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JUSTICE REED AND THE FIRST AMENDMENT-THE RELIGION CLAUSES. By F. William O'Brien, S.J. – A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON. (Third edition by Walter H. E. Jaeger).

Thomas F. Butler Jr.

James J. Hayden

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BOOK REVIEWS

JUSTICE REED AND THE FIRST AMENDMENT—THE RELIGION CLAUSES.
By F. William O'Brien, S.J. Georgetown University Press, 1958. Dis-
tributed by Associated College Presses, New York. Pp. xi, 264. \$5.00.

He is a bold and adventurous person who elects to be the first to undertake the analysis of the opinions and voting record of a jurist, particularly one such as Justice Reed, who sat on the Supreme Court not only for so long, but also during such a revolutionary period. One's admiration for the daring adventurer is not diminished by the fact that the area of initial exploration is advisedly kept within narrow boundaries. By concentrating primarily on opinions dealing with the religion clauses of the First Amendment, Father O'Brien recognizes that discretion is the better part of valor.

Stanley F. Reed took his place on the Bench of the Supreme Court of the United States on February 1, 1938. He retired on February 27, 1957, more than nineteen years later. Notwithstanding this long and distinguished career of service, Justice Reed has heretofore been quite generally neglected by writers of treatises on the judiciary. Perhaps this is explained by the popular impression that Justice Reed was neither a liberal nor a conservative, and that he was not an exponent of any particular philosophy of constitutional law attracting special attention.

Admittedly based only on the limited area of this study, Father O'Brien reaches conclusions quite contrary to such popular impression. First, he submits that Justice Reed's "opinions and voting habits have advanced rather than retarded the cause of genuine liberty." Second, he suggests that Justice Reed "has made a significant contribution to the nation by his promotion of that all-pervasive pluralism which characterizes American democracy."

Constitutional law is a specialty with which one seldom comes to grips in day to day law practice, and in the academic study of which a general practitioner such as this reviewer has little time to indulge. In this instance, lack of even passing acquaintance with most of the books listed in Father O'Brien's bibliography must be confessed.

There is consequently a strong inclination to say no more than words of deserved praise for the thorough research and disciplined objectivity of Father O'Brien's honest and scholarly analysis, in Part I, of the cases dealing with freedom of worship and, in Part II, of the "no establishment of religion" cases in which Justice Reed played an influential role. A noteworthy highlight is the long overdue recognition of the true worth of Justice Reed's opinion in *McCullum v. Board of Education*.¹ Father O'Brien's restrained yet glowing tribute to that most important and realistic dissent is an outstanding feature of the book. And one may safely add that the material is excellently organized, reads easily, made to flow by paragraph headings *a la* John P. Marquand, and well indexed.

At the same time, the urge persists to register reservations with regard to

¹ 333 U.S. 203 (1948).

the author's two major premises, which he has combined into one in the following statement:²

"Justice Reed . . . appears to realize that there is a whole, as well as parts, in a social community, that there are group interests as well as individual liberties which must be considered legitimate objects of governmental concern."

True, on more than one occasion Justice Reed has taken issue with the concept that individual civil liberties must be protected, whatever the cost, in disregard of the resulting impact upon others and of the duty owing by any one individual to other individuals or groups. That is something quite different, however, from the concept that the Constitution should be so interpreted that groups (presumably including corporations) have the same standing as individuals to claim the protection of the "liberty" of the Fourteenth Amendment. Yet, as Father O'Brien observes, the latter concept is implicit in Justice Reed's opinion in *Kedroff v. St. Nicholas Cathedral*,³ where no individual's rights were alleged to have been aggrieved.

If the *Kedroff* decision, and the doctrine of Democratic Pluralism, mean that groups are to be recognized as "citizens" or "persons" under the Fourteenth Amendment in respect of such matters as freedoms of speech and press, and if groups include incorporated bodies, then Justice Reed's constitutional philosophy is a notable development. If group rights are to be considered, then the group should have standing to assert them in the first place. Whether it would be genuine liberalism, however, and a "significant contribution to the nation" to reinforce corporate claims to these guarantees, is something to ponder.

To date, in such cases as *Kingsley Books, Inc. v. Brown*,⁴ corporations have succeeded in claiming relief against local censorship laws under the First Amendment, via the due process route of the Fourteenth. Their standing to do so has not been seriously questioned, so far as this reviewer knows; yet their only possible precedent could be *Grosjean v. American Press Co.*⁵ Unless a distinction is to be drawn between freedom of speech and freedom of the press, rights which were described in *Grosjean* (p. 244) as "of the same fundamental character," the value of that case as authority seems to have been weakened by *Hague v. C.I.O.*,⁶ in which Chief Justice Stone (Reed, J., concurring) said:

"As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial persons."

The pluralism doctrine, full blown, suggests a backing away from *Hague* in this respect. Next, consider the case of a corporation for profit, seeking to protect the property interests of its shareholders, in contrast to that of an artificial entity acting for members whose personal rights are in reality involved. Whether such a corporation can rely on the due process clause of the Fourteenth Amendment, by reason of some claim of indirect deprivation of property, as the stepping stone to resort to the First Amendment in free speech or free press cases is, of course, a

² *Mr. Justice Reed and Democratic Pluralism*, 45 GEORGE L.J. 364, 386 (1957).

³ 344 U.S. 94 (1952).

⁴ 354 U.S. 436 (1957).

⁵ 297 U.S. 233 (1936).

⁶ 307 U.S. 496, 527 (1939).

question outside of Father O'Brien's prescribed field of study. Does the doctrine of "Democratic Pluralism," however, call for an affirmative answer?

Closely related is the question whether all sections of the Bill of Rights were intended to be integrated *verbatim* into the Fourteenth Amendment, rather than only such rights as the Court may consider to be embraced by the due process clause.⁷ In this connection, too, it is to be recalled that Mr. Justice Black on several occasions (e.g., *Connecticut General Life Ins. Co. v. Johnson*,⁸ has maintained that the word "person" in the Fourteenth Amendment does not include corporations for any purpose, even as to the guarantee against the taking of property without due process. A thorough study of these three related subjects is a project which might well command the interest and support of an organization such as The Fund for the Republic.

THOMAS F. BUTLER, JR.*

A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON.
(Third edition by Walter H. E. Jaeger), Mt. Kisko, New York. Baker,
Voorhis & Co. Volume I. Pp. 826. \$20.50.

Professor Jaeger has made an excellent beginning in the publication of Volume I of Williston on Contracts. It is contemplated that it will require about twelve volumes to complete this Third Edition.

Time brings changes in style and arrangement in legal publications as well as in other fields of printing. Among the important improvements in the Third Edition, Professor Jaeger has simplified the statements of principle, reduced the length of sentences, added recent decisions while eliminating some of the older cases, cited more material from legal periodicals, and statutes, and emphasized modern trends in the development of contract law. The Index has been improved materially and provides quick reference to the subject matter.

Chapter I is devoted to the definition of terms presented in more readable fashion. Chapter II is brief and deals with the requisites of informal contracts, including requirements for their formation, the element of legality, and matters of consent and intent of the parties. Chapter III contains a comprehensive treatment of the making of offers, and includes a considerable amount of new material developed since the last revision. Chapter IV concentrates on the duration and termination of offers, including a discussion of options and the rights and obligations incident thereto. Chapter V is likewise detailed and covers the acceptance of offers. Emphasis has been placed upon explanatory notes, and upon the modern developments in such matters as withdrawing letters from the mail, the use of telephone and teletype in making contracts and the rulings of courts in such situations. Chapter VI deals with problems of consideration. Beginning with the common law background the chapter presents a thorough treatment of the subject, showing modern trends in the application of traditional doctrines. Chapter VII presents an interesting study of promises without mutual assent or consideration. It begins

⁷ For a recent lively discussion of this problem, see Arthur John Keeffe, *Comments on the Supreme Court's Treatment of the Bill of Rights in the October 1956 Term*, 26 *FORDHAM L.R.* 468-505 (1957).

⁸ 303 U.S. 77, 83 (1937).

* Member of the Ohio Bar.

with a discussion of gratuitous undertakings, equitable estoppel and promissory estoppel, and continues with the traditional topics treated in earlier editions of the book. Chapter VIII is a brief but adequate consideration of the formation of formal contracts, the use of the seal originally and the changes by rule or statute in the use of the seal on contracts of every description. The effects of the seal, the need for sealed authority of the agent, the use of modern recognizances, penal bonds, governmental and private bond issues, and the negotiable instruments which form a part of the law affecting investment securities are placed in proper relationship.

Williston's great work in the field of contracts has been outstanding in this century. Professor Jaeger's Third Edition of this indispensable publication has added lustre to the two earlier editions and will be as important to the present generation of practitioners and law teachers as either of the earlier printings of this internationally known statement of the law of contracts.

JAMES J. HAYDEN.*

* Professor of Law, Georgetown Law Center.