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Book Reviews

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The courts have long disputed the exact priority between chattel mortgages and artificer's liens. The majority of decisions rendered concerned automobiles. 62 A.L.R. 1485 (1929). In this case the extent of the mobility of the mortgaged chattel must be considered against the scope of a recording system which is meant to cover the entire United States. The artisan knew that the engines belonged to a corporation of The United States and expected to find any mortgage on such engines recorded, of necessity, in the Civil Aeronautics Administration files.

The discrepencies of the common law decisions have been eliminated to some extent in most jurisdictions by statutes stating the exact relation of a prior chattel mortgage to an artificer's lien. They seem to have attempted generally to hold the chattel mortgage prior where it has been duly registered and the artisan placed in a position whereby he is able to know of such mortgage. Notes, 32 A.L.R. 1005 (1924); 88 A.L.R. 1185 (1934). See also 10 AM. JUR. CHATTEL MORTGAGES §§ 215-219. The fundamental rights of property are not violated by the priority of a lien against a chattel mortgage without consent or such construction by legislative enactment as makes it unavoidable. See JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 474 (6th ed. 1933).

The situation in the principal case is not properly analogous to the similar cases in admiralty, since it cannot be said that such repairs were immediately necessary because of unexpected emergency. Nor is there any consideration as to the artificer's lien having priority over a valid government lien, by way of mortgage, since the government lien is invalid as to third persons. Since this was a mortgage lien for a debt, the United States would be held to the same rules as to validity and priority of security as applied to any citizen, since such liens are not likely to cripple the United States in carrying on its sovereign functions.

In summation, it may be said that an artificer's lien may take precedence over a government lien invalid as to third parties. Since the mortgage did not contain a sufficiently definite description of the engines to constitute a valid mortgage as to third persons, the defendant's lien prevailed and the replevin action was dismissed.

The modern growth of highly specialized repair work, occasioned by the ever-increasing complexity of our mechanical civilization, has highlighted the need for comprehensive legislation, already attempted in a few states, to establish definitely the relationship between the chattel mortgage and the artificer's lien.

Dale A. Winnie

BOOK REVIEWS

THE HISTORY, NATURE AND USE OF EPIKEIA IN MORAL THEOLOGY. A dissertation by the Rev. Lawrence J. Riley.[1] Washington, D. C.: The Catholic University Press. 1948.—The first part of this lengthy dissertation is devoted to the historical aspects of the *epikeia* problem, while the second part is dedicated to an investigation of the nature, usefulness and extent of *epikeia* in moral theology. The historical part emphasizes with great skill and understanding the teachings of Aristotle and St. Thomas Aquinas on this subject in particular. The author correctly points out that Aristotle's *Nicomachean Ethics,* supplemented by a few passages from the *Rhetoric,* contain the first detailed explanation of the *epikeia* or *epieikeia*; and that this authoritative explanation influenced directly or indirectly nearly all subsequent writers on this subject.

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St. Thomas has pointed out that any law concerned primarily with the achievement of the common good must "take into account many things, as to persons, as to matters, and as to times." [2] "Now it happens often that the observance of some points of law (St. Thomas refers here to the strict positive law) is conducive to the common weal in the majority of instances, and yet, in some cases, is very hurtful." [3] Should such a situation arise the strict positive law is not to be enforced, but should be supplanted by *epikeia*, that is "equitable justice." Thus *epikeia* becomes a vital part of justice, or to be more exact, of the administration of justice. According to St. Thomas this *epikeia* constitutes a form of justice [4] which is not superior to justice in general, but in some respects superior to strict "common law justice." The strict law cannot do justice to every concrete individual case. The law-giver in framing laws attends to what commonly happens; but if these laws were to be applied to certain cases, they would actually frustrate the idea of justice and equality and thus be injurious to the common good which the law has in view. "In these and like cases it is bad to follow the strict law, and it is good to set aside the letter of the strict law and follow the dictates of justice and the common good." [5] For "to follow the letter of the strict law when it should not be followed is sinful." [6] *Epikeia*, on the other hand, does not set aside what is right and just, nor does it try to pass judgment on the strict law by claiming that the latter was not well made. It merely insists that, in the interest of a truly effective and fair administration of justice, the strict law is not to be applied in some particular instance. For "without doubt he transgresses the law who by adhering to the letter of the strict law strives to defeat the intention of the law-giver," [7] and thus obstructs the achievement of the common good, the ultimate end of all law. According to St. Thomas the administration of justice should, in its effort to bridge the ever present lack of formal sources of the positive law or to bridge the gaps in these sources, take into account the inspirations of reason and of conscience before coming down to an examination of the positive nature of things. For there are principles of justice which are superior to the contingencies of fact as well as to the contingencies of the strict law. And these principles are to be applied through *epikeia*.

The basic views of St. Thomas on *epikeia* are under the influence of Aristotle who had stated that the strict law always contains "a general statement [8] which lays down a general rule [9] and which for that very reason cannot cover every particular case,[10] but must in certain instances be considered defective on account of its generality." [11] In addition, the law-givers often "find themselves unable to define things accurately." [12] "In matters, therefore, where, while it is necessary to speak in general terms, it is not possible to do so correctly, the strict law takes into consideration merely the majority of cases, although it is not unaware of the error this involves." [13] But, "the materials of human conduct are essen-

2 S. THEOL. I. II. qu. 96, art. 1.

3 *Id.* art. 6.

4 S. THEOL. II. II. qu. 120, art. 1 and art. 6.

5 *Id.* art. 1 and art. 2.

6 *Ibid.*

7 *Ibid.*

8 NIC. ETH. 1137 b 12 ff.; 1137 b 20; 1137 b 27.

9 *Id.* 1137 b 20 ff.

10 *Id.* 1137 b 14.

11 *Id.* 1137 b 26.

12 RHETORIC 1374 a 30.

13 NIC. ETH. 1137 b 14 ff.

tially irregular." [14] Thus in the sphere of human conduct situations may arise which, for justice's sake, have to be considered exceptions to the general rules laid down by the strict law.[15] In other words, instances may occur where it is necessary to decide on general terms, but nevertheless impossible to apply an universally valid rule of law.[16] This exception to the general or universally valid rule of the strict law is the Aristotelean *epieikeia* or "equity," which is actually nothing else than a "rectification of the strict law wherever the latter proves itself defective on account of its generality." [17] "When the strict law lays down a general rule and thereafter a case arises which is not covered by this general rule, then it is right and just, where the law-giver fails us and has erred through over-simplification, to correct this omission or defect by deciding as the law-giver himself would decide if he were present on the occasion, and would have legislated if he had been cognizant of the case in question." [18] *Epieikeia* is, therefore, an "indefinite standard" made to fit the circumstances of a particular case in itself indefinite as regards the strict law.[19] But it must always conform to the general principles of justice. *Epieikeia* thus distinguishes itself from the general rules of the strict law by the absence of universal applicability.[20] But in no way is *epieikeia* intended to break down the authority of the strict law.[21]

On page 82 the author seems to be a little troubled over the passage *"aequitas vero (potest contineri) sub epikeia vel amicitia."* [22] We remember that in *Nic. Eth.* 1134 ff. Aristotle speaks of the equitable and fair man [23] "who by choice and habit does what is equitable and fair, and who does not stand on his rights unduly, but is content to receive a smaller share, although he has the law on his side." St. Thomas refers to this passage in his *Commentary to Aristotle's Ethics,*[24] but fails to see that Aristotle speaks here of the "fair minded individual" and not, as St. Thomas implies, of the courts which act leniently toward some one who has transgressed the law. Obviously, this Aristotelean "equitable man" is not identical with *epieikeia* discussed in the preceding paragraph. There can be little doubt that this new type of *epieikeia* is no longer related to the traditional Aristotelean meaning of justice, but signifies "unselfish devotion to the well being of another, the Aristotelean *philia.*[25] *Philia* can be translated as *amicitia* or "friendship," although the term "friendship" does not actually render the full meaning of Aristotle's *philia. Philia (amicitia)* actually signifies a sympathetic attitude towards another, a sense of socio-moral responsibility and sociability—the fullest realization of human relations and human values accomplished in the spirit of unselfish service to others. Hence the highest perfection of justice is to be found in the *philia* or *amicitia,* the practice of unselfish devotion to one's fellow man. "If men were friends," that is, altogether dedicated to the ideal of unselfish mutual devotion, "then there is no need of legal justice among them." [26]

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14 *Id.* 1137 b 19.

15 *Id.* 1137 b 20 ff.

16 *Id.* 1137 b 14 ff.

17 *Id.* 1137 b 26 ff.

18 *Id.* 1137 b 19 ff.

19 *Id.* 1137 b 26 ff.

20 POLITICS 1292 a 38.

21 NIC. ETH. 1137 b 24 ff.

22 S. THEOL. II qu. 80, art. unic.

23 NIC. ETH. 1135 a 35; 1137 a 34 ff.

24 V. lect. 16.

25 NIC. ETH. 1155 a 1 ff.

26 *Id.* 1155 a 28.

For whoever has this *philia* or *amicitia,* and whoever practices this type of *epieikeia* does not merely regard his fellow man as his equal in a legalistic sense, but enters with him into an ideal social union, into "a friendship between man and man universally." [27]

*Anton-Hermann Chroust**

EDUCATION FOR PROFESSIONAL RESPONSIBILITY. Proceedings of the Inter-Professions Conference on Education for Professional Responsibility. Pittsburgh: Carnegie Press, 1948. 207 pages.—This book is a report of the Inter-Profession Conference held at Buck Hill Falls, Pa., April 12-14, 1948. The various sections are written by representatives from seven universities, two institutes of technology, one theological seminary, the Director of the General Education Board and the Executive Director, Institute of Pastoral Care, Massachusetts General Hospital. The nineteen sections of the book in addition to dealing with the three traditional professions, medicine, ministry and law, include also two modern professions, engineering and business.

Following the introduction by Elliott Dunlap Smith of the Carnegie Institute of Technology, Chairman of the Conference, Session I, "The Objectives of Professional Education" presents addresses on all the professions named above except medicine; Session II. "Content and Method in Professional Education" treats of all five professions with two addresses dealing with medicine; and Session III. "Social and Humanistic Aspects of Professional Education" deals with the three traditional professions only, with the last address "The Education of Professional Students for Citizenship" by Dr. Smith again (also Chairman of the Planning Committee) dealing with the problem of integrating general and professional education from two points of view of content and method (pp. 188-203). This address discusses the problem of separate and subsequent education in the two areas in contrast with education in both at the same time; that is, as Dr. Smith expresses it, "in parallel." He strongly favors the latter solution for this problem.

The readers of this review will be more interested in the address entitled "What the Law School Can Contribute to the Making of Lawyers" by Lon L. Fuller of Harvard University (pp. 14-35). He lists four objectives of legal education: (1) to give the student *knowledge,* (2) to impart *skills,* (3) to expose the student to *great minds,* and (4) "to give the student an understanding of, and an insight into the *processes* in which the lawyer participates." After suggesting that "specific knowledge and specific skills are relatively unimportant," he makes a strong plea for the fourth conception, "The lawyer is a participant, and usually the most active and responsible participant, in two basic social processes: adjudication and legislation. Both terms are here used in a somewhat broader sense than is customary" (p. 18). He then analyzes each process in some detail. On the basis of this analysis he answers the question, "What branches of law should we include in the three-year course?" (p. 23). The address is concluded with an answer to this question: "How can we relate law to the life and theory beyond law without losing the sharp focus on specific issues that has been a cardinal virtue of traditional legal education?" (p. 28). Certainly this address merits

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[27] *Id.* 1155 a 22.

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careful reading and study by all professors of law and in some cases surely, replanning the curriculum for the improvement of legal education in the schools in which they are serving.

There are brief bibliographies on four of the professions treated (pp. 205-7) but none on the ministry. There is no index.

*W. F. Cunningham, C.S.C.**

CONSERVATION OF OIL AND GAS. A LEGAL HISTORY, 1948. Edited by Blakely M. Murphy.[1] Chicago: Section of Mineral Law, American Bar Association. 1949. 754 pages. $3.00.—The introduction to this work characterizes it as "neither a textbook nor a technical treatise of the regulation of oil and gas production".[2] This is a correct description. The book is, however, a valuable collection of monographs by experts in the field of conservation law assisted by experienced technical advisers. In 1938, the Section of Mineral Law of The American Bar Association which is responsible for the publication of the present volume published a similar work on the subject.[3] This preceding book contained a brief discussion of the theory and practical application of statutes for the conservation of oil and gas, and described the conservation record in nine states. The present volume is much more complete. It contains the conservation record of thirty-five states and also describes the conservation activities of the Interstate Oil Compact Commission and the national government.

The present volume is organized into four parts. Part I is concerned with the nature of petroleum reserves, reservoir fluids, and reservoir energies. Part II deals with the legislative, judicial, and administrative background in the various states. Part III with the Interstate Compact to Conserve Oil and Gas and the Compact Commission, and Part IV describes the federal conservation functions.

The first part of the book which deals with the technological background of conservation comprises only a few pages of the volume (pages 3-15). The brief treatment of the subject, however, is excellent. It is written in nontechnical language and is devoid of the usually present (and sometimes confusing) diagrams and drawings. One does not need engineering training to understand the technical fundamentals of oil and gas reservoirs as outlined in this short section.

Pages 19 to 541, inclusive, almost three-fourths of the book, are concerned with conservation concepts as applied within the jurisdiction of the states. These summaries of the oil and gas producing states could not be properly termed analytical studies, but they give adequate descriptions of the legislative histories of state conservation and note the leading judicial and administrative holdings in matters of conservation. The editors and writers of the book have shown judiciousness in that they have devoted more space and study to the important oil and gas producing states. Thus, only four pages (19-22) are deemed sufficient to describe the legislative history of conservation in Alabama while nearly sixty-five pages (447-512) are needed to record the conservation legislation of Texas, "Alabama," the editors note, "is a newcomer to the roll of states having wells

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1 Editor and Member of the Committee on Special Publications, Section of Mineral Law, American Bar Association.

2 p. xv.

3 LEGAL HISTORY AND CONSERVATION OF OIL AND GAS—A SYMPOSIUM (1938).

producing commercial quantities of oil and gas."[4] On the other hand, Texas is an "oldtimer" in oil and gas production.

In making these state conservation studies, the writers of the present volume have given consideration to the development and role of proration, well-spacing, and unit operation.[5] These techniques for oil and gas conservation have been developed to combat economic over-expansion and creation of waste. It is assumed by the proponents of these measures that production in excess of market demand is waste. It is important to have a record of the present status of these conservation methods, in order to understand the controversial literature on the subject.[6]

The portion of the book devoted to the Interstate Oil Compact Commission is probably one of the best descriptions of the work and objectives of this voluntary, inter-governmental agency of the oil jurisdictions. The workings of this commission are set down in detail as well as the activities of its constituent committees. The present volume notes that:

> The Commission [i.e. Compact Commission] has gone on record as the sponsor of any and all legitimate programs to preserve by known legal means and scientific means the reservoir pressures, to increase the ultimate recovery of oil and to prevent its waste, to improve the efficiency of secondary recovery in all its multitudinous aspects, to recommend and secure the passage of uniform measures which lead to better utilization of present knowledge of the physical characteristics of reservoirs, to urge the adoption of rules, regulations, and orders furthering the statutory devices, and finally to provide interest, support, and understanding to those to whom conservation is a true saving of oil and gas by achieving a maximum economic recovery.[7]

The labors of this agency justify the saying of "Amen" to this statement.

The last part of the book discusses the activities of the National Government in the field of conservation. The reading of this section of the book leaves the reader with the feeling that the authors have already decided that local (i.e. state) law supplemented by the Interstate Compact and supported by the Federal Hot Oil Act constitutes a system of regulation and administration best designed to prevent waste and to serve the public interest. It is of interest in this connection to note an excerpt from the Smith-Wimberly Report on the Natural Gas Investigation undertaken by the Federal Power Commission. It reads in part, as follows:

> It is highly desirable that these problems of conservation and the protection of correlative property rights be dealt with locally by those who

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[4] p. 19.

[5] *Proration*—Proration is a method of waste reduction through production control. It involves assigning to each well a fixed daily quantity of production known as the *per-well allowable.*

Well Spacing—To prevent indiscriminate drilling of wells, it is provided that no well shall be drilled unless it is to be the only well within a given area (usually 10 to 40 acres for oil wells).

Unit Operation—In unit operation, all surface lessees over a given reservoir agree to treat their properties as a single lease, the project being carried out by a single operator responsible to a committee on which all lessees have representation.

[6] See, Comment, *Proration of Petroleum Production,* 51 YALE L. J. 608 (1942) and 6 INTERSTATE OIL COMPACT QUARTERLY BULLETIN, No. 2, p. 60 (Aug. 1947).

[7] pp. 595-596.

are in close touch with the particular conditions and varied requirements of changing local situations.

But it is just as important to recognize that the authority of the States within this sphere is not merely a right; it likewise confers a responsibility which the States must effectively meet and which they can fulfill, with the necessary cooperation from the oil and gas industries, "if they only will." [8]

No review of the present volume would be complete without mentioning certain features of the book that make it useful as a reference work. First, every chapter of the book is fully annotated with citations to cases, administrative orders, rules and documents, law articles, and textbooks, as well as sundry other materials pertaining to conservation. Appendix A consists of a table of state conservation agencies, their personnel and location. Appendix B is a listing of the writers (with biographical sketches) of the monographs that comprise the book and their advisers. Appendix C contains the text of the Interstate Compact to Conserve Oil and Gas, and Appendix D gives the By-laws of the Interstate Compact Commission.

One last characteristic of the book deserves real praise. Even a non-technical discussion of a technical subject is prone to be dull. This volume is an exception; in fact, it is most readable. The authors do not have qualms about originating apt words such as "lawgineers" and "enginawyers." [9] Nor do they fear to begin a chapter on the development of conservation legislation in Oklahoma by writing:

The King is dead. Long live the King. A new ruler has come to the throne in the last ten years. Not by one blow, but by a series of thrusts and jabs, the legislature, the courts and the Oklahoma Corporation Commission have buried individual (I own) property rights, and raised to the throne the greatest good for the greatest number.[10]

This reviewer is happy to report that the editor and writers of this book have succeeded in making the volume very interesting reading without sacrificing the high quality of its contents.

*Louis Charles Kaplan**

THE JUDICIAL FUNCTION AND INDUSTRIAL AND INTERNATIONAL DISPUTES. By Robert N. Wilkin.[1] Charlottesville: The Michie Company, 1948. 91 pages. $2.75.—Judge Robert N. Wilkin of the United States District Court in Cleveland was invited by his alma mater, the University of Virginia, to deliver a series of lectures under the sponsorship of the William H. White Foundation. These lectures, three in number, were delivered in 1948 and are now published in book form.

As a prelude to his suggestion that the settlement of labor-management problems and international disputes should be referred to independent courts, Judge Wilkin outlines the history of the judicial function. He starts with ancient times

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[8] FEDERAL POWER COMMISSION—NATURAL GAS INVESTIGATION (1948). (Docket No. G-580)—SMITH-WIMBERLY REPORT, p. 151.

[9] p. 422.

[10] p. 369.

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[1] United States District Judge, Northern District of Ohio.

and shows that the judicial process has always been recognized as an essential function of government; that is, the orderly determination of disputes has been deemed necessary to enable the state to preserve the peace and promote the common welfare. On the other hand, he emphasizes the fact that the judicial process has not always been considered a separate function of the state and that until comparatively modern times, it was often combined with the legislative or executive branches of government.

After a brief but illuminating resume of the history of the judicial process in ancient Rome and Greece and in Europe during the Dark Ages, the author traces its development in England and the United States. While the common law was slowly developing, two significant ideas relative to the judicial process were formulated and engrafted upon the Anglo-American jurisprudence. These are the doctrines of the supremacy of the law and the separation of the judicial process from the other functions of government. Today, we consider it fundamental that the state itself should be limited by law and that the courts must be independent of the other branches of government, free to protect the weak from the strong and to safeguard the rights of all.

Judge Wilkin starts his first lecture by saying, "The history of the world has been told largely in terms of dynasties and military campaigns, but the rights and liberties of man have been forged and molded by the judicial process." He concludes by quoting Professor McIlwain: "And the one institution above all others essential to preservation of the law has always been and still is an honest, able, learned, independent judiciary."

Against this historical background of the judicial function, Judge Wilkin advances the theses that industrial disputes should be subjected to legal determination by regularly constituted courts and that international controversies should be resolved in a similar manner. He recognizes the formidable obstacles that are involved, but argues persuasively that these obstacles are surmountable. The alternative, he says, is anarchy, with its attendant calamitous effects. On the international level, wars are well-nigh inevitable unless the disputes which lead to them can be resolved in an orderly way by the judicial process. And on the domestic scene, economic strife and industrial violence are likely to continue until the controversial issues between labor and management are recognized as being within the competence of the courts. In this connection Judge Wilkin states:

> We have suffered international anarchy abroad because no world agency has been created with authority to exercise the sovereignty of law. And we suffer economic anarchy at home because the governmental agencies which have been created have failed to exercise the sovereignty of law in that field.

Judge Wilkin makes specific proposals regarding the settlement of industrial disputes. He thinks labor problems should not be dealt with by special governmental agencies or labor courts, but that they should be disposed of by regular judicial procedure. He further says:

> The exercise of the judicial function can make a much greater contribution to industrial peace and prosperity than men generally expect. The history of its evolution, if properly understood, invites a greater reliance in its processes than men have yet shown a willingness to bestow.

The great obstacle to the exercise of the judicial function in international affairs is the maintenance of the idea of national sovereignty. Judge Wilkin writes: "National sovereignty . . . is in the last analysis nothing more than the power to make war." Therefore, he says, "Claims to sovereignty in world affairs must be abandoned or modified so as to permit the organization of an adequate government for world affairs."

These lectures present a stimulating view and a hopeful aspect of some of the most perplexing problems which we face today. Some readers may feel that the distinguished jurist is too idealistic in his approach to solutions of these problems. But the answer to such criticism, if any there be, is that until his proposals are tried, who is to say that they will not work. As Judge Wilkin points out in his concluding remarks, wherever the judicial process has been employed, it has worked well. He adds that what is needed is faith in the belief that if it were tried in these suggested areas, it would prove equally adequate.

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