corporate Reorganization Division, S. E. C., before the "Practicing Law Courses" (New York, Jan. 5, 1939).

3. Isaacs, *Business Security and Legal Security* (1923) 37 HARV. L. REV. 201, 202.

4. The Commission's indifference to the fate of stockholders may in some measure be due to its previous explorations of managerial manipulations of reorganization proceedings in their own interests and its continuing conviction that management is to be identified with stockholders. See the various reports of the S. E. C. on Protective & Reorganization Committees (1936-1937).

holders are not faithfully fulfilled, an event occurs which is native to the bankruptcy process: the impairment of contractual obligations; if this leads to loss of faith in the bond as a secured investment, an event may occur for which some critics eagerly hope: the abandonment of bonds as a financing medium.<sup>5</sup> The persistency with which the rights of bondholders are reduced in reorganizations attests the expediency of the relative priority theory; the resistance of courts to deny stockholders' participation suggests a sympathy which the logic and legalisms of the Commission may not easily overcome.<sup>6</sup>

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5. Isaacs, *supra* note 3, at 210.

6. Typical of the entire book are the author's strong convictions and weak reasons on this issue. Mr. Swanstrom's criticism of second circuit court cases, in which district courts were reversed for failure to observe absolute priorities, is a pious observation: "That which is fair and useful is good and lawful, but that which is destructive is error." P. 173.

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