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Book Reviews

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BOOK REVIEWS

The Constitution and the Men Who Made It. By Hastings Lyon.[1] Boston: Houghton, Mifflin Co., 1936. Pp. xii, 314. $3.00.

Fifty-five Men. By Fred Rodell.[2] Harrisburg: The Telegraph Press, 1936. Pp. 277. $2.50.

Both books retell the story of the Constitutional Convention of 1787. Both are based upon Madison's notes. Similarity, but not agreement, ends there. Except for summaries of the subsequent careers of the delegates, Lyon's account stops with the submission of the Constitution. Rodell carries on through ratification and the adoption of each of the amendments.

As a factual history of the deliberations of the Convention, neither book adds anything to Farrand's *The Framing of the Constitution.*[3] Lyon admits[4] that Farrand "is so clear as to raise a question whether any further attempt at lucidity is worth while." Lyon's attempt does not wholly succeed. The narrative is so cluttered up with parliamentary detail as often to obscure the focus. A tendency toward discursiveness and artfulness in style is disconcerting. And the helter-skelter interjection of biographical sketches interferes with the development of the exposition. One wishes that these sketches had been bundled into a separate chapter, as are the notes of the framers' later careers.[5] Although their Who's Who data are less revealing than Farrand's terse, qualitative evaluations,[6] they constitute, together with the cross-section of prevailing economic conditions, the most distinctive contributions of Lyon's work.

Rodell, on the other hand, writes with provocative simplicity and directness. He makes the story his own, and his interpretations, sometimes cynical, always realistic, shape up the material. Through many contrasts with current thought, he projects his history onto the 1936 scene. The fifty-five men are subordinated to the vivid interplay of

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[2] Associate Professor of Law, Yale University.

[3] New Haven: Yale University Press, 1913, ninth printing, 1930.

[4] Preface, VIII.

[5] North Carolinians will be interested in the tragedy attendant upon the closing days of James Wilson, of Pennsylvania. Hounded by creditors, he took refuge in the home of his colleague on the Supreme Court, James Iredell, at Edenton, where he died in August, 1798. He was buried in the family graveyard of Governor Samuel Johnson, on the shore of Albemarle Sound. In 1908, his remains were removed to Philadelphia. In comparison with Lyon's account at p. 267, see Hampton L. Carson, *James Wilson and James Iredell* (1920) 22 N. C. B. A. R. 68.

[6] *Op. cit. supra* note 3, Ch. II, 14.

issues, strategy and compromise. Indeed, had the titles of his and Lyon's books been interchanged, they might more accurately have pointed to the books' respective emphases. The sedate may regret, in the treatment of such a subject, Rodell's occasional resort to colloquialism. The investigator will be irritated to find that there is no index, and that the table of contents is more colorful than indicative. Lyon has supplied search-devices and his work is completely documented.

Although Lyon is at first inclined to hedge in terms of extra-constitutionality, he finally demonstrates that the Constitution was unconstitutional, that its framers and proponents precipitated a bloodless revolution. The Articles of Confederation required amendments to be approved by the Congress and by the legislatures of all of the states. The authority of the delegates was limited to amending the Articles. What the Convention brought forth was a new organic instrument. It was never submitted to the Congress, except for immediate handing on to the states, and went into effect upon ratification by conventions in nine states. Rodell agrees and goes on to record the later evolution of two unwritten amendments of particular significance today: the popular election of the President without benefit of electoral college, and the judicial veto, under the Fifth and Fourteenth Amendments, over policies of legislation.

Lyon has some doubts and reservations, but he agrees, on the whole, with Rodell's view that the great majority of the delegates distrusted democratic control of the processes of government, especially as manifested by the state legislatures of the period, and that one of the Convention's dominant purposes was to set up a machinery which would counteract the tendencies of that democracy. In this the delegates reflected the economic interests of their class, for they were chiefly representative of the planters, merchants, manufacturers, shippers, bankers and investors generally. The democracy they feared was that which in the state legislatures had sought to protect the debtor class through paper money and moratoria. "In their own interests—and, to their minds, in the interest of the nation—they wanted that government to protect property, trade, and business, even at the expense of real democracy. Fighting against these men and against the Constitution [over ratification] were the poor, the small farmers, the men who owed money and found money hard to earn.[7] . . . Lined up with them were some few men of high position who believed wholeheartedly in democracy—men who believed, as most of the framers did not believe, that the people could be trusted to govern themselves."[8] Democracy lost temporarily, but subsequent amendments and developments, notwithstanding Supreme Court

[7] Rodell, 198. [8] *Ibid.*

decisions of a contrary tendency, have "made the national government more nearly of the people, by the people, and for the people.[9] . . . Thus slowly but surely through the years, the American people have broken away from the form of government originally meant for them. They have carved their own initials all over the intent of the fifty-five founding fathers . . . they have bent and twisted the Constitution closer and closer to democracy."[10]

What of the relevancy of history to today's agitation for a constitutional amendment which would extend the power of Congress to legislate generally in the interest of the national economic and social welfare? Lyon traces[11] the modification of the Virginia plan, which, as it went to the Committee on Detail, would have enabled the Congress ". . . . to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." Was the Committee's substitution of a list of specific powers meant to be a complete equivalent? Lyon does not consider the question. Rodell says:[12] "And still, the long list of specific laws that Congress could pass was not allowed to stand alone. For the Committee, in making the list, had left out the Convention's broad permission to Congress to 'legislate in all cases for the general interests of the Union.' But in the final draft of the Constitution, the 'general interests of the Union' were not forgotten. And today, at the very head of the list, stands the right to use any national funds 'to provide for the common defence and general welfare of the United States'."

As to the present need for a legislative power covering "the general interests of the Union," both Lyon and Rodell are silent.

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Handbook of Equity. By Henry L. McClintock. St. Paul: The West Publishing Company, 1936. Pp. xix, 421. $5.00.

The reviewer confesses that he took up this book with misgivings. In his mind arose inescapable questions. Even if the publisher desired to fill out his list of hornbooks with a substitute for the artificial Eaton,[1]

[9] *Id.* at 210.
[10] *Id.* at 216.
[11] Pp. 247-263.
[12] P. 127. *Cf.* Farrand, 176-178, 182; Brant, STORM OVER THE CONSTITUTION (1936) 101; Stern, *That Commerce Which Concerns More States Than One* (1934) 47 HARV. L. REV. 1335, 1340.

[1] EATON ON EQUITY (1st ed. 1901, 2d ed., by Throckmorton, 1923). Patterson appraised Eaton as ". . . an uncritical, platitudinous summary of what judges and text-writers have said." (1923) 9 A. B. A. JOUR. 647, 649.

did the profession, with Walsh[2] available, need another one-volume text on substantially the whole of Equity, in three hundred and sixty-four net pages, three-fifths the size of Walsh? Would not university scholarship have been more profitably invested in an intensive, definitive exploration of a narrower area, such as Griswold's *Spendthrift Trusts*?

Might-have-beens aside, what of McClintock's work?[3] Even with due allowance for the inevitable by-products of brevity and selection, perhaps a third of the book appears to be superficial and inadequate. There is an unfortunate sketchiness in the treatment of most procedural matters. Notably is this true in connection with the trouble spots under the fusion codes and practice acts, such as the pleading and modes of trial of issues raised by the joinder of legal and equitable causes of action in the complaint and by equitable defenses and counterclaims. For this reason, the Supreme Court's advisory committee on the new Federal rules would get little help from this book.

On the other hand, the material often comes definitely to grips with administrative realities. Enforcement measures, such as civil and criminal contempts and *in rem* relief, are handled effectively. The actualities of attempts to deal coercively with personal and political interests are sympathetically presented. And there are frequent prophecies of the modifications in traditional doctrines and administrative policies likely to result from the propinquity of law and equity in the same tribunal. Witness the handling of the effects of supposed inadequacies of competing remedies.

The text, on those topics which McClintock has chosen for major emphasis, is relatively free from oversimplification and from doctrinaire dogmatism. The author has not been intimidated by *stare decisis*. He has put into the book much of his own reflective, critical thinking. In this respect, his work displays the discernment and insight first demonstrated in his articles on *Adequacy of Ineffective Remedy at Law*[4] and *Discretion to Deny Injunction Against Trespass and Nuisance*.[5]

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[2] WALSH ON EQUITY (1930), reviewed by McClintock (1931) 15 MINN. L. REV. 844; by Chafee (1930) 44 HARV. L. REV. 313.

[3] The book is divided into twenty-one chapters: introduction, procedure, general principles, jurisdiction, specific performance, fraud and misrepresentation, mistake, reformation, equitable ownership, liens and subrogation, servitudes, interests in tangible property, interests in intangible property, interests of personality, public interests, injunctions against litigation, bills of peace, interpleader; *quia timet*, quieting title and removal of cloud; adjustments between creditors and debtors, and auxiliary and ancillary relief. In addition to the table of contents and index, there are appended a table of cases, a table of some ninety law review articles (not including the many editorial notes), and a table of some thirty treatises, cited.

[4] (1932) 16 MINN. L. REV. 233. [5] (1928) 12 MINN. L. REV. 565.

The Law of Future Interests. By Lewis M. Simes.[1] St. Paul and Kansas City: West Publishing Co. and Vernon Law Book Co., 1936. 3 vols., pp. xv, 527; xv, 556; xv, 583. $15.00.

For a long time a modern, comprehensive, and authoritative treatise on the law of Future Interests has been needed. It has arrived in the form of a three volume work by Professor Lewis M. Simes. This work —the outgrowth of Professor Simes's rich experience as student, teacher, practitioner, definitive writer on property law, and Adviser on Property to the American Law Institute—will serve immediately to place its author alongside of Kales and Gray in the formation of a great triumvirate of writers on the law of future interests. This is high praise indeed, but withal, richly deserved.

Writing in a lucid and concise style, Professor Simes has succeeded admirably in his purpose "to state as simply as possible the existing American law of future interests in land and other things." In order to give a complete and accurate picture of such law, the author has had to take into consideration not only those historic terminological techniques which survive in the present law, but also the transitional and more rationalistic stages of the law which have been developed since 1900 through independent judicial decision and modernizing legislation. The important matter of statutory modification of common law principles has been thoroughly discussed by the author. In furtherance of his intent to present the entire subject in as simple and practical a manner as possible, he has suppressed any desire he may have had to invent new terminology, preferring to redefine with care the old terms. Psychologically, this approach seems sound when one takes into consideration the well-known aversion of the legal profession to deviation from well-defined and easily recognized paths of thought.

As stated by Professor Simes in his preface: "The general arrangement of the chapters represents a compromise between the historical approach involving a separate consideration of the various types of future interests and the modern tendency to lump all types of future interests together and to consider under one head a particular aspect of all future interests." After an introductory chapter which concisely presents the historical developments of the law of future interests, the work is divided into five parts. Part I considers one by one the permissible types of future interests and expectancies in land and other things. Part II deals with problems of the creation of future interests; most of it is concerned with questions of construction. Part III is devoted to a consideration of general rules restricting the creation of future interests. The rule against remote contingent interests is dis-

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cussed in detail. In order to furnish an adequate background for an understanding of the rule against perpetuities, consideration—less detailed—is given to direct restraints on alienation, indestructible trusts, spendthrift trusts, and illegal contingencies. Part IV is concerned with the present legal relations of owners of future interests which have been properly created. Part V discusses the vesting and termination of future interests.

It may be inferred from what already has been said that this treatise is not merely a regimentation of judicial decisions and statutory enactments in the field of future interests. Professor Simes not only presents the law accurately and succinctly as it has been determined by statutes and court holdings; he also presents, in a masterly way, a critical analysis of each problem, the courts' technique in handling it, and the underlying policies involved. In many instances his critiques of the judicial process in arriving at predetermined results should furnish more rational bases for the solution of similar problems in the future. He does not hesitate to criticise the doctrines of the old land-mark cases and the rationales upon which those doctrines have been predicated; nor to offer what seems to be a preferable solution of his own. This point is well illustrated by his discussion of the Rule in Wild's Case. Whenever background materials or a statement of hypothetical cases are needed for a full understanding of a problem, they are given by the author.

The mechanical set-up of the three volumes is excellent. Printed in large, clear type, each volume contains at the beginning a descriptive chapter index and a complete table of contents of all three volumes. Section headings numbered and printed at the beginning of each chapter are particularly helpful as a time-saving device to the research worker. A well-constructed index may be found at the end of the third volume. There, also, is located a table of cases citing each case to the section and note number where it may be found with reference to its allocation in the text. Each case is set apart in the table by double spacing and may be easily found.

Even at the risk of appearing uncritical, one can not be too lavish in his praise of Professor Simes's treatise. It should adequately serve the needs of law students and teachers, and of the bench and bar, in the solution of problems arising in the field of future interests.

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Trial Evidence: The Chamberlayne Handbook. Second Edition by Leslie J. Tompkins.[1] New York: Matthew Bender & Company, Inc., 1936. Pp. xxxiv, 1259. $15.00.

Probably the novice and the old hand are nearer together in their ignorance about the law of evidence than about any other extensive subject in the law. The tyro who attends his first class in the law school course in Evidence has picked up as a listener at trials and as a reader of cases in other courses, a few common phrases, such as "hearsay is inadmissible", "the best evidence is required", and "opinions are not evidence". Add to these "res gestae", "irrelevant and immaterial", "leading and suggestive", and "self-serving declarations", and you have completed the inventory of the average lawyer's stock in trade. Perhaps other phrases and ideas, more useful in trial administration might be substituted for these, but the list could hardly be much extended or greatly refined. The trial judge cannot administer a system more complex than the apparatus of finger-tip knowledge possessed by the lawyers who practice before him. Unless we are to develop a class of barrister-specialists in trial work, we cannot expect lawyers, no matter how scholarly their law school equipment, to carry in their minds very long any elaborate system of evidence doctrines. Most of the questions which arise in the court room will continue to be settled offhand in terms of this limited coinage of simple phrases.

Occasionally, it is true, the lawyers on both sides will anticipate that the case can be made to turn upon some evidence point, such as the admissibility of a confession, or the competency of proof of an oral agreement made along with a written one. Then, with trial briefs and prepared argument, the niceties and distinctions of the evidence doctrine will actually be explored. But most commonly such thorough exploration comes, if at all, only at the appellate stage. In this sense, the law of evidence could be said to be a part of the law of appellate practice.

The tune of evidence law, then, as it is played in the trial court, can readily be learned by ear. In consequence, there seems to have been but little demand for elementary handbooks of the subject for ready reference in the court room, whereas there has been a huge consumption of the many-volumed treatises of Wigmore, Jones and Chamberlayne, which carry the collection and analysis of decisions far enough to aid the maker of briefs on appeal. Apart from local books, the work under review is one of the few single-volume evidence texts of substantial merit which have been published in this country in recent years.[2]

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[2] Others are WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE (1935); WIGMORE, CODE OF RULES OF EVIDENCE IN TRIALS AT LAW (2d ed., 1935) (both of these are specialized in purpose and scope, as I indicate in a review of them, (1936) 30 ILL. L. REV. 686; MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE (4th ed., 1932).

Such shorter works have three possible fields of usefulness: as parallel reading for law school students, as general reading for a lawyer who specializes in trial work, and who, by acquiring an unusual familiarity with the rules, may gain style and assurance, and, finally, it may be used by lawyers as a reference work in determining generally the lines of evidence to be followed or avoided in planning the proof to be used at particular trials. How does this work meet these needs? For the student it hardly fits the specifications. Its eleven hundred and fifty pages are too long. The terminology and analysis do not altogether conform to the styles current in law school teaching of today. Though the editor of the present edition of the work is a law school teacher, and though he has here rewritten the major part of the earlier edition, he has not been interested in coming to grips with the problems which agitate the professors who compile the casebooks. As an instance, the knotty question whether an instruction which informs the jury of a presumption operating in favor of one of the parties should place any burden of persuasion upon the adversary, and if so, how much,[3] is given only the summary dismissal which is traditional (pp. 153, 196, 372). Law review articles are occasionally, but not systematically cited. Recent landmark cases, such as the controversial evidence decisions in the Supreme Court of the United States,[4] if cited at all, are not featured or discussed. The rapidly widening field of scientific evidence is glanced at (pp. 966-7), but not exploited. In sum, the book is not cut to the pattern of a professor's interest, and hence cannot be recommended as a student's text.

For the practitioner's uses, mentioned above, as a general refresher or as a guide in preparation for trial, the work is distinctly valuable. It is written in a flowing, interesting style. Judging from the sampling which I have given it, I believe that the text reflects with accuracy the holdings of the majority of courts upon the evidence questions most commonly arising. The citation of cases is judicious and selective, though only a small sprinkling of cases decided since the previous edition was published are included. All in all, of recent one-volume textbooks on evidence, this is probably the one which most nearly meets the needs of the practicing lawyer.

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[3] See the strenuous workout which E. M. Morgan gets from these difficulties, in his article, *Instructing the Jury on Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59.

[4] I have in mind such cases as Liang Sung Wan v. U. S., 266 U. S. 1; 45 Sup. Ct. 1, 69 L. ed. 131 (1924); Funk v. U. S., 290 U. S. 371, 54 Sup. Ct. 212, 78 L. ed. 369 (1933); Olmstead v. U. S., 277 U. S. 438, 48 Sup. Ct. 564, 72 L. ed. 944 (1930), cited at p. 109; Shepard v. U. S., 290 U. S. 96, 54 Sup. Ct. 22, 78 L. ed. 196 (1933), cited pp. 746, 747, 791; Alford v. U. S., 282 U. S. 687, 51 Sup. Ct. 218, 75 L. ed. 624 (1931).