BOOK REVIEWS

It is to be hoped that Mr. Boorstin, on the basis of work already done, can supplement his study of Blackstone and the Commentaries with a book less objective, in which is shown the influence of the spirit and representative minds of the mid-eighteenth century on Blackstone, a conservative by temperament, association, position, and profession. Such a book, not devoted to describing how Blackstone, consciously or otherwise, employed the ideas of his time to accomplish a certain end, would probably place the Commentaries in a different light than that in which it appears in this work. It is not to be inferred that Mr. Boorstin has overlooked this influence or failed to warn his readers in a mild way of it. For he states that “Blackstone’s work, like every human document, was the product of a particular time and a particular place” and that “in the eighteenth century, many of the most profound and most influential students of society approached their study with the conviction that institutions were fundamentally beyond human criticism.” This hope is also expressed because recent biographies of Blackstone treat him apart from the time in which he lived.

These statements should in no way be considered as detracting from certain definitive merits of Mr. Boorstin’s book, a detailed, scholarly, and novel exposition, based on an unusually minute study of the Commentaries and a wide survey of non-legal material of the eighteenth century. It will surely challenge the interest of the student of legal history and serve as provocative material in a course in legal history. But as Blackstone’s handbook may have misled his uncritical audience, so may Mr. Boorstin’s book mislead those of the “semantic school,” who wish to find additional authority for their belief that “the law” is always crafty and mystical in its use of ideas and words and that lawyers as jurisprudential scientists are ever “tricksters and quibblers.”

For readers not seeking self-serving evidence, Mr. Boorstin’s closing pages should be read first. It is there he states “we shall not be unfair if, in determining the stature of the man and the validity of the document, while admitting its logical limitations,” we judge mainly by the social meaning of the values of humanity, liberty, and property in Blackstone’s time, and not by “the hyper-scientific approach to institutions.”

J. S. WATERMAN


This book is a valuable discussion of the legal problems relating to surplus and profit distributions by business corporations. The particular matters treated by the author include not only the determination of the fund available for dividends, but also the declaration, payment, and revocation of dividends, remedies against directors

8 P. 4.
9 P. 12.
10 Warden, The Life of Blackstone (1938); Lockmiller, Sir William Blackstone (1938).
12 P. 189.

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and shareholders for illegal dividends, relative dividend rights of shareholders, dividend problems arising upon merger and consolidation, problems of conflict of laws, and the federal income tax on dividends.

That embraces a fairly large part of the field of corporation law. This book, however, does not purport to be a comprehensive treatise on all of these topics. Rather, it is a volume of related articles on interdependent subjects. While the legal profession would no doubt welcome a book of this character on the subject of corporate dividends at any time, the present value of Mr. Kehl's work gains considerably because of the complete revision of a large number of state incorporation acts in the past decade.

The author's treatment of the historical background and development of American dividend law, his analysis of the fund available for dividends, and his discussion of the relative dividend rights of preferred and common shareholders are of particular worth. Accounting illustrations are frequently inserted in simplified form, more for the purpose of explaining legal problems than for a discussion of accounting principles.

In classifying statutory regulation of dividends, writers have generally found two, three, or four major rules. Mr. Kehl divides the statutes into three primary classes: those employing the solvency test, those employing the "balance sheet surplus test," and those employing the profits test. Admittedly, the solvency test is submerged in importance by reason of the fact that when it is adopted it is frequently in combination with the surplus test. Differentiation between the surplus test and the profits test is almost entirely dependent upon the accounting period prescribed in the profits statute. As the author states, a dividend statute which permits payments out of profits but measures profits by a review of the entire historical profits of a corporation is substantially the same as a surplus statute. The real conflict of principle in dividend law occurs between the laws of the states imposing the surplus test and the laws of the states permitting the payment of a dividend out of profits for a current accounting period despite the existence of a capital impairment.

Most of the recent statutes have rejected the profits test and have adopted the surplus test, adding to the surplus test limitations upon the use of reduction surplus, upon the use of surplus arising from unrealized appreciation of assets, and upon the use of surplus arising from the purchase of shares for treasury. Since it is well recognized that a valuation of assets, inherent in a surplus test, is in itself a difficult problem, why is it that the surplus test prevails over the profits test? Certainly in the recent elaborate overhauling of corporation acts consideration has been given to all of the existing rules. Mr. Kehl clearly shows the trend, without specifying the reason for the trend.

The trust fund theory which appeared early in American dividend law was little more than a pronouncement that dividends must not be paid to the prejudice of creditors. The more recent theory, that the shareholders have irrevocably dedicated to the risks of the business the amount paid in as capital, is an equally unsatisfactory principle for a rationalization of modern statutes. It appears to the reviewer that the recent enactments have attempted to achieve two purposes: first, to prohibit the payment of a dividend which is tantamount to a transfer fraudulent as to creditors, using as a cushion for the benefit of creditors the variable capital of the corporation; second, and apart from the rights of creditors and the relative rights of shareholders, to prohibit the payment of a dividend which has a tendency to mislead shareholders in their appraisal of the financial condition of the corporation. There may be differences of opin-
ion as to whether the newer statutes have achieved these objectives, but certainly the Delaware profits rule, which specifically permits the payment of dividends out of net profits for the current or preceding fiscal year notwithstanding capital impairment, with a restriction only where there are preference shares, does not seek to achieve either of these purposes. The rejection of the Delaware rule can no doubt be ascribed to that failure.

Some writers on corporate distributions have maintained that dividend law will suffer from confusion until valuation of assets is abandoned as a measure of the right to pay dividends. If they are correct, then confusion is on the increase. The application of the popular balance sheet surplus test is almost exclusively a problem of valuation of assets and, as Mr. Kehl's analysis demonstrates, a problem of increasing complexity. With a decline in reliance upon historical accounting costs and a restriction upon the use of unrealized appreciation, directors are required to take into account certain changes in value downward but are prohibited from taking into account corresponding changes in value upward.

Recent developments in the law relating to valuation of assets for dividend purposes may soon be overshadowed, however, if the prospective future earnings test sponsored by the Securities and Exchange Commission in reorganization cases, and recently emphasized by the Supreme Court of the United States, finds general application in dividend cases.

WHITNEY CAMPBELL†


After the present war, win or lose, one of the most important trends in our society will be governmental planning. We can guess that there will be some international order, voluntary or imposed, or at least some economic planning through quotas, agreements, cartels, or directives on a world-wide scale. There is less doubt about national planning of production in business, agriculture, labor. Regional planning, based on power resources, will no doubt remain an integral part of American government. With greater certainty still, we can anticipate an intensification in land-use planning and regulation, both rural and urban. Urban planning in particular will be used to transform our cities, a process that has already gone forward in our rapid shift from a rural to an urban people, and now to a metropolitan and suburban civilization.

Whether the law will be an effective instrument of planning depends upon the philosophy and understanding of the bar and the bench. Such an understanding will not be attained without a contemporary body of knowledge about city planning which can be absorbed by our legal profession. One of the best readable compilations for this purpose is Robert A. Walker's book. As the University of Chicago's Social Science Study Number 39, Dr. Walker's is the latest in a whole series of urban researches in the sociology, the economics, and the administration of city life, along with other well-known studies on metropolitan government, public health, education, judicial administration, water supply, governmental reporting, and legal powers.

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