

BOOK REVIEWS

Corporate Executives' Compensation. By George Thomas Washington.* New York: The Ronald Press Company, 1942. Pp. xii, 519. \$7.00.

This book is on the "must list" for the corporation lawyer. As announced in the subtitle, business as well as legal aspects of executives' compensation plans are considered, and the entire volume is of interest to businessmen as well as their counsel. It deserves to be considered a "lawyers' book," however, for it is practical in the sense that it contains full theoretical analysis and does not oversimplify. The author conceals neither the difficulty of the problems nor the confusion in the decisions. The publication of such a book by the Ronald Press furnishes a reminder to lawyers that the most useful law books are not always those brought out by the law publishers.

Mr. Washington has presented an elaborate treatment of all types of executive compensation, including profit-sharing plans, stock bonuses, stock options and bargain purchases, deferred compensation and tax reimbursement plans, pensions and annuities. In connection with each type of compensation arrangement, tax questions are analyzed in detail and attention is also given to problems to be anticipated in drafting the agreement. The author has made a study of compensation plans of many of the largest corporations as embodied in agreements filed with the Securities and Exchange Commission.

Chapter 11, entitled *The Adoption of the Contract*, contains a careful and exhaustive discussion of familiar legal problems such as those presented by self-dealing and retroactive compensation and the effect of shareholder authorization. At times the attempt to classify the decisions is overelaborate, as with the analysis of the problem of self-voted salary arrangements.¹ Here the cases are grouped not only according to their holdings, but also according to a division of states as "void" or "voidable" jurisdictions; that is, jurisdictions in which the courts more frequently use one or the other of these terms in condemning self-dealing. The reader is not surprised to learn that this difference in language gives no safe indication of the effect of self-voting.

Part II deals with legal controls over the size of compensation payments. The material is fascinating and is presented in a manner at once interesting and accurate. As throughout the book, the author is neither muckraker nor apologist. Detailed consideration is given to the litigation concerning Bethlehem Steel, National City Bank, and Warner Brothers Pictures, as well as the perennial American Tobacco litigation. The discussion is concluded by a section on *The Lawyer's Task*, in which reference is made to Mr. Justice Stone's comments on the responsibility of the Bar for some of the evils of excessive bonuses.² While the author protests that it is unfair to ask the lawyer to pass upon the reasonableness of compensation payments, he believes it entirely fair

* Professor of Law, Cornell University Law School; member of the New York Bar and the Federal Bar.

¹ Pp. 199-202.

² Stone, *The Public Influence of the Bar*, 48 Harv. L. Rev. 1, 9 (1934).

to ask counsel to insist on "the observance of standards of good faith and arm's-length bargaining."³

Part III consists of five chapters on Problems of Indemnity and Reimbursement. Here is material of the greatest current interest. As the author puts it, the past few years have seen the development of a new corporate "fashion," clothing directors with agreements of indemnity which protect them in varying degrees from loss in connection with suits brought by shareholders. The author persuasively argues the case for corporate reimbursement of the cost of successful defense of such suits. He presents a thorough discussion of the cases which leave the matter in serious doubt in most states and approves agreements which provide for such reimbursement.

Mr. Washington goes on to ask, "What should be the rule where the suit is settled before trial?"⁴ This is obviously a more difficult problem and the author's researches have apparently not resolved his doubts. He first answers, "It would appear that the directors are not entitled to reimbursement, at least in the absence of exceptional circumstances."⁵ But on the next page he is impressed by the "heavy premium" which denial of reimbursement would place on subterfuges and concludes: "It would seem better to place the whole matter on a fair and open level and allow reimbursement when it is honestly deserved." In the same vein he characterizes as "so aptly drawn as to merit quotation in full" a pending bill relating to directors of national banks.⁶ Under this bill, reimbursement may be given in cases of settlement, but only with the approval of shareholders. The chapter closes, however, with the author still searching for the rule which, in the absence of statute or agreement, "will do justice to directors and stockholders alike." "Such a rule would seem to require that directors *who have successfully defended their administration on the merits of the suit* should be reimbursed from corporate funds, the grant of reimbursement to be in the discretion of the trial court, guided in doubtful cases by the views of stockholders and disinterested directors."⁷

The question recurs in the chapter dealing with types of indemnity agreements. It is recognized that the problem of settlements presents a "key difficulty"⁸ and that in dealing with it "questions of some complexity arise."⁹ On the one hand, "If the corporation has thereby been deprived of a real possibility of recovering a substantial judgment, it is clear that the directors should not be reimbursed . . ." but "If the suit is not meritorious, . . . more of an argument can be made for reimbursement." The author realizes, however, that "any conclusion that the suit is not meritorious is subject to grave doubt"¹⁰ and, "The chief difficulty is, of course, that we cannot rely on the views of the directors or their counsel as to the merits of their own point of view."¹¹ Under the circumstances, therefore, "the safest rule would seem to be that directors who settle should not be reimbursed. In some cases, settlement at the expense of the corporation itself may be justifiable: here, reimbursement of payments made by directors may perhaps be proper, if full disclosure of the proposed reimbursement has been made, in advance, to a court or to the stockholders or both."¹²

The same problem—"difficult indeed to solve"—occupies the last pages of the text,

³ P. 309.

⁴ P. 353.

⁵ *Ibid.*

⁶ P. 355.

⁷ *Ibid.* (italics added).

⁸ P. 403.

⁹ P. 379.

¹⁰ Pp. 379-80.

¹¹ P. 425.

¹² P. 380.

in connection with the recent New York statutes.¹³ Once again Mr. Washington shows his scholarly balance, his agony of indecision. He is not the only writer, of course, who has hesitated between a desire for full protection of honest fiduciaries and a belief in the value of prophylactic rules. I have a strong suspicion that I am in no position to cast even a sympathetic stone.

WILBER G. KATZ†

American Legal Records, Vol. 4: The Superior Court Diary of William Samuel Johnson, 1772-1773. Edited by John T. Farrell.* Washington: American Historical Association, 1942. Pp. lxxv, 293. \$7.50.

As the fourth volume in its American Legal Records series, the American Historical Association has selected for publication the Diary of William Samuel Johnson, Judge of the Superior Court of Connecticut from 1772 to 1773. The volume includes the Diary, consisting of cases noted by Johnson for a few months in the winter of that year, together with pertinent illustrative material—writs, pleadings, depositions and other file papers—added by the editor. Mr. Farrell has prefaced it with a valuable introduction, in which he discusses the pre-Revolutionary court system in Connecticut, civil procedure and criminal process, and gives a short account of Johnson and his contemporaries. A brief foreword by Judge Charles E. Clark, and a few additional pages devoted to sketches of attorneys practicing before the Court, complete the volume.

The book is full of interest and is a valuable contribution to the legal and historical literature of the period; it should, as Mr. Farrell hopes, be welcomed by all scholars who can find useful information in legal records. Johnson's career touched many sides of life in the eighteenth and early nineteenth centuries. A man of wide literary interests, he was also thoroughly conversant with the English common law. Always prominent in public affairs, he was, in addition to his term on the Bench, important in the formation of the Federal Constitution and became a Senator from Connecticut in the first Congress. He finished his career as President of Columbia College.

The historian will find in the volume many points of interest. On the one hand, in the Introduction, there is an account of the development of the writ system in England and its adoption by Connecticut; there is also a provocative discussion of the origin of the Grand Jury in a form peculiar to Connecticut. On the other hand, in the Diary are cases shedding light on slavery in the North, restrictions against gaming, marital relations, and the local poor law. And in the parties' complaints and witnesses' depositions we frequently have the strong flavor of pithy Yankee language.

The lawyer will appreciate the value of the Diary when it is first said that the court on which Johnson sat and heard the cases here noted was, normally speaking, the highest court in the colony. Although an appeal might lie in certain cases to the General Assembly, most important questions of law were decided in the Superior Court. In the second place, although the Diary is not an official report, Johnson himself was well trained as a lawyer. He had systematically studied the English reports and abridgements, and had broadened his knowledge by readings in Hale, Fortescue, and Puffendorf, as well as by frequent attendance on the English courts when in that country

¹³ Pp. 426-27.

† Dean of The Law School, University of Chicago.

* Associate Professor of History, College of New Rochelle.