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BOOK REVIEWS

Law Finding Through Experience and Reason. By Roscoe Pound. Athens: University of Georgia Press. 1960. Pp. ix, 65. $2.50.

Roscoe Pound, Dean Emeritus of the Harvard Law School, and one of the world's great men in the field of jurisprudence, in his ninetieth year gave three lectures which are printed in this book. The occasion was the Centennial Celebration of the University of Georgia Law School, and the lectures were given in February, 1960. The little book would be noteworthy if for no other reason than that it reflects the views of a man so eminent, expressed at an age few men attain.

In the first lecture, entitled "Law Making and Law Finding," Pound contrasts making particular laws or rules by the exercise of the will of legislators with the process of finding law in the sense of broader principles. He takes the view that law in the latter sense is developed in large measure out of ideals combined with experience, and he supports his position with material taken from his voluminous learning. He traces the stages through which systems of law have developed and in so doing summarizes much of the material to be found in his article, *The End of Law as Developed in Legal Rules and Doctrines,* written in 1914.[1] His lecture carries the discussion up to the present.

In the current stage of legal development Pound sees a trend away from local law and in the direction of universality. Behind such a trend he points to the increasing commercial unification of the world and the annihilation of distance by air transportation. In this connection he argues that we shall have to get rid of the idea that law "is a body of commands of a political sovereign and that a politically organized world-state is a necessary prerequisite of a law of the world."

The reviewer believes that this latter statement of Pound's is valid only within limitations. A commercial law of the world can operate without a global sovereign to issue rules in the form of commands and enforce them, but Pound himself in the article referred to above pointed out that the first objective of law in its earliest stage is to keep the peace.[2] To date this has been successfully done within particular nations by law enforced by government but has not been accomplished on an international scale for lack of any world government capable of enforcing world law. The present precarious position of the peoples of the earth should make it plain that global law without an organization to enforce it falls short of insuring an orderly world.

[1] 27 HARV. L. REV. 195.
[2] *Id.* at 198.

In his second lecture, "Stare Decisis," Pound continues his theme that law is, in considerable measure, found as distinguished from artificially created. He points out that law never stands still; that along with stability in a legal order there must be flexibility, a continual overhauling and refitting to the changes in the life of the society which the law governs. The apparatus for making this continuous adjustment includes law making by legislation, but it also includes law finding, the ascertainment of principles by judicial decision and juristic writing.

Pound reviews the juristic position of the neo-Kantians, led by Rudolph Stammler, and notes the widening gap today between the neo-Kantians represented by Giorgio Del Vecchio and those represented by Hans Kelsen. He also sketches the position of the neo-Hegelians, neo-idealists, revived law of nature school of jurists in France, and neo-realists. In connection with the latter group he makes an interesting one paragraph thumbnail sketch of a group of Swedish realists who are "explaining psychologically law as an aggregate of independent imperatives establishing behavior patterns for those whom a lawmaking authority seeks to influence."

Pound's emphasis, as in his earlier works, remains on sociological jurisprudence. He states that the sociological jurist of today insists on: (1) study of the social effects of legal institutions, precepts, and doctrines; (2) study of means of making the precepts effective; (3) psychological study of judicial, administrative, legislative, and juristic processes; (4) study of what social effects legal doctrines have produced in the past, and how; and (5) individualized application of legal precepts looking to reasonable and just solution of individual cases.

When law is found judicially and is embodied in decisions, stare decisis introduces stability in that the decisions are followed as precedents. Pound argues, however, that they are not to be followed blindly, but in the light of changed conditions. He calls attention to cases recognizing stare decisis as "a principle of social policy rather than an inflexible rule of law."

Pound's third lecture is on "Reason and Reasoning in Law Finding." In it he makes a distinction between reason and reasoning. He criticizes rigid legal reasoning by analogy and by deduction from fixed conceptions as a means of solving new problems. Such artificial logic brings law out of accord with reason or reasonableness, which takes account of the importance of changed conditions. The contrast seems to be one between law tied to concepts and law geared to human needs and purposes. One of Pound's many illustrations is the linking of restitution with the concept of contract so that restitution to prevent unjust enrichment was tied to the analogy of recovery on an express promise.

These lectures are not closely knit treatments of particular subjects but broad discussions on a large scale, bringing into play many juristic points of view. Pound, the profound student of the juristic past, also remains an observer and participant in the movements and changes of the present. In this book he brings to bear much of the erudition with which students of Pound are familiar, and blends with it a scholar's appraisal of today's juristic scene.

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The Law of Corporations. By Norman D. Lattin. Brooklyn: The Foundation Press, Inc. 1959. Pp. 613. $8.00.

Professor Lattin's one-volume student text on corporations is the first of its kind in two decades.[1] Although his work is more compact than his predecessors',[2] he has, by eschewing such esoteric subjects as corporate liability for torts and crimes[3] and the admission and "presence" of foreign corporations,[4] covered most of the area the student will encounter in the usual law school course on corporations.

Most, but not all, for there are a few serious deficiencies. Four pages on the federal Securities Act[5] are inadequate to deal with the extensive impact of that act upon corporate flotations. Two pages on the fraud provisions of Sec. 10(b),[6] eight on the "short swing" provisions of Sec. 16[7] and four on the proxy provisions of Sec. 14(a)[8] of the Securities Exchange Act do not do justice to that act. Finally, nothing but hornbook tradition can justify the omission of any treatment of debt financing in a book which devoted more than one hundred pages to pre- and post-incorporation stock issues. Debt accounts for 40-45% of all corporate financing; and outside equity financing represents a small part of the 55-60% remainder, which consists largely of retained earnings and de-

[1] OLECK, MODERN CORPORATION LAW (student ed. 1960) is a "digest of extracts" from a five-volume practitioners' treatise designed to demonstrate "the invalid half-truth" of the hornbook writers' premise "that it is better for a student to learn much about little than little about much" (p. iii). The premise seems to me to be unimpaired.

[2] BALLANTINE ON CORPORATIONS (rev. ed. 1946) (992 pages); STEVENS, THE LAW OF PRIVATE CORPORATIONS (2d ed. 1949) (1125 pages).

[3] BALLANTINE, *op. cit. supra* note 2, at 270-282; Stevens, *op. cit. supra* note 2, at 355-375.

[4] STEVENS, *op. cit. supra* note 2, 966-1018.

[5] Pp. 126-127, 146-147.

[6] Pp. 274-276.

[7] Pp. 276-284.

[8] Pp. 309-313.

preciation allowances.[9] Except for the few schools which can afford the luxury of a separate course in corporate finance, the student must learn what he learns of debt issues in the basic course in corporations.

Space for the treatment of these matters would have been available had Professor Lattin departed further from the traditional pattern of the hornbook on corporations. With improved draftsmanship of corporate articles and frequent legislative attention to the problem, the old ultra vires doctrine is not of sufficient contemporary importance to warrant thirty-three pages.[10] Legislative attention again plus Professor Frey's exhaustive efforts of a few years ago[11] leave less that needs to be said about the de facto corporation than will justify twenty-eight pages.[12] The chapter on choice of business form,[13] essentially a small business problem, does not "come off." Tax considerations will usually be controlling and can never be ignored, but a work this size cannot deal adequately with these considerations. The better part of valor would have been to omit the fifty-nine page chapter and refer the student to the American Law Institute's two-hundred page pamphlet,[14] now in the process of revision.

Within the coverage he undertakes, however, Professor Lattin's treatment is for the most part unexceptionable. But again the "most" qualification is necessary, for two reservations must be made.

There are, in the first place, occasional puzzling omissions:

(1) The discussion of the liability of shareholders in undercapitalized corporations reaches the conclusion that innocent and inactive shareholders should not be liable to corporate creditors. This conclusion is rested on analogy to cases dealing with defectively formed corporations.[15] No mention is made of the fact that the Supreme Court has reached the opposite conclusion, that even an innocent shareholder should be vicariously responsible for the knowing acts of corporate directors.[16] Although this decision is not binding on state courts if the corporate liability is not federally created, its existence might at least have been acknowledged.

[9] See Lintner, *Financing of Corporations,* in MASON, THE CORPORATION IN MODERN SOCIETY 177-181 (1960).

[10] Pp. 177-210. Professor Lattin's own estimate is that "within the next quarter-century the subject of ultra vires will be of historic value only." P. 191.

[11] Frey, *Legal Analysis And The "De Facto" Doctrine,* 100 U. PA. L. REV. 1153 (1952).

[12] Pp. 148-176.

[13] Pp. 1-59.

[14] SARNER AND METTE, ORGANIZATIONAL PROBLEMS OF SMALL BUSINESS (1956).

[15] P. 71.

[16] Anderson v. Abbott, 321 U.S. 349 (1944), cited on p. 73 for the proposition that "use of a holding company to avoid a statutory double liability provision placed upon shareholders in banking corporations [will] not . . . relieve the shareholders in the holding company from this double liability."

(2) The entire discussion of underwriting agreements[17] proceeds on the assumption that the only underwriting arrangement known to man is the "strict" underwriting of the English type. The student who would learn of the "firm commitment," more commonly employed in this country, or of the "best efforts" underwriter must look elsewhere.

(3) The orthodox recital of the duties of the corporate secretary as "keeper of the corporate records and of the seal"[18] contains no hint of the potentialities for mischief inherent in that functionary's authority to certify both true and false corporate records and to attest both genuine and spurious signatures of other corporate officials.[19]

(4) The treatment[20] of the SEC proxy rule authorizing stockholder submissions, in management proxy solicitations, of proposals which are by state law "a proper subject for action by security holders" contains no reference to the ominously ambiguous 1954 amendment excluding proposals "relating to the conduct of the ordinary business operations" of the corporation.[21]

(5) The discussion[22] of *Ringling Bros.-Barnum & Bailey Combined Shows Inc. v. Ringling*,[23] which held that a stockholders' voting agreement with an arbitration clause is not invalid for failure to comply with the Delaware voting trust statute, will leave the student vulnerable to some surprise when he discovers elsewhere *Abercrombie v. Davies*[24] holding that a stockholders' voting agreement with irrevocable proxies to voting agents and an arbitration clause is invalid under that statute.[25]

There is, secondly, an occasional lack of accuracy or precision in statement which is particularly serious in a work designed for beginning students:

(1) The statement that the "fiduciary obligation of the majority shareholders to the minority" will prevent the majority's ratification of an unfair contract between the corporation and a director[26] does not describe anything decided in *Pepper v. Litton*[27] or *Zahn v. Transamerica*

[17] Pp. 123-125.
[18] P. 233.
[19] See McMan Oil & Gas Co. v. Hurley, 24 F.2d 776 (5th Cir. 1928); Condor Corp. v. Cunningham, 71 Cal. App. 2d 25, 162 P.2d 21 (Dist. Ct. App. 1945); Holden v. Phelps, 141 Mass. 456, 5 N.E. 815 (1886); Commonwealth v. Reading Savings Bank, 137 Mass. 431 (1884); McLain Fuel Corp. v. Lineinger, 341 Pa. 364, 19 A.2d 378 (1941); Hutchison v. Rock Hill Real Estate & Loan Co., 65 S.C. 45, 43 S.E. 295 (1902).
[20] Pp. 309-313.
[21] See Bayne, Caplin, Emerson & Latcham, *Proxy Regulation and the Rule-Making Process*, 40 VA. L. REV. 387, 428 (1954).
[22] Pp. 319-320.
[23] 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947).
[24] 130 A.2d 338 (Del. 1957).
[25] Or perhaps I am still suffering from an advocate's myopia incurred while serving with counsel in *Abercrombie* in support of the unsuccessful argument that *Ringling* was controlling.
[26] P. 260.
[27] 308 U.S. 295 (1939).

Corp.,[28] which are cited for that proposition. More apt citations are available.[29]

(2) The treatment of *noncumulative* preferred stock includes, of course, a discussion of the usual rule that dividends are at the discretion of the board of directors and completely noncumulative, and of the New Jersey "dividend credit" rule which treats dividends as cumulative to the extent earned. But the discussion is preceded by this sentence: "Contrary to cumulative preferred stock, if there was no fund from which dividends could have been declared in a particular year, such shares may not later receive that year's dividend from a fund realized at a prior or later period."[30] From this statement the unwary student may draw the negative inference—and at least one of mine has—that *cumulative* preferred is cumulative only to the extent that there is a "fund from which dividends could have been declared."

(3) In the discussion of the proposition that dividends may not be declared out of capital this sentence appears: "The term 'capital' is not descriptive of any particular assets such as land, buildings, inventory, cash, etc., but is value in the large sense of value of corporate assets contributed for permanent use . . . and equal . . . to the aggregate par value of shares issued and outstanding plus amounts received (or promised to be paid) through the issue of no-par value shares to the extent of the amounts which are capitalized, plus other values which have been added through the capitalization of surpluses . . . ."[31] This language invites the novice to conclude that there are two kinds of corporate assets—those that are "contributed for permanent use" and some other kind—and that no dividends may be declared unless assets of the former kind in value equal to the amount of the capital charge are retained.

(4) "And, of course, if net assets must be figured—as they should be—by including the stated capital items as a liability, the insolvency test, as adopted in bankruptcy, would bar a dividend except where a surplus shows up by subtracting liabilities, including stated capital, from total assets, after deductions have been made for depreciation, bad debts, etc., which good accounting as well as the law requires."[32] Surely this implies that the bankruptcy courts, or possibly "good accounting" and "the law," treat the capital account as a liability account in determining solvency—a proposition equally erroneous in either of its alternatives.[33]

[28] 162 F.2d 36 (3d Cir. 1947).

[29] See BAKER AND CARY, CASES AND MATERIALS ON CORPORATIONS 513-14 (3rd ed. unabridged 1959).

[30] P. 439.

[31] Pp. 467-468.

[32] P. 469.

[33] The notion persists with Professor Lattin. Capital "appears as a liability—a fictitious one for the corporation is not bound to pay it . . . ." (p. 470). Some courts, in determining the proper source of dividends, have "applied an income test rather than one which balances assets against liabilities including stated capital . . . ." (p. 471).

(5) After presenting the argument against treating unrealized appreciation either as an asset or as a loss-offset for purposes of declaring cash dividends, Professor Lattin suggests that, "Stock dividends permitted by a number of statutes are relatively harmless for they take nothing from creditors or shareholders."[34] But the shareholder in a corporation which issues a stock dividend, with a corresponding increase in its capital charge, against an unrealized appreciation which later evaporates, might find some cause to dispute this statement as he contemplates his future dividend prospects.

(6) In discussing the problem of stock valuation under an appraisal statute, Professor Lattin says that, "market value, where there is a free and open market and the volume of trading in the share is such as to constitute a fair reflection of the buying and selling public's judgment, is entitled to much weight. The New York court seems eventually to have concluded that market value is a controlling (but not the only) consideration where the market is as stated above."[35] What is a controlling consideration which is not the only consideration? Logic suggests that it is a non-controlling consideration. So does the New York case cited,[36] if the opinion is taken at face value. It does say that market value is "controlling" where the market is free and open and the volume of trading is substantial, but it says also that the appraisers may test the market value by earnings, dividends, book value and the market value of comparable securities. The opinion may mean that the market value, tested by other indications of value, is controlling, or it may mean that the court is willing to allow appraisers to treat market value as controlling but will insist that they make a pretense of considering other value indicators. It cannot mean that market value is controlling but not controlling.

With these numerous caveats, this book seems to me the best one-volume text for student use,[37] and not merely because it covers developments of the last twenty years. Professor Lattin conveys, much better than his predecessors have done, the vital information that the solution of a vast number of legal problems relating to corporations does not rest upon a "common law" of corporations but upon an interpretation of articles, by-laws, share certificates, resolutions and other corporate documents. He brings to many of these problems, moreover, a common-sense approach and a pungent comment which lay bare some judicial fallacies. Thus, of the hoary notion that creditors of a corporation rely upon the "capital stock" of the corporation in extending credit:

[34] P. 479.

[35] P. 528.

[36] Application of Marcus, 273 App. Div. 725, 79 N.Y.S.2d 76 (1948), which holds only that the stockholder is not entitled to subpoena all of the company's financial books and records to establish that book values were too low because the company followed the accepted practice of carrying fixed assets at cost and inventories at the lower of cost or market.

[37] Which suggests my first use for reprints of a book review.

> It seems like pretty high nonsense to assume that business men in giving credit rely that much upon the amount of capital stock set forth in articles or in balance sheets and, if they did, to conclude that they further assume that the figure will always remain the same until they are notified otherwise. They are much more interested in liquid assets and current liabilities, credit ratings and previous paying experience than in any statement of the company's capital stock.[38]

And, of cases suggesting that directors should be liable only for their "gross negligence":

> Any court taking such a view has a heart too tender for the hard-headed business men who usually sit upon boards of directors. There is no valid reason why directors should not pay sufficient attention to the business of the corporations upon whose boards they sit so that they will qualify under [more strict tests] .... If they cannot pay that much attention to the corporate business, they should not be sitting upon the board.[39]

In a field too long dominated by conceptualism, Professor Lattin's approach is welcome.

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[38] P. 121.
[39] P. 243.