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History of the Statutory Rules of Federal Jurisdiction and Procedure

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HISTORY OF THE STATUTORY RULES OF FEDERAL JURISDICTION AND PROCEDURE*

The title of this review may seem distinctly different from the title of the book, as shown in the footnote. However, the title of the book is unduly (or perhaps modestly) restricted and the book is actually an analysis of the statutory changes in federal jurisdiction and procedure from the beginning in 1789 to the Judiciary Act of 1925. The reason for the authors' taking this title is that the book is primarily concerned with the effect of these statutory changes upon the Supreme Court. While the jurisdiction of the Supreme Court is not fully under the control of Congress, yet the principal purpose and effect of the successive statutes has been, as the authors fully explain, to reduce as far as possible the burden upon that court—at any rate, to restrict to the full its compulsory jurisdiction.

Perhaps the most unfortunate feature of the book is something for which the authors are not primarily to blame. The paper cover prepared by the publishers begins its discussion of the contents by the astounding statement "The nine men on the Supreme Court at Washington are the real rulers of this country." If this statement is true the United States is ruled by an obligarchy and the attacks upon our judicial system by our radicals are subject only to the criticism that even the most virulent of them fall far short of the actual truth. Of course the statement is not true, and it is to be hoped that it never will be true. Nor can the authors be fairly charged with responsibility for this unfortunate *faux pas* of their publishers, although it is perhaps in part due to their own natural tendency to magnify the importance of our judicial system—a tendency which lawyers share with other professional people, of magnifying the importance of that part of the social system which they themselves administer.

As already stated, the bulk of the book is taken up with a very careful analysis of the various statutory changes made in the Federal judicial system—including some discussion of the various personalities whose conflcting ideas caused the statutes to take the form that they did—and a careful analysis of the excellencies and the defects of the successive statutes. The authors never lose sight of the one clear thread which goes through the mass of legislation—*i. e.*, the absolute necessity of restricting the compulsory jurisdiction of the Supreme Court

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**The Business of the Supreme Court.* Felix Frankfurter and James M. Landis. New York. The MacMillan Company. pp. viii, 349. Price, $5.00.

in order that it might continue to function. For instance, our Supreme Court judges were for a hundred years expected to go on circuit—a requirement which may have been reasonable enough in the early days of the government when the business of the court was comparatively limited and the traveling distances reasonably small, but is obviously a ludicrous impossibility at the present time. Yet it took Congress many years after substantially the present conditions, at least from a geographical standpoint, existed, before this requirement was done away with.

Then there was the problem of the constantly increasing number of cases coming before the Supreme Court. Here too, the situation had gotten almost beyond remedy before Congress gave any relief. The first measure of effective relief came in the Circuit Court of Appeals Act of 1891, which, however, failed to remedy the complicated and unnecessary division of original jurisdiction between the circuit and the district court. As the authors point out, the failure to reform this difficulty was due almost solely to the personal influence of Mr. William M. Everts. Personal influence of Congressmen has had a continuous and generally unfortunate effect upon legislative regulation of the Federal courts. Finally this matter was cleared up by the Judicial Code of 1912.

The course of federal legislation has been considerably hastened and made more drastic in recent years largely because of the enormous increase of litigation resulting from the war. The authors summarize a number of desirable but rather makeshift pieces of legislation passed immediately after the war and then go into some detail as to the judicial conference called in accordance with the Act of September 14, 1922. This was a very important departure, for it enabled Congress to get the benefit of the considered opinions of the persons most capable of suggesting desirable amendments to the laws governing the federal jurisdiction—to-wit, the federal judges themselves. As a result, the bill which was finally enacted as the Judicial Act of 1925 was drafted. The result of this act was, as is said on p. 280 of the book, that "Congress gave the Court what is wanted —a very strictly confined jurisdiction."

Probably but little more can be done by Congress in reducing the burden imposed upon the court. The authors in the last chapter suggest various further expedients, mostly more or less voluntary in character, such as the bar itself cooperating to cut down unnecessary appeals. That such expedients would be desirable can hardly be doubted, but that any lawyer who feels that he has a reasonable chance to getting a reversal (or even a much-desired delay) by appealing, will refrain from doing so merely to reduce the burden of the Supreme Court, seems, to say the least, extremely unlikely.

In addition to this careful discussion of the courts of general jurisdiction, the authors have included a chapter on courts of specialized jurisdiction, particularly the ill-fated Commerce Court. The feeling of the authors is that there is no considerable tendency at this time toward the formation of such courts. As to this the reviewer is not so sure. As a matter of fact probably the most important court of specialized jurisdiction which has ever been formed has been created in this country within the last five years. Reference is made, of course, to the so-called Board of Tax Appeals. It is referred to in a note on p. 186 as an "administrative tribunal." Of course this is what Congress called it. But any one who has ever dealt with the so-called Board—and there are few lawyers in active practice who have not done so directly or indirectly—knows that it is really a court which has rules of procedure and evidence, the technicality of which is today almost unprecedented. If the judicial reformers are in need of something to do at the present time they could well address themselves to getting Congress to liberalize the procedure of this Board.

But, the book itself points out, such reformers still have much to do even with the courts of ordinary and general jurisdiction and with those matters affecting directly the burden of litigation in the Federal courts, and therefor the burden which ultimately falls upon the Supreme Court. In addition it may be suggested that the Conformity Act is still on the statute books and that it apparently sanctifies such judicial absurdities as Slocum v. New York Life Insurance Co., 288 U. S. 264. The Uniformity of Procedure Bill would not only clarify this disgraceful morass in the Federal judicial system, but would in time greatly reduce the burden upon the Supreme Court and the other courts of the Federal system. Here is the chief present tax of those persons, in and outside Congress, who are interested in the "business" of the Supreme and other Federal courts.

As already stated, the book under review is mainly concerned with legal (especially statutory) history and is not likely to be of any great interest to the ordinary practitioner. Nevertheless, the information which is here assembled ought to be of enormous interest and importance, not merely to legal reformers, but to any one who is interested in the larger aspects of judicial administration. The problems in the Federal courts are larger and in many respects more complicated than in any of our state courts, but, at least in our larger states, the overburdening of the courts also is, and will continue to be, a pressing problem. Therefore the information contained in this book has an interest much wider even than the ambit of Federal jurisdiction. Legal history, like other history, repeats itself, and we have here a piece of legal history which shows clearly both the desirable methods and the pitfalls in legislative regulation of the courts. Especially important is the showing of the nec-

essary limitations of such regulation and the consequent desirability of having the courts themselves handle such matters so far as possible. Whether or not one agrees fully with the conclusion reached by the authors, he must conclude that in bringing together in a compact and useful form this historical information, a piece of work which is of enormous theoretical importance and which should be of great practical benefit, has been done, and done well.

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