Chicago-Kent Law Review

Volume 17 | Issue 2 Article 8

March 1939

Book Reviews

George S. Stansell

CHIEF JUSTICE WAITE. Bruce R. Trimble. Princeton, New Jersey: Princeton University Press, 1938. Pp. ix, 320.

"Here is the story of a lawyer of ordinary attainments, with no prior judicial experience, who became a great administrator and a judge of recognized ability." Dr. Trimble thus summarizes the career of Morrison R. Waite, seventh Chief Justice of the United States. The place of the Supreme Court in legal and constitutional development has been the subject of a considerable inquiry. The interested reader may select from a modest library a number of books which effectively present the influence of the court upon our national affairs. Its doctrines have been critically examined, its dogmas have been vigorously attacked, and its statesmanship has frequently been praised. But to the average reader the court has remained an institution and a symbol. Rarely has he been afforded glimpses of the court in action. With a few marked exceptions little has been told of the frequently clashing personalities of its judges. "The prejudices which judges share with their fellow men" have received surprisingly little scrutiny in the years since Mr. Justice Holmes' reminder of their importance over the syllogism.

Certain men have received their share and more than their share of the attention which has been paid to personalities. The august and angular figure of John Marshall stalks through the pages of many volumes. Story, Taney, and Field take on individuality, and in our times, anecdote aside, Holmes, Brandeis, and Cardozo. But the tendency of the literature has been to merge the personalities of the judges in the collective personality of their court. Mr. Justice Frankfurter has written: "A full length analysis of only two or three of the seventy-eight Supreme Court Justices has been attempted. Yet not less than a dozen had a major share in shaping the doctrines by which American constitutional law has been moulded. Until we have penetrating studies of the influence of these men we shall not have an adequate history of the Supreme Court and, therefore, of the United States."[1] It is tempting to add that such studies will be needed for the story of American law that must eventually be written.

Morrison Remick Waite is entitled to a position among the justices whose influence upon the course of American constitutional law has been greatest. Dr. Trimble's book is therefore a much needed addition to the slowly lengthening list of biographies of members of the Supreme Court.

The first eight chapters, comprising somewhat less than one-half of the volume, are devoted to tracing the events of the first fifty-seven years of Waite's life, or until he was nominated on January 19, 1874, by President Grant for the office of Chief Justice of the United States. In these pages we have the story of the life of an ordinarily successful lawyer in

[1] F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite (The University of North Carolina Press, Chapel Hill, 1937), 6.

pre-civil-war Ohio. Waite's rise to a position of prominence at the Ohio bar was comparatively uneventful. While he was actively engaged in politics he did not hold public office and the chief recognition of his talent and ability as a lawyer came in 1872 when he was appointed one of counsel for the United States to appear before the board of arbitrators at Geneva, chosen to adjust the differences between the United States and Great Britain arising out of British activities during the Civil War. He appears to have discharged his duties capably and was honored upon his return. Waite was serving as President of the Ohio Constitutional Convention of 1873 when he received word of his appointment as Chief Justice.

Dr. Trimble devotes the eighth chapter of his book to a discussion of the political events leading to the selection of Waite by President Grant after Grant had withdrawn the nomination of George H. Williams of Oregon and a Republican caucus had rejected the nomination of Caleb Cushing of Massachusetts. The remainder of the volume is devoted to a consideration of Waite's opinions and work as Chief Justice.

Of the remaining eight chapters one is devoted to the effect of withdrawing the court from politics occasioned by Waite's refusal to be considered as a candidate for the presidency in 1876. One is devoted to an appraisal of Waite's performance as an administrator in the position of Chief Justice. The other six chapters deal with his constitutional opinions. Dr. Trimble has organized his material so as to treat separately of Waite's attitude toward reconstruction, his opinions in the Granger cases,[2] his contribution to the evolving of "due process," his influence in imposing limitations on the Dartmouth College case, and his construction of the commerce clause.

The figure of Waite has been a shadowy one in American constitutional history. The opinion in *Munn* v. *Illinois* has been one of the most discussed opinions ever rendered by a judge of the Supreme Court; but its author has had far less than his share of attention. As Frankfurter has pointed out this may have been due to two factors. Waite's opinions are not examples of literary brilliance. Moreover, he believed self-restraint in the exercise of judicial power to be the first duty of a judge in constitutional cases. A proper respect and allowance for legislative judgment was always present in his mind. Whatever the reason he has until now been neglected by biographers and historians alike.

Dr. Trimble's book is an adequate presentation of the facts and events of Waite's life. It contributes much to a clearer understanding of the man who unintentionally laid the foundations of the public utility concept. In the years after *Brass* v. *North Dakota*[3] and down to the decision in *Nebbia* v. *New York*[4] the appearance of definiteness in the phrase "busi-

2 Munn v. Illinois, 94 U.S. 113, 24 L. Ed. 77 (1877); C. B. & Q. R. R. Co. v. Iowa, 94 U.S. 155, 24 L. Ed. 94 (1877); Peik v. C. & N. W. Ry. Co., 94 U.S. 164, 24 L. Ed. 97 (1877); Winona & St. Peter R. R. Co. v. Blake, 94 U.S. 180, 24 L. Ed. 99 (1877); Stone v. Wisconsin, 94 U.S. 181, 24 L. Ed. 102 (1877).

3 153 U.S. 391, 14 S. Ct. 857, 38 L. Ed. 757 (1894).

4 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934).

ness affected with a public interest" was often used by the court to confine regulation of business by government within the relatively narrow limits which the majority of the court thought proper. Waite would not have used the phrase this way. The deference he thought due the legislative judgment would have prevented his sanctioning the new content of his words.

This reviewer has the impression that Dr. Trimble felt himself limited by considerations of space to a strictly narrative treatment of the events of Waite's life. We are told of his warm personality and of his many friends, but we are not given the opportunity to see that personality in action. We must take the biographer's word for the kind of man he was. The expansion of the first part of the book would have permitted the reader a deeper insight into the character of this "Defender of the Public Interest."

Dr. Trimble's treatment of Waite's capacity as an administrator likewise merits amplification. The brief chapter entitled "Behind Conference Doors" gives us all too fleeting a glimpse of the relations between the Chief Justice and the members of his court. It is to be regretted that in his portrait of Waite Dr. Trimble did not feel that space permitted him to brush in the features of some of the members of his court. We miss the personalities of Field, Bradley and Harlan.

In his treatment of the constitutional issues coming before the court during the fourteen years of Waite's chief justiceship, Dr. Trimble is a faithful narrator of his subject's views. When dealing with the development of due process of law the author is inclined to accept rather than critically examine the court's value-judgments.

Perhaps the most instructive part of the book dealing with Waite's constitutional views is the chapter devoted to his interpretation of the contract clause. Dr. Trimble has presented admirably the process by which the doctrine of the Dartmouth College case was narrowed. The cases discussed in this chapter, in some of which Waite dissented, are perhaps more revealing of his basic assumptions than any others.

A good many people will disagree with some of the author's own views which he has expressed in this book. It is possible also to disagree with his interpretation of some of the cases. The present reviewer regrets that Dr. Trimble did not treat more adequately cases such as *Pensacola Telegraph Company* v. *Western Union Telegraph Company*.[5] The effects of the decision in this case were among the most far-reaching of any of those in which Waite participated. Regardless of these criticisms, Dr. Trimble has made much more discernible the character of one of the most important of our constitutional interpreters. ROGER L. SEVERNS[6]

CHAPTER TEN. CORPORATE REORGANIZATION UNDER THE FEDERAL STATUTE. Luther D. Swanstrom. Chicago: The Foundation Press, Inc., 1938. Pp. xvi, 473.

It too frequently happens that practioners best qualified to write about

[5] 96 U.S. 1, 24 L. Ed. 708 (1878).

[6] Professor of Law, Chicago-Kent College of Law.

the law are so busily engaged in the legal arena actually building the law that they have little time to describe in detail the rambling structure which they have assisted in creating. Occasionally, however, such a builder does pause in his labors long enough to sketch the structure of his specialty in broad outline, indicating its fundamental anatomy, and commenting particularly upon certain details. Such it would seem is the present offering, and to any charge that he has not made the maximum contribution, the author pleads guilty in advance. He tells us in his preface[1] that "no pretense is made of a finished and comprehensive treatment," and modestly admits that such value as the work "may have lies in the fact that it is framed in practice by a practioner whose time and interest have been consistently devoted to the subject" since the adoption of Section 77B.

The text consists of eight terse chapters dealing respectively with Bankruptcy Power; Parties, Practice and Procedure; Administration; Claims and Classification; Plan; Allowances; Tax Provisions; and Applicability. The text is followed by three appendices. The first of these sets out 77B, broken down into small subdivisions, each of which carries two references, one to the corresponding section of the Chandler Act, the other, to the text. The second appendix sets forth the Chandler Act, with each provision of Chapter X thereof cross-referenced, first to Section 77B as set out in the first appendix, and second, to the text. The third appendix contains the complete text of Section 75, dealing with agricultural compositions, Section 77, dealing with railroad reorganization, and Chapter IX of the Chandler Act (Chapter X of the former act) dealing with readjustment of taxing districts. These are followed by a rather novel "Citator" of reorganization cases, to which reference will be made later. The work concludes with separate indices to Chapter X and to the text.

In the text the author has synthesized Section 77B, Chapter X, the problems presented, the judicial solutions insofar as the courts have passed upon them, and, certainly not least important, suggested solutions of problems not yet adjudicated. The footnotes, while embracing all of the statutory reorganization cases, are limited to those decisions, except for the inclusion of a few leading equity cases. In general, collateral authorities, both texts and equity cases, have been excluded. While the severity of this limitation has its obvious disadvantages, it does tend to focus attention on the cases immediately in point, and may well appeal to the reader who wants access to these authorities in a minimum amount of time. In reading Mr. Swanstrom's text, one feels little opportunity to browse in the by-paths of the subject, but rather that he is being impelled down the main highway by a busy guide who is much at home, and who answers his questions tersely, sometimes even curtly, with a passing reference to judicial pronouncements in which the traveler will find additional information, and who, upon being urged

[1] P. vii.

to state just what he will find in those pronouncements, simply admonishes the traveler to read them.

One feels a vigor about the work which smacks more of the court room, the referee's office, and the conference table, than of the academic cloister. One is conscious, however, that the author has developed a rather definite philosophy of the subject, concerning which he is quite insistent. For example, one suspects that Mr. Swanstrom's experience prior to the adoption of 77B in equity reorganization and mortgage foreclosure of large bond issues has convinced him of the inadequacy and inflexibility of such remedies. He does not write like a man to whom the equity limitations have become a way of life. Seemingly he regards the doctrine of the Boyd case[2] merely as a general guide to be applied insofar as practicable, but utterly unworkable in statutory reorganization if followed blindly as a strict mandate.[3] He seems to feel that the interests of the creditors as a class are not so well served by obtaining for them 100 per cent of the liquidation value of the tangible property of an insolvent debtor corporation, as they would be by obtaining for them 90 per cent of the total value of the assets, tangible and intangible, including good will and going value, and throwing the remaining 10 per cent to the stockholders and management to preserve the continuity of the enterprise.[4] He does not believe that all that is given to persons other than creditors is essentially taken away from the creditors, but realizes that, practically, the share of the creditors as a class may be greatly enhanced by such generosity.[5] Mr. Swanstrom is quite sure that Congress felt the same way and that it was its intention to relax the strictness of the equity requirements and permit the accomplishment of things impossible in the absence of the statute; that reorganization under the statute is not equity reorganization, and that the statute was designed to permit the courts to affect rights which the courts of equity as such could not affect[6]. He is convinced not only that the purpose of the statute is to reorganize and not to liquidate,[7] and that the interest of a majority of a class and of the public must override the legal license of particular persons to insist arbitrarily upon abstract, technical rights, but also that the statute is sufficiently flexible to achieve its purpose.[8] He objects in no uncertain terms to any attempt to "strait-jacket" the legislation by imposing upon it the limitations of the earlier equity cases, and insists that reorganization presents a practical problem, and involves a bargain.[9] His attitude may

2 Northern Pacific Ry. Co. v. Boyd, 228 U.S. 482, 33 S. Ct. 554, 57 L. Ed. 931 (1913).

3 Pp. 166, 172-173. "Applied equity is not opposed to participation in a common enterprise by junior interests on a parity with senior interests in proportions found fair and just by the judge, as guardian of the silent non-acceptors as well as the articulate objectors, under the peculiar exigencies of each reorganization problem, and when such participation does not result in oppression of minorities by accepting majorities." p. 173.

4 Pp. 167-168, 139, 151, 157, 166.

5 This is the practical phiolosophy underlying the so-called "ninety and ten" plans which have proved so successful under the statute.

6 Pp. 22, 24, 25, 165.

7 Pp. 21, 24, 138.

8 Pp. 25, 151, 157, 161, 165.

9 Pp. 171, vii-viii, 28, 169.

be characterized by use of his own aphoristic language: "In reorganization proceedings potency of fact surmounts authority of theory. Over-nice theories supported only by technicalities blossom well in the library, but they must yield to practical considerations dominant in the workshop and factory."[10]

The mechanism of the applicability chapter and of the "Citator" are worthy of particular mention. In addition to indicating concisely the applicability of general bankruptcy provisions to Chapter X and 77B proceedings, and of Supreme Court Orders to 77B,[11] the author indicates in tabular form the cases in which the applicability of each section of the general bankruptcy provisions have in fact been passed upon.[12] This device, segregating the reorganization cases, saves the practitioner the labor of examining all the cases, reorganization and others, ordinarily cited under the various general bankruptcy provisions, and directs his attention immediately to the reorganization cases.

In the novel Citator the author gives us not only an ordinary citator of all 77B and leading equity cases relied upon in 77B, but, with the eye of the practitioner, indicates which judge wrote the opinion, and what the division of the court was, if any.[13] This feature of the work is designed also to serve the purpose of a table of cases for the text, and is superior to the ordinary table of cases in that when several references are carried, the subject matter of each is indicated. Here again the advantages of limitation of the cases are obvious. Suppose for example that the attorney desires to know the treatment in statutory reorganization of the much discussed and much mooted Boyd case.[14] Referring to the ordinary citator he finds an entire column of citations in fine type to be examined, and an additional half column in the supplement. The "Citator" directs his attention immediately to the eleven reorganization cases in which the Boyd case is mentioned.[15]

In concluding, the reviewer cannot refrain from expressing the regret which must be felt by the entire legal profession, that the author has not given us the exhaustive, comprehensive treatment of the subject which he is so pre-eminently qualified to produce. It must be remembered, however, that he did not undertake to do so in the present volume, and that this work must be evaluated in view of what he has undertaken, rather than in the light of the maximum contribution which the profession might desire him to make. We must be content with expressing the sincere hope that he will see fit and find the time in the future to produce such an exhaustive treatise on the subject, which treatise will, however, by some ingenious mechanism—possibly the use of contrasting type styles—preserve the advantages of the present work which flow from the segregation of the reorganization cases from the general mass of collateral authorities. While the present work may not contribute a

10 P. 166.
11 Pp. 216-219.
12 Pp. 219-227.
13 Pp. 413-452.
14 Northern Pacific R. R. Co. v. Boyd, 228 U.S. 482, 33 S. Ct. 554, 57 L. Ed. 931 (1913).
15 P. 436.

great deal to the few specialists in the subject who have built their own sets of working papers, it is believed that the ordinary practitioner will certainly be grateful to Mr. Swanstrom for sharing his working papers with the bar at large. GEORGE S. STANSELL[16]

HANDBOOK OF THE CONFLICT OF LAWS. Herbert F. Goodrich. St. Paul, Minnesota: West Publishing Company, 1938, Second Edition. Pp. 624.

The first edition of this treatise appeared in 1927 and correlated the important decisions on this branch of law which had appeared since the early writings of Storey and Dicey. It was a thoroughly workmanlike accomplishment, which filled a long felt want and proved very useful to students of the law. However, in 1934 the Restatement of the Law of Conflicts was issued under the auspices of the American Law Institute. It became necessary then to reconsider and to rewrite the early treatise in part. This work the author has done in the second edition, bringing the subject down to date. The general plan of the work is identical with that of the early edition. The important difference is the attention given to the subject of Taxation and the cases thereon, and also the references to articles in the leading law periodicals, which have been distributed under appropriate subheadings. This work continues to be a highly with the bar at large. GEORGE S. STANSELL[16]

[16] Professor of Law, Chicago-Kent College of Law.

[1] Professor of Law, Chicago-Kent College of Law.