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The Law Practice of Alexander Hamilton, edited by Julius Goebel, Jr.

Francis Paschal
Duke University

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BOOK REVIEWS

THE LAW PRACTICE OF ALEXANDER HAMILTON. Edited by Julius Goebel, Jr., and others. Volume I. New York: Columbia University Press. 1964. Pp. xxiv, 898. \$18.50.

When Alexander Hamilton returned home from the Revolutionary War in 1782, he set a pattern since followed by a good many other veterans, dividing his time between rocking the cradle and studying law.¹ In July 1782, he was admitted to practice in New York, and less than two years later he could report to Gouverneur Morris that "a legislative folly has afforded so plentiful a harvest to us lawyers that we have scarcely a moment to spare from the substantial business of reaping."² More of the "legislative folly" and the "so plentiful a harvest" in a moment. For present purposes it is enough to note that from the beginning of his study in 1782 until his senseless "interview" with Aaron Burr twenty-two years later, Alexander Hamilton was, to the extent that his other responsibilities permitted, heavily involved in the *practice of law*.³

This involvement has been a matter of profound and continuing consequence to the Republic. It is therefore, as the editor of this book rather modestly asserts, "something of an event in the annals of our profession" that the trustees of the William Nelson Cromwell Foundation should initiate "this documentary reconstruction" of Hamilton's professional career.⁴ Moreover, the editor virtually promises us additional volumes. In this connection it is well to recall that those preparing the definitive edition of Hamilton's writings have relinquished to Professor Goebel the "legal papers."⁵ This resolution of what can be seen to be a most formidable editorial problem⁶ is, from one standpoint, regrettable. It would certainly be convenient for Hamilton scholars to have available

1. "I have been employed for the last ten months in rocking the cradle and studying the art of *fleeing* my neighbors." Letter from Hamilton to Lafayette, Nov. 3, 1782, in 3 THE PAPERS OF ALEXANDER HAMILTON 192 (Syrett ed. 1962).

2. Letter from Hamilton to Gouverneur Morris, Feb. 21, 1784. *Id.* at 512.

3. Cf. Corwin, *James Madison: Layman, Publicist and Exegete*, 27 N.Y.U.L. REV. 277 (1952).

4. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON ix (Goebel ed. 1964) [hereinafter cited as GOEBEL].

5. 3 THE PAPERS OF ALEXANDER HAMILTON v (Syrett ed. 1962).

6. The expedient adopted raises other problems. Illustrative is the problem of what to do with the two *Letters from Phocion*, *id.* at 483-97, 530-58, which bear directly on *Rutgers v. Waddington* and the War Cases. We get only a few quoted excerpts in the volume under review, and the *Papers*, as indicated, get the complete text.

in one set of books Hamilton's writings. But the decision to have two sets does have its advantages, as this book makes abundantly clear.

The chief of these advantages is that Professor Goebel and his associates have been able to achieve a great deal more than a "documentary reconstruction" of Hamilton's professional career. They have been able to govern themselves by the generous notion that whatever will enable the reader better to understand Hamilton's career at the Bar could fairly be included in this volume. We thus have much material here of no unique relevance to Hamilton. We have, for example, an opening section of thirty-five pages, entitled "Law and the Judicial Scene," which takes us through the maze of New York's colonial and post-revolutionary courts. And we are given something like a transcript (it is obviously incomplete) of the proceedings in a murder case in which Hamilton, along with Aaron Burr and Brockholst Livingston, served as counsel for the defendant.⁷ But there is hardly a single contribution of Hamilton to the prisoner's defense that is identifiable. Similarly, in the section on "Practice and Procedure," we have reproduced for us twenty-nine procedural documents of which only six can be attributed to Hamilton or a case with which he was connected.⁸ I neither protest nor regret the inclusion of these materials. Indeed, I am grateful for them. I merely wish to point out that a good deal of this book has no more to do with Hamilton than it does, say, with Brockholst Livingston or with any other New York lawyer in the years following the Revolution. One result is that we have one of the clearest and liveliest pictures yet available of law practice in eighteenth-century America.

Let me quickly add that for all the wealth of background material, the editors have not forgotten their central commitment. We are enabled to see Alexander Hamilton as lawyer in far sharper focus and more intimately than ever before. In this the editors have been aided by documents from Hamilton himself, many never before printed. By all odds the most noteworthy of these is Hamilton's practice manual, *Practical Proceedings in the Supreme Court of New York*.⁹ While this work is hardly of the magnitude of those recently published from the pen of another eighteenth-century lawyer,¹⁰ still the editors claim for it the distinction of being the first treatise in the field of private law by one of our great lawyers. The date of this treatise is uncertain, but the editors argue, convincingly I think, for the first part of 1782, when Hamilton was

7. GOEBEL at 704-74.

8. *Id.* at 136-66.

9. *Id.* at 55-135.

10. James Boswell. Of the many volumes available for citation, see particularly BOSWELL FOR THE DEFENSE (Wimsatt ed. 1959).

studying for the Bar. At any rate, it abounds in interest, both for what it has to say about the law in eighteenth-century New York and for what it tells of Hamilton the lawyer. It is, despite its antique idiom, modern in temper and liberal in tone. For example, concerning pleas in abatement, Hamilton remarks:

Formerly there was a great deal of nice Learning . . . which is now in Little Estimation and indeed the Pleas themselves are seldom used; and are always discountenanced by the Court, which having lately acquired a more liberal Cast begin to have some faint Idea that the end of Suits at Law is to Investigate the Merits of the Cause, and not to entangle in the Nets of technical Terms.¹¹

Closely allied to the "liberal Cast" here displayed is Hamilton's constant search in his treatise for reason in the law. He looks for the reasons behind the rules he collects, and when he can find none, he says so.¹² He complains of the rule disqualifying a witness for interest as excluding those most knowledgeable.¹³ He believes that courts should just as readily grant new trials for inadequate damages as for excessive damages,¹⁴ and he disapproves the necessity of a second action for mesne profits after an ejection.¹⁵

In *Practical Proceedings*, we see Hamilton in the role of student. In the other sections of this book, we see him as counsellor and advocate as well. There is a substantial section devoted to Hamilton's work as counsel in the Western lands dispute, a dispute still alive in 1926.¹⁶ There is also a section on criminal cases where the principal item of interest is Hamilton's argument in the well-known case of *People v. Croswell*,¹⁷ in which Hamilton contributed so largely to the establishment of truth as a defense in libel actions. James Kent, one of the judges, took notes on

11. GOEBEL at 81.

12. See, e.g., *id.* at 122-23, where Hamilton confesses puzzlement at a rule denying that choses in action can be the subject of a release. The editors come forward with a superb note indicating that Hamilton had not stated the rule correctly and pointing out how the available sources probably were responsible for his error. There is instance after instance of comparable thoroughness on the part of the editors, particularly in their handling of *Practical Proceedings*.

Further on the subject of releases, Hamilton is surely right when he declares: "The most effectual Release is by Writing under Seal, by which the Releasor, 'remises Releases and quits Claim to all Actions, Suits, Debts, Dues and Demands whatsoever, from the Beginning of the World to the present Day.'" GOEBEL at 121.

13. *Id.* at 95.

14. *Id.* at 120. Cf. *Dimick v. Schiedt*, 293 U.S. 474 (1934).

15. GOEBEL at 131.

16. *Massachusetts v. New York*, 271 U.S. 65 (1926).

17. 3 Johns. Cas. (N.Y.) 337 (1804).

Hamilton's argument, and we can see in them a reflection of an advocate of hypnotic power. The argument, Kent reports, "was probably *never surpassed*."¹⁸ Far and away the largest section is that devoted to the War Cases, from which Hamilton reaped his "so plentiful a harvest" and not exclusively to his own benefit, but, to this day, to that of the Republic as well.

The War Cases involved the harassed Loyalists caught in the toils of the measures of the New York legislature taken against them at the time of and after the Revolution. The first such measure was the Confiscation Act,¹⁹ forfeiting, after a supposed judicial proceeding, the property of those adhering to the enemy. The second, the Citation Act,²⁰ was designed to relieve patriots of their debts to those who remained in the territory under British occupation. The third, the Trespass Act,²¹ passed in 1783, created a new brand of trespass and took from those who occupied patriot property during the occupation the defense of having done so under an order or command of the "enemy."

Writing in 1795, Hamilton tells us in respect to the Trespass Act that "a general opinion was entertained embracing almost our whole bar as well as the public that it was useless to attempt a defence and accordingly . . . many compromises were made and large sums paid under the despair of a successful defence. . . ."²² Hamilton knew along with all others concerned that the treaty of peace with Great Britain, if honored, provided a defense. But he alone had the courage and resourcefulness to make an effective demand that the treaty be honored. He could fairly claim: "I was for a long time the only practicer who pursued a different course and opposed the Treaty to the Act. . . ."²³

The vehicle of his demand was, of course, the famous case in 1784 of *Rutgers v. Waddington*.²⁴ The resort of Hamilton to national law (THE ARTICLES OF CONFEDERATION and the peace treaty) to protect his client Waddington from the widow Rutgers and the Trespass Act unmistakably pointed the way to a national law operative on individuals. Just as unmistakably it pointed to the supremacy of national law over

18. GOEBEL at 839 (emphasis in the original).

19. N.Y. Laws, 1779, ch. 25.

20. N.Y. Laws, 1782, ch. 1.

21. N.Y. Laws, 1783, ch. 31.

22. Extract from draft of a letter to George Washington, July 9-10, 1795. GOEBEL at 541.

23. *Ibid.*

24. ARGUMENTS AND JUDGMENT OF THE MAYOR'S COURT OF THE CITY OF NEW YORK, IN A CAUSE BETWEEN ELIZABETH RUTGERS AND JOSHUA WADDINGTON (New York 1784), printed here. GOEBEL at 393.

state law and its binding force on state judges.²⁵ And unquestionably the argument contributed to the doctrine of judicial review. All of this we have known for quite a long time. Indeed, from the moment of its utterance in 1784, the argument and its implications have been a part of our national consciousness.²⁶ What is new here is that the editors gather together for the first time all of the documentary materials now available relating not only to *Rutgers v. Waddington* but to all the other sixty-odd cases in which Hamilton was employed by beleaguered Loyalists. In their variety, these materials are admirably suited to the editors' purpose. We have pleadings of all sorts, procedural parries and thrusts, petitions for relief as a matter of grace, research notes, opinion letters, and the importunities of clients. From the materials and from the editors' skillful presentation of them, there emerges a picture of Hamilton as lawyer pulsating with life.

Generally, the editors have discharged their immensely demanding assignment in a manner beyond praise. They have spared no effort nor any archivist. Where commentary is needed to make a difficult text intelligible, they have supplied it. They have approached their task with a discriminating imagination based on solid learning. This is not to say that they invariably please²⁷ or do not on occasion mislead. Of the latter, I shall mention only the most grievous instance. In less than four pages,²⁸ the editors assertively and dogmatically dispose of the existence of a fed-

25. In his "notes for argument," Hamilton put the point this way: "Judges of each state must of necessity be judges of United States." *Id.* at 351.

26. For both the immediate influence and the enduring importance of Hamilton's argument, see Corwin, *Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 529-31 (1925).

We have no text of the argument as delivered, but ever since 1910, when Allan McLane Hamilton published his *Intimate Life* of his grandfather, we have had in print two drafts of Hamilton's "notes for argument." ALLAN McLANE HAMILTON, *THE INTIMATE LIFE OF ALEXANDER HAMILTON* 457 (1910). Scholars have been aware of the existence of a much more comprehensive draft in the library at Hamilton College. ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 306 (1964). Moreover, since 1784 there has been the opinion of the mayor's court, which recites much of the argument.

In addition to the mayor's court opinion and the two documents published by Allan McLane Hamilton, the editors present here the Hamilton College draft and two other drafts plus a brief procedural memorandum. Happily, the editors follow the example of Allan McLane Hamilton in their manner of presentation, striving as nearly as the exigencies of printing will permit, to reproduce the documents as they are. We thus have all the deletions, interlineations, marginal notes, and even Hamilton's signal for emphasis—a hand with the forefinger pointing to the words to be emphasized.

27. Hamilton once wrote: "In law as in Religion the Letter kills. The Spirit makes alive." GOEBEL at 391. With a caution that excites wonderment even in this non-Bible reading age, the editors remark: "The inspiration for this aphorism is apparently II Corinthians 3:6. . . ." GOEBEL at 335. There are a few other comments equally timid and equally banal.

28. *Id.* at 3-35.

eral common law and of the interpretation of section 34 of the Judiciary Act of 1789²⁹ as well. As to section 34, even the muse of the *Erie* priesthood confesses difficulty and goes so far as to assert that Professor Crosskey is "persuasive" in his approach to the significance of Charles Warren's discoveries.³⁰ But whatever occasional fault this book may have, it is certain to be essential to an understanding and appreciation of Alexander Hamilton.

FRANCIS PASCHAL†

JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION. By Fowler V. Harper, introduction by Irving Brant. Indianapolis and New York: Bobbs-Merrill. 1965. Pp. xxv, 406. \$6.95.

It was the nation's misfortune, as well as his own, that Wiley B. Rutledge served for so short a time on the Supreme Court bench. The six-year span from 1943 to 1949 was hardly long enough to project a widely recognized public image; it is reasonable to speculate that, had he lived to twice that length of time on the bench, the matured philosophy which he brought from a lifetime of teaching might have accelerated the forces which, half a dozen years later, ushered in the present epochal sequence of constitutional decisions. Rutledge was the last of the appointees of Franklin D. Roosevelt; the first, Mr. Justice Black, has enjoyed a tenure of sufficient length to epitomize the judicial function as F.D.R. presumably envisioned it—although another early F.D.R. appointee, Mr. Justice Frankfurter, remained long enough to undergo a jurisprudential sea-change.

In any event, Mr. Justice Rutledge bolstered a core of constitutional liberals among whom could be counted Black, Robert H. Jackson, and William O. Douglas, supported with fair consistency by Mr. Chief Justice Stone and Frank Murphy. In the very heart of the second World War, President Roosevelt at last had his ideological majority of men who were aware, if the war itself had not been a reminder, that a far more complex economic and social fabric was in the making. The simple truths of a frontier society had not been refuted so much as they had become irrelevant; to find new constitutional propositions consistent with the past but

29. 1 Stat. 73 (1789).

30. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y. U.L. REV. 383, 389 (1964).

† Professor of Law, Duke University.