REVIEWS


It may be only coincidence that it was in February, 1939, that the President became “greatly impressed” with the Attorney General’s statement of December, 1938, that there was need for procedural reform in administrative law and that it was in January, 1939, between the Attorney General’s communication and the President’s reply that the House of Delegates of the American Bar Association approved the bill, drafted by its Committee on Administrative Law, which became the Walter-Logan bill. Whether or not the relationship of these events in point of time is coincidental, their relationship is nevertheless highly significant in its influence upon the report produced by the Committee which the Attorney General established upon the President’s suggestion.

The principal draftsman and exponent of the Walter-Logan bill was O. R. McGuire, a disciple of the late James M. Beck whose whole approach to the subject of administrative law consisted of hysterical denunciation. Despite the transparency of the Beck-McGuire frenzy, McGuire was able, in the course of over five years of dogged maneuvering, to utilize the American Bar Association to build up a very considerable political pressure for the enactment of a fantastic bill. The fact that the bill was actually passed by Congress and failed to become law only because of the President’s veto has, in some degree, operated to lend dignity to it and to obscure the fact that its provisions were so completely ridiculous that had they dealt with a subject familiar to the electorate it is inconceivable that the bill would have been seriously entertained.

If the Walter-Logan bill were a live issue today, I would, of course, not seek to oppose it merely by characterization; but by the painstaking analyses of others the validity of my summary description has been established and it is described here only because its pendency furnished the political context in which the report under review was prepared. This is not to say that the work of the Committee is a political stratagem—far from it. The Attorney General got together a committee which included some of the ablest and most astute and best informed practitioners, judges and teachers in the administrative law field. The committee utilized the services of a small but

1. For a summary of the development of the bill see Landis, Crucial Issues in Administrative Law (1940) 53 Harv. L. Rev. 1082, n. 10.
2. See H. R. 4236, 76th Cong., 1st Sess. (1939); see also S. 915 and H. R. 6324, 76th Cong., 1st Sess. (1939).
3. See Beck, Our Wonderland of Bureaucracy (1932) passim, reviewed by Hart in (1932) 46 Harv. L. Rev. 173.
4. See Landis, supra note 1, and articles cited therein.
exceptionally able staff under the direction of Professor Walter Gelhorn, which set about carefully and methodically to make a scholarly analysis of the actual workings of the various federal administrative agencies. I do not believe that there could be any serious quarrel with the assertion that the series of 27 monographs embodying the work of the staff constitutes the greatest informational and analytical contribution yet made to administrative law in this country.

Having supplied itself with the most adequate data ever available for the study of administrative law, the Committee might have been expected to address itself to fundamentals and to contribute a monumental product. It might have considered whether there really is such a thing as what is called the "administrative process" or whether the term is merely the label attached to all functions of government that do not fit the three compartments into which we have assumed all governmental activity must inherently be divisible. That the Committee almost came to the point of thinking about such things is indicated early in the report: "Congress has enacted statutes, and it has resorted to the administrative device in the framing of statutes, in the practical effort to meet particular needs." But that they did not quite arrive at this point is disclosed in the next sentence: "Because the administrative process has developed in this fashion, it invites comprehensive study with a view to coordination and improvement." I should suppose that if one thought the matter through, he would at least have to give consideration to the proposition that because what is called the administrative process has developed in this fashion it defies comprehensive study, and coordination is no improvement.

But even if it be assumed that there must be an administrative process or there would not be a Committee studying it, at least it is to be expected that such a committee would make an independent analysis of what the process is. It is at this point that the report is particularly disappointing and it is here that the political context in which the report was prepared becomes especially significant. Thus, since the technique by which support was mustered for the Walter-Logan bill involved a representation that the bill provided for the more expeditious settlement of disputes with the Government, the Committee report considers the advantages to be gained by delegation of authority within agencies and by encouragement of informal dispositions of matters. Again, since it was alleged that the citizen is kept in the dark as to what his rights are and how they are determined, the Committee report considers the desirability of giving publicity to agency structure, regulations, procedures and decisions, and of making declaratory rulings. Since rule-making and adjudication had been subjects of particular assault, a large part of the report is devoted to these subjects. And since the political atmosphere in which the Committee sat included pressure for the extension of the area and scope of judicial review of administration, the Committee gives us its views upon that subject, although, be it noted, judicial review is no part of administrative procedure notwithstanding its undeniable effect on administration.

5. P. 7.
6. Ibid.
No doubt it will be said that these comments are captious; that when the body politic bestirs itself about particular alleged abuses, it is with the greatest propriety than an inquiry such as this be directed to the allegations that are current and be guided by the objective of finding out whether the allegations have substance or are purely imaginary. I would be more impressed with this line of thinking if I were not so completely convinced that the body politic did not bestir itself at all and that the tremor which was perceived was simply generated by fanatics and given momentum by those opposed to the policies which Congress had directed that certain agencies should carry out. Suppose, though, that I have in this respect wholly misconceived the situation and that guidance of the inquiry by the allegations was eminently proper. Nevertheless, the first contribution of such a committee ought to be the establishment of demonstrably valid standards of judgment, and this demands, first of all, searching inquiry as to whether there really is anything which can be called the administrative process, and if so what it is, what it is supposed to accomplish and how.

The lack of any such searching analysis is exposed by more detailed examination of the Committee's findings and recommendations with respect to the several issues that have been outlined. The necessity for delegation of authority within agencies is predicated by the Committee upon their size, their responsibility for results, and the variety of their duties. Having found that in some agencies there is hesitancy to delegate by reason of doubt as to the authority to delegate, the Committee recommends a blanket enlargement of powers in this respect. Since the number of agencies in which enlargement of such powers is required is relatively small, it is a little puzzling to find no evidence that consideration was given to the alternative of giving legislative attention to the specific requirements or that such an alternative was rejected for persuasive reasons. However, the proposal is at least harmless and no one could charge the Committee with serious error in its handling of this subject. The interesting things are the fact that the subject was considered and the nature of the consideration given.

Delegation of authority is, of course, an important matter in any large organization whether business, industrial, executive or administrative. Its effective utilization in an infinite variety of circumstances challenges the imagination of the ablest executive. In an administrative agency it usually generates problems of administrative procedure, but it is not itself a matter of administrative procedure but rather of managerial technique. It involves decisions upon such vital questions as whether, and to what extent, professional or expert personnel is to be used in the direct conduct of operations and the extent to which professional or expert service units are to render special services to operating units without directly conducting operations. Such decisions, in turn, are largely determinative of the type of personnel to be employed and the means appropriate to controlling the exercise of delegated authority. Control of delegated authority is not merely a matter

7. See Landis, supra note 1, at 1089.
8. The following discussion is addressed exclusively to the report of the whole committee. Additional views were expressed by four members of the Committee and further additional views by one of these four.
of the extent of delegation and the scope of direct supervision and review; instead it requires choice among a great variety of available means for collateral control. Again, the difference between efficiency and inefficiency may depend upon whether, to carry out a given job, it is better to delegate responsibility for the entire job to a unit or whether the work can be more effectively and expeditiously done by delegating parts to several units, each to some degree specialized.

In the face of such intricate and delicate problems the Committee cavalierly tells us that internal management should be delegated to an executive officer,\(^9\) that subordinates should handle routine matters, that responsible officers should be authorized to make informal dispositions and settlements and to initiate formal proceedings, and that the exercise of delegated power can be controlled by stating formulated policies, by agency consideration of the novel and difficult cases, and by requiring periodic reports on the issuance of complaints. How the Committee could possibly have dealt with the subject of delegation enlighteningly, I frankly do not know. What interests me is why the Committee felt called upon to give *ex cathedra* expression to a few clichés upon a subject with which it was obviously not able to deal— and the only answer I can find is that a bill was pending “for the more expeditious settlement of disputes.”

The recommendations for distribution of information have already been summarized. Here again the central problem—just what practical devices can be utilized to see that affected interests actually get the specific information they need when they need it—is not even faced but is simply stated in a footnote.\(^10\) Technical due process may be satisfied by “making available” the type of information the Committee indicates, but certainly many functions of government, such as social insurance, for example, are not made effective through the availability of information which, as a practical matter, affected interests will never see. I have no doubt that the work of the Committee’s staff would have been easier if all agencies had available the several types of information that are pointed out, but I suggest that the generalized proposals of the Committee are inappropriate unless accompanied by some demonstration of who will use such information in what agencies and how.

The Committee is fascinated with the device of declaratory rulings and recommends legislation authorizing all agencies to issue them. A fairly con-

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9. There is no indication that the Committee is at all aware of the complex and subtle problems of staff relationships that are inherent in this process.

10. Footnote 3, p. 26, states: “It may not be wholly amiss to add here the thought that no agency can know in advance the identity of every affected interest or every attorney who may at some time be involved in its proceedings. Hence, those who may be interested must themselves bear the major responsibility for securing the information an agency may make available. It is no doubt true even today that accessible documentary material is often not consulted because of failure to seek it from one or another of the agencies. Many law libraries, both those of professional organizations and those connected with educational or public institutions, neglect to index or to maintain current files of administrative materials which may be obtained from the agencies at little or no cost.”
Vincing showing is made for the utility of the device in the specific instances discussed, and the majority—unlike the minority—has by a purely permissive recommendation, protected itself against the charge of compelling the declarations in situations that are inappropriate. But by the same stroke the Committee protected itself against the necessity of making any detailed inquiry as to what functions of the so-called administrative process would be advanced and what functions retarded by declaratory rulings. Certainly it is not alien to our common-law and public-law concepts that there are areas of human relationships in which the intervention of governmental authority is a last resort and in which it is a deliberate policy that persons approach the brink of illegality at their own risk. I conceive this to be true of at least some phases of such legislation as the National Labor Relations Act; it is for this reason that declaratory rulings are inappropriate in such fields and not merely, as the Committee says, because it is a "complex, shifting problem" in which the "intrusion of variables may distort or destroy the plans concerning which the ruling was intended to give guidance." The declaratory ruling is a comparatively new technique of administration whose careful development may be a substantial contribution. Had the Committee given real thought to what the various functions and policies of government are in which administrative agencies are utilized it might have been able to shed valuable light upon the relationship of this particular technique to those functions and policies.

In its handling of the subject of administrative adjudication the report reaches its lowest point. The Committee is fully aware of the fact (and demonstrates the propriety of it) that the great bulk of administrative adjudication is informally done; it is further aware that these adjudications are of a great variety of types for a great variety of purposes under a great variety of circumstances and bear varying relationships to formal adjudication and other activities of administration. From this, one might have expected the conclusion that the presence of certain formalities in certain phases of adjudication affords no basis for appraising those phases in isolation from the remainder of the particular governmental function being carried out, nor for generalizing about such phases collectively. But at this point the Committee virtually ignores the fact that much formal adjudication is in the nature of appellate review of informal adjudication, selects the trial-examiner type of proceeding as representative, pays lip-service to the fact that issues and purposes in formal proceedings do differ, and proceeds to model its recommendations upon the situation in which an agency is charging private parties with violation of law or regulations and part of the agency staff is trying to prove the violation to another part of the staff—the object of the epithet "prosecutor-judge combination." The Committee disavows complete separation of functions because of the necessity for unified responsibility and for some integration with other processes of administration. But

11. P. 32.
12. Evidently the exception of "agency tribunals" from the application of Title III of the Committee's proposed bill is intended to take cognizance of this problem, but the definition of the term renders the exception ineffective, for there are appellate review tribunals which are not "agency tribunals" as defined in the bill.
it suggests the use of “Hearing Commissioners” instead of trial examiners; these “commissioners” are supposed to be endowed with some mystic quality called “independence” by being appointed for seven-year terms by an Office of Federal Administrative Procedure (upon nomination of the agency) and being paid $7500 per year. The situations in which such officers are to be used are described in the bill proposed by the Committee, not in terms of the “prosecutor-judge combination” which it was obviously devised to fit, but in terms of proceedings “wherein rights, duties or other legal relations are required by law to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing.” The language is very ambiguous, but it probably includes a number of appellate review procedures as well as other proceedings in which no part of the agency is in any way a party to the controversy being adjudicated.

The nature of the “independence” which these “commissioners” are supposed to have is not at all clear. The arrangement is an obvious compromise which cannot represent anyone’s consistent thinking. If there are administrative proceedings in which the Committee is convinced that the agency is really in controversy with private parties such independence is not enough; for no agency can provide an appropriate forum for the resolution of a controversy with itself no matter what selection, salary, or tenure may be provided for the employees who hear the evidence and make the initial decision. But the existence of such a controversy cannot be inferred merely from the issuance in the name of the agency of a moving paper called a complaint and from the designation of a staff member to present the evidence and argument in support of the facts alleged. It may be that in many such proceedings there is an illusion of controversy with the agency, to the detriment of public confidence, by reason of the trial attorney’s activities; it may be that in such cases a more accurate perspective would be maintained if the examiner himself were charged with the function of investigation and of arranging that all relevant evidence is presented, but without getting into the position of advocating a particular conclusion. Or it may be that agencies have in some cases had staff members developing and presenting cases where the responsibility for that activity would better have been left to private parties urging opposing conclusions upon the agency. These are the kind of questions I should like to have seen the Committee explore. But their exploration requires consideration of each procedure individually, analyzing what is really in issue, how the issues are related to the governmental functions for which the agency is responsible, what processes of proof are feasible and expectable, and what devices are available for distinguishing clearly, one from the other, controversy between private parties, controversy with the agency, and opposition to the Congressional policy which the agency is charged with effectuating.

The Committee's discussion of administrative rule-making is a valuable summary of the history and purposes of this subject, the types of rules in use and the utility of available techniques by which the agencies may acquire the information for fair and effective rule-making. I believe it oversimplifies the distinction between “legally binding regulations” and “interpretative regu-
lations," for it is my observation that they merge into each other on many occasions. This classification also overlooks the fact that regulations which are procedural or interpretative in form may be adopted to achieve a substantive affirmative effect in carrying out agency policy. Finally, when we come to the legislative recommendation—that regulations be given a deferred effective date unless circumstances require otherwise—the existence of interpretative regulations is apparently forgotten. Such regulations are generally retroactive in operation, no matter what effective date is stated, and the statement of a future effective date is misleading.

In its discussions of judicial review—both of adjudication and of rule-making—the report reaches its highest point of quality. I will not be so ungenerous as to suggest that this may be due to the fact that this subject has received extensive and thoughtful treatment previously, or to the fact that this is a subject with which members of the Committee have had greater experience than with administrative procedure; and I hope readers will not be so ungenerous as to suggest that my estimate of the quality of these sections of the report is due to the fact that upon this subject the Committee's recommendation is to let well enough alone.

I have, of course, not done justice to the report as a whole. It is a useful summary of materials from the various staff monographs—though not so useful as the monographs themselves, nor as useful as a document written expressly as a summary and coordination of the monograph material would have been. I have had to deal critically with various approaches, recommendations, and conclusions in an effort to indicate the sort of contribution the Committee might have made but did not. I believe that their failure to make an outstanding contribution can be attributed to an unfortunate political atmosphere which impelled them to treat ready-made issues which obscured fundamentals.

Lester P. Schoene†


This brief survey of some of the problems of dividend law is addressed to corporate directors, accountants, and lawyers. In his preface Mr. Kehl says that he has made a careful analysis of the evolution of the current dividend statutes in each of the forty-eight states, and has put emphasis upon the statutes rather than the decided cases. He says that he has sought to interpret the statutes in the light of accounting practices and to harmonize accounting and legal principles.

This is indeed an ambitious project for so brief a work of some 350 pages, only the first 150 pages of which are devoted to dividend statutes and the classification and interpretation of their dividend restrictions. It is unfor-
tunate that more of the book was not devoted to this topic. The last 200 pages of the book are devoted to a somewhat cursory treatment of a variety of legal topics more or less connected with dividends. These topics, which are much less troubled by the complexities of statutory construction, include the revocation of declared dividends, the dividend rights of non-cumulative preferred shares, the liability of directors and shareholders for illegal dividends, the effect of the sale of assets, merger or consolidation upon the surplus of the constituent corporations which was available for dividends, and the somewhat irrelevant topic of the effect of federal income taxes on dividends. Strange to say, there is no separate chapter dealing with capital stock and the evolution of the concept of legal capital, although this subject receives incidental treatment.

The most interesting as well as the most controversial discussion appears in the first part of the book dealing with the tests of the funds available for dividends—the surplus test, the net profits test, and the computation of the amounts available under these tests. Rather than attempt an evaluation of the book as a whole, the reviewers feel that they can render the best service to prospective readers by concentrating upon certain points in the first part of the book, the treatment of which they find unsatisfactory. These points are (1) a failure to work out or expound clearly the true concept of legal capital in the light of legislative policy and the history of statutory development as interpreted by the courts; (2) an inflexible assumption that all the words in a dividend statute, and especially the word "profits," when used with other words, must be given some significance; (3) an insistence on the idea of current profits as an alternative source of dividends whenever the word "profits" is coupled with the word "surplus"; and (4) the advocacy of certain interpretations of terms and accounting practices which tend to produce uncertainty as to the basis for determining legality of dividends and to defeat the policy of the law of providing security for creditors. In order to bring out the delusive tendencies in the author's treatment of statutes and charters it is necessary to argue some of his points more than is customary in a book review.

The author recognizes that "the capital impairment rule has long been the backbone of American dividend law."

But he finds a very strange uncertainty as to what is the measure of the legal capital called for and whether there is any definite figure to place on the balance sheet as the capital which determines the surplus from which dividends may be paid. In his opinion, no certain measure appeared until the most recent statutory revisions. He suggests three alternative possibilities as to the meaning of capital stock in the sense of legal capital: (1) the actual dollar value of the consideration received upon the issue of shares, even though the shares were flagrantly watered on original issuance; (2) the par or stated value of the issued shares (which has generally been assumed to be the measure); and (3) the actual amount of capital at the opening of the current accounting period, i.e., in case of impairment, the capital as "reduced" or impaired by prior losses.

1. Pp. 4, 11, 12, 15, 24, 28, 41.
Mr. Kehl seems to favor the first alternative measure of capital, although he seems not to disapprove of the third, which bears a strong resemblance to the peculiar English doctrines on this subject. His idea of legal capital is entirely out of line with all the modern statutory definitions of "stated capital," which may well be regarded essentially as formulations of what has always been regarded as legal capital.

The New York dividend statute of 1825, as the author points out, has exerted wider influence than any other statute on the development of American dividend legislation. The language of the New York Act, the father or grandfather of many others, provides that:

"It shall not be lawful for the directors or managers . . . to make dividends excepting from the surplus profits arising from the business . . .; and it shall not be lawful for the directors . . . to divide, withdraw, or in any way pay to the stockholders . . . any part of the capital stock."

The author makes the astonishing assertion that in many states which derive their law from this old New York Act, it is still an open question whether the statutes authorize the payment of dividends from annual net profits even though capital is impaired and whether capital deficits of prior accounting periods need be made up out of subsequent earnings. He believes that the "antecedent background of the New York Act" shows the original intention to have been to authorize such payment despite a capital impairment, and he believes that "from the economic standpoint this is the sound approach."

This section of the old New York statute was very clearly construed by Earl, J. in the case of Williams v. Western Union Telegraph Company where the purpose and policy of the statute as to creation and maintenance of the property capital were fully expounded. The court declared that the policy of the statute was the creation and maintenance of a property capital "to the extent required by the charter" and that whatever property the corporation has up to that limit must be regarded as capital stock. When its property exceeds that limit, then the excess is surplus.

Formerly, corporation laws required all the authorized shares to be subscribed and issued at full par value before the commencement of business. Hence, the charter itself prescribed a legal capital fixed at the aggregate par value of the authorized shares (a sum in dollars fixed by the certificate of incorporation or charter). This full contribution was the required substitute for individual liability and established the legal limit on distributions. Now that the full authorized amount of capital need not be raised, the capital limit on distributions remains the aggregate par value of the shares issued,

5. 93 N. Y. 162 (1883).
6. In other New York cases the term "chartered capital" is sometimes used. See Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 266, 77 N. E. 13, 16 (1906); Randall v. Bailey, 23 N. Y. S. (2d) 173, 181 (Sup. Ct, 1st Dep't 1940) and cases cited; (1940) 50 Yale L. J. 306, 309.
not the actual value of the consideration received on the issuance of the shares. For it has been uniformly held that when a corporation goes forth into the business world it is supposed to have a capital at least equal to the par value of its issued shares. Creditors have a right to rely on the assumption that the par value of the shares has been fully paid and that the property taken in payment has been accepted at a fair valuation.

The author's lack of understanding of the concept of legal or stated capital is shown by his denial that the corporation is under any duty whatsoever to restore prior losses of capital out of subsequent earnings. He asserts that there can be no "division" of capital which the corporation did not receive in the first instance (due to a fictitious payment) or which has been dissipated by losses in a prior accounting period. But, as indicated in his own illustration of a "bin of assets," legal capital is not something received; it is rather like a mark or gauge on the side of a bin or reservoir of assets fixed at a certain minimum figure by the law. If the assets are equal to or below that figure, they are covered by the capital limitation and restricted against withdrawal. Only the excess or amount above the mark is surplus which may be withdrawn. It is not necessary to have a statutory provision requiring that profits be appropriated to make good a deficit of capital because the legal capital measure automatically covers all values below the capital amount in the reservoir of assets and all funds that come into the treasury become at once capital until there is an excess over the capital mark. The result is that in spite of gains by income there will be no net profits, but only a smaller deficit. The author's ideas indeed seem to be drawn from the peculiar British theory of capital which has been regarded as inapplicable in this country. Ideas such as that impairment of asset capital "reduces" the legal capital, that a corporation may, for accounting purposes, start at the beginning of each year or other accounting period with a new legal capital so impaired and that such a possibility is left open under many American statutes, seem to result almost entirely from a failure to observe the development and doctrine of American statutes concerning this reduction of capital.

The question of the effect of stock watering on the right of a corporation to pay dividends without making up the initial deficit of legal capital presents some conflict in the decisions. The author takes much too seriously the

8. P. 28; see Ballantine and Hills, Corporate Capital and Restrictions Upon Dividends under Modern Corporation Law (1935) 23 Calif. L. Rev. 229, 234.
9. See National Newark & Essex Banking Co. v. Durant Motor Co., 124 N. J. Eq. 213, 1 A. (2d) 316 (1938), aff'd, 125 N. J. Eq. 435, 5 A. (2d) 315 (1939) (no dividends can be paid from "profits" while a deficit remains). Mr. Kehl, however, disapproves of this case.
10. As to the English theory, see Weiner, Theory of Anglo-American Dividend Law: The English Cases (1928) 28 Col. L. Rev. 1046, 1056-60; Ballantine and Hills, supra note 8, at 242; Reiter, Profits, Dividends, and the Law (1926) 59-62, 75-84; Samuels, Shareholders' Money (1933) 146, 149, 347.
peculiar case of *Goodnow v. American Writing Paper Company*. In that case the value of the present assets exceeded the value of the actual assets with which the corporation began business. The stock had been issued at a grossly excessive valuation. The complainant contended that a dividend could not be paid until the capital deficit—represented by the difference between the actual value received and the grossly excessive valuation—had been restored. The Court found that "profits" and "surplus" were alternatives, and that "capital stock" as used in the statute referred to actual value paid in and not to par value. It did not decide whether "net profits" meant the net profits upon the whole of the company's business from its organization or the profits of the current year (the difference between gross earnings and operating expenses for that year), inasmuch as either test would have been satisfied. Thus, under the *Goodnow* case, if nothing were paid for watered stock except blue sky, no margin of assets would be required for creditors who would be left to bear all the risks of the business. All the current earnings could be frittered away in dividends, although the corporation had issued shares of large aggregate value.

Under the acts of some states apparent alternatives are provided by language stating that dividends may be declared out of "surplus" or "net profits" or "earnings." Often, however, these terms are used in combination with a prohibition against the impairment, division, or withdrawal of capital or capital stock, as in the New Jersey statute. In such cases it seems clear that the terms are used simply as part of the description of earned surplus so as to include undivided profits which may be carried in a separate account. In only five states are profits of the current or preceding year clearly specified as an alternative source, despite impairment of capital. In most of the statutes, however, in which the terms "net profits" or "earnings" are employed without specifying some particular period for their determination, they mean accumulated profits or earned surplus and no alternative to surplus is intended. It is very doubtful whether the statutory draftsmen, who were not accountants, made any distinction between these words, and it is absurd to deny the possibility of the use of synonyms in statutes, even

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12. 73 N. J. Eq. 692, 69 Atl. 1014 (1908). See note 11 * supra*. He fails to cite the cases *contra*.

13. Note that Peters v. U. S. Mortgage Co., 13 Del. Ch. 11, 17, 18, 114 Atl. 593, 601, 602 (1921), which stated erroneously that "capital stock paid in was used in ascertaining surplus by the New Jersey court" and purported to follow that doctrine in ascertaining surplus, is now discredited by the present Delaware General Corporation Law, Section 14, clearly defining the method of determining the amount of capital to include the aggregate par value of all shares issued.


if such language is surplusage, for frequently different clauses are restatements of the same test. The author presents the Indiana Corporation Act as an instance in a modern revision of an "almost unintelligible dividend regulation." He first finds supposed "alternatives" of surplus earnings and net profits and then finds the "enlarging effect" of such alternatives counteracted by an express provision against capital impairment. It is only by reason of the author's fixed idea about alternatives and his unwillingness to construe a statute as a whole that there is any difficulty. The word "or" is a big word for the author. He calls it a "statutory dichotomy" which "necessitates making some differentiation between surplus and net profits." He is an ardent advocate of current profits as the basic concept and of the right to pay dividends from such profits, even when there is capital impairment—a bias which may color his interpretation of statutes and charters. The author advocates "double alternatives" to open as many doors or channels as possible in the bin or reservoir or dike of assets so as to conduct assets into the pockets of the shareholders. In fact, he seems to find triplicate and quadruplicate alternatives or leaks in the dike, by indorsing lax rules of accounting which do not take account of catastrophic losses on the profit and loss statement but which recognize the technical possibility of an earned surplus in the face of a capital deficit, and the theory that capital stock is automatically reduced by losses. Hence, a corporation may be going deeper and deeper into the red and still distribute "profits" which do not come "directly" out of capital. The more a corporation waters its stock or impairs its capital by losses, the less the required margin of assets becomes, until it may approach zero, and all protection provided for creditors, present and future, as well as for shareholders, may vanish. And while the author does not advocate the distribution of profits on particular transactions, he does believe in relying on profits as shown by income statements for an arbitrary period in preference to balance sheets which present a long term picture. But it is the opinion of the reviewers that both financial statements ought to be considered in ascertaining the financial condition of the corporation. Current profits measured by annual income statements ought not to be taken as a source of dividends without some further restrictions. 

In short, Kehl's Canons of Construction are not conducive to the preservation of capital funds for creditors. The author raises needless doubts and views for which little can be said are given greater credence than those which are generally accepted and for which there is strong authority and policy. 

Henry W. Ballantine†
George S. Hills‡

†Professor of Law, University of California, School of Jurisprudence.
‡‡Member of the New York Bar.
This casebook is intended by Professor Brown, of the University of Wisconsin, to be used in the first year course in Real Property. Presumably it is to be preceded by the course in Personal Property, and is to be followed by specialized courses, often elective, such as Rights in Land, Conveyances, Landlord and Tenant, and Future Interests.

The book is a study in compression. In 75 pages of clear, terse prose Professor Brown presents for the beginning student an analysis of basic concepts and a brief survey of the Feudal system, the common law scheme of estates, and the famous English statutes. The various possessory estates are then treated in succession by the conventional use of cases and notes. The freehold estates (fee simple, fee tail and the various life estates) are given about 75 pages; the tenancy for years and the lesser tenancies are given 105 pages; co-tenancies receive more ample treatment in 70 pages; and future estates require the remaining 225 pages.

After some of the recent ostentatious casebooks, this one might seem thin and meager. But there is hardly a wasted word. The cases are seldom novel or colorful. They are not even conspicuously recent, but they are chosen with great care both for the orderly development of the subject and for economy of space. The policy followed in preparing the notes is especially commendable: the citations are not so numerous as to discourage a student, but every reference is to a case or note or article which would be worth a student's time to read. One who has himself prepared a casebook in real property is not likely to find in this book many cases which he wished he had used, but in observing Professor Brown's sound craftsmanship, he might well wish that he had taken more time to cut out some or edit others which he did use.

But the book is too descriptive. There is seldom a provocative clash in authority—unless, of course, students can be relied upon to read the cases in the notes. A case is often chosen because the judge has given a neat historical survey or a "pat" summary of the law. And obviously the narrow space limits have compelled the editor to leave out much interesting and important law. Perhaps it is defensible to cut dower down to a few pages and courtesy to a single case, but the modern statutory substitutes should be given some space. (Bodner v. Fcit is cited for another point.) The treatment of the life tenant-remainderman relation could profitably have been expanded. There is only a brief note on special assessments, and no treatment of such interesting cases as those in which a remainderman seeks to share in the sum a life tenant has recovered for permanent injury to the land or buildings, or in the proceeds of an insurance policy carried by the life tenant, or in an outstanding interest acquired by the life tenant. The space allotted to landlord and tenant should, in my judgment, have been doubled at least. Even if it is conceded that such matters as percentage leases, security deposits, and the effect of bankruptcy on leases should not be covered by principal cases, still a note might be included. Dyett v. Pendleton may be the best case on constructive eviction, and McCullough v.
Cox as good as any on dependence of covenants in a lease, but they should not be the only cases reprinted. Many of the best cases are cited in the notes, but would not class discussions be improved if a few more were reprinted?

The most serious question is whether the subject of future interests is entitled to nearly half of the space in a casebook for first year students. Professor Brown's argument is that since so few students elect the advanced course in future interests, all students should have a speed course in it. The treatment here is not merely a survey. It is a full-dress course in miniature. Some of us have long thought that it was better to give all students a moderate course in future interests instead of giving a definitive course to a few. But this seems a case of too little and too soon. In my judgment this “sneak preview” will not encourage students to take the full course, nor will it give them sufficient training by itself.

If five or six separate courses in property are to be continued, a book like this is a good introduction. Many of us who, as students took two or three of the separate courses, received no clear idea of the law of property as a whole. Property seems to me the best of all subjects for a “combination course.” But if students are to be permitted to study intensively a few random fragments of the whole, then a book like this gives them a good bird's eye view of the whole field — even if many of the topics must be covered again in later courses.

RUSSELL DENISON NILES†


International law and its exponents have not lately, to put it mildly, been held in high esteem. It must be conceded that even before lawlessness in the international community became the revered order of the day rather than the exception, faith in this branch of the legal science stood on a ledge too narrow for safety. It is, therefore, not surprising that the recent unqualified adoption of the “might makes right” theory throughout the world has resulted in increasing criticism both in volume and in tone. In this instance, the indictment was drawn up by a guild member who has in the past made valuable contributions to international law both as a practitioner and as a writer. Judge Ralston, the author of this book, served at the beginning of this century as American agent in the Pious Fund case before the Permanent Court of Arbitration and as Umpire of the Italian-Venezuelan Claims Commission; he has also written several books which have commanded at least the attention and the respect of students of international affairs.† Therefore, his attack against what in his opinion is international

†Professor of Law, New York University.

1. DEMOCRACY'S INTERNATIONAL LAW, reviewed by Professor Borchard in (1923) 32 YALE L. J. 520; LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS, reviewed by Mr. Frederic R. Coudert in (1927) 36 id. 583; INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO, reviewed by Professor Borchard in (1931) 40 id. 835.
“law” by courtesy only (p. 38) and the scorn which he heaps on international lawyers cannot be lightly disregarded.

Judge Ralston's thesis, in brief, is that international law failed because it took a fiction—the State—as the unit of the community whose relations it aspired to regulate. In seeking to turn this fiction into a reality and in proceeding to worship it, international law forgot the individual, the only reality composing the nation or the state. In the author's opinion, human beings rather than States should be treated as units of international law; the same rules of morality should apply to the conduct of nations as obtain in the relations of man to man, because the multiplication of the units of law—of all law—namely men, into societal groups does not change the fundamental characteristics of human intercourse as governed by natural law. As expressed by Judge Ralston, international law ought to be the law of peoples and not of rulers (p. 44). It is in the light of this thesis that fundamental concepts of international law are dissected and rejected: the State, as the unit; its attributes—sovereignty, independence and equality; the laws of war and of neutrality; and the more dramatic incidents of international relations—intervention, the assertion of national and vital interests and imperialism.

The author's underlying thesis that international law cannot accomplish anything because it runs contrary to the “natural law” governing individuals has already been expounded—less forcefully perhaps—in his Democracy's International Law. Do the distressing events of the last decade give support to his claim that anarchy may be avoided in the international community by piercing the corporate veil of the State and looking behind it to the individual? The suggestion is certainly attractive at first glance; it appeals to the humanitarian instinct. But how far are Judge Ralston's fundamental postulates founded in reality? Is it true that the State or nation, or any other organized group, is nothing more than the simple mathematical aggregate of the individuals who compose it, and that if their activity to accomplish a desired objective or their mental reaction to a given issue could be reduced to pounds or inches, it would add up to nothing more and nothing less than the sum total of what each of the individuals are capable or willing to exert? My observation induces me to believe that in association, even of small groups of very rational men and women, individuality is to a large extent lost and the action or reaction of the group in most instances differs substantially from that which would have obtained if the individual had not been subjected to that mysterious and unfortunately unascertainable influence which, in a crowd, seems to work certain transformations on the human mind. I am not only thinking here of what is rudely called “mob-psychology” which induces otherwise sensible people to cry themselves hoarse when they assemble before the Palazzo Venetia in Rome to hear their Prime Minister or gather in Madison Square Garden for a meeting of the America First Committee or of the Committee to Defend America by Aiding the Allies. What I have in mind is rather a small group of select persons, pursuing a common objective, knowing each other and getting along fairly well—let us say, the members of a university class or the faculty of a university department. Surely, they are different
in group and in individual relationships; and it is not too far-fetched to say that the larger, the more mingled, the more indeterminate the group, the wider is the gulf between the group as a whole and the aggregate of its components.

Then Judge Ralston repeatedly urges us to apply the same rules of morality and conduct to relations between States as are accepted for regulating the intercourse between individuals (p. 33); he believes that much would be gained if nations would act as gentlemen act in private life (pp. 9, 84). Again, on its face, this suggestion is entitled to unqualified endorsement. But are the “rules of morality” the same or even approximately the same in all parts of the world? Assuredly not. For instance, I understand that the Japanese regard it the highest honor to die in battle for the Emperor, whereas the burden of Judge Ralston’s book is to awaken people to the imbecility of war. Which, then, of the “rules of morality” would be applied to the world at large: those prevailing in Japan, or those prevailing in the United States? In this connection, passing reference may be made to Judge Ralston’s belief that few, if any, of the “plain citizens” of England, France and Germany had “the slightest desire” to go to the war which now rages in Europe (p. 73). The finding undoubtedly applies to England and France; but no one who saw Germany in the years preceding September, 1939 can earnestly contend that the German people did not want this war. It is likely that there were perhaps a considerable number of people in Germany who looked with apprehension at the possibility of a war; but the majority very decidedly did want the war.

And what about this gentlemanly behavior? The first thing which comes to mind is again the wide difference in outlook as to what is required of a gentleman—let us say in Italy, or in Japan, or in the United States. Which of the accepted requirements shall apply in the society of nations? The fact that Greater Germany’s Foreign Minister stated as one of his country’s war aims the destruction of “gentlemen” in the world might be disregarded were it not for Judge Ralston’s citation of Holland, Denmark, Sweden and Norway as illustrations of gentlemanly attitudes of nations (p. 110).

There are other aspects of Judge Ralston’s arguments which invite doubts. I suppose the utilitarian theory is as acceptable a foundation of law as can be found. Yet the greatest benefit for the common man need not be conceived in economic formulas exclusively. The author states the issues in those terms only. The ills of international society are traced to protective tariffs and other barriers to free trade and to the struggle for control over natural resources (p. 95 ff); the Versailles Treaty is criticized primarily from the economic point of view (see Chapter XIII, p. 141 ff); the source of imperialism, in its most blatant form—i.e. colonial possessions—is found in the desire to control trade and natural resources and supplies of cheap labor (p. 162). The pattern on which the author would fashion a better international society is the United States where the absence of strife is explained on the ground of absence of barriers to free trade. Without in any way belittling the tremendous importance of economic factors as sources of wars, declared and undeclared, it is submitted that the causes
of so many bloody struggles cannot be reduced to as simple and tangible a formula as an export-import balance. If it is true, even in a limited sense, that the State or Nation is merely an aggregate of the individuals who compose it, then surely Judge Ralston will concede that the motives of men in breaching the municipal law against murder or theft, are not always economic. Indeed the French, who always were masters of fine legal distinctions, created in their law of homicide the category of “crime de passion” which, because of the very absence of any sordid economic motive, is treated differently from ordinary murder. I should not like to be misunderstood as endorsing war as a method of settling controversy between states, but it seems to me that if the reasons for the wars in the course of many thousands of years of history are as simple as Judge Ralston appears to think, then inability or unwillingness to put an end to wars proves nothing but the infinite and incurable foolishness of the human race.

I found this book interesting and entertaining because of its vigorous style and the obvious sincerity of its criticism, much of which is perfectly true and to a large measure justified. But as an answer to the solution for which we all search, it gives but little satisfaction. The world which the author envisages is not one which we ourselves, our children or grandchildren may hope to live to see, but one which may come, perhaps, after centuries of purposeful education designed to change human nature, which is fundamentally predatory, selfish, covetous and often cruel. Education heretofore has done little to change human nature, except by incantation. Something more than the absence of trade barriers will be necessary to induce the nations of the world to follow the example of the United States. For myself, I should like to believe that economic aspirations were not the sole consideration which led to the establishment of this union but that there were other motives of a more lofty nature which continue to operate with sufficient strength to make it worthwhile for us to defend, if necessary, the land, the institutions and the way of life the American people have chosen in the pursuit of their happiness—however imperfect they may be.

FRANCIS DEÁK†


This volume shows the result of research and industry. The author sets out to indicate how prima facie defenses to various causes of action may be proven to assist “the neophyte at the Bar” and the established lawyer. He furnishes a starting point for further research by the citation of leading cases. The author sums up the fundamental object of his work in this sentence: “In short, the basic purpose of the present volume is to make available to the legal profession a practical working tool for use in preparing for trial and in preliminary interviewing of clients.” The book deals with

†Assistant Professor of Law, Columbia Law School.
certain specified defenses and situations common to many defenses, setting forth the questions which the author believes it necessary to be asked.

From the author's statement that his book is not designed merely for the purpose of "assisting the neophyte at the Bar," the question suggests itself: What is its practical utility to the busy working lawyer? For a lawyer not a neophyte would have small patience and less time for the reading of a book which tells him how to ask: "Q.: Are you the defendant in this case?"; "Q.: What is your business or occupation?", etc. I doubt whether this book would be of much use to the actual practitioner. If a lawyer does not already know, for example, what constitutes failure of consideration or "contributory negligence," or what is "condonation" in a divorce case, and so on, I think he would turn to a fundamental treatise on the substantive law.

Having determined exactly what are the elements of a defense in any particular action, no lawyer who is qualified to take the case need be told the exact form in which the questions should be asked. The oral interrogation of witnesses in court, whether in cross-examination or in direct, is surely not a mechanical performance. It is not something which can be performed by rote. What to ask, what not to ask, how much and how little to ask depend, not only upon the mastery of the law of the case, but upon a complete understanding of the facts communicated to the lawyer by his client. But even this is not enough. No lawyer goes into a case knowing all the facts. There are many facts which his client does not know. There are many situations about which the lawyer in the trial of his case must make a shrewd guess. Knowledge of the law and of such facts as he can learn before going into court is only the groundwork, the foundation of the lawyer's effort in the trial of the action. These are the fundamentals. How and in what way he will use them depend upon experience, ability and perception.

Much has been written about the art of cross-examination. The art of direct examination, though less dramatic, is of at least equal importance and commands at least equal talent and finesse. I do not think that these things can be learned out of any law book as a matter of fact, or can they be taught by a professor. Legal treatises, of course, are essential, but how to ask a question either on direct or cross-examination can be learned only through experience.

The book is the conscientious effort of this lawyer-author to pass along to others practical hints which his experience has already taught him. Perhaps some lawyers might find it useful. It would undoubtedly be suggestive to a lawyer who has had but little experience in court and has never had a case involving any of the defenses here discussed.

LLOYD PAUL STRYKER†

†Member of the New York Bar.