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Book Reviews

Edmund A. Stephan

Charles E. Clark

Joseph A. McClain

Roger Paul Peters

supra, private suits against these companies have benefited from the Court's exhaustive and authoritative analysis. But, as the cases increase in number the requirements for inferring conspiracy decrease. Attempts to interpose more rigid standards have been unsuccessful. *Milwaukee Towne Corp. v. Loew's, Inc., supra; Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.,* 176 F. (2d) 594, 597 (2d Cir. 1949). A recent review of the problem in *Fanchon & Marco v. Paramount Pictures, Inc.,* 100 F. Supp. 84 (S.D. Cal. 1951), takes into consideration the simple truth that the "clearance" and "run" system has become a generally accepted state of affairs. This is true throughout the industry and has become a habit with the public. In *Fanchon* no unreasonableness was found in the application of the system to the independent exhibitor. This distinguishes *Fanchon* from the instant case where the treatment of the drive-in was not based on any particular factual references. Without being given a competitive test, the drive-in was uniformly assigned to the second-run spot.

When the rule of the instant case is viewed out of the context of the circumstances, it could hardly win unquestioned approval. Behind the inference, however, stands firm evidence of unlawful combination used to suppress competition. In carrying out the policy of the anti-trust laws, a careful, judicious, case-by-case approach is needed to prevent misuse of any conspiracy formula. As stated in *Fanchon & Marco v. Paramount Pictures, Inc., supra,* 100 F. Supp. at 104, "No parallelism, conscious or unconscious, can overcome a finding of reasonableness."

William J. Hurley

BOOK REVIEWS

ADMINISTRATIVE AGENCIES AND THE COURTS. By Frank E. Cooper.[1] Ann Arbor, Michigan: University of Michigan Press, 1951. Pp. xxv, 470. $5.00.—The rise of the administrative agency to its present position of power and prestige is perhaps the most significant development in American jurisprudence during the past half century. Its way has not been easy. The philosophy that gave it birth compromised a principle that the American people have long cherished — the doctrine of separation of powers under which the legislative, judicial and executive functions are supposed to be neatly compartmentalized. The result was an immediate hostility from which administrative institutions have never been freed.

The familiar charges that the administrative agency is a usurping "fourth branch" of government or that it is an "unholy combination"

1 Member of the Detroit Bar; Visiting Professor of Law at the University of Michigan Law School.

of policeman, prosecutor and judge, threatening our basic liberties, stem, no doubt, from a perfervid faith in the strict tripartite form of government, if not from a dislike of having one's life or business regulated. Equally publicized have been the claims advanced by the advocates of the administrative process. The rise of industrialism and the power of giant industries, it is said, demanded a new set of economic and social controls that were beyond the competence of any of the three conventional branches of government. The investment banking business might be cited as a case in point. The debacle of 1929 and the subsequent congressional revelations pointed to an obvious need for government intervention. The issuance of new securities and trading on the national exchanges required continuous supervision, great expertise, flexibility in procedures and in rule-making, and, with it all, a sense of mission. No court or legislative body, it is claimed — and the statement is not easily challenged — could do the job.

Today the issue would no longer appear to be whether we shall have administrative agencies, but rather how they are to be kept within bounds. The difficulties encountered in granting to an agency enough power and freedom of action to perform its function, but not so much that it overruns the liberties of the citizens are formidable indeed and have taxed the ingenuity of the legislature and the courts. Fitting the administrative process into our present constitutional framework, rather than according it the equality of a coordinate branch of government, has provided both conceptual and practical problems of a high order.

Unlike the British who rely upon Parliament to check the excesses of administrative action, we look to the courts to exercise the principal restraints. The legislature, to be sure, starts the agency on its way, and in the typical case endows it with broad powers and holds it accountable to prescribed standards, albeit fairly loose ones. To the courts is left the task of defining the statutory bounds, keeping the agency within them, passing upon the fairness and adequacy of the agency's procedures and adjudicating the constitutional issues that seem continually to beset the administrative process.

The relation of the courts to the administrative process is the central theme of Professor Cooper's book. The author's purpose, to paraphrase his own statement, is to bring together the leading cases which have laid down the principles that govern the decision of litigated matters before the agencies and to describe the criteria and techniques of administrative adjudication within the standards imposed by the courts. The result is a basic survey of the administrative process that should have appeal both to the law student and the practitioner.

The major parts of the book are familiar: The Place of Administrative Agencies in the Judicial System, Underlying Constitutional

Questions, Procedure in Adjudication of Cases, Rule Making and Judicial Review. The section on Adjudication of Cases — the so-called quasi-judicial function of administrative bodies — is particularly excellent. It is in this area that public criticism has been the most vociferous and perhaps the most justified. The author's approach to the topic is refreshingly dispassionate. He does not commence with an answer but rather with the problem. After making out a convincing case establishing that an administrative agency cannot function as a court if it is to accomplish its assigned task, he goes on to make specific recommendations for the improvement of administrative procedures. He calls for major revisions in pre-hearing conferences, the conduct of the hearing itself, the separation of prosecuting and adjudicative functions, the presentation of evidence and in post-hearing procedure.

The author treats the quasi-legislative and quasi-judicial functions of both state and federal agencies. If the book has any major shortcoming, it is that the breadth of the survey precludes much analysis in depth. The Administrative Procedure Act [2] which has brought considerable uniformity to the rule-making and adjudicative functions of the federal agencies, particularly in such areas as notice, hearing, separation of functions, admission of evidence and scope of judicial review, receives frequent but cursory mention. It could, and perhaps should, be the core of any current treatise on the subject of administrative law.

The author's style is somewhat turgid. There seems to be something about legal writing that stifles originality. Most treatises have the literary qualities of a law review note. But law books, fortunately, are not read for their stirring prose and it would be captious to make much of any deficiencies in this respect. *Administrative Agencies and the Courts* is a sane and well documented treatment of a subject that is becoming more important to the practitioner with each passing year. Professor Cooper's volume should take its place with the works of Benjamin, Dickens, Landis, Stason and other scholars in the field.

*Edmund A. Stephan**

CHARLES EVANS HUGHES. By Merlo Pusey.[1] New York: The Macmillan Company, 1951. 2 vol. Pp. xvi, vii, 829. $15.00. — Within its planned confines this is an engaging book. It is an authorized biography, making use of the subject's own notes and aided by a series of personal interviews with him over the years looking to this publi-

2 60 STAT. 237, as amended, 5 U.S.C. §§ 1001 *et seq.* (1946).

* Partner in the firm of Mayer, Meyer, Austrian & Platt, Chicago.

1 Authorized biographer.

cation. And the family has co-operated with private memoranda, letters and advice, though not control. Undoubtedly it is as close to an official life as we shall get, or should expect. And so we have in plenteous detail and attractive form a typical American success story in — to speak only truly — exaggerated form.

For what a success story it was! Here is a poor minister's son who shows real brilliance at an early age, achieves a striking scholastic record, and, having chosen the law, seeks his laurel crown in the difficult area of metropolitan New York. True to the story book tradition, it does not elude him long and, having married his boss's daughter, he is soon a recognized leader of his profession. So far the pattern is not unusual; the metropolitan bar has continually enriched itself in just such fashion by talent culled from all over the country. But from then on he breaks forth from the mold, to go on to a career of thirty-five years of public service which brings him twice to the Supreme Court, once as its chief, and within a hairbreadth of the presidency itself. One reviewer has said recently that he had nine successful careers, instead of a single one.[2] Perhaps the number is still set too low. In any event the amazing thing is that he made a distinctive mark in each one.

Moreover, all this success was duly earned; none of it appears in the least fortuitous. (Any one who has lost the presidency by a mere 3775 votes in a single state cannot be held a special favorite of Lady Luck.) What he accomplished was the result of yoking his superb mental equipment to an unusual drive and capacity for sustained and orderly action. Even the typed step of marrying the boss's daughter was not trite, and was no departure from character; as Pusey is at pains to point out, he refrained from any attention until he was already a partner (at the age of twenty-five!). Indeed, Mrs. Hughes deserves mention in her own right for her part in this story and her husband's life. No more attractive sections of the book can be found than the accounts of their continuing love story, lasting for fifty-seven years, and their gay and affectionate letters to the end. And she seems to have been that rare person who grew equally with her husband and took her proper place by his side, no matter how high the summit he attained. The quip by one of Washington's great ladies that that city is full of poor boys who have become famous — and the wives they married before they became famous — is clearly wide of the mark in its implications, at least as to this gracious lady who contributed so markedly to her husband's success.

In what I have said I have perhaps indicated what is, to me, the more interesting part of the work — the recapturing of the man as a human being in his personal and family relationships. Pusey works

2 Elliston, *The Integrity of Justice Hughes*, 189 ATLANTIC MONTHLY No. 4, 73, 74 (1952).

very hard to show that his hero was not the distant, austere being so commonly depicted. Possibly he works too hard, with almost a sense of strain. For after all, Hughes was not a jolly rotarian and cannot be shown as such. He was a man of innate dignity, and his mind worked faster than the minds of those he met. Inevitably that meant some gulf. But Pusey is quite right in showing the friendliness, the capacity for fun, the gayety underneath, which helped to attract those close to him and stimulate the intense loyalty he always inspired in those who worked with him.

One feature of his personal life I wish Pusey might have developed more as it would have been of particular interest to lawyers. That is, how he managed to achieve the security he actually had when he returned to the bench. From various details we can deduce the following: When Hughes first went on the bench in 1910 his salary was $12,500, later increased to $14,500. After he lost the presidency in 1916, he had to sell his Washington house in order to start in practice again. He left the office of Secretary of State because he needed to recoup his private means. Hence his real start, monetarily speaking, seems to have been in 1925; in 1930 he was Chief Justice. In his best year in the interim he made $400,000. But his private practice was interrupted for his term of service as Judge of the International Court at The Hague, and significantly reduced when his son became Solicitor General, since he thereafter refused cases affecting the Government. Moreover, a long time and much effort was devoted to service as a Supreme Court master in an important case where his fee was only $30,000. Interspersed also were continuous speaking engagements and semi-public service of many kinds. One infers that during the short period of his active practice — even in those days of lower taxes — he must have received a number of very substantial fees to have made him so swiftly a millionaire. When he retired from the bench in 1941, he still had a fortune of about $1,200,000 and did not need the retirement allowance, but on consideration took it as desirable policy for the Court.

On the public side of Hughes' career the book should provoke more controversy — naturally enough in view of the many-sided facets of his life. Further the book is here marred by that hero worship which seems an usual occupational disease for authorized biographers, but is perhaps inevitable for one with such close contacts with so towering a figure. In a sense this is a disservice to Hughes; Pusey's picture of him is not of a person growing in power and strength, but of a figure always the same and always a god. It does, however, supply a notable set of villains who worked to subvert the hero's high purposes, including two presidents and several nations. One may say that even in his choice of enemies Hughes was great!

Nevertheless much material is provided, some of it quite new. As widely heralded as any is the well-kept secret (till now) that the

justices asked Holmes to retire; even that wise realist did not leave the Court of his own initial volition. The material dealing with Hughes' tenure as Secretary of State is the most extensive. Pusey evidently regarded this period with particular satisfaction. He devotes some 200 pages or 50 percent more space to these four years than to the eleven years of the Chief Justiceship. By contrast the Court crisis of 1937 in the controversy with President Roosevelt — surely one of the historic events in the history of the Court, if not of the nation — merited only fifteen pages of direct account and fifteen more of background.

In future discussions of this great lawyer it is clear that the material of this book will be a prime source, particularly for the personal reactions of the subject. But since Hughes touched so many parts of American life, beginning with his utility and insurance investigations which first brought him deserved fame, and his fighting governorship of New York, through his several careers in Washington, there is sure to continue an interest in his accomplishments. And discussion and dispute will inevitably ensue. Now we are too close to evaluate his real historic stature, as is shown by the responses to the man himself, in the universally favorable reviews of this book now appearing.[3] When near contemporaries mark him "excellent" in each of his nine careers, the total impact is so overpowering that one career alone may hardly be separately dissected. But that comparison with others of stature in each field will come with time. So, with some temerity, I suggest future possibilities for discussion in the area which will remain of lasting concern to the lawyer, namely, that of his service on the Supreme Court.

Now it can hardly be gainsaid that Hughes was a great judicial administrator in the conduct of his Court, probably the greatest we have seen. His devotion to civil rights is beyond all question, being more consistent than that of even Holmes, as his supporters are justified in pointing out. And he has shown his mastery of other judicial fields — the Commerce Clause, the Contract Clause, to name two. But I suggest that he is not a great Chief Justice in the sense of impressing his individuality upon the status and function of the Court, and of that, in turn, upon the country, in the sense that Marshall and Taney were. Consider the claims of his idolaters in this regard. All they claim in effect is that his was a holding operation, to keep the Court as it was, to "save" it from the attack of the democratic leader elected by the people. There appears to be some doubt how much was saved; but if we concede that the symbolic function of the Court was pre-

3 A partial exception is the interesting review by the contemporary lawyer and statesman, George Wharton Pepper, who expresses high admiration for Hughes and then points out some details of difference on important measures. Pepper, *Charles Evans Hughes: Publication of New Biography Is Major Event,* 38 A.B.A.J. 200 (1952).

served in form, we must still inquire what was preserved in substance. And we are compelled to answer that we do not yet know — except that generally the Court's is now a different and a lessened role. The things it stood for so boldly in the 20's and early 30's vanished with those opinion days of the spring of 1937; no more complete overthrow of a conception of judicial function, with not a single open or expressed regret, can be imagined. For a time it seemed that the Court might concentrate on civil liberties; more recently it has shown that such will not be its objective. It had already rejected a role for which older generations of justices had shown it well fitted, perhaps best fitted, namely, as an expert court of common law.

All this poses some significant questions. What happened in the 30's that affairs could so suddenly develop to a crisis without careful planning and forethought of the judiciary's role? And was that crisis really resolved by preserving the form and letting substance go? What the answers may be for future protagonists, for presidents with democratic programs, or for chief justices who desire their court to be a continuing effective part of republican government, is anything but clear. Given a repetition of such strains — and history indicates that repetition is inevitable — I doubt if the active contestants in that future crisis will be able to look back to the Hughes period of the Court with assurance that it contains a lesson; all we can deduce with assurance is that some change will out.

I realize that one may well urge that no one individual could have inspired a permanent or lasting solution, that even a John Marshall could have done no more. That may well be true. It was Marshall's good fortune to serve his time well; a like feat may now be beyond the power of any individual man. That truly is a frightening thought! Americans may make advances in science and physical betterment that are the wonder of the world; but in the science of living together they are enmeshed by their past. So we improve the automobile each year; but we do not improve our methods of meeting and taking care of the toll of injury and death the machine brings. But underneath the form, institutions of government do change; unfortunately if we submit to being bound by the form, then we may not control the change, but must accept it blindly, whatever its direction. Today we seem to be suppressing freedom of thought and of expression — suppression being the present climate of opinion — through the very forms of law designed to preserve those quite fundamental American rights. So the Supreme Court's function continues to change as was begun under Hughes, but without conscious plan or debate as to direction and course.

I mentioned above the few pages here devoted to the Court fight. Practically everything stated by Pusey as to it was already publicly known. The only new factor I noted — and it is one suggesting intriguing speculations — is that Harlan Stone was disturbed by the

submission to the Senate Committee of the famous Hughes letter as to the work of the Court without consultation of the full Court. But I expect no more space was devoted to this crisis, and to the drift before it, because actually there was no more to tell. These profound changes in the Court's function and position were occurring with the justices hardly more than puppet figures swept along by fate or destiny. Surely there is an insistent question: Couldn't a John Marshall actually have done more?

Of course all of us, even the greatest, are conditioned by our own experience. Marshall certainly was a child of his times and his experience; it happened that this coincided with a country's need. And so we may in part explain Hughes by his background as a modern urban lawyer, one eminent in the profession. What is the special forte of the lawyers of our day? One may suggest that it has been not innovation, but adjustment, within the norms of known experience. Hughes certainly showed this. He was, in the best sense of the term, an ameliorator. He cannot be called a compromiser — that signifies a viable conscience and a lack of courage, neither of which could be said of the man who defied the New York Assembly to support the Socialist members or who consistently and outspokenly upheld all civil rights. But he did try to work within a given framework. His campaign for the presidency was but cautious liberalism. Though he supported the League of Nations in the 1920 campaign, as Secretary of State he saw that pressure for it was useless and took another course, that of reduction of armaments. As a justice he went to rather extreme lengths to distinguish away, rather than overrule, outworn cases. This, as I pointed out here not long ago, is perhaps the chief defect in his craftsmanship as a justice; [4] but it is entirely in keeping with his entire career. To attempt to control or shape the future of the Court, or to direct it into strange waters, would have been foreign to his nature. And yet may not bold steps be the wiser in the end? Perhaps we ask too much to expect this of the brilliant and successful lawyer; what we may need is something more uncouth, possibly a country rail-splitter or a doctrinaire college professor!

It appears to be the function of reviewers not only to state, but shortly to solve, momentous issues overlooked in the books under review. I have no desire to take such a course; indeed, I have no ready answers to the questions I raise. But I do think the career of this great man suggests such questions; having so much we are justified in asking why he could not have been yet greater. And without belittling the worth of this book in the slightest,[5] we may hope for

4 Clark, Book Review, 26 NOTRE DAME LAW. 765 (1951), where HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT (1951) was reviewed.

5 Errors seem very few. Taft, while a professor, was never dean of the Yale Law School, text at 306; Daugherty was not acquitted, but the jury disagreed, *id.* at 508.

further search into the complexities of greatness and the response of genius and near-genius to problems of unusual magnitude. We are bound to take this book as the first step in any such search. And beyond it we can read it for what it also is, an attractive narrative of a most interesting person, who was not merely a razor-sharp intellect, but also a gay and happy husband, father and friend.

*Charles E. Clark**

SOCIETY AND THE CRIMINAL. By Sir Norwood East.[1] Springfield, Illinois: Charles C. Thomas, 1951. Pp. x, 437. $8.50.—This book covers a broad range of topics dealing with law, psychiatry and various aspects of criminal law administration and penology. It comprises nineteen chapters, most of which represent extensions of previous addresses or articles by the author. For this reason there is some repetition of views, but not in sufficient degree to detract from the solid worth of the presentation. In fact, this arrangement has some advantages for it enables one to select a particular topic of interest and secure a fairly complete exposition of the author's views by studying one chapter.

The first thing that impresses one about the book is the exceptional experience of the author qualifying him to deal with the wide range of subjects the book covers. He brings to his task a fine scientific training in medicine and psychiatry and also the practical experience of one who has worked extensively as an important official and administrator of the criminal law in England, specifically as a Prison Commissioner and Director of Convict Prisons.

Perhaps the outstanding impression one receives from the book is the hard-headed practicality of the author who refuses to accept simple solutions offered by medical authorities for problems which he recognizes from practical experience as being extremely complex. He holds strongly to the view that the rights of the individual must always be weighed against the rights and interest of society and he feels that frequently scientific experts emphasize the individual without due regard for society.

One major thesis which he emphasizes is the distinction between criminal responsibility as recognized by the legal profession and culpability as regarded by medical men. He believes also that many

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* Judge, United States Court of Appeals for the Second Circuit.

1 M.D., F.R.C.P. Lecturer on Forensic Psychiatry, Institute of Psychiatry, Maudsley Hospital (London University). Formerly, H.M. Commissioner of Prisons; Inspector of Retreats under the Inebriate Acts; Consultant to the Royal Navy.

critics of criminal law and its administration fail to recognize the modifying influence injected into administration by the constant efforts of legal and executive officers to modify suitably the punishment and treatment of offenders.

The statement regarding the McNaghten Rules which form the commonly accepted test of legal insanity gives a good insight to the author's point of view: [2]

> It is a well-known fact that some lawyers and doctors from time to time express their disapproval of the so called McNaghten Rules in cases where criminal responsibility is contested. It is alleged that the law in this matter is antiquated and unfair. But one is sometimes forced to wonder how much first hand acquaintance the critics have in the matter. For their proposals are sometimes highly controversial, and fail to provide for a practical, reliable and effective alternative. It must be remembered that the Rules are retained because no one has improved upon them in a manner which leaves the issue still clear to the jury. Some critics seem to be unaware of the way in which the law operates, or of the significance of the oft repeated reference in the Court of Criminal Appeal to the powers frequently exercised by the Secretary of State under the Criminal Lunatics Act, 1884.

There is no doubt that this book can be recommended for study by any student of the criminal law and its administration, for it presents a sane, practical and yet highly scientific treatment of some of the most complex problems surrounding criminal responsibility and the treatment of offenders. It is believed that it will be through efforts by men such as the author, who combine thorough medical training with practical training and experience in the administration of criminal law, that the gap between the law and scientific investigation will eventually be bridged.

*Joseph A. McClain, Jr.**

THE COURT AND THE CONSTITUTION. By Owen J. Roberts.[1] Cambridge, Massachusetts: Harvard University Press. 1951. Pp. 102. $2.00. — Three lectures on constitutional law, delivered by former Justice Roberts as the Oliver Wendell Holmes Lectures for 1951 at Harvard University, have been made available to the public in this book. The areas selected by the author for consideration are taxation, regulation and due process. The unifying and limiting theme is the relationship of the nation and the states in our dual system of government.

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2 Text at 417.

* Dean, College of Law, Duke University.

1 Dean, University of Pennsylvania Law School; Former Associate Justice, United States Supreme Court.

The first lecture is largely a survey of the development of the doctrine of intergovernmental immunities with respect to taxation. The author quotes rather extensively from the opinion in *McCulloch v. Maryland* [2] and observes that: [3] "Here is an avowal that the Court is not construing the words of the Constitution, but enforcing the principles on which it rests." The author further states that: [4]

> This case was the forerunner of a series of some eighty cases of major importance dealing with state taxation of federal activities and federal taxation of state activities. In no field of federal jurisprudence has there been greater variation and uncertainty.

Students of constitutional law will be particularly interested in the author's occasional adverse comments on the Court's majority and dissenting opinions. For example, concerning the dissent in *Panhandle Oil Co. v. Mississippi* ex rel. *Knox*,[5] he remarks that he does "not understand the later view of Mr. Justice Holmes." [6] It will be recalled that it was in that dissent that Holmes said that the "power to tax is not the power to destroy while this Court sits." [7] Discussing *James v. Dravo Contracting Co.*,[8] the author says that: [9] "The opinion of the Court labored valiantly, and, as I think, unsuccessfully, to distinguish the earlier cases." More severe is the comment on *United States v. County of Allegheny* [10] for the author indicates: [11]

> It is difficult to justify the result in the light of the progressive subjection of contractors to nondiscriminatory state taxation on the proceeds of contracts with the United States, or on their property used in performance of the contract. The tax was not a direct tax on the property of the United States, as the Court held. It seems that, in effect, the Court has reintroduced, under the formula of direct taxation, the discarded test of economic burden.

The author also says that the opinion in *Clallam County v. United States* [12] "was wholly vague as to the reasons for the decision." [13] This comment and one previously noted are the only references in the lectures to Mr. Justice Holmes.

The last group of tax cases discussed in the first lecture consists of those in which a state operates what might be considered a business,

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2 4 Wheat. 316, 4 L. Ed. 579 (U.S. 1819).

3 Text at 6.

4 *Id.* at 9.

5 277 U.S. 218, 48 S. Ct. 451, 72 L. Ed. 857 (1928).

6 Text at 12.

7 Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223, 48 S. Ct. 451, 72 L. Ed. 857 (1928).

8 302 U.S. 134, 58 S. Ct. 208, 82 L. Ed. 155 (1937).

9 Text at 18.

10 322 U.S. 174, 64 S. Ct. 908, 88 L. Ed. 1209 (1944).

11 Text at 19.

12 263 U.S. 341, 44 S. Ct. 121, 68 L. Ed. 328 (1923).

13 Text at 21.

such as selling liquor or bottled mineral water. The author observes that such cases present "perhaps the most difficult situation that has faced the Court." [14]

He concludes his discussion of intergovernmental immunities with several comments, one of which is as follows: [15] "Most of the immunities so carefully built up on *McCulloch v. Maryland* have subsequently been swept away. In any practical view of the subject, more should go." Noteworthy also is the fact that in these concluding comments not only is disagreement with Mr. Justice Frankfurter registered on the power of Congress to provide for immunities from state taxation,[16] but also there is the suggestion that Chief Justice Marshall was perhaps "wrong when he said that the question was not one of 'confidence' but one of power." [17]

Because of the momentous change in the attitude of the Court towards the regulation of economic affairs by the Federal Government, which change took place while the author was a member of the Court, the second lecture, relating to conflicts in police power, is of more general interest than the first. Readers expecting revelations as to what went on behind the scenes in 1937 will be sorely disappointed. We are told that: [18]

> The continual expansion of federal power with consequent contraction of state powers probably has been inevitable. The founders of the Republic envisaged no such economic and other expansion as the nation has experienced. Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country — for what in effect was a unified economy. It may be that in a sense the resort of Congress to the taxing power, to the general welfare power, and to the commerce power as means to reach a result never contemplated when the Constitution was adopted, was a subterfuge. An insistence by the Court on holding federal power to what seemed its appropriate orbit when the Constitution was adopted might have resulted in even more radical changes in our dual structure than those which have been gradually accomplished through the extension of the limited jurisdiction conferred on the federal government.

Perhaps this explanation is the best we could hope for from the former Associate Justice. His urbane and temperate language contrasts very favorably with the tirades of those who rail at their opponents on constitutional issues, referring to them as "illiterates."

The third lecture, relating to the Fourteenth Amendment, necessarily embraces a great variety of situations. The vast materials are admirably handled, including those with respect to freedom of speech.

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14 *Id.* at 27.

15 *Id.* at 32.

16 *Id.* at 34.

17 *Id.* at 35.

18 *Id.* at 61-2.

The author says that [19] "the decision that the liberties protected by the due process clause included those to be implied from the provisions of the First Amendment. . . was the most sweeping judicial extension of federal power over state action in the history of the republic." He also states that [20] "It is within the possibilities that soon the Court will adopt the view of the present minority that due process is . . . shorthand for the text of the first eight amendments.

The book is a boon to the neophyte in constitutional law since it provides an authoritative, rapid survey of three highly important bodies of constitutional doctrine in excellent English prose. All citizens, and especially all students, should find it profitable.

*Roger Paul Peters**

THE LAW OF REAL PROPERTY. Vol. III. By Richard R. Powell.[1] Albany and New York City: Matthew Bender & Company, Inc., 1952. Pp. ix, 880. $18.50. — It is a difficult assignment to review the third volume of a proposed five volume treatise on the law of real property, and it is even more difficult when one knows that the third volume contains only a portion (the latter chapters of subhead two through six of eight subheads) of the materials which comprise Part III of the projected five Parts. Part III, entitled "Permissible Interests in Land," according to the author represents roughly 40% of the treatise.[2] The materials covered in Volume Three include the closing chapters (dealing with some constructional problems) of the subhead dealing with future interests, and the subheads dealing with powers of appointment, easements, franchises and security interests.

That which is written in Volume Three must be considered in the light of the expressed purposes of the entire treatise. There is evidence of the same bitter conflict between Professor Powell, the objective scholar,[3] and Professor Powell, the impatient evangelist,[4] as has been

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19 *Id.* at 73.

20 *Id.* at 88.

* Professor of Law, University of Notre Dame.

1 Dwight Professor of Law, Columbia University, and Reporter on Property for the American Law Institute.

2 1 POWELL, REAL PROPERTY 4 (1949).

3 *Id.* at 2. "The background, even of considerable remoteness in time, is essential to any real understanding of what today's rule really requires. Furthermore, statesmanship in the law of land requires perspective, a comprehension of the workings of the whole social organism, an awareness of the processes of evolution which are constantly at work in even the least regenerate of the fields of law."

4 *Id.* at 236. "Strict following of early English rules has made the jurisprudence of Illinois, in some particulars, distinctly anachronistic." And in the

evidenced in earlier parts of the treatise, and in certain areas of the *Restatement of the Law of Property*. The resolution of this conflict is not the suppression of the historical background and evolution, but rather the training of lawyers and the selection of judges whose scholarship will require them to reject any notion that rules of construction, devised to reach the results consistent with the facts of one period of time, should be crystallized into rules of law which are quite inappropriate to the needs of society, when applied in another period of time.

Professor Powell, with able advocacy, urges that old rules be not applied to modern situations (where the reason for the application of the rule has long since ceased to exist) in his chapters dealing with the constructional problems inherent in gifts over on death, or on death without issue, other miscellaneous construction problems, and class gifts. He relies heavily in these areas on the authority of the *Restatement of the Law of Property*, for which he was the Reporter and for which he synthesized the research of many persons which produced a work which was much more than a *restatement* of the law of property. He considers also the legal consequences of the interests of expectant distributees.

In his treatment of powers of appointment, Professor Powell, quite properly, deviates from his purpose as stated when the work on the treatise was beginning.[5] Some time after June 28, 1951, Professor Powell realized that not even the most superficial coverage of the legal consequences of powers of appointment could be made without considering the impact of the Powers of Appointment Act of 1951.[6] Consequently, he includes an adequate discussion of the effect of an act of federal tax legislation on the substantive law of powers.[7] He recognizes that, for all practical purposes, this federal tax legislation has become a part of the substantive law of powers of appointment.

With the same meticulous care, Professor Powell considers the problems which arise from the recognized legal interests of easements, licenses and some franchises.

The latter chapters of Volume Three are concerned with security interests in real property. Professor Powell ably distinguishes between the voluntary security interests in the area where state policy permits

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footnote keyed to this quotation it is stated: "This is particularly true with respect to the law of future interests, as to which Albert Kales' great knowledge of the early English law, helped the Supreme Court of Illinois to reincarnate much which has been elsewhere left decently interred."

5 Under Paragraph 4, Exclusions, *id.* at 3, Professor Powell observed, "Condemnation and *taxation* are topics which are logically within the field. Yet each of these topics is so large a field that a separate volume would be required for its proper treatment. These are fields for specialists." [Emphasis supplied.]

6 Pub. L. No. 58, 82d Cong., 1st Sess. (June 28, 1951).

7 3 POWELL, REAL PROPERTY 328 *et seq.* (1952).

individuals to create such interests, the interests where the legislative policy of the state has defined the rights for the benefit of non-governmental creditors, and the governmental security interests (where the state, as such, has an interest).

Volume Three is only a segment of a treatise written by a great scholar of the law of real property, but a scholar, nevertheless, who is an equally great advocate for the policy decisions which he believes should be made. Volume Three is not only a pronouncement of what the law is, but also what it should be. Regardless of the ultimate decision of history, Volume Three is a part of an outstanding work, which will be one of the timeless monuments of American legal scholarship.

*Leon H. Wallace**

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* Acting Dean and Professor of Law, Indiana University.

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