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# Book Reviews

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> Patent Office cases holding to the contrary, but, following the trend, it is very likely that both the courts and the Patent Office will tend more and more to deny registration or use of a mark used for drugs when adopted by another concern for cosmetics or vice versa. In this connection, of course, the doctrine of secondary meaning is important.

It is evident in this field at least that the courts in determining the likelihood of confusion as to source in the trade-mark cases are placing more emphasis on the interests of the producer. Ex parte *McKesson & Robbins, Inc.*, 73 U.S.P.Q. 296 (1947); *United Drug Co. v. Ar-Ex Cosmetics, Inc.*, 70 U.S.P.Q. 362 (1946); *Antoine de Paris, Inc. v. Napolitan*, 60 U.S.P.Q. 252 (1944); *Marshall Field & Co. v. Betts & Mumpeton, Inc.*, 8 U.S.P.Q. 425 (1931).

With the dropping of the dilution doctrine, the courts have kept the interest of both the original producer and the infringer in the background and have generally favored the "confusion as to source or product test" in determining trade-mark infringement. However, it can be said that in light of the food, drug, and cosmetic cases, *supra*, that the rights of the producer, in this particular field at least, are given more consideration.

So far as we are able to bring the descriptive qualities of the plaintiff's products in the instant case within the rule applied in the food, drug, and cosmetic cases it may be predicted that the interests of the plaintiff in his trade marks "Tabu" and "Taboo" as used in conjunction with the sale of toiletries and perfumes, will be enhanced. It is doubtful that this would bear on the instant case because of the descriptive variance of these goods with the defendant's products. The courts have come to place more emphasis, in this particular field at least, upon the propensity of the producer to branch out into products not immediately related to his main product. On its face this tendency approaches the dilution doctrine in protecting the producer's right to expand into other commercial fields.

*Paul R. Jackiewicz*

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# BOOK REVIEWS

ANGLO-AMERICAN LAW, A FIRST BOOK ON. Second Edition. By Charles Herman Kinnane.[1] Indianapolis: The Bobbs-Merrill Company, Inc., 1952. Pp. xvi, 810. $8.50. — Here is a book which should find a place in every law and social science library. In 700 pages, Professor Kinnane gives the reader not only a presentation of the historical development of Anglo-American law, but also some observations which might be con-

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sidered as an introduction to the study of jurisprudence and sociology of law. The first 160 pages (six chapters) are devoted to these subjects.

In those introductory remarks, the author explains different theories concerning law, its necessity and place in society, its way of functioning and sources. He cites various definitions of law but does not commit himself to any one; like many modern legal scientists in the United States and on the Old Continent (*e.g.*, Professor Scelle in Paris), instead of giving his own definition, he is rather prone to assert that law defies any definition.

The first part of the book is too inclusive to be more than superficial in quite a few instances. However, it should be kept in mind that it was written primarily for laymen and can serve as an introduction to legal studies. The problems include a short philosopy of criminal law and a concise but good characterization of the totalitarian systems of law.

After those preliminary observations the author passes, in the second part of the book, to the main features of ancient systems of law and makes some good remarks about the civilizing influence of the Roman law. Then he reaches the very subject of his study: the Anglo-American law.

The approach of the author is historical. He begins his story with pre-Norman law in England, then characterizes the Norman period, passes to the origin of Common Law, explains the growth of equity law, and devotes a chapter to canon law, its place in the whole system and its influence upon the English law. Next, he turns to the law merchant and gives the reader an idea about the contribution of maritime law and commercial law. Part II of the book is closed by rather extensive, perhaps even lenghty, in proportion to other topics, observations about administrative law.

The next two parts of the book present "modern" English and American law. Passing from England to the United States, the author explains the reception of the common lay system in this country by the fact that the United States and England have a common language. It seems that this factor, important as it was, has been overstressed by the author. As some legal scholars such as Pound[2] and Hurst[3] have demonstrated, the result of the competition between common and civil law in the first years of the Union was largely dependent upon the success of state legislation, since the civil law system was considered as based on legislative action. The complete failure of the legislative branch of government in the formative period of the law in this country was an important element which contributed to the victory of the courts and their common law system.

Part III is essentially devoted to the organization of the courts in England and the United States, as Part IV is similarly devoted to pro-

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2 POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938).

3 HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950).

cedure and remedies. Thus, the whole system of law is viewed from the angle of objective rather than subjective law. True, the development of the English substantive law was strictly connected with procedure and cannot be separated from it; but it has been proven[4] that the matter can be presented by emphasizing subjective law. Thus, both methods are possible. But under the approach chosen by Professor Kinnane the reader may get the idea that there is no law outside of court litigation, an idea which the author himself seems to condemn. In fact, he remarks very aptly about the devotion in the American legal education to the "case system" and asserts that the over-emphasizing of the "precedents" makes the student look backward instead of seeing "what is going on in the world now" and "what is in the making for tomorrow."[5] As one of the remedies, the author suggests laying more stress upon legislation and studying the legislative process itself[6] — an idea which has already been carried out at the Law School of the University of Notre Dame.

The suggestions of the author as to the improvement of legal education are but one example of his modern ideas. Many other examples can be cited. In quite a few instances he expresses his admiration for the Anglo-American law and the creative genius of the generations that contributed to the entire system. But he is aware of all its shortcomings and its excessive conservatism, and voices an impressive plea for improvement. He deplores the diversity of the legal systems of the American states — a phenomenon which is rare even in federal countries — and advocates the necessity for a body of American national law.[7] By simple, clear, and infallibly logical arguments he convinces the reader that quite a few changes in the existing legal system are indispensable in order to keep abreast with the progress of humanity. Thus, the simplicity of administrative procedure should serve as an example for all the branches of law;[8] the obsolete general verdict system should be abolished;[9] in civil cases the whole jury system with its antiquated rules of evidence is outworn and should be modified or eliminated;[10] and in criminal cases, the modern society calls for the abolishment of many rules, as in particular that the state has no right to appeal from an acquittal.[11] Many changes in procedure are necessary, such as the introduction of a "true appeal" in all cases,[12] and a complete break with the remnants of the old formulary procedure[13] as the persistance of the common law system of actions

4 See, *e.g.*, HOLMES, THE COMMON LAW (1881).
5 Text at 441.
6 Ibid.
7 Text at 491.
8 *Id.* at 548.
9 *Id.* at 572.
10 *Id.* at 576.
11 *Id.* at 596.
12 *Id.* at 603.
13 *Id.* at 611.

accounted for "traps and pitfalls . . . frustration and . . . . anguish and . . . defeats of justice." [14]

The book is permeated with the desire to render the law accessible to rich and poor, simple and understandable to anyone. But, in connection with the question of morals, the reader is surprised that the author gives a somewhat lax "moral code" for the legal profession. Instead of stressing the high responsibility of lawyers in the society and encouraging them to be guided in their practice not only by legal rules but also by ethical principles, he absolves any action of the advocate made "to defend and protect his clients under the existing state of the law." [15] True, he asserts that he does not intend to give the legal counsel "general absolution for any wrongs he might have committed, merely because he is a lawyer," [16] and draws the attention of the reader to the professional canons of ethics and conscience of each lawyer. But those short observations are weak when compared with arguments advanced on behalf of lawyers who assist their clients[17]

> . . . by proper means to secure an advantage which the law gives him, either by way of claim or defense, — save possibly in those cases where the law is so much at variance with morals and decency that no citizen, whether lawyer or not, should abide by the law.

Of course, the expression "abide by the law" is not well chosen and should be replaced by "take such advantages as he lawfully can." It ensues that the lawyer is excused for having the most lax conscience in all society, since only when "no citizen" would disregard morals and decency the lawyer is to respect them, and then only "possibly." Thus, the observations of the author are not surprising; they tend to convince the reader that whatever means are used by the lawyer to defend an accused are good if the advocate "can invoke the laws society has made." [18]

But there are many wrongs and immoralities which can be committed by unscrupulous lawyers even without direct violation of any legal rules or canons of ethics, and it is certain that many miscarriages of justice were committed because of lawyers who have taken advantage of different technicalities or defenses not prohibited by law. It seems that it would be appropriate, particularly in a book written primarily for prospective lawyers, to emphasize the moral side of the legal profession and to convince the readers that ethical considerations should guide them throughout their legal practice.

It has been pointed out that the author gave interesting observations about ancient systems of law. In addition, in describing the historical

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14 *Id.* at 638.
15 *Id.* at 146.
16 *Id.* at 147.
17 *Ibid.*
18 Text at 148.

development of English law, he made many references to the influence of Roman law, either direct or through canon or civil law. It is the great merit of the author that he applied this comparative approach in his study. As a matter of fact, too many American lawyers do not even realize that in various instances there may be quite different solutions and approaches than those provided by their own law. The interdependence of different systems of law is masterfully presented by the author. It could be wished that he had used the same comparative approach in describing also the present state of the law. True, he does so in a few cases: *e.g.*, he commends the civil law procedure in which the judge rather than counsel is in active charge of the conduct of the trial,[19] but he neglects to make appropriate comparisons in many cases. Thus, he emphasizes "the stress in various quarters on the need for an improved 'pretrial' procedure,"[20] but does not mention that in civil law countries this procedure has been extensively applied for a long time: he suggests that "the use of several judges instead of . . . only one judge in court trials" is often advisable although not practiced,[21] but makes no reference to good results obtained by the application of this method in many European states: he asserts that a jury of less than twelve "has some advantages,"[22] but does not cite the fact that recently the number of jurors in France has been reduced to seven. On another occasion, he makes a reference to France and states that in that country "the judicial courts are precluded as a rule from reviewing administrative action,"[23] but does not mention anything about the special system of administrative courts in that country, the highest of which, the *Conseil d'Etat,* enjoys a prestige no smaller than that of the *Cour de Cassation* and is a powerful check on the action of the administrative bodies.

However, considering the length of the book, it was impossible for the author to give all the examples that could have been given in order to fully develop his numerous observations. He tried to be concise in order to cover the base area under consideration. Probably some of the questionable statements that are found in the book can be explained in this way. Thus, he states that there is:[24]

> . . . a notable difference between a city ordinance and an administrative 'rule.' Generally a city has no authority to give effect to its ordinances outside its own local territory. By way of contrast, a county administrative body may be authorized to prescribe a rule applicable throughout a whole county. . . .

In reality there is no contrast in the two instances given by the author; both exemplify the fact that each authority is limited in the exercising of its power to the area over which it has jurisdiction. Another objectionable

19 *Id.* at 600 n. 6.
20 *Id.* at 548 n. 14.
21 *Id.* at 550.
22 *Id.* at 560.
23 *Id.* at 422.
24 *Id.* at 70.

statement is the author's suggestion that one of the several ways of doing the judicial work under a federal system is that, "All federal courts might be abolished and the courts of the states authorized to apply the federal law. . . ."[25] Actually, there is no federal state existing without a federal court, and the author's suggestion seems impracticable. Under such a system the federal law would receive various interpretations in state courts and a disorganization of the whole federal structure might ensue.

Lastly, the author unnecessarily gives an abbreviated text of Article VI of the Constitution, without even indicating the omission: "This Constitution shall be the supreme law of the land; and the judges in every state shall be bound thereby. . . ."[26] Thus, the supremacy clause has been limited by the author to the Federal Constitution alone, and an uninitiated reader may wonder how it is that the author draws from the Constitution the conclusion that the supremacy clause includes federal laws and treaties.

Although the book was written primarily for laymen in a simple and easily readable language, it undoubtedly is of great value to every lawyer. Some sections of the book, such as those discussing the history of the action of ejectment or detinue, may seem of little interest to a layman but will be appreciated by lawyers who wish to supplement their practical knowledge by some philosophical and historical foundations. Undoubtedly, the book will not only help them to systematize the ideas acquired piecemeal during their "case method" studies and their practice, but will also give them some information they lacked, particularly in the field of ancient and Roman law. And in any course in legal history, Professor Kinnane's book should be the first required to be read by the students.

*Wienczyslaw J. Wagner**

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HOLMES — LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935. VOLS. I AND II. Edited by Mark Dewolfe Howe.[1] Cambridge: Harvard University Press, 1953. Pp. xvi, 1650. $12.50. How different these two volumes are from the *Holmes-Pollock Letters*. In the latter, two men in their prime exchanged ideas and occasional thoughts within a very definite framework common to both of them, *i.e.*, the great traditions of the Anglo-American legal system. There is no limitless rambling in the Holmes-Pollock correspondence; how much one may disagree with some of their statements and thoughts it was an aesthetic pleasure and an intellectural adventure to

25 *Id.* at 473-4 n. 6.
26 *Id.* at 476.
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read their letters. Correspondence between two great men is a form of conversation — and we find exactly that in the *Holmes-Pollock Letters*. On the other hand, the Holmes-Laski correspondence here under review is typical of an age in which the art of conversation — oral and written — seems to be waning. Conversation is being replaced by the argumentative, self-advertising monologue which today we even find taking hold of what used to be the inner recesses of culture and learning.

One of the keys to an understanding of the *Holmes-Laski Letters* is the fact that when they met for the first time in July, 1916, Holmes had passed his 75th birthday — and Laski was twenty-three. This seems to explain why Justice Holmes' contributions to his correspondence do not provide any new aspects of his personality and thought. His letters are mostly an expression of the rather placid pleasure which the octogenarian took in still being in touch with the living, developing and pulsing world of the younger generations. Holmes' attitude throughout all these years of correspondence was highlighted by two letters. The first, written on March 31, 1920, when Laski was leaving for England, said, "Your intellectual companionship . . . have enriched life to me very greatly and it will be hard not to look forward to seeing you in bodily presence. However, I shall get your letters and that will be much."[2] And twelve years later, November 23, 1932, in what obviously was Holmes' last letter to Laski he repeated, "If you keep a list of charities — my name should lead all the rest. . . . You see how hard I find it to write — my affection is unabated — but I can no more. Please keep on writing to me."[3]

Laski's part of this correspondence consists mainly of rambling repetitious bibliographies and of reports on his encounters with the great and semi-great of his days. Considering his high degree of activity, academic, political, and social, it seems physically hardly feasible for Laski to have actually read all the books referred to by him in his letters; and even if he did read them the time necessary for evaluation and mental integration must have been completely lacking. In his letter of March 20, 1917, Laski laid down the following two rules on the art of reading:[4] "I am clear that in reading one ought to have two rules — (a) to know one subject inside out and (b) to have an eye on what the rest of the world is doing." However, the snappy and unwarranted comments frequently made in his letters seem to testify to a rather habitual violation of Laski's own ideas on reading.

Laski's letters confirm the rule that correspondence usually offers a better insight into the working of a man's mind than his formal writings. On the subject of sovereignty — so important and central an idea in

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2 Text at 256.

3 *Id.* at 1420-21.

4 *Id.* at 68.

Laski's thought — we see him squirm and contradict himself continuously. Referring to Holmes' statement in *McDonald v. Mabee,* that "the foundation of jurisdiction is physical power," [5] Laski wrote on March 20, 1917, "that on the main heads we are in substantial agreement." Only to continue in the very next sentence, "I don't think sovereignty is anything more than a balance of forces and I am anxious to stay the implicit theocratising of any other attitude." [6] This has to be read and understood in the light of earlier letters which prove that Laski either did not or did not want to understand Justice Holmes. Laski had written on July 22, 1916, about eight months previous to the above statement, "It seems to me that the groups . . . are simply basic and I am human enough to read sovereignty in terms of their consent." [7] And again on September 16, 1916, he wrote: [8]

> My problem is to take away from the state the superior morality with which we have invested its activities and give them back to the individual conscience. Isn't there far too great a dread of responsibility today — a tendency to push things on to the government as an ultimate reservoir which excuses individual thinking.

By 1925 Laski had moved so far from this position that Holmes, commenting in his letters of July 23, 1925, on Laski's *Grammar of Politics,* wrote: [9]

> I think I perceive at critical moments a tacit assumption that papa Laski, or those who think like him, are to regulate paternally the popular desires. If a man makes a great fortune by selling some patent medicine to the crowd, that shows that in those circumstances the crowd wants it — and I can see no justification in a government's undertaking to rectify social desires — except upon an aristocratic assumption that you know what is good for them better than they—[adding, perhaps ironically, in parenthesis] (which no doubt you do).

In his early days Laski seems to have been aware of some of the shortcomings of Holmes' basic position and he posed the problems quite correctly; unfortunately, the solutions he came up with were erroneous and dangerous ones. In his letter of December 8, 1917, Laski said: [10]

> You seem to stop before Duguit . . . begins. You say that what the courts pronounce is law. So it is; but it is not less important to know the sources whence it derives. . . . Duguit says that more and more the courts will have to pronounce a law that takes into account the modern disposition of economic forces. . . . The truth is that we are witnessing a revival of "natural" law and "natural" is the purely inductive statement of certain minimum conditions we can't do without if life is to be decent. . . . [They represent] the movement towards the inductive realisation [*sic.*] of these "natural" rights into a generalised [*sic.*] social scheme in which broad hap-

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5 243 U.S. 90 (1917).
6 Text at 68.
7 *Id.* at 7.
8 *Id.* at 23.
9 *Id.* at 762.
10 *Id.* at 116-17.

> piness . . . will be realised [*sic.*] after a hell of a row to get it. Russia has started a movement of which the evolution is still only at the beginning.

Some of the more important writings of Duguit had been translated by Mr. and Mrs. Laski into English and Laski could never again free himself of Duguit's influence.

Laski's mind as revealed by these letters was full of the most amazing lacunae and misconceptions. Small wonder, therefore, that he continuously confused natural law and natural rights, and that we find the following comment on the traditional natural law doctrine: [11]

> I should therefore argue that the Christian ethic was at no point of itself a liberating influence until it rediscovered natural law in the Scholastic revival. I put all this to a Jesuit from Louvain who is in this hotel and he was so horrified that I was tempted to feel that I might be right.

And on January 18, 1930, he wrote: [12]

> I read, too, a clever book by a Belgian professor, *La philosophie du droit positif* — one Dabin — an able defence of a modified Austinianism such as you would like. But he is also a Catholic, and it was amusing to note how medieval natural law *would* creep in every so often. . . .

Such a statement is a typical example of Laski's sloppy reading habits which quite frequently led him to making entirely unsubstantiated and unwarranted comments. To call Dabin's teachings " a modified Austinianism" can be justified on one assumption only *i.e.,* to have read the first paragraph of Dabin's book and to have stopped there for good. Professor Buckland's opposition to traditional natural law concepts is too well known to suspect him of any leniency towards Dabin's work; and he referred to the very same book which Laski had called "an able defence of modified Austinianism with the following words: "For him [Dabin] the enquiry into the rational basis of law is in the moral field, quite outside the juristic." [13]

The farther we get in reading these letters the more are we struck by Laski's increasing self-adoration, by his repetitiveness and — most deplorable of all — by the shallowness of his statements. This correspondence demonstrates one of the great tragedies of the modern mind — its unceasing attempt to grow in width without ever growing in depth.

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11 *Id.* at 1083.

12 *Id.* at 1218.

13 BUCKLAND, SOME REFLECTIONS ON JURISPRUDENCE 11 (1945).

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THE SEPARATION OF POWERS DOCTRINE AND ITS PRESENT-DAY SIGNIFICANCE: Second Lectures in the Roscoe Pound Lectureship Series. By Arthur T. Vanderbilt.[1] Lincoln: The University of Nebraska Press, 1953. Pp. 144. $2.50. During the last two decades numerous funeral orations have been pronounced over the "remains" of the separation of powers doctrine.[2] The "corpse" won't stay dead. Chief Justice Vanderbilt of New Jersey shows why. The American people "instinctively sense" that the "freedom so essential to both the individual and to our civilization" [3] can be insured only through the "reign of law"; the "reign of law, in contrast to the tyranny of power, may be achieved only through separating appropriately the several powers of government." [4]

In the first lecture Judge Vanderbilt reviews the doctrine historically as part of the American heritage of constitutionalism, and draws instructive lessons in liberty from the fate of the doctrine in other lands. The second lecture shows how the doctrine is threatened at home by the dominance of the Federal government over the states and of the executive over the legislature. The final lecture analyzes "judicial deference" as a conspicuous cause of present-day "constitutional imbalance."

Mention of the word "imbalance" will arouse those who dismiss the whole checks and balances apparatus of the Constitution as embodying the "mechanistic" or "Swiss watch" theory of government,[5] which is obsolete today when triumphant democracy through universal suffrage provides in the ballot the only really necessary check.[6] Having such a check, we are told we can let the "balances" go. They are derived from a time when it was assumed that between government and people there was an essential antagonism and every governmental act was therefore suspected.[7] Today, Liberty does not need Cokes to thunder to Kings that they are also "under the law." Leviathan is a prisoner. Democracy has made government a servant, and the "Police State" a "Service State." We can by our votes "turn the rascals out." Thus, we need not fear even when the administrative process "bends" judicial doctrine and procedure to "realistic curvatures," [8] and Liberty is not endangered when executive, legislative and judicial functions are blended in a single administrative agency. Do we not elect the legislative creators of these "bent" or

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1 Chief Justice, New Jersey Supreme Court.

2 CARROW, THE BACKGROUND OF ADMINISTRATIVE LAW (1948); LANDIS, THE ADMINISTRATIVE PROCESS (1938); RIKER, DEMOCRACY IN THE UNITED STATES (1953); Coil, *Remarks on the Separation of Powers: A Reply to Professor Kinnane,* 38 A.B.A.J. 365 (1952); Kinnane, *Some Observations on Separation of Powers,* 38 A.B.A.J. 19 (1952).

3 Text in Introduction.

4 *Id.* at 37.

5 PADOVER, THE COMPLETE MADISON 13 (1953).

6 CARROW, *op. cit. supra* note 2, at 140-142; RIKER, *op. cit. supra* note 2, at 160.

7 CARROW, *op. cit. supra* note 2, at 140.

8 LANDIS, THE ADMINISTRATIVE PROCESS as quoted in text at 6.

"blended" agencies? If they do harm we can vote out the legislature, and by killing the creators, we can kill the creatures. (Presumably, the time-lag in this indirect process of homicide by ballot is a minor matter.) So runs the newer thesis which proponents of a revitalized separation of powers, like Judge Vanderbilt, face today.

Judge Vanderbilt does not give us just another anthology of historic American affirmations of the doctrine he defends. He quotes indeed, once more, Washington, Adams, Jefferson and Madison and cites again Montesquieu and other eighteenth century sources to which the authors of the Constitution turned. Madison sums them all up in the wise warning: [9]

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

True, the "Father of the Constitution" did not discuss in detail the modern thesis that whatever the value of separation of powers as a political principle on the higher levels may be, there is no need to fear its violation in the concentration of functions in a subordinate agency, responsible to officials who are in turn responsible to the people. The fifty-first number of the *Federalist,* however, did anticipate and answer the heart of the modern view: [10]

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. *A dependency on the people is, no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.* (Emphasis added).

Judge Vanderbilt does not, however, rest his case upon appeals to authority. He will have separation of powers stand on its own legs in a mid-twentieth century world. Readers of his lectures may decide whether his comparative survey of the status of the doctrine in other lands corroborates Madison, Jefferson, Adams and Washington. In Soviet Russia, Andrei Vyshinsky declares that the "program of the All-Union Communist Party (of Bolsheviks) rejects the bourgeois principle of separation of powers." [11] Thus the "judgments" of Soviet "courts" may be set aside by an executive body. The halting acceptance of the doctrine in the Weimar Constitution of the Second Reich made it easy for Adolf Hitler

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[9] THE FEDERALIST, No. 47 at 313 (The Modern Library ed. 1937).

[10] *Id.,* No. 51 at 337.

[11] VYSHINSKY, THE LAW OF THE SOVIET STATE 318 (1948), quoted in text at 8.

to take over, behind the facade of that Constitution, all governmental functions and even to change the Constitution, by executive decree.[12] Many Latin American executives, may almost at will, declare an emergency and assume unlimited powers.[13] In France of the Fourth Republic, the executive is exercising legislative powers "in flat defiance of the plain words" of the French Constitution, and no French court "will even hear a protest against such conduct." [14] Too serious to suggest by a facile *post hoc ergo propter hoc* that strict adherence to separation of powers would have saved fundamental human rights in some of these now tragic lands, Judge Vanderbilt's survey entitles him to ask: whether in our confused times there is a more depressing fact than the widespread failure to correlate the time-worn separation of powers doctrine with the rule of law, and the rule of law in turn, with the preservation and protection of individual freedom and basic human dignities? The question makes an issue for protagonists of administrative justice, like Dean Landis, former chairman of SEC. Dean Landis brushed aside the doctrine as the work of an "Aristotelian theoretician" and a "page of theory in Montesquieu." [15]

In his second lecture, Judge Vanderbilt discusses the threat to the separation of powers doctrine (and indeed, to constitutional government itself) in the increasing centralization of powers and functions in our Federal government at the expense of local self-government, and in the dominance of the Federal executive over the legislative branch. The two phenomena are closely related as cause and effect. Economic depression, emergency or "crisis" experimentation to meet its problems, followed by wars, now "hot," now "cold," and the role of world leadership thrust suddenly upon our peace-loving people, seemed to require quick action at the national level. The result has been a growth in administrative law accelerated by the practice of delegation of wide powers to the executive by the legislative branch. Since the exercise of such delegated administrative power must be uniform throughout the nation, the areas of state and local activity have been correspondingly curtailed. With this has come the development of the "administrative" mind, impatient of restraint, contemptuous of older judicial and constitutional limitations.

Review space here forbids detailed quotations from Judge Vanderbilt's illustrations, but one cannot resist at least referring the reader to a classic example of the "administrative" mind at work in the recommendation of the late Secretary of Labor, Maurice Tobin. He stated that we need a national labor law so written that it would be "uncertain" whether the government would or would not intervene in a labor dispute; uncertain whether the President might or might not seize an industry in case of

12 Text at 13-18, 34.

13 *Id.* at 25-34.

14 *Id.* at 35.

15 Landis, *Administrative Agencies in Government,* DUN'S REP. 7 (Nov. 1932), quoted in text at 3.

strikes jeopardizing the national welfare; uncertain likewise whether the President would do so with or without a prior fact-finding board.[16] Judge Vanderbilt also cites the Emergency Price Control Act as an instance of the "studied effort to comply with the constitutional forms while withholding their substance." [17]

He is, however, no mere "viewer with alarm." He has hopes for the Federal Administrative Procedure Act of 1946,[18] although doubtful about numerous exceptions to the application of the Act.[19] He has anticipated President Eisenhower's appointment of the Commission on Intergovernmental Relations by his thoughtful suggestion that the time has come to re-examine which of the many governmental and administrative functions now exercised by the Federal government might be returned to state or local control. The test on the face of it, of course, will be efficiency. Readers will see that this is not the whole story. Value-judgments are involved. Chasmic differences of opinion will be inevitable. Compromise, the way of 1787, will undoubtedly also be the way of 1954. For some, Federalism is not just an accident of our history and presently an anachronism, but rather, an invaluable way of preserving Liberty by keeping dispersed that absolute power which stifles it. For others, the end of Federalism holds no terrors, if we can, by force of the ballot in free elections, keep government doing, in Dean Landis' words, "what we now expect government to do." [20]

Judge Vanderbilt's final lecture deals with "judicial deference" as a cause of "constitutional imbalance" today. The late Chief Justice Stone once reminded his brethren of the necessity of judicial self-restraint in approaching constitutional questions.[21] Is judicial deference to the legislature and the executive, and now full-blown in its application to administrative findings, the normal, logical development? When does judicial deference become judicial abdication[22] so as to threaten the existence of the separation of powers doctrine? Space again requires the reviewer to resist quoting from the third lecture in detail, other than to indicate some examples, such as: judicial acquiescence in administrative "expertise"; congressional action denying essential judicial functions to the courts by stripping courts of equity of injunctive powers; precluding access by an aggrieved individual to the regular courts, and thus curtailing the power of courts to adjudicate on the validity of statutes and administrative regulations.

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16 Text at 81, n. 78.

17 *Id.* at 82.

18 60 STAT. 237 (1946), 5 U.S.C. § 1001 *et seq.* (1946).

19 Text at 87-88.

20 LANDIS, THE ADMINISTRATIVE PROCESS at 49 as quoted in text at 5.

21 U.S. v. Butler, 297 U.S. 1, 79 (1935) (Dissenting opinion).

22 Palmer, *Causes of Dissents: Judicial Self-Restraint or Abdication,* 34 A.B.A.J. 761 (1948).

Judge Vanderbilt fully documents his case for the imperilling of separation of powers by judicial deference. He is not one of those "good plain people" who pay "uncritical veneration" [23] to the separation of powers doctrine "embroidered by pontifical moral phrases." [24] He has the courage to suggest that if the congressional power to spend to "promote the general welfare" is not limited, as Madison claimed,[25] to the objects of the powers specifically enumerated in Article I, Sec. 8 of the Constitution, there should be some way in which such congressional bounties can be reviewed or tested by litigants in the courts. If the "Theory of the Welfare State" is to receive tacit judicial benediction, is *Massachusetts v. Mellon*[26] to remain the law? If so, it is difficult to see how very much can be done to return government to its proper bounds by restoring that balance in government which the Constitution intended. In concluding Justice Vanderbilt says: [27]

> On respect for the doctrine of separation of powers, not as a technical rule of law, but as a guide to the sound functioning of government, rests not only the stability of this nation but of every other nation and the freedom not only of our own citizens but of the citizens of every other country. The doctrine must be universal in its application if stability and liberty are to be sought and obtained.

If, as others would have them do, the American people decide to bury the checks and balances principle of government and the separation of powers doctrine which is a part of it, they should at least understand the true nature of that which they are consigning to the dust.

*Edward F. Barrett**

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THE STRANGE CASE OF ALGER HISS. By The Earl Jowitt.[1] New York: Doubleday & Company, Inc., 1953. Pp. 380. $3.95. This interesting and provocative book by a distinguished British lawyer could not fail to arouse strong comment on the part of those who read it. The very nature of the subject matter alone would be a guarantee of that. The trial of Alger Hiss is an event that casts its shadow on our generation as other famous criminal proceedings have stirred former ones. In addition, Earl Jowitt's treatment of his subject, although moderate in style, is fierce in purpose and result; it could not help but exacerbate all the passionately

23 Kennedy, Book Review, 28 NOTRE DAME LAW. 573 (1953).

24 LANDIS, THE ADMINISTRATIVE PROCESS at 49 as quoted in text at 3.

25 U.S. v. Butler, 297 U.S. 1, 65 (1935).

26 262 U.S. 447 (1923).

27 Text at 143-144.

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1 Formerly Lord Chancellor of Great Britain.

partisan voices of the right and left who see in the verdict reached in the Hiss case a vindication, or betrayal, as the case may be, of their own political philosophies.

However, it should not be the purpose of a book review in a legal periodical to stray too far from the area of what should be its more technical and germane enquiry. For that purpose, it may be pointed out that the author wrote with the acknowledged intent of calling attention to the consequences, so far as the Hiss case was concerned, which "arise from the differing functions assigned in the American and in the English jurisdictions to judge and counsel." [2] An admirable purpose this is, and, to the extent adhered to, supplies the bench and bar with interesting insights into the comparative advantages and disadvantages of both systems.

However, in this reviewer's opinion, Lord Jowitt perverts what should have been an objective comparison of two types of trial court criminal procedures, to serve a demonstrably biased end. There is no doubt that the author believes that Hiss was convicted erroneously. There is even less doubt that he is convinced that if the defendant had been tried in a British court, or at least in Jowitt's, he would have been acquitted. Believing as he does, it is not surprising that the author has succumbed to the very human temptation among authors to subvert technique to conviction, to use it to support a conclusion, rather than to illuminate and instruct.

There are found throughout the book many examples of this misuse of method to serve belief. For instance, the author complains, with a good deal of justification, that the American courts allow too many excursions in attempts to impeach the credibility of witnesses. Few can quarrel with that observation. Most readers could appreciate also that this license of cross-examination worked to the disadvantage of Hiss on occasion during the trial. However, what this reviewer cannot let pass without comment is the fact that the author is patently inconsistent in applying his own point. For, when it comes to the prosecution's witnesses, especially Whittaker Chambers, Lord Jowitt's solicitude for confining examination to the issues vanishes. He is the first to refer to Chambers' unsavory past, or his admitted deceptions and untruths, as detracting from his present testimony under oath.[3] He complains of the admission into evidence of the memorandum of Adolph Berle to whom, in 1939, Chambers described Hiss as a Communist. Yet, later, he makes much of the fact that Chambers on that occasion had referred to Mrs. Hiss as only a Socialist and not as a Communist.[4] He excuses the understandable difficulties which Hiss may have had in testifying clearly and consistently

[2] Text at 6.

[3] *Id.* at 222.

[4] *Id.* at 77.

with respect to events which occurred ten years before the trial. But let Chambers suffer from similar disability of memory and narration, and the author seizes upon them to impugn severely the latter's testimony.

The author reminds us that British counsel are restrained by professional training and trial court supervision from indulging in provocative or prejudicial rhetoric.[5] Implicit usually, but explicit from time to time, is the author's feeling that Mr. Murphy, the prosecutor of Hiss, violates this British standard of courtroom decorum. The book is silent about, and this reviewer is not familiar with, defense counsel's conduct along these lines in the second trial. However, the papers at the time related in detail, and no one can doubt, the devastatingly vituperative attack made upon Chambers, as a person and as a witness, by Mr. Lloyd Stryker, defense counsel in the first trial, and a master of purple rhetoric.

There are other examples of this double standard of analysis which is used by the author. Together they have turned what might have been an invaluable clinical appraisal of this famous case by an objective foreign observer and student, into an advocate's well written brief on appeal. However, the author's appeal lies only to the court of American public opinion. It is this reviewer's opinion that on that score his book must be accepted for what it is. *The Strange Case of Alger Hiss* is not even a moderately objective effort to unwind the terribly deep mystery of a man whose conviction by a jury of his peers has not been able to dissipate successfully the doubts that still remain concerning his guilt or innocence.

That Lord Jowitt succumbed to his prejudices on this question is doubly unfortunate. First, his bias detracts from the conceded merits of a splendidly written book. Secondly, it will only serve to fan the fires of controversy between those who cite the guilt of Hiss as prima facie evidence of the collective treason of the New Deal and all its works, and those who placed all their shallow faith in the virtues of that era on the innocence of one who betrayed it. The guilt of Alger Hiss is personal; it can not impeach the great majority of those who served their fellow Americans loyally and effectively during the 1930's. It is a pity that Jowitt's book, although unintended for that purpose, will obfuscate further that fundamental fact.

*Alfred Long Scanlan**

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5 *Id.* at 206.

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*SEPARATION OF POWERS AND ITS PRESENT DAY SIGNIFICANCE, THE. By Arthur T. Vanderbilt. Lincoln: The University of Nebraska Press, 1953. Pp. 144. $2.50.

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*Reviewed in this issue.

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