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Book Reviews

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and was sentenced to San Quentin prison, but the convictions were subsequently reversed upon appeal due to some legal technicalities involving entrapment and erroneous instructions given the jury by the trial judge. *People v. Werner,* 29 Cal. App. (2d) 126, 84 P. (2d) 168 (1938); *People v. Werner,* 101 P. (2d) 513 (1940); *People v. Werner,* 16 Cal. (2d) 216, 105 P. (2d) 927 (1940).

In conclusion, therefore, the majority of jurisdictions in the United States that have dealt with the validity of retraction statutes have held them to be unconstitutional where they deprive persons of the recovery of general damages in actions for defamation on the following grounds:

1. That compensatory damages for a wrong are property and a person cannot be deprived of his property by legislative enactments except by due process of law.
2. That privileges and immunities are given to one class of persons, namely newspaper publishers and radio broadcasters, which are denied to other classes.

Maurice J. Moriarty

BOOK REVIEWS

HANDBOOK OF THE CONFLICT OF LAWS. Third Edition. By Herbert F. Goodrich,[1] assisted by Paul A. Wolkin.[2] St. Paul: West Publishing Company, 1949. Pp. XIX, 729. $6.50.—The first edition of Judge Goodrich's text in 1927 and the second in 1938 enjoyed a well-merited popularity. This reviewer found them most useful in introducing beginning students to the complexities of the Conflict of Laws. The developing case law of the past decade amply justified a third edition.

Many chapters in the new edition, which follows the general arrangement of subjects of its predecessors, remain substantially unchanged. Indeed the black-letters have, for the most part, stood up well during the past ten unstable years. The *Williams Cases* [3] and the retreat from *Haddock v. Haddock* [4] are reflected in the revision of the chapter on Divorce which came late enough to footnote "confusion's masterpiece"—*Rice v. Rice.*[5] Chapter Three is a valiant effort to set forth the Conflict of Laws of Taxation in some seventy pages in a day when eager legislatures are in quest of new financial pastures.

1 Judge, United States Court of Appeals for the Third Circuit.

2 Member of the Philadelphia Bar.

3 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945); 317 U. S. 287, 63 S. Ct. 807, 87 L. Ed. 279 (1942).

4 201 U. S. 562, 26 S. Ct. 525, 59 L. Ed. 867 (1906).

5 ....U. S....., 69 S. Ct. 756 (1949).

Though the revision of this chapter presented "some puzzles," [6] as the author puts it, he has modestly submitted it as "probably accurate," if there is "a common law of Conflict of Laws of taxation." [7] The caveat suggests the gradual merging of Conflict of Laws questions into questions of Constitutional Law.

In his preface, Judge Goodrich says that "as years go by . . . there seems to me to be less compulsion about Conflict of Laws rules except as the Constitution provides the compulsion." [8] We have seen evidence of the readiness of the Supreme Court to strike down under the Due Process Clause "egregious blunders" in the choice of law by state courts. The extension of Constitutional Law to control such problems may be all the more necessary now that *Swift v. Tyson* [9] is gone after a century on our books and federal courts must follow the Conflict of Laws rules of the states in which they sit, under the implications of *Erie Railroad v. Tompkins*.[10] Conflict of Laws has, nevertheless, lost neither its integrity nor its function to ascertain the rules which should properly inform the constitutional clauses to which the Supreme Court will turn. Judge Goodrich sees the fading of any "categorical imperative" behind traditional conflicts rules.[11] It may still be asked, however, whether there is not an objective standard discoverable in the field of Conflict of Laws as elsewhere? If so, some of us may not yet be ready to scrap all that the master, Beale, has taught us, however fashionable it has become to give him the bad name of "dogmatist."

The present edition contains an excellent discussion of the Conflict of Laws in the field of Workmen's Compensation. Judge Goodrich cites the amendment to Section 403 of the Restatement as possibly reconciling *Magnolia Petroleum Co. v. Hunt* [12] and *Industrial Commission v. McCartin*.[13] Whether the late Justice Murphy's somewhat puzzling language in the latter case has drained the life blood from the former is for the reader to decide. It would seem that the "end is not yet" with regard to "double" recoveries in Workmen's Compensation when the employee-claimant is injured in the course of employment in a state other than the state of the contract.

Most interesting in the new edition is the author's apparent abandonment of the "vested rights" theory so consistently followed in the earlier editions, in favor of the "local law" theory. We were quite unprepared for the change. The brief discussion of Conflict of Laws the-

6 Preface, p. v.
7 *Id.* at vi.
8 See note 6 *supra.*
9 16 Pet. 1, 10 L. Ed. 865 (U. S. 1842).
10 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).
11 See note 6 *supra.*
12 320 U. S. 430, 64 S. Ct. 208, 88 L. Ed. 149 (1943).
13 330 U. S. 622, 67 S. Ct. 886, 91 L. Ed. 1140 (1947).

ories in the introductory chapter accepted Professor Cheatham's eclecticism that "the policies behind all of these theories (comity, vested rights and local law) have validity. This suggests that they are not entirely mutually exclusive. Indeed there may be a gain in using different theories at different places to make more readily apparent the change in policies deemed dominant as the situations vary." [14] From the present text, however, it seems that the author has not found "situations" in which applying the "vested rights" theory is a "gain." Language even faintly suggesting the latter theory is rigorously expurgated.[15] Where the earlier editions stated the basis of Conflict of Laws rules to be "the principle of civilized law that rights once vested under the law . . . are recognized and enforced though they have come into being in another state," [16] the present edition declares that the forum "will look to the law of the other state or states involved, and consonant with other considerations that may be of concern, seek a result conforming to this law." [17] Again, it is somewhat startling to see *Slater v. Mexican Railroad Co.*[18] cited in the third edition apparently in support of the "local law" theory, when the same case was cited in the second edition as an illustration of the "vested rights" theory.[19] Surely some explanation for the change was due to the student. None appears. The introductory comment in Chapter One, consisting of three short paragraphs on the various theories, is inadequate.

These remarks perhaps indicate the shortcomings of the hornbook method. Limitations of space may be offered in explanation. But, having abandoned the "vested rights" theory, some exposition of its deficencies was in order. The student will learn soon enough that the Conflict of Laws has always been the happy hunting ground of the philosophic jurist intent on his own particular philosophy of law. He will need much more than the present edition to enable him to make up his mind as to the relative values of the various theories. For it is not the difference in actual results reached through an application of the "vested rights" or "local law" theories which matters so much. Often, similar results are reached through either theory. It is rather the underlying philosophy of law in general, implicit in one or the other theory, which should be of major concern.

When Judge Goodrich issued his first edition, it brought down upon it the academic wrath of "realists" and "functionalists"—so happy in their subjectivist blue heaven. The text was frowned upon as "conceptualism" retarding the "scientific" study of Conflict of Laws via

14 Text, 3d ed., at 10.
15 *Id.* at 21, 29, 252, 254, 272, 322.
16 Text, 2d ed., at 11.
17 Note 14 *supra*, at 14.
18 194 U. S. 120, 24 S. Ct. 581, 48 L. Ed. 900 (1904), cited in text, at 272-3.
19 Note 16 *supra*, at 220.

the "inductive method." Realist and functionalist wrath reached a crescendo when the Restatement elaborately black-lettered Conflict of Laws in 1934 under "Bealish" auspices. Not in the least deterred, the author, still following the "vested rights" theory and strengthened by the Restatement, issued a second edition. Now comes the apparent surrender in the third edition. We can only ask "why?" The critical reader may wonder whether a text so completely written from a "vested rights" point of veiw can be made a consistent piece of revision by the device of excising "vested rights" language and inserting "local law" terminology. If eclecticism in the face of competing theories is understandable, to demand a reason for the choice as made is not impertinent. Realists and functionalists denounced the "hornbook" method as an invitation to "dogmatism." Will they acquiesce in the "hornbook" method now that the "local law" theory has found its way into hornbook black-letters?

At any rate, the present third edition in the hands of an alert and careful student will provoke some thinking on his part. If a hornbook accomplishes that—and Judge Goodrich's text certainly does—little more can fairly be asked of it.

*Edward F. Barrett**

MR. JUSTICE BLACK: The Man and His Opinions. By John P. Frank.[1] New York City: Alfred A. Knopf, 1949. Pp. XIX, 357. $4.00. —It makes no difference whether the readers of this interesting and informative study of a Justice of the United States Supreme Court pay honest homage to the idealistic abstraction which claims that we have "a government of laws and not of men," or whether they adhere to the more realistic, if somewhat discomforting, view that "the Constitution is what the Supreme Court says it is." In either event they should agree that Professor Frank's work on Hugo L. Black is stimulating and scholarly in the proper measure, and that much can be learned from its pages. Allowing for the affectionate prejudice which Professor Frank bears toward a man under whom he served as law clerk, and which, incidentally, he acknowledges in an honest admission of the possibility of restricted objectivity, the author has presented us with a book which lays bare the legal philosophy of Justice Black and the life out of which that philosophy has been hewn. The picture which emerges, and the reviewer confesses the same partisanship toward Justice Black as the author manifestly holds, is one of a man who lives and breathes the

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philosophy of government for the common good, with no exceptions tolerated, even in the hearts and minds of Supreme Court Justices.

The technique used by Professor Frank is not by any means novel. Nevertheless, the method of combining a fairly comprehensive biographical sketch of Mr. Justice Black's life with numerous and very typical selections from opinions which he has written while serving on the highest bench, proves to be one singularly adapted to furnish a clear portrait of Hugo Black, the man, and the judge. Some may object to this biographic-casebook combination. They may complain that it is too great a mental jump from the easy examination of young Hugo in the earthy surroundings of the Birmingham, Alabama, police court, to the heavy intellectual digestion of his legal philosophy as it is culled out of the rarified atmosphere of Supreme Court opinions. However, in the mind of this reviewer, the switch is well worth the effort. For Professor Frank's technique allows those who wish to take the time to see how a man's judicial philosophies, prejudices, and predilections are the fruitions of his life, his experience, and are not given full grown to him, either by the formal presentation of a jurisprudential holy spirit, or awarded to him in an additional, but invisible, diploma upon graduation from law school.

In the biographical material, which occupies the first one hundred and eight pages of the book, we see, in a somewhat abrupt but nevertheless satisfactory fashion, the long transition from son of a middle class Alabama store-keeper to senior Justice of the Supreme Court. Though the road is a long one, its course is steady, its progress consistent. From a youth in which he first became captivated by the philosophy of people's democracy, as preached then by the Populists, through the trials that he faced as a young lawyer with unions and working people as his main clients, to the hectic days as candidate for political office, then sweeping through the days of his senatorship, first quiet and then bursting with the fire of his intense liberalism, finally to rest upon the summit of his great achievement, appointment to the Supreme Court, Hugo Black comes off well. True, he may have been a prohibitionist, and perhaps Professor Frank has somewhat played down his association with the Klan (which was to plague him in such great measure upon his appointment to the supreme bench); yet the sketch of the author outlines clearly the sources of Hugo Black's convictions. His sympathy with the poor white and the Negro, his humane dispensation of justice in the police court, his avid reading of Jefferson, his friendship with Alfred E. Smith, his apprenticeship under the great George E. Norris while Black was a neophyte senator—all combine to produce a man whose true merit is not yet appreciated by his times.

It would be beyond the proper purpose of a book review to take up analysis of the many opinions written by Justice Black which the book contains. Suffice to say the author has divided them into sections

entitled: Extent of Federal Power; Extent of State Power; Problems of Regulation; Basic Theory of Civil Rights; Speech, Press, Religion; Fair Trial; Marriage and Divorce; and Aliens. Here we see vividly, in his own simple but so often strong words, a Supreme Court Justice who believes that the power to govern is in the hands of the people, both on the national and state level, to be exercised when necessary, as fully as possible within the great generalities of the Constitution. This power to govern is not one to be vitiated by the hampering restrictions of judges who happen to have different economic and political views from those reflected in the legislative will. Black appears as a Twentieth Century "states'-righter," who would deny to the Court the prerogative of striking down state regulation and taxation which they feel burdens interstate commerce. Such evaluation of economic and fiscal policies he would leave to the Congress. A firm believer in real "free enterprise," he calls for vigorous enforcement of the anti-trust laws. Equally devout in his belief in free labor, he supports in his opinions legislation which gives the widest possible protection to the working man whether it be wage-hour or workmen's compensation legislation. At only one point does he recoil from giving the widest possible sweep to the power of representative government, and that is in the field of personal, or civil, liberties. As Professor Frank phrases it: "Black's broad notions of the extent of the power to govern does not include sanction of the power to oppress. . . ." [2] Thus Black closely scrutinizes state and national legislation which might infringe on free speech, press, fair trial, or the practice of one's religion; and loudly and persistently does he call upon his colleagues to recognize the original and true intent beyond the Fourteenth Amendment, i.e., that it should impose upon the states the same restraints over the governmental power, which the Bill of Rights places on the Federal Government.

Here, then, we see a humanitarian, a latter-day Jefferson with the same deep faith in his country and with high reverence for representative government on the state and national levels; a judge with a passionate feeling for the people; a man who tolerates nothing less than the fullest judicial protection of their fundamental liberties. In the pages of Professor Frank's book we may discern Hugo L. Black as a man of high moral purpose, of deep philosophical conviction, of great intellectuality; a man who indeed has lived up to the prophecy which the late and beloved George E. Norris spoke of him upon his appointment to the Supreme Court: "He is a worthy representative of the common people. He understands their hopes and ambitions, and their liberties in his hands will be safe." [3]

*Alfred L. Scanlan**

2 Text, at 118.

3 Text, at 100.

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REVENUE ACT OF 1948, LEGISLATIVE HISTORY SERIES. Edited by Paul Wolkin and Marcus Manoff.[1] Albany, New York: Matthew Bender and Company, 1948. Pp. xxiv, 667. $10.00.—"Legislative intent" as revealed outside the printed statutory word has, since the advent of the New Deal judiciary, been exalted from its one time position of simple irrelevance[2] into a veritable *deus ex machina.* At an earlier juristic stage, something more than lip service was paid to the canon of construction asserting the proposition that the best evidence of legislative intent is to be found in the precise words employed in the statute as finally enacted. It cannot be successfully averred that greater certainty has been imported into federal tax law by reason of the abandonment of the older concept.[3]

The English courts, although operating on the same basic theory espoused by our own judiciary—the ascertainment of the meaning of statutory language in which the intent of the legislature is embodied—refuse to quest after the meaning behind meaning. On the basis of what may perhaps be termed a parol evidence rule applied to legislation, whereunder earlier drafts and versions admittedly do not embody the ultimate legislative intent, all but the final words employed in legislation as enacted is ignored by His Majesty's judges.[4]

Our own federal judiciary were once almost as content to make "a fortress out of the dictionary"[5] as their English brethren. Where, however, the legislative language employed was ambiguous, our courts would indulge themselves in the luxury of peeking behind the printed verbalisms as engrossed to ascertain the legislative intent, if possible, from extrinsic evidence. From this modest lapse from the strict English rule, our courts continued their easy descent to Avernus by again looking outside the four corners of the act when the reading of statutory words in their ordinary sense led to results which seemed absurd or ridiculous. Next the judicial gaze wandered beyond the strict confines of the Statutes-at-Large where the plain meaning of the statutory words employed, although not productive of results actually absurd, were plainly at variance with the policy behind the legislation as a whole.

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1 Members of the Philadelphia Bar.

2 *Cf.,* the remarks of Chief Justice Fuller in Dunlap v. United States, 173 U. S. 65, 75, 19 S. Ct. 319, 43 L. Ed. 616 (1899), quoted in Landis, *A Note on Statutory Interpretation,* 43 HARV. L. REV. 886, 890, n. 17 (1930).

3 *Compare* Commissioner of Internal Revenue v. Korell, 176 F. (2d) 152 (2d Cir. 1949), *with* Commissioner of Internal Revenue v. Shoong et al., ... F. (2d) .... (9th Cir. 1949).

4 Landis, *supra* note 2.

5 A dictionary, by the way, may well provide just as serviceable material for fortress building as such amorphous stuff as the unexpressed major premise that the function of the federal courts is to serve as an adjunct to the Treasury.

At this point sheer semantics took over, for what is plain and manifest to a judicial Podsnap may be far from crystalline to a mind capable of questioning first principles.[6] The United States Supreme Court has, for the present at least, exercised the view that *Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio,* with the observation that "words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear . . . ." [7]

Of just what, then, does this always relevant legislative history consist? For all practical purposes a tax lawyer may confine his attention to: (1) prior statutes containing legislative forerunners of the act to be interpreted; (2) Treasury Regulations and judicial decisions promulgated prior to the enactment of the legislation to be construed, for knowledge of and acquiescence therein are attributed to the enacting Congress;[8] (3) all changes made in the section to be construed during the legislative process of enactment, including earlier unsuccessful attempts to secure adoption; (4) reports of the House Ways and Means, Senate Finance and Conference Committees; (5) pertinent statements made on the floor of either chamber during enactment, with the remarks and explanations of the bill's managers being entitled to the greatest weight; (6) testimony taken before the Ways and Means and Finance Committees at the hearings prior to introduction of the legislation; and finally (7) budgetary, and latterly (8) veto messages from the President.

The Messrs. Wolkin and Manoff's *Revenue Act of 1948,* the first in a promised series of legislative histories, embraces the 1948 Act and the changes made thereto in the process of passage, the House and Senate hearings, the reports of the Ways and Means and Finance Committees, floor debates, presidential veto message, and House and Senate debate on enactment over veto.[9] It will thus be seen that a very comprehensive legislative history is presented of the Revenue Act of 1948 which enacted into law far-reaching proposals designed to equate the income, gift and estate tax burdens borne by residents of common law states with those borne by residents of community property states, after the gift and estate tax law with respect to community property had been restored to its pre-Revenue Act of 1942 status.

The editors have, in main, performed their task in a creditable and workmanlike fashion. Their volume is to be commended to every

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[6] Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863 (1930).

[7] Harrison v. Northern Trust Co., 317 U. S. 476, 479, 63 S. Ct. 361, 87 L. Ed. 407 (1943). The words are those of the late Justice Murphy speaking for a unanimous Court.

[8] *Cf.,* Taft v. Commissioner, 304 U. S. 351, 357, 58 S. Ct. 745, 82 L. Ed. 109 (1938).

[9] The Revenue Acts of 1943 and 1948 have the unique distinction of being enacted into law over a presidential veto.

attorney, who without being personally possessed of all the materials contained therein, desires to master the intricacies of income "splitting," and the "marital" deduction.

In light of the promise of the editors and publisher that additional volumes in their projected Legislative History Series will be forthcoming, a few constructive criticisms may, perhaps, be in order. The lack of an index detracts from the value of the volume. The editors' handling of material from the Congressional Record requires comment in at least two particulars. Firstly, and most unfortunately, the page references to the Record are to the original, temporary pagination, quite different from the proper page citations to the final, bound edition of the Record. Secondly, the execrably fine print employed in the Record is reproduced throughout the volume under review. Since this material is reproduced throughout by photo-offset, it would have been quite feasible for the fine type used in the Record to have been magnified the requisite number of times to avoid subjecting the reader to undue eyestrain.

A practical question of economics obtrudes as to the wisdom of the projected Series. Insofar as the federal revenue acts are concerned, it must be observed that certain important portions of their legislative history are currently available for moderate sums. The vital House and Senate Committee Reports have been republished by the Government Printing Office.[10] Already in print are an excellent legislative history of the federal income tax laws[11] and of the excess profits tax laws.[12]

Strangely enough, what are not readily available to the tax attorney are the materials first listed above, that is, a complete set of all prior federal revenue acts. One compilation goes back only to 1924,[13] whereas an attempted overall correlation of federal income, gift and estate tax statutes covers only 1916 to 1943.[14] A masterly edition[15]

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10 Committee Reports for the Revenue Acts of 1913-1938 are contained in the Internal Revenue Cumulative Bulletin 1939-1 (Part 2), obtainable for the price of $1.00 from the Superintendent of Documents in Washington, D. C. The Committee Reports for subsequent acts appear in the Cumulative Bulletin for the year of each respective act. Although these Bulletins are moderately priced, the years 1944-1945, are, for example, unobtainable except at inflated prices on the second-hand market, because of the fact that they are not always kept in print.

11 SEIDMAN, LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS, 1938-1861 (1938). This volume, of course, does not extend beyond the income tax field and then stops with the Revenue Act of 1938.

12 SEIDMAN, LEGISLATIVE HISTORY OF EXCESS PROFITS TAX LAWS, 1946-1917 (1947).

13 See West Publishing Company's compilation, in two volumes with pocket supplement, of Internal Revenue Acts from 1924 to date, under title 26 of U.S.C.A.

14 BARTON, FEDERAL INCOME, ESTATE AND GIFT TAX LAWS CORRELATED (9th ed. 1944) (1939-1943); (8th ed. 1938) (1926-1938, income taxes; 1916-1926, estate taxes; 1924, 1932, gift taxes).

of the federal revenue acts from 1909 onward exists, but stops short with the year 1940. In addition, the edition is out of print and has become well-nigh unobtainable.

Complete and accurate copies of the Treasury Regulations for past revenue acts, although frequently of great importance to the tax attorney, are essentially unobtainable. Thus it appears that those materials comprising legislative history listed above in both (1) and (2) are among the most difficult to obtain.

In consequence, it is suggested that any publisher willing to reprint accurate copies of the revenue acts and Treasury Regulations from 1909 to date would be sure of a continuing market for his volumes among attorneys, judges, law school and bar association libraries, law students and the never-ending flow of legal and accounting neophytes anxiously pressing to transmogrify themselves overnight into tax "specialists."

What is needed are reprints of all prior revenue acts, copies of all drafts of each revenue act in the various legislative stages, reprints of the Treasury Regulations, and reproductions of all pertinent House and Senate floor discussions of revenue bills, preferably reproduced in one volume. Little or no editorial comment or even arrangement other than by sheer chronology is necessary or desirable. Completeness, accuracy and reasonableness are the three prime essentials. In addition, reproduction by photo-offset is desirable and has the twin merits of low cost combined with absolute accuracy of reproduction. The first element must be supplied by the directing intelligence of editor and publisher.

Robert T. Molloy *

THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE (The Thomas M. Cooley Lectures). By Henry Rottschaefer.[1] Ann Arbor: University of Michigan Law School, 1948. Pp. xvi, 253. $3.50.—This book comprises five lectures delivered in March, 1947, before the Law School at the University of Michigan. They inaugurate the endowed lecture series in memory of Thomas M. Cooley, whose career as professor in the University of Michigan Law School, as a Justice of the Supreme Court of Michigan, as first chairman of the Interstate Commerce Commission and as author of the magistral *Constitutional Limitations,* securely established his preeminence among constitutional lawyers and jurists during the latter third of the Nineteenth Century.

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15 FEDERAL REVENUE ACTS AND RELATED STATUTES, 1909-1940 (1941) (Revenue Act Publishing Company, Washington, D. C.).

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Cooley viewed the American Constitution as a great living instrument whose basic principles, though stable, are anything but inflexible and immutable. He insisted with Chief Justice Marshall that a constitution intended to endure for ages to come must be adapted to the various crises of human affairs.

The years since 1933 undoubtedly constitute one of these crises in human affairs. The New Deal period has been a time of decided "socio-economic change" which, in keeping with the Marshall-Cooley formula, has induced the Supreme Court to reinterpret "at least some provisions of the Constitution." In fact, Rottschaefer inclines to the view that the Constitution has been radically altered by the New Deal judges. Though the transformation may not be as complete as he implies, few will quarrel with his contention that constitutional revision was necessary and natural in a period of severe and prolonged economic depression. Even more than the depression itself, the widely accepted theory of its causes and remedy influenced the judiciary. A clear majority of the people believed (and still do, the author thinks) that uncontrolled production and reckless competition inevitably bring depression since under these conditions farmers and industrial workers lack sufficient purchasing power to consume the goods produced and to sustain uninterrupted business operations. The people expected the New Deal administration and the judiciary to pass and to uphold laws designed not to introduce socialism but to stabilize the economy and to bring about a more equitable distribution of wealth, the stabilizing measures being at once the result and the cause of a more even diffusion of the national income. The author's essentially correct estimate of the New Deal illumines the pages of a necessarily difficult book.

In his first chapter, Development of Federal Powers Prior to 1933, the author shows that the virtually unlimited authority of Congress today to direct the nation's economic life was implicit in pre-New Deal judicial construction. Clinging to the views of Chief Justice Marshall, "the spiritual ancestor of those who have sanctioned" the recent extension of federal powers, the Supreme Court had denied to the states concurrent power with Congress to regulate interstate commerce and had upheld acts of Congress destroying commerce in lottery tickets, liquor shipments to prohibition states, and stolen automobiles. Further than this, it is true, the Court had refused to go. For the most part unsympathetic to labor, the Court in the celebrated case of *Hammer v. Dagenhart*[2] disallowed the congressional act prohibiting interstate commerce in goods produced by child labor, and four years later refused to enforce the discriminatory tax against child-fabricated articles. In the field of employer-employee relations the Court in *Adair v. United States*[3] rescinded that section of the

[2] 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918).
[3] 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436 (1908).

Erdman Act forbidding interstate railway operators to discharge workers because of membership in labor unions. But twenty-two years later, in 1930, the Court conceded that the connection between interstate commerce and union membership was a real and substantial one, sustaining the power of Congress in the Railway Labor Act of 1926 to prevent employers from interfering with the right of employees to select freely their own collective bargaining representatives.

The reasoning in this epoch-making case, *Texas and New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks,*[4] was used by the Court to bring virtually all industrial relations under the jurisdiction of the Commerce Clause during the New Deal "thirties." If the Court did not explicitly approve of the economic philosophy underlying the New Deal labor legislation, it did agree that low wages, long hours, child labor and the refusal of employers to recognize and bargain with labor unions "burdened" interstate commerce and justified federal regulation of activities once viewed as strictly local. The relevant labor cases (on whose importance the author lays special stress), the agriculture cases and the Holding Company Act cases are thoroughly, if not elaborately, analyzed in the light of the Court's changing attitude toward the authority of Congress under the Commerce Clause. The author's discussion will convince many readers that the leading New Deal cases, notably *National Labor Relations Board v. Jones and Laughlin Steel Corporation,*[5] *United States v. Darby,*[6] *Mulford v. Smith,*[7] *Wickard v. Filburn,*[8] and *North American Co. v. Securities and Exchange Commission,*[9] are among the most significant in our judicial history.

In asserting federal powers, the present Court, unlike the pre-1933 Court, has been motivated by the desire to constitutionalize new socio-economic legislation and not by fear or distrust of the states. In fact, the new Court has considerably expanded state as well as federal powers. On the theory that interstate commerce "should pay its way," the Court in case after case has permitted particular states to levy use, gross income and sales taxes on businesses in interstate commerce, provided, of course, that the tax situation is such that it cannot be duplicated in other states and thereby destroy or "substantially" burden the traffic. Federal-state cooperation enjoys the support of the present-day judiciary which upholds acts of Congress designed to help the states enforce measures deemed socially desirable. The Court has also overruled the old Marshallian doctrine of inter-governmental immunity which prevented one level of government from taxing the instrumen-

4 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034 (1930).
5 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).
6 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).
7 307 U. S. 38, 59 S. Ct. 648, 83 L. Ed. 1092 (1937).
8 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942).
9 327 U. S. 686, 66 S. Ct. 785, 90 L. Ed. 945 (1946).

talities of the other. Federal-state relations are now resolved, as the late Justice Rutledge so aptly phrased it, "by a new, or renewed, emphasis on facts and practical considerations" rather than by "dogmatic logistics." The Court's present approach has "transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action."

Turning from the Commerce Clause and the taxing power, the author in his chapter, Protection of Personal and Property Rights, discusses socio-economic change from another angle, namely, the degree of freedom from governmental restraint now enjoyed by individual interests under the Due Process and Contract Clauses. This chapter is a hodgepodge of cases involving price and rate fixing, state moratory laws, federal currency legislation and the regulation of industrial relations. The author's comments on the latter lose some of their timeliness since they were recorded before the passage of the Taft-Hartley Act. He anticipated, however, and justified in advance that piece of legislation. Moreover, his generalization is true enough—that today "the due process clauses protect personal liberty more extensively than rights of property." A case in point is the decision in *Thornhill v. Alabama,*[10] written by the late Justice Murphy, declaring mass picketing of a peaceful sort to be a form of free speech or press. Rottschaefer affirms that the Court conceded equivalent rights of free speech to employers but failed to enforce them against the "aggressions" of the National Labor Relations Board.

In his excellent summary chapter, the author is concerned with the implication of recent trends. Mainly by extending the application of long accepted principles, the judiciary of today has constitutionalized the first steps toward governmental economic planning and interposes, the author fears, no effective obstacles against its further extension. Though he thinks that the area of economic planning will be enlarged, he is not convinced that the people will demand state capitalism or communism, at least not in the foreseeable future. To date, the planning movement has curtailed only the economic freedom of big business groups and has presented no general threat to civil and political liberties. Today, more adequately than during any previous epoch in American history, the courts protect freedom of speech, of religion and of the press. By resolutely upholding political and civil rights, even to the extent of permitting opposition to the established regime by those who wish peaceably to change it, the courts of our day will help save us from the degradation of serfdom. For, as he says in his concluding sentence, the danger "that modern liberalism may spawn a tyrannous totalitarianism is neither an illusion nor the delusion of 'reactionary' thinking."

Aaron I. Abell *

[10] 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

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THE LAW OF REAL PROPERTY. Volume I. By Richard R. Powell.[1] Albany, New York: Matthew Bender and Company, 1949. Pp. XIII, 792. $16.50.—Lord Coke once said "Let us now peruse our old authors, for out of the old fields must come the new corne." Professor Powell must have heeded this advice in the preparation of Volume I of his treatise on the law of Real Property. Although he acknowledges the importance of twenty-eight years of personal experience in the field and the contributions of thousands of students, he reiterates that "law is found in the books" and that Real Property law can be understood only in the light of its historical evolution. In recognition of the futility of attempting to incorporate the law of Real Property into five volumes, he has attempted something more than the restatement of accepted rules as derived from and influenced by historical considerations.

The objective has been threefold: to integrate the whole subject, to examine current problems with respect to the evolution of property principles, and to stress and consider the importance of the statutory factor. Emphasis has been placed on the individual states, territories, and possessions of the United States and the indigenous laws thereof to explain the varying degrees of acceptance, enforcement and modification of the English common law. Students and practitioners alike may see therein the reason for the complexity and nonconformity of the property law of their particular jurisdiction. In Part I, a single chapter entitled Sources of American Law constitutes the largest, if not the most original and valuable, portion of the book. Part II, entitled Capacity to Hold and Deal with Interests in Land, while overshadowed by Part I in emphasis and length, has not been neglected. It has received the succinct integrated treatment which has been the author's purpose.

An examination of the theory of property is, of course, germane to any attempted integration of the subject. Although only eight pages are devoted to the question, Professor Powell follows his procedure of stating the problem followed by citations to sources which in turn contain exhaustive citations of the authorities. This method is invaluable when considered in the light of the contemporary query as to whether there is a natural right to property or whether the only justification for private ownership lies in the function of property in terms of its social contribution. Especially noteworthy is the statement of the theory that property exists as a natural right: "The right to possession is a direct right, inalienable, antecedent to all law, and instituted for the general good." [2]

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

[2] Text, at 12.

The author, in Volume I at least, has accomplished his objective. *The Law of Real Property*, by Powell, is a significant addition to this field, not only because it represents a needed modern integration of the subject, but as a basic tool for student, research fellow or practitioner. The treatise is fraught with promise. If the succeeding volumes follow the pattern and precedent established herewith, a worthy successor to Tiffany's standard text has been found. Judgment thereon is accordingly reserved.

*Robert E. Sullivan**

BOOKS RECEIVED

THE AMERICAN SUFFRAGE MEDLEY: The Need For a National Uniform Suffrage. By Dudley O. McGovney. Chicago: The University of Chicago Press, 1949. Pp. vii, 201. $4.50.

BIBLIOGRAPHY OF THOMAS REED POWELL: To May 26, 1949. Cambridge, Massachusetts: Distributed by Harvard University Press, 1949. Pp. 41. $0.75.

BUSINESS LIFE INSURANCE AND OTHER TOPICS. By Albert Hirst. With pocket supplement, Tax Handbook. Bloomington, Illinois: State Farm Life Insurance Co., 1949. Pp. xvi, 165.

CONSERVATISM REVISITED: The Revolt Against Revolt. By Peter Viereck. New York City: Charles Scribner's Sons, 1949. Pp. xv, 187. $2.50.

*THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE: The Thomas M. Cooley Lectures. By Henry Rottschaefer. Ann Arbor, Michigan: University of Michigan Law School, 1948. Pp. xiii, 253. $3.50.

COURTS ON TRIAL: Myth and Reality in American Justice. By Jerome Frank. Princeton, New Jersey: Princeton University Press, 1949. Pp. xii, 441. $5.00.

THE DEPARTMENT OF STATE: A History of Its Organization, Procedure, and Personnel. By Graham H. Stuart. New York City: The Macmillan Co., 1949. Pp. x, 517. $7.50.

ENCYCLOPEDIA OF INCORPORATING FORMS: An Exhaustive Compilation of Forms Used in Organizing a Corporation. By the Editorial Staff. New York City: Prentice-Hall, Inc., 1948. Pp. cviii, 1166.

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*Reviewed in this issue.

THE ENGINEER AT LAW: A Resumé of Modern Engineering Jurisprudence. Two Volumes. By Conde B. McCullough and John R. McCullough. Ames, Iowa: The Iowa State College Press, 1946. Pp. 447, 442. $3.75 ea. vol.

FREE GOVERNMENT IN THE MAKING: Readings in American Political Thought. By Alpheus Thomas Mason. New York City: Oxford University Press, 1949. Pp. xviii, 846. $6.00.

FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT: By Alexander Meiklejohn. New York City: Harper & Brothers, 1948. Pp. xiv, 107. $2.00.

*HANDBOOK OF THE CONFLICT OF LAWS. Third Edition. By Herbert F. Goodrich, assisted by Paul Wolkin. St. Paul: West Publishing Co., 1949. Pp. xix, 729. $6.50.

INTRODUCTION TO INCOME TAXATION. Second Edition. By James M. Henderson. Rochester, New York: The Lawyers Co-operative Publishing Co., 1949. Pp. x, 536.

AN INTRODUCTION TO LEGAL REASONING. By Edward H. Levi. Chicago: The University of Chicago Press, 1949. Pp. 74. $2.00.

LABOR RELATIONS AND FEDERAL LAW: An Analysis and Evaluation of Federal Labor Policy Since 1947. By Donald H. Wollett. Seattle: University of Washington Press, 1949. Pp. xxv, 148. $3.00.

LAW AND THE EXECUTIVE IN BRITAIN: A Comparative Study. By Bernard Schwartz. New York City: New York University Press, 1949. Pp. viii, 388. $5.50.

*THE LAW OF REAL PROPERTY. Volume I. By Richard R. Powell. Albany, New York: Matthew Bender and Co., 1949. Pp. xiii, 792. $16.50.

LAW AND TACTICS IN JURY TRIALS: The Art of Jury Persuasion Tested Court Procedures. By Francis X. Busch. Indianapolis: The Bobbs-Merrill Co., Inc., 1949. Pp. xxvii, 1147. $17.50.

LAW OF TRUSTS. By Ralph A. Newman. Brooklyn: The Foundation Press, Inc., 1949. Pp. xi, 452. $4.50.

LEGAL PHILOSOPHY FROM PLATO TO HEGEL. By Huntington Cairns. Baltimore: The Johns Hopkins Press, 1949. Pp. xv, 583. $7.50.

*MR. JUSTICE BLACK: The Man and His Opinions. By John P. Frank. New York City: Alfred A. Knopf, Inc., 1949. Pp. xix, 357. $4.00.

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*Reviewed in this issue.

THE NEWSPAPER: A Study in the Workings of the Daily Press and Its Laws. By Ignaz Rothenberg. New York City: Staples Press, 1948. Pp. xvi, 351. $5.50.

ORTEGA Y GASSET, EXISTENTIALIST: A Critical Study of His Thought and Its Sources. By José Sánchez Villaseñor. Chicago: Henry Regnery Co., 1949. Pp. viii, 264. $3.00.

READINGS IN AMERICAN LEGAL HISTORY. Edited by Mark DeWolfe Howe. Cambridge, Massachusetts: Harvard University Press, 1949. Pp. x, 529. $7.50.

RELIGION AND EDUCATION UNDER THE CONSTITUTION. By J. M. O'Neill. New York City: Harper & Brothers, 1949. Pp. xii, 338. $4.00.

*REVENUE ACT OF 1948, LEGISLATIVE HISTORY SERIES. Edited by Paul Wolkin and Marcus Manoff. Albany, New York: Matthew Bender and Co., 1948. Pp. xxiv, 667. $10.00.

SUCCESSFUL TRIAL TACTICS. By A. S. Cutler. New York City: Prentice-Hall, Inc., 1949. Pp. ix, 319.

*Reviewed in this issue.