Yale Law Journal

Volume 50
Issue 6 *Yale Law Journal*

Article 7

1941

# REVIEWS

# REVIEWS

REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON BANKRUPTCY ADMINISTRATION. Washington: U. S. Gov't Printing Office, 1941. Pp. 330.

WITH increasing emphasis in some quarters on the "expertness" of "specialized" administrative agencies and mounting criticism of their functioning in others, it was inevitable that our bankruptcy system, one of the oldest examples of the administrative process and the only one conducted almost entirely under the judicial aegis, should come in for its share of scrutiny.

Thus, when the Committee on Bankruptcy Administration[1] came to survey the aspects of the bankruptcy field still open for investigation after the Chandler Act amendments of 1938 and found certain areas already preempted, such as the railroads by the Wheeler Committee, and other types of corporate reorganization by the Securities and Exchange Commission, it was natural for it to turn to the failings of the referee system and the defects in bankruptcy procedure which, despite the Constitutional mandate, remains far from uniform. Natural and most fortunate because, except for occasional attempts by the Department of Justice to secure the passage of legislation dealing with relatively isolated phases of the problem, and efforts in certain districts to put their own affairs in order by local rules, no broadly conceived endeavor to appraise the workings of bankruptcy administration has been undertaken for a decade — a decade which has seen a series of substantive amendments to the Act without any corresponding overhaul of its machinery.

The principal task upon which the Committee set out in itself presented a problem in organization. The subject did not lend itself to the public hearing technique of investigation. Instead, the Committee gathered information through questionnaires submitted to the district judges, the referees themselves, bar associations and credit men's organizations, supplemented by case studies conducted through law schools. The work of compiling and analyzing the information received through these channels has been accomplished in a capable fashion by the Committee's Director and his assistants;[2] and the end product is a compact and well arranged collection of facts and statistics which form a basis for the Committee's conclusions and recommendations. These recommendations were approved, with slight modifications, at the January, 1941 Judicial Conference of Senior Circuit Judges.

The Committee's initial conclusion that the administration of the bankruptcy system now lacks coordinated supervision is premised on the fact that at present the responsibility for the actions of the 470 referees, the real administrators of the Act, is not even localized within the various districts but is

1. The Committee, which was appointed by former Attorney General Murphy on April 19, 1939, consists of Francis M. Shea, Chairman, Jesse H. Jones, Jerome N. Frank, William J. Campbell, Robert P. Patterson, Edward H. Foley, Thomas McAllister, and Lloyd K. Garrison.

2. Charles A. Horsky served as Director; George S. Elpern and Leon Frechtel were his assistants.

diffused among the 189 judges, some of whom have accepted it, but many of whom have not. This condition the Committee would remedy by substituting for the judges an agency — a Division of Bankruptcy in the Administrative Office of the United States Courts — whose tasks would include, besides the auditing of referees' accounts and the collection of bankruptcy statistics now handled through the Attorney General's office, the investigation of complaints in bankruptcy matters and, more important, the suggestion of changes in local rules which, if not accepted by the referees and the district judges, would be brought before the Judicial Council of the particular circuit.

The second general conclusion reached in the Report is that, without disturbing the self-supporting feature of the present system, a rarity in contemporary government, referees should be made to serve on a full time salaried basis. Agitation to put referees on salaries is not new; it began in 1867 and has been renewed in practically every reform proposal since then. The basic objection to the fee system has been that it results in the referees having a direct pecuniary interest in many of their decisions. Coupled with the fee or commission system of compensation is the curious practice, not even referred to in the Act, under which the referees reimburse themselves for the expenses of maintaining their offices through what is called "indemnity." Not only is there great divergence between the amounts charged for indemnity in different districts, but the method of allocating a referee's total expense among the various estates in his charge is often haphazard. Nor do part time referees observe any fixed rules in apportioning their office expense between their bankruptcy cases and their private practice. The referee mentioned in the Report who kept two stop watches for this purpose can only be treated as a remarkable exception to the usual practice. Some referees avoid the problem altogether by treating the indemnity funds as part of their compensation.

The Report approaches the need for changes in the method of referees' compensation and the indemnity system in the light of the non-acceptance of the similar proposals contained in the Donovan and Thacher Reports in which suggested reforms were linked with the creation of a new central agency or division in the executive branch of the Government. The objection that executive control over affairs traditionally regarded as the exclusive province of the judiciary might lead to bureaucratic administration and the possible injection of political considerations is avoided by the Committee's recommendations that supervision be left within the judicial branch.

Although concurring in the Committee's recommendation for abolishing the fee system and establishing a system of full time referees at fixed salaries, the Judicial Conference has suggested that the authority to determine how soon and to what extent the changes should be made be vested in itself rather than in the Director of the Administrative Office. Since the Director holds office only at the pleasure of the Supreme Court, the policing of and control over bankruptcy administration will, under either form of recommendation, remain in the federal courts, but it will be shifted to some extent from the district judges to the senior circuit judges comprising the Judicial Conference. This shift, plus the centralizing of other supervisory functions in the Administrative Office, should tone up the work of the referees and

perhaps make bankruptcy practice a little less incomprehensible to members of the bar who do not qualify as bankruptcy specialists.

While lacking any of the sensational qualities that usually mark committee output emanating from Washington these days, this Report represents a sound contribution toward the solution of a long neglected problem, and it is to be hoped that its recommendations, as modified by the Judicial Conference, will soon be the subject of enacting legislation.

ROSWELL L. GILPATRIC†

BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE. Edited by George E. Woodbine.* Volume Three. New Haven: Yale University Press, 1940. Pp. 412.

IN considering a life work such as this, any present notice seems bound to look both backward and forward. It may not be amiss to remind that Professor Woodbine, after proving his special fitness for just this type of work in his *Four Thirteenth-Century Law Tracts* (1910), addressed himself to the greatest single editorial job in English legal history and brought out his first volume of Bracton in 1915. That 400 page quarto contained no text, but dealt wholly with the manuscripts, their pedigree, and the baffling problem of the *Addiciones* — the grinding, thankless, preliminary criticism in which Twiss in the Rolls Series edition had so tragically defaulted. It was Professor Woodbine's plan to follow this volume with two volumes of text and commentary, and two of translation, with the introduction in the final volume. Volume II, containing about a third of the text, appeared in 1922 with an explanation in the preface as to why it seemed best to reserve the commentary until the whole text was in print. In the long interval between Volumes II and III came Professor Woodbine's definitive edition of Glanvill (1932). Just as Bracton made very full use of this "first classical textbook" in English law, so the editing of the two works is reciprocal; expert knowledge of Bracton was just the foreground needed in working back to Glanvill, and Professor Woodbine's experience with Glanvill is sure now to help to a better and briefer completion of the present work, especially when it reaches the commentary stage.

Volume III leaves about a third of the text still to be published, but the entire work of collation has been completed, so that the remainder will be ready this year, either as Volume IV or as Volume III, part 2. The commentary will follow, coming before the translation — whether or not they will be combined in one volume cannot now be stated. But some of the larger themes, susceptible of separate treatment, may appear in law publications, as, for example, *The Roman Element in Bracton's De Adquirendo Rerum Dominio*, already published in the YALE LAW JOURNAL.[1] Much of the material for the

†Visiting Sterling Lecturer, Yale Law School; Member of the New York Bar.

*George Burton Adams Professor of History, Yale University.

1. (1922) 31 YALE L. J. 827.

commentary has already been collected and it is the editor's expectation that it will be published in at most three years. Then will come the translation, the introduction and the index, the last already partly finished.

It was foreseen at the outset that "new manuscripts of Bracton may be discovered in unsuspected places," and now we find that in addition to the forty-six manuscripts used for the first third of the text, two more have come to light and contribute to the present volume. One of these, now (or recently) in the British Museum, dates from about 1300, "a typical member of group II, a manuscript abounding in *addiciones* and textually of no great importance." The other is "one which was purchased by the Law School of Columbia University in 1932 and is now in the library of that institution. Written in a hand of the last quarter of the thirteenth century, this manuscript is not only one of the finer of the Bracton MSS. artistically, but is also one of the more valuable textually." It is found to belong to the best of the three main textual traditions, yet it is not "the progenitor of the other manuscripts in its group," and we are still no closer at any point than "the third generation to the original."

Professor Woodbine's mastery of his craft and his tireless and successful application of it to the infinitely complex Bracton material have been so well recognized and commented upon by those competent to judge, and this second installment of text is so thoroughly in line with the first, that it seems useless to repeat what has been said or attempt to add anything in the way of detailed appraisal. But it is a privilege to remark at this point upon the fine deliberation and renunciation of anything swift or spectacular with which this work was approached and the rigidity with which the editor has held to his standard for nearly thirty years. There has been no polemical glorying when his own completer study has forced him to differ with earlier authorities, especially the revered Maitland. " . . . It is in no spirit of controversy that I have taken exception to some of his statements. . . . my plea must be that it is the evidence of the manuscripts, and not I, that is speaking," he remarked in his first preface. It is the manuscripts that have continued to speak. For a parallel to such sustained, self-effacing, critical scholarship one involuntarily thinks back to the heroic age of the *érudits*.

Bracton has been a living force in law from his own time to ours — a work "which in declaring law will make it for ages." The preparation of the text has not been merely a work of legal antiquarianism. Said Maitland, having in mind Bracton and Blackstone: "Twice in the history of England has an Englishman had the motive, the courage, the power to write a great readable, reasonable book about English law as a whole." Bracton has been a continuing influence not only in law but also in political theory, especially in the pregnant Tudor and Stuart periods. Its immediacy is strikingly shown in Professor McIlwain's *Constitutionalism, Ancient and Modern*, just published, where in freshly interpreted passages in Bracton is found not only the key to medieval thought on the state but an interpretation of our own debt to the past and light on the great dilemma which is shaking the world today.

ALBERT B. WHITE†

†Professor of History, University of Minnesota.

RESEARCH IN INTERNATIONAL LAW. Under the Auspices of the Faculty of the Harvard Law School. I. Judicial Assistance. II. Rights and Duties of Neutral States in Naval and Aerial War. III. Rights and Duties of States in Case of Aggression. Supplement Section to the American Journal of International Law. Volume 33, 1939.

THIS volume presents the results of the fourth and, for the time being, last, phase of the Research in International Law organized under the auspices of the Faculty of the Harvard Law School in 1927 and 1928, for the purpose of preparing draft conventions on subjects to be laid before the First Conference for the Codification of International Law in 1930. Like the other conventions produced by the Harvard Research, these texts and accompanying comments display a high degree of scholarship and exhaustive utilization of literature, historical precedents, and judicial decisions.

The Draft Convention on Judicial Assistance[1] is designed to establish rules governing the service of documents, the obtaining of evidence abroad for use in civil, criminal and international proceedings, and the obtaining of information generally on the laws of other States. It excludes extradition and the execution of foreign judgments which, although usually included in the term "international judicial assistance," because of their importance and specific difficulties properly form the subjects of separate undertakings. The Convention expressly includes, however, judicial assistance in criminal matters, a subject which has not received the same attention as judicial assistance in civil and commercial matters for fear that it might aid States in conducting criminal proceedings *in absentia*. The application of judicial assistance to administrative proceedings through a broad interpretation of the term "tribunal" of the State where the request originates (State of origin) likewise constitutes an important departure from a number of existing treaties. Despite a considerable body of opinion to the effect that international law imposes on States a duty to render judicial assistance to other States, and although the common interest of nations in the effective administration of justice strongly suggests such a rule, the Convention refrains from adopting it as an accepted principle of international law. In the last analysis, the "public interest" of the requested State (State of execution) will decide whether or not to grant the request.[2] In many of its details the procedure devised by the Convention fulfills the requirements of practicability and speed.[3] A bibliography and a list of the more important treaties enhances the usefulness of the work.

While the Convention on Judicial Assistance exemplifies the close cooperation among States through direct contacts of their judicial and administrative

1. The Reporters were James Grafton Rogers and A. H. Feller of the Yale Law School.

2. Art. 2, §6[c]; art. 4, §8[b]; art. 5, §5[b], replacing the customary "sovereignty and security" clause.

3. See, *e.g.*, the formal requirements for the various requests, the alternative use of the diplomatic channel for transmission or of direct communication, the appointment of commissioners for obtaining evidence, the preference for the local law of the executing State.

4. The Reporter was Philip C. Jessup of the Columbia Law School.

authorities for the peaceful promotion of a common interest, the major part of the volume touches upon the international law of war. In its 114 Articles, the Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War offers a complete picture of the subject. The comments are careful in pointing out when a principle may be assumed to represent existing law and when it simply suggests future developments. The Convention is based on the fundamental proposition that the traditional concept of neutrality was not outmoded, let alone eliminated, by the establishment of the League of Nations and other subsequent international agreements. It lies within the political discretion of a State whether or not to stay neutral in a given situation. Once a decision is made in favor of neutrality, the neutral State automatically acquires rights and assumes duties in relation to the belligerents, the most essential of the duties being impartiality and abstention from "supplying to a belligerent assistance for the prosecution of the war." The Convention (drafted in 1939) does not recognize an intermediate status between neutrality and belligerency, although the question arose as early as 1917 with respect to the position taken by some Central and South American Republics after the entrance of the United States into the War.[5]

In the much-debated matter of armed merchantmen, the Convention establishes a clear-cut rule that belligerent merchant vessels, if armed for defense or offense, shall be assimilated to warships.[6] Section 5 on Neutral Trade attempts to solve one of the most intricate problems of neutral rights and duties in naval warfare on the basis of practices, known as the navicert and quota systems, developed during the War of 1914-18. The former is designed to secure exemption of neutral shipping engaged in genuine inter-neutral trade from belligerent visit and search through the issuance by the neutral government (possibly under the supervision of a belligerent) of certificates testifying to the neutral character and destination of vessels and cargoes; the quota system, by limiting the imports of neutrals to their actual needs, would bar the application of the doctrines of continuous voyage and ultimate destination. None of the provisions of this Section is claimed to represent existing law. The Convention merely suggests the outlines of a future international agreement on neutral trade, reconciling, as far as possible, the conflicting economic interests of neutrals and belligerents.[7]

While both the aforementioned Conventions to a large degree reflect actual international law, the Draft Convention on the Rights and Duties of States in Case of Aggression[8] "frankly speaks *de lege ferenda*." This Convention does not pretend to set up a universal system of collective security; nor is it

5. The Government of El Salvador, for example, issued a statement that "its state of neutrality could not bring it to consider the United States as a belligerent, subject to the common rules of International Law."

6. The same applies to armed private aircraft. Art. 88. The rule as to armed merchantmen is well defended by a legal discussion relying, *inter alia*, upon Chief Justice Marshall's opinion in The Nereide, 9 Cranch 388 (U. S. 1815) and Secretary Lansing's note of January 18, 1916 to the Allied Governments.

7. The establishment of a maritime blockade zone, extending fifty miles from a blockaded coast, is permitted. See art. 81 dealing with time and place of permissible capture for breach of blockade and with presumption of knowledge of blockade.

8. Here, too, the Reporter was Philip C. Jessup of the Columbia Law School.

concerned with intricate distinctions between "just" and "unjust" wars. It merely supplements the existing law of war and neutrality with a set of rules applicable to a specific case of aggression. In the event of war, the rights and duties of non-participants are governed by the law of neutrality. If, however, the conflict results from the use of force by a State in violation of an obligation to refrain from force and if this violation has been determined by a procedure to which the law-breaking State has previously agreed, the rules of this Convention become operative. The State pronounced aggressor does not acquire rights or relieve itself of duties customarily arising from a state of war. In particular, situations created by an aggressor's use of armed force do not change sovereignty or other legal rights over territory. Third States may acquire one of three status: they may be "co-defending States" if they oppose the aggressor with armed force, "supporting States" if they assist the defending State without armed force, or they may be simply "non-cooperating," with the rights and duties of neutrals, except with regard to the aggressor. The Convention fails to devise a procedure or to suggest a tribunal which could perform the function, prerequisite to its application, of impartially adjudicating the lawfulness of a resort to force. This severely detracts from its practicability, although its value as a stimulating contribution to the problem of the legality of the use of force in international relations and as a systematic collection of the relevant material cannot be contested.

JOACHIM VON ELBE†

THE CHANGING WEST. By William Allen White. New York: The Macmillan Company, 1940. Pp. 144. $1.50.

THE sub-title of Mr. White's book, which grew out of a series of lectures at Harvard, is "An Economic Theory about our Golden Age." But the sub-title inadequately indicates the wealth and variety of matter in this little volume. It does not even indicate what is most valuable in it. The economic theory is, in the main, sound, though it is subject to more shadings and limitations than Mr. White has room to suggest. Put in a sentence, it is that the prosperity, democracy, and morality of the West, from Pittsburgh to San Francisco, was based upon a princely increment of land values, rising for a century and a half; that this increment built up an impregnable fortress of capital for the whole nation; and that the halting of the increment has confronted the West with terrific new problems, to deal with which our Government has forsaken some of its oldest traditions. This is at some points more than the truth, and at other points a good deal less. Some economists would say that the income from the land, not its rising capital value, is what really counts; some economic historians would point out how uneven and halting the rise in land values has been, that long rural depressions (like that of 1880–1897) occasionally gripped the West. It can also be said that no interpretation of Western history which leaves out the way in which the West was

† Assistant in Research, Yale Law School.

geared to a rising industrialism can be fully satisfactory. But, in the main, Mr. White is right, and his thesis can be interestingly illustrated.

The great merit of the book, however, does not lie in its economic interpretation but in the social and cultural history that Mr. White has packed within its covers. Fortunately, the dry bones of the past do not interest Mr. White. He is interested in the living, acting, aspiring people, the ideas they held, the hopes they cherished, the way of life they led; he is inspired by the pulsating democracy they created. Intellectually, that democracy never reached a high altitude. Morally, it was shot full of faults, showing more corruption, more violence, more wastefulness, than can easily be condoned. But in its energy, optimism, kindliness, essential justice, and faith in the innate capacities of the plain man, it was admirable. Mr. White explains how it reared its fabric upon the cornerstones of the little red schoolhouse and little white church, upon universal literacy and the Protestant system of ethics. In two chapters, "The West That Was" and "The West That Is," he gives us vivid pictures of the civilization of the Middle West a generation ago and today, showing how well the essential traditions have been preserved amid changing circumstances. He has faith that they will continue to survive; that the democratic process will be handed on by the West to its children. The increment coming from mechanical power can replace the surplus that arose from the settlement of prairie and plain, and sustain our standard of living. "But our leadership," he adds, "must have the vision that has sustained even the poor, the underprivileged." Mr. White adds to an interesting economic theory and to much good social history, according to his wont, a wholesome and moving sermon, which gives elevation to his whole volume.

ALLAN NEVINS†

THE ENGLISH NAVIGATION LAWS, A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING. By Lawrence A. Harper. New York: Columbia University Press, 1939. Pp. xiv, 503. $3.75.

ONLY those who have ventured into the uncharted confusion of the Treasury papers and Customs' Accounts in the British Public Record Office can appreciate the gigantic amount of labor that preceded this excellent scientific appraisal by Dr. Harper of the efficacy of the English Navigation Acts. Wisely and frankly Dr. Harper steers clear of making any value judgment whether "the benefits gained from the laws were worth the price which was paid." His aim is rather to study the laws as "a consciously planned policy, an experiment in social engineering," and to attempt to discover the effectiveness of the laws in attaining the results for which they were intended. The phrase "social engineering" is a favorite with the author, and while no one would deny the value of studying the Acts as a "deliberately planned attempt to regulate economic conduct along predetermined lines," the expression perhaps suggests a too clear-cut and consistent theory and practice in English mercantilism.

†Professor of History, Columbia University.

Of the four parts of the book, the first deals with the origins and nature of the Acts themselves from the earliest medieval attempts to strengthen the state through encouragement of navigation down to the great legislation of the second half of the seventeenth century. Then follows an analysis of the men and methods, the courts and policies elaborated to enforce the Acts in England. The third part does the same for the colonies, and the last section makes the final reckoning as to the success of the Navigation Laws.

Dr. Harper's discussion of the machinery of enforcement displays a keen appreciation of the compromise between parliamentary intent, the personal factor, and the hard facts of reality, which must be understood if past legislation is to become something more than a line of heavy type in the statute book. The whole machinery of the Acts as it existed in the last forty years of the seventeenth century has never been more lucidly set forth: the complexities of officialdom as state control gradually replaced the older private forms, the basic efficiency of the administrative machinery which shifted the burden of proof onto the accused, the local differences which made the system in the colonies a variant rather than a pale reflection of the English parent. Every student who has painfully tried to piece together a picture of these middle years in English commercial history will be grateful for the full-length portrait.

The fourth part is the longest and most interesting section of the book. Here Dr. Harper, in assessing the Navigation Acts as means to an end, broadens the scope of his investigation in time as well as in place. The whole course of trade at home in Europe and abroad in the colonies from the years preceding the first Acts in the seventeenth century down to their eventual repeal almost two centuries later is included within his province. During this long period of time a great many influences quite separate from commerce inevitably had their effect on trade, and this last part of the book might be criticized because Dr. Harper of necessity is forced to limit his approach. But within these self-appointed boundaries his arguments are most convincing.

The author concludes that the Navigation Acts definitely succeeded in their original purpose of stimulating England's commerce and shipping. Though trade with Africa and Asia was little benefited, English colonial and European trade was considerably helped. English shipping actually increased and the virtual monopoly which the Acts afforded the English seaman served to prosper his wages. In shipbuilding, the handicap of being separated from the main sources of ship stores under which England was to labor until the coming of steam and the iron ship made the Acts of great protective importance. And, finally, Dr. Harper finds that the original purpose of the mercantilists was assisted by the Navigation Acts, for the increase in England's share of world trade which took place during the time in which the Acts were in force must in part at least be attributed to their influence. The great labor that went into this book's preparation and the clear thinking that characterizes its presentation make Dr. Harper's work a truly significant contribution to English economic history.

THOMAS MENDENHALL†

†Instructor in History, Yale University.