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Book Reviews

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really the only case that held the issuance of a pass raised a federal question, and subject to decisions of the federal courts. Following this, the Court relied on the *Adams* and *Boering* cases without a judicial review of the same. At that time, the validity of the *Adams* case could have been upheld on two theories, one, the old "transcendental law" theory of *Swift v. Tyson,* the other, the exclusive power of the federal courts regarding interpretation of a federal law. The second theory was not seriously debated in the *Van Zant* case mainly because the Court could have passed it on the *Swift v. Tyson* doctrine. In 1938, the *Tompkins* case overruled the *Swift v. Tyson* doctrine, the main basis for the decision of the *Adams, Thompson,* and *Van Zant* cases.

In the present case, the Court was confronted with a main issue, the validity of the aforementioned second theory. The Court sustained its validity without really examining the shaken foundations.

The Hepburn Act merely made certain pass issuances prohibitory, and excepted certain other classes. Nowhere in the Act can be discerned the intent of Congress to take from the states the right to pass on the incidents of tort law relative to passes and until they do so the state courts are supreme. The encroachments of federal power through the media of the judicial branch was never contemplated by the framers of the Constitution and should not be allowed a free reign now.

The danger of these decisions is apparent. By abrogating the doctrine of the *Tompkins* case, it allows the United States Supreme Court to formulate rules for the forty-eight states. It centralizes and binds the state courts to decisions which cannot be questioned until the same Court reverses itself. All the evils which the *Tompkins* case set out to correct can be loosed on a branch of interstate commerce.

The Court, on principles of justice and logic, should have followed the reasoning of the dissent and overruled the previous cases upon which they rest this decision.

Edward L. Twohey

BOOK REVIEWS

THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES. By Carl Brent Swisher.[1] Chicago: The University of Chicago Press, 1946. 261 pages. $3.00 —In this short volume the distinguished constitutional historian from John Hopkins University analyses our constitutional system as it operates today. The book is timely, and, owing to the insight and skill of the author, it is also significant and interesting. Though it is a learned and meaty treatise, it is not written for the specialist but for the general reader anxious to gain a unified understanding of our present governmental structure. The book consists of a series of lectures delivered by the author at the University of Chicago during the spring quarter of 1945 under the sponsorship of the Charles R. Walgreen Foundation for the Study of American Institutions. Thus occasioned, the study aims primarily to educate and influence public opinion rather than to extend the frontiers of knowledge in a technical sense.

Designed primarily to promote intelligent citizenship, the book employs a most pleasing and felicitious combination of the analytical and the historical methods.

1 Professor of Political Science, Johns Hopkins University.

As the title indicates, the author is concerned with the great fact that our constitutional system, under the impact of two major wars and a major depression, "has become the source or the channel for a flow of governmental power so great as to stagger the imagination." To the elucidation of the implications of these trends, he brings the ripest products of political philosophy and constitutional law. But the findings of political and legal science are presented for the most part in a historical context, the stress being laid on the years since the progressivism of Theodore Roosevelt and Woodrow Wilson. Even more, the author finds that much in the recent growth of constitutional power in the United States cannot be fully understood apart from some knowledge of our entire history. Throughout the book, notably in the first three chapters—"Democratic Conceptions of the Constitution," "Shifting Boundaries of Federalism," and "The Pendulum of Checks and Balances." Swisher summarizes salient aspects of our constitutional history in a masterly manner.

By their very nature, the author begins, all constitutions confer power. In the American view, however, constitutions are also indispensable limitations upon power and the manner of its exercise. An American constitution, the author summarizes, must forbid government to do certain things, must require that certain things be done only in prescribed ways, must require that government operate strictly according to rule, must embody the rule of "rightness", must be federal, must divide the powers of government among three co-ordinate branches and must base government upon the consent of the governed. The author demonstrates that Americans today entertain substantially the same ideas on the nature and purpose of government as those which guided the action of the Founding Fathers. Owing largely, however, to the triumph of mass-production industrialism, the controls of government in the economic field have been vastly extended and new techniques adopted. In this frame of reference, Swisher clearly pictures our present-day constitutional structure. His skillful marshalling of significant illustrations, mainly from recent decisions of the Supreme Court, will visualize for most readers the sources of and the barriers to expanding power as well as define precisely the existing relations among the three departments and the several administrative agencies. Much of the book, as in every good treatise on the American constitutional system, deals with the judiciary, particularly the predominantly New Deal Supreme Court of the last ten years. If until 1937 the Court restricted for the most part the authority of government over a developing system of private enterprise, the present Justices permit both the federal and state governments to control economic life as they see fit. In the broad area of the civil liberties, however, the present Court is more inclined than former ones to put restraints upon government at all levels.

By and large the author approves the new trends in constitutional interpretation. He realizes that the permeating influence in the American economy of corporate industry, whose methods of control and management reproduce the techniques of autocracy and dictatorship, forces government to intervene in business in order to maintain unimpaired the people's freedom and welfare. A "new federalism" has emerged, he thinks, to govern the exercise of power in American society. To the federal and state governments of the old federalism are now added two great aggregations of economic power, namely, the corporations and the labor unions. Just as the federal government has not absorbed the states, so also it does not plan to absorb industry. As always, its function is to direct and balance power. Thus the main body of its industrial legislation aims "to bank corporations one against another in a competitive system" and to inflate labor unions up "to positions of equality with employing corporations so that the process of collective bargaining can be carried on between parties at the same bargaining level." Swisher also points out that the impact of corporate industry on government is

likely to be more than national: the approximation of a world state, if and when it comes, may come not merely for the prevention of war but also for the control of state-created corporations which have grown so powerful as to become laws unto themselves.

Thus Professor Swisher finds a place for economic institutions within our present-day constitutional system. His success in integrating corporation and trade union law into the traditional body of our constitutional doctrine gives his book a unique place in American historiography. The book, now in its third printing, seems destined to achieve its author's aim: arousing citizens to a more intelligent understanding of their great frame of government and charter of liberties. On the thinking and conduct of the people our freedom from tyranny depends. "The ultimate safeguard of the constitutional system," he concludes, "is watchfulness, understanding, and participation on the part of the American people. With the people properly on guard and properly active, the growth of constitutional power in the United States should be a matter of pride and not at all of anxious concern."

*Aaron I. Abell**

THE LAW OF WILLS AND THE MANNER OF THEIR DRAFTING, EXECUTION, PROBATE AND INTERPRETATION TOGETHER WITH TESTIMENTARY FORMS. By George W. Thompson, Indianapolis: The Bobbs-Merrill Company, 1947. 1444 pages. $20.00. Third Edition. Pocket Supplement, 95 pages.—"A truce to jesting; let me have a confessor to confess me, and a notary to make my will." The Institute of Natural Law at The University of Notre Dame College of Law in December 1947 restated in the light of today the law of God and the law of man in relation to basic legal institutions. The "will" from the beginning of time is one of these institutions. With the new marital deduction for gift and estate taxes under the 1948 Revenue Act obliquely causing an examination of extant wills the profession will welcome this third edition of *Thompson* ON WILLS. It has been a *vade mecum* of many lawyers since 1916.

The present volume follows the basic pattern of its earlier editions of 1916 and 1936 but adds about 2,500 new cases, statutory developments, etc. Excerpts from the state statutes relating to pertinent provisions of the law of wills are contained in the 1948 Pocket Supplement that is found in the pocket flap of the book . . . a very valuable legal tool in view of the fact that the law of wills is not uniform in the various jurisdictions. A recent case involving a conflict of laws caused an estate to suffer a loss of several thousand dollars because the testator's will did not contemplate that property in a foreign state would not necessarily pass under a will that satisfied the law of his home state. There are other vagaries in recent statutes, for example a California law in effect since September 12, 1947 provides that a person ". . . may by will dispose of the whole or any part of his or her body . . ." to certain beneficiaries.

In breaking down the contents of the book, one finds fifty per cent text material on the law of Wills; ten per cent on the law of Trusts; twenty per cent legal Forms; ten per cent Table of Cases; and ten per cent Index. Chapter 37, Suggestions for Drafting and Executing Wills, is one of importance to every lawyer, and in the light of modern developments of this thorny subject its eighteen pages will have to be supplemented. If the precedent of the Chief Justice of the Supreme

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Court of the United States, Edward D. White, is followed no addition will be necessary; his last will consisted of five lines.

The historical sketch of the law on Wills on pp. 17-18 is too brief to unfold the fascinating and instructive historical continuity of the subject. Whether a person starts with the will of Uah written on papyrus and traces the unfolding of the law from ancient times through the biblical period and in the Roman era or commences from the time that the memory of man runneth not to the contrary in England, the influence of Roman Law, Civil Law, and Canon Law must be observed in our present statutes. A will was considered as a testament to God and the first concern of the testator was for the repose of his soul. The early form of a will in England contained such clauses as the following: "My body is to be buried in——— Churchyard, and I give toward the repairing of the said Church................ $................, and also $................ for Masses for the repose of my soul." Ecclesiastical jurisdiction in early common law over the goods of the testator explains some of the rules applicable today and that is only one reason why the law of wills has to be given considerable historical attention.

The format and typography of this volume is excellent. The type is large enough to be readily readable. The style is simple and the margins are fine. This book is neither too large nor too thick. The press-work and binding is beyond criticism. A timely preface and liberal table of contents enables a person to determine what is in the volume.

You will find this third edition of Thompson on Wills a valuable asset to your library. Its recognition by three generations of lawyers tolls the statute of prescriptive veneration. As I write on Shakespeare's birthday (sic) it seems fitting to close with the opening words of his will: "In the name of God, Amen!"

*John W. Curran**

ECONOMICS OF PUBLIC UTILITIES. By Emery Troxel.[1] New York: Rinehart and Co., 1947. 892 pages. $5.75.—The lawyers and administrators engaged in the work of regulating and administrating the utility industries should be particularly interested in the present volume. Like nearly all books on the subject written in the last decade or so, it is primarily a college text on the economics of water, urban-transportation, gas, electric, telephone and radio-broadcasting industries. But, it is also a valuable source book for those responsible for the state or federal controls of the utility enterprises.

The first commendable feature of the volume as a reference book is its recency. Since the early 1930's there has been an unprecedented growth of the so-called traditional (i. e., water, transportation, gas, electric and telephone) utilities, as well as of the new utility enterprises such as radio broadcasting, motor carriers and aviation (the latter two utility industries are not treated in the present volume). The expansion of these utilities necessitated additional regulation, especially in the federal field. The Communications Act, the Motor Carrier Act, the Federal Power Act and the Natural Gas Act were all enacted in the period between 1934 and 1938. The author of the volume traces the historical development of local, state and federal controls of the utility enterprises and also indicates the present

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[1] Associate Professor of Economics, Wayne University.

day trends in regulation. The current developments are well-documented with state and federal court citations and excerpts from the leading cases. It is unfortunate that the author places his footnote references in the back of the book under appropriate chapter headings, rather than on the page where the foot note appears. This detracts somewhat from the usefulness of the present volume as a quick source of reference.

The timeliness of the book is not, however, its sole attainment. It is also an excellent economic study of the important problems of the utility businesses. The author, unlike many academic writers, has applied the methods of economic analysis to some very concrete and practical problems that are currently important in dealing with either the managerial or the regulatory aspects of the utility industries.

The first two chapters are devoted to an explanation of the legal concept and economic characteristics of utilities. The next three chapters, as already indicated above, trace the growth of regulatory controls. This done, the author proceeds without delay in tackling the problems of utility economics. Chapter 6 emphasizes the importance of accounting control in the utility regulatory field. The author notes that: "If accounting procedures are carefully prescribed, the commissions have access to revenue, cost, and property valuation facts that can be used for earnings, price, and financial regulation."[2] This emphasis on accounting control is an accepted feature of all efficient regulation, local, state or federal, yet only one other fairly recent text[3] gives it the deserved prominence that it enjoys in the present volume. The importance of accounting controls cannot be denied. It was the need for such regulatory accounting supervision that led to the adoption of a uniform system of accounts by state and federal commissions.

The chapters in the present volume dealing with the control of competition, depreciation, rate of return and obsolescence are also very timely. Interutility rivalry and a needless duplication of service present very real problems to the regulatory authorities. The certificate of public convenience and necessity has been a means for checking undesirable competition that is harmful to the public interest, but the problems that arise from these competitive situations are still unsettled not only in the case of the older utilities, but also in the newer utility industries[4].

The author analyzes the problem of depreciation in an impartial manner, noting all the new legal views on the subject of depreciation deductions, observed depreciation deductions, and the reserve requirement. His analysis and discussion of depreciation are comparable in thoroughness to the excellent article on this problem written by Professor Freeman in a leading law periodical.[5] Both appear to have an excellent grasp of the fundamental matters involved in the problem of depreciation. The problem of the rate of return is analyzed by the author from the viewpoint of the modern judicial recognition of the complementary relation of the reasonable-return and the reasonable depreciation cost. The chapter on obsolescence presents the problem in terms of accounting, thus ensuring a practical method of measurement of the obsolescence value. Regulatory policy can then be evolved from these measurements.

Fully five chapters are on the subject of utility price structures. This extensive treatment of pricing is entirely warranted, for, as the author states, control

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2 Page 116.

3 See BARNES, THE ECONOMICS OF PUBLIC UTILITY REGULATION, c. VIII.

4 See Westwood, *Choice of the Air Carrier for New Air Transport Routes*, 16 GEO. WASH. L. REV. 1.

5 See Freeman, *Public Utility Depreciation*, 32 CORN. L. Q. 4.

of price differentiation is the important problem of price regulation.[6] It is still the contention of the utilities that price-fixing is a managerial functon, but many commission and court decisions are now placing some of the price-fixing functions under social control. The regulatory commissions are becoming more and more aware of the fact that the social and economic effects of price structures are no longer within the exclusive province of utility managers.

The author's chapters on municipal utility systems and multiple-purpose projects are noteworthy. He believes that the expansion of federal river projects will stimulate the expansion of the municipal systems,[7] and that, generally, municipal ownership spells price advantages to the consumer.[8] This is the only part of the book wherein the author is rather partial; his discussion of the regional projects, both federal and non-federal, is more objective.

The omission by the author of chapters on the public relations and propaganda activities of public utilities, which are customarily included by other authors in similar textbooks, is praiseworthy. The discussion of such utility ventures would subtract from the fine analyss of the more important concrete problems that obtain in this field of enterprise.

*Louis Charles Kaplan**

TAXATION FOR PROSPERITY. By Randolph E. Paul.[1] Indianapolis: Bobbs-Merrill Company, 1947. 448 pages. $4.00.—That confession is good for the soul is a truism unquestioned by the civilized. That such confession should take place in the market place is subject to question. A large portion of the first of the three books into which Mr. Randolph Paul, one-time Tax Advisor to Secretary Morgenthau, later General Counsel and Acting Secretary of the Treasury in charge of Foreign Funds Control, divides his latest work on federal taxation, falls under the foregoing strictures against public confessions.

This first portion of Mr. Paul's new volume is devoted to a brief historical recapitulation of the history of the federal revenue acts since the Supreme Court's invalidation of the income tax re-imposed by Congress in 1894 in the much mentioned, seldom read, *Pollock v. Farmers' Loan and Trust Company*.[2] The remaining two books in the volume, Problems of Future Tax Policy and a Federal Tax System for the Future, essay a more ambitious role.

Taxation for Prosperity being a laudable, if not wholly successful, attempt to popularize a difficult and little under understood field—the impact and potentialities of federal taxation upon our economy and way of life—it is perhaps churlish to observe that what may be termed Mr. Paul's brief partisan raids along the historical borders of the Cleveland-McKinley-Roosevelt-Taft era have been more notably led by other literary free-booters.[3] His almost blow-by-blow description

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6 Page 532.

7 Page 656.

8 Page 664.

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1 Member of the New York Bar.

2 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759; 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108.

3 SULLIVAN, OUR TIMES, for the general picture, and Robert Swaine's HISTORY OF THE CRAVATH FIRM, for the forces at work in the *Pollock* case.

of the more recent war-time legislation from the time he went to Washington in 1941 through 1946 might well have been labeled *Apologia Pro Vita Sua in Aerorio.* Though perhaps the writing of these pages provided the *raison d'etre* for the entire book, they add but little to Mr. Paul's professional stature. Circulated among friends as a private brochure, Chapters 12 through 17 would have served to highlight an interesting portion of a busy career.

Unfortunately this volume, dedicated to the high purpose of charting a tax program for a solvent and prosperous America, is much marred by that grave, often fatal, stylistic defect, over-generality. Concreteness yet remains the essence of impelling prose. Chapter 38 on the subject of social security is perhaps the most stimulating portion of this volume. Yet it, too, suffers from generalities and a pervading failure to come to grips with the myriad of concretions which underlie the Social Security Acts. Specific cases breathe life into "employee," "employer," "unemployment insurance" and "dependency benefits." Mr. Paul has passed them over in favor of an intricate matching of such literary cliches as "one world", "dynamic factors in the world economy," "realistic long-term program" and "face the challenge of an unfathomable future" and even "sound economics." And this from an author familiar with Arnold's *Folklore of Capitalism!*

Mr. Paul's tax blueprint for a prosperous future is distressingly vague both in outline and detail. Estate and gift taxes should be strengthened by correlation. Social security is to be extended. Excise taxes are to be "handled with careful regard for the relative importance of various taxed commodities to the maintenance of a prosperous economy." In brief the problem is stated, not solved.

Taxes must be "fair" we are solemnly told. "Fairness" cannot be achieved while the present depletion allowances for oil, gas and various minerals are permitted, while the Treasury remains "temperamentally" unfit to utilize the full scope of its rule-making power, while persons of great wealth avoid income taxes through the ownership of tax-exempt bonds. All this is doubtless true. Nowhere, however, does the author examine the political realities of his program. If the solution of these three problems, deemed necessary to achieve "fairness", is not capable of political realization either now or in the immediately forseeable future, does Mr. Paul's thesis offer us a workable guide?

"Taxes for More than Revenue" is a central theme of this book. And a challenging theme it is. An auspicious start is made with the humbling admission that: "The formula for a dynamic economy is not discoverable by taxes alone." [4] We are not further informed, however, as to just what the limitations are upon the doctrine of using the nation's taxing power for social aims over and above the production of revenue. A score of taxes have been levied to achieve ends other than the strict raising of revenue. Gift and estate taxes produce little revenue and Mr. Paul has already expressed the widespread doubt "whether inheritance and estate taxes do achieve a redistribution of wealth." [5] Poll taxes disenfranchise; margarine taxes subsidize the dairy interests. Tariffs no longer are looked upon as prime fiscal supports of the nation. Though brushing against them in passing, Mr. Paul foregoes the tantalizing opportunity of probing the meaty interiors of these rich kernels.

Equally disappointing and superficial is the author's treatment of whether taxation kills initiative and dries up the wellsprings of risk capital. Excessive taxation of lower income groups in England—the miners in particular—has led to a direct fall in production. Mr. Paul confines himself to the imponderables of whether

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4 PAUL, TAXATION FOR PROSPERITY, 219 (1947).

5 PAUL, FEDERAL ESTATE AND GIFT TAXATION I, 46 (1942).

high taxes on the rich result in loss of incentive on their part. As to risk-capital, he assumes it comes from the upper middle and wealthy classes. Today risk-capital is supplied directly in ever-increasing volume by the nation's larger banks, insurance companies, and by the federal government itself. The resources of these organizations stem in large measure from the lower middle and lower economic classes.

Mr. Paul has for almost a score of years been an ornament to the nation's tax bar. From the lecture platform, through countless law review articles, three bound studies in federal taxation, and finally through his peerless three volumes on federal estate and gift taxation, Randolph Paul has helped to illumine the minds of bench, bar and classroom. Is it too much to hope that the source of this urbane illumination, having re-fought the fiscal battles of World War II in public print, may find catharsis through his castigation of his conniving but shamelessly successful rival, Beardsley Ruml? Those of us who have heretofore found both profit and pleasure in Mr. Paul's writings sincerely hope so.

*Robert T. Molloy**

LAW AS AN INSTRUMENT OF SOCIAL POLICY: THE BRANDEIS THEORY. By Miriam Theresa Rooney.[1] THE NEW SCHOLASTICISM, January, 1948.

"Law As An Instrument of Social Policy" is a short but scholarly study of the Brandeis theory of law by Dr. Miriam T. Rooney, whose analyses of contemporary juridical theory have won her recognition both in legal and in philosophical circles. Here, as in her study of Cardozo[2], Dr. Rooney has traced the law behind the law—the philosophy that consciously or unconsciously shaped the legal decisions of a distinguished American jurist.

Although deeply sympathetic with Justice Brandeis' concern for the rights of labor, his refusal to identify the common good with corporation profits, and his attack on the unnecessary centralization of power in the federal government, Dr. Rooney clearly shows that behind much of this laudable liberalism lay a Kantian concept of liberty whose only limits were the interests of others, and an equally vague concept of brotherhood whose social improvement was the sole end of the individual.

Wisely refusing to restrict her study to a destructive criticism of these concepts in Justice Brandeis' philosophy of law, Dr. Rooney points out the strength as well as the weaknesses in his theory, especially his insistence that reason, not private will or public caprice, should be the controlling factor in positive law, and that positive law is a means, not an end, in corporate society.

In fact, so intent is Dr. Rooney on fairly presenting the philosophical theories of Justice Brandeis and on making allowances for his well-intentioned errors that she concedes that "Through the confidence placed in the reason of each person and his natural tendency toward the good when given opportunity for free choice, the theory contains the essential elements of a valid concept of democracy." This is more than the present reviewer is willing to concede. Any legal theorist who denies, as Justice Brandeis denied, that the soul is immortal, thereby excludes an

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1 Associate Editor, The New Scholasticism.

2 The New Scholasticism, January, 1948.

essential element of true democracy. Such exclusion logically leads to totalitarianism. If man has no end, no fulfilment, that transcends society, he is necessarily reduced to a mere part of a political whole. He has no rights, no duties other than those which the state grants or recognizes. This was, in fact, as Dr. Rooney notes earlier, the conclusion drawn by Justice Brandeis himself: "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community." Needless to say, to include in one's legal theory the immortality of the soul and its *natural* destiny, after death, to an intimate (not intuitive) knowledge of God does not involve an appeal to theology or to revelation. These are not "supernatural facts": both data can be and, historically, have been ascertained by reason. The only source of man's intrinsic dignity, their inclusion is critical for any sound philosophy of law.

All this, of course, is quite clear to Dr. Rooney, as would be evident if the statement quoted above were taken in context with her other writings. But since there has appeared in recent years among certain legal philosophers (Dr. Rooney is not one of them) a tendency to base the dignity of man merely upon his possession of intellectual powers, the fact that man's intrinsic dignity is ultimately based on his final ordination to God cannot be overstressed.

One might suggest, however, that to speak, as Dr. Rooney speaks, of man's reason as a "faculty which *intuitively* indicates conformity of his action with natural law" (italics ours), might possibly lead to misunderstanding. While the basic principles of natural law are known with relative ease, their application, as well as the more difficult principles themselves, is often known only after considerable reflection and experience.

The statement that Justice Brandeis "embraced the Jewish doctrine of disbelief in personal immortality" might also have been more carefully qualified. Even though large numbers of unorthodox Jews have denied the immortality of the soul, this disbelief can hardly be called typical of the Jewish religion as known historically.

But the chief task which Dr. Rooney set out to do is admirably executed. In a little more than fifty pages, she has gathered together the salient features of Justice Brandeis' legal theory, traced them back to their philosophic sources, calmly and critically weighed each. In this short study, the legal theorist, as well as the practicing lawyer, will find the clearest picture yet presented of the complex forces that moulded the mind and decisions of the late Louis Brandeis.

*R. W. Mulligan, S. J.**

CASES ON FEDERAL ANTI-TRUST LAWS. By S. Chesterfield Oppenheim.[1] St. Paul, Minnesota: West Publishing Company, 1948.—In this splendid casebook Professor Oppenheim presents the first part of his two volume revision of his earlier casebook on Trade Regulation (1936). A companion effort, *Cases On Unfair Competition,* is in print and soon will make its appearance.

In the volume reviewed here, the author has isolated the cases and materials relevant to that part of a course in trade regulation which deals with the public policy of preserving or enforcing competition within the framework of the

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1 Professor of Law, George Washington University.

American competitive enterprise system. To the extent that the public policy behind the anti-trust laws is aimed at preserving free competition by punishing those who deviate from that article of economic faith, this work deals with the negative aspects of trade regulation. However, the book is extensively cross referenced to the impending work on unfair competition which will treat of the affirmative attempts not only to preserve, but to raise, the plane of fair competition. Therefore, Professor Oppenheim's isolating of the anti-trust material is not sterile in nature, but is an intelligent, practical dichotomization of the complex and overlapping subject of trade regulation.

Moreover, this severing maneuver eliminates the disadvantage of bulkiness inherent in any single casebook which attempts to span the field. It makes easier too, the opportunity to conduct separate courses in trade regulation, one dealing with anti-trust problems, the other with those of unfair competition.

An outstanding feature of the casebook is the inclusion of excellent non-case material. Unlike other attempts along these lines, Professor Oppenheim has forsworn the practice of cluttering up his work with endless extracts on the economic and business background which is admittedly necessary for proper student apprehension of the subject. Instead, the author has, in most cases, summarized, in cogent, objective, explanatory editorial comments, the non-legal background material relevant to the various sections of the book. The same technique is relied on to cover many of the cases of lesser importance which, nevertheless, still form a necessary part of the subject matter. However, in addition to the editorial comments, there are specially prepared background texts. All these devices not only serve to economize casebook pages and classroom time, but also to stimulate student interest in a great measure. This intellectural titillation is a necessary adjunct in any attempt to teach successfully a subject such as trade regulation to law school students, many of whom lack a good pre-law background in economics. Not only does the non-case material inserted by the author provide stimuli to student interest, it also directs the attention of the student to the currently evolving doctrines of anti-trust law, carrying those who wish to go to the frontier regions in the legal-economic field of trade regulation.

The content of the book is arranged in an orderly fashion which combines the twin virtues of continuity of presentation and re-occuring novelty of subject matter. After dealing with ancillary and non-ancillary restraints of trade at common law in the first two chapters, the author takes us into the Sherman Act in chapter three. In this chapter Professor Oppenheim, through skillful use of editorial comment, special text, and a comprehensive check list of the American private competitive enterprise system, points up vividly the conflicting economic and social forces around which are fought the battle against monopoly. The next three chapters form part two of the book and treat of mergers, consolidations, and monopoly under the federal anti-trust laws. The chapter on monopoly which ends with the horizon-opening *Yellow Cab* case,[2] and the one which deals with the major hole in the anti-monopoly dike, Section 7 of the Clayton Act,[3] are especially well presented.

Part three of the casebook deals with individual transactions and loose associations under the anti-trust laws. Beginning with chapter seven on price-fixing agreements not predicated on legal monopolies, the author winds a progressively unfolding and interrelated course through trade associations and their characteristics and activities, resale price maintenance and the "fair trade" act debates, and

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[2] United States v. Yellow Cab Co. et al.; 332 U. S. 218, 67 S. Ct. 1560, 91 L. Ed. 1594 (1947).

[3] 38 Stat. 730 (1914), 15 U. S. C. 12 *et seq.* (1940).

delivered price systems. All these controversial areas of anti-trust law are fairly and fully painted; no attempt at dogmatism is tried in a field where its espousal would not only be poor teaching, but bad lawyering. This is not to say, however, that Professor Oppenheim's presentation does not allow the acute student to grasp with sufficient certitude the evolving trends where their outlines are fairly discernible.

Chapter eleven, dealing with legal monopolies and the anti-trust laws, is an excellent portrayal, with fine perspective, of the delicate balancing of anti-trust policy with the public policy behind the American patent system. It is here that the author demonstrates beyond cavil that he is one who does not shrink in the face of slogans or shibboleths, and that he is one who agrees with Judge Frank that the "problem is not whether there should be monopolies, but rather, what monopolies there should be, and whether and how much they should be regulated." [4]

After considering exclusive arrangements, tying devices, and trade boycotts, the author closes part three of the book, appropriately enough, with a chapter on foreign commerce and international cartels under the anti-trust laws. This last chapter is one of the more noteworthy completely new additions to his first casebook on trade regulation. Its inclusion is additional evidence of the modernism and timeliness of Professor Oppenheim's work. The last part of the book is an interesting treatment of the problem of remedies under the anti-trust laws. While certainly worthy of consideration, its place at the end of the volume allows more easily its exclusion in those cases where time limitations curtail the amount of material which can be taken up in a course. There are excellent appendices to the book including those on the Sherman, Clayton, Federal Trade Commission, and Webb Export Trade Acts. This reviewer would like to have seen the Robinson-Patman Act inserted but since it undoubtedly will be found in the casebook on unfair competition, he will not voice that single minor criticism.

Indeed, then, the author has created a work which is both an outstanding teaching tool and also an excellent contribution to the literature of the law of anti-trust. Its appearance at a time when the growing concentration of economic power may well threaten the continued existence of the American free competitive economy is most fortunate. Professor Oppenheim, with intellectual humility and scholarly objectivity, reveals himself in the pages of his casebook as one who understands completely what a really free economy is, and on what foundations it necessarily must rest. His cult is a rare one; but may his tribe increase.

*Alfred Long Scanlan**

IMPACT OF THE NEW LABOR LAW ON UNION-MANAGEMENT RELATIONS. By Leo C. Brown, S. J.[1] St. Louis: Institute of Social Order, St. Louis University, 1948. 114 pages. $1.50—Essentially, this booklet is a question-and-answer discussion of the Taft-Hartley Labor-Management Relations Act of 1947 including the full text of the law.

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4 Frank, J., concurring in Picard v. United Aircraft Corp. 128 F. (2d) 632, 643 (C. C. A. 2d, 1942).

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1 Associate Professor of Economics, St. Louis University.

In his preface, the author points out that the booklet is not intended to be expert—and *a priori*—legal or juridical opinion. Rather, it is an interpretation of application of the new amendments to concrete situations that may arise. Several attorneys and personnel men gave the author the benefit of their experience, along with union representatives who posed many of the questions.

Because of the skillful organization of the booklet, it is a usable, quick-reference handbook. Some considerable value is added in an appendix covering such things as labor organization registration forms, financial data certificates, and loyalty affidavit forms. For those not having easy access to the weekly reporting service the booklet is well worthwhile.

*John H. Sheehan**

SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, Edited by Margaret E. Hall.[1] New York: Fallon Publications, 1947. 456 pages. $5.—"The significance of the record of his life lies in the fact that in youth and at college and in manhood, as a lawyer and as a judge, in work of ever widening importance, he gathered an ever widening circle of friends—an ever increasing influence in the development of the law and in the administration of Justice."[2] That Cardozo was a popular judge may be inferred from the universal approbation and acclaim that greeted his elevation from the New York Court of Appeals to the Supreme Court of the United States. That he was a great judge can be discerned from the tenor of his decisions and their influence upon the course and content of our law. "No other judge of his time was so deft in weaving the precedents of centuries into a new shape to govern a new society."[3]

But there are those amongst his disciples who point to the extra-judicial utterances rather than judicial opinions as constituting his contribution to the literature and philosophy of American law. "His extra-judicial writings contain his more articulate philosophy of law, and are thus more likely to be enduring than his opinions as a judge."[4] The one does complement the other as can be seen from Cardozo's appraisal of the effect of personal philosophy upon the law. "The works of any man must always partake, in large degree, of the spirit of the man himself; and the more pronounced and earnest his views may be, the more the truths he has discerned burden him and press for utterance, the more constantly will they dominate his writings, and the more clearly will his writings reflect the workings of his spirit."[5] And again, "We may try to see things as objectively as we please. None the less we can never see them with any eyes except our own."[6]

To evaluate adequately his contributions to the science of jurisprudence and the bases of his judicial opinions we must discover and analyze his philosophy of law and the place of philosophy in the law. The present collection seeks to trace the development of this philosophy from Cardozo's undergraduate days at Columbia

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1 Reference Law Librarian, Columbia University Law Library.

2 Lehman, MEMORIAL IN SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO xiii.

3 Cummings, IN MEMORY OF BENJAMIN NATHAN CARDOZO 6 (1938).

4 Patterson, *Forward to Selected Writings of Benjamin Nathan Cardozo* V.

5 SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 61 *(The Moral Element in Matthew Arnold).*

6 *id.* at 110 *(The Nature of the Judicial Process).*

(The Altruist in Politics) to the eve of his appointment to the Supreme Court of the United States *(Jurisprudence)*. As an attempt to present the development and the synthesis of Cardozo's legal thought, it is commendable. But as an attempt to foist the tenets of sociological jurisprudence upon the legal profession and the general public, it is condemnable.

It has been said [7] that "His was a life-long quest: How does the law grow? How does it bridge the gap between the experiences of yesterday and the needs of today? How can it be a permanent thing, something to rely and act upon, and yet fulfill the changing exigencies of the hour?" Noting that the work of modification was a gradual one,[8] Cardozo concluded that "Out of the ferment there will come a new philosophy that will guide the thought of our successors". [9]

This philosophy, dominated by the sociological school of jurisprudence looks to the morality of the community as the pattern of justice: "I hold it for my part to be so much of morality as juristic thought discovers to be wisely and efficiently enforceable by the aid of jural sanctions." [10] But the function of the judge is something more than merely reflecting the *mores;* "The judge interprets the social conscience and gives effect to it in law, but in so doing he helps to form and modify the conscience he interprets." [11] The effect of discovering the social conscience and applying settled rules of law thereto in the mind of Cardozo, establishes the premise that all is relative. "The more we study law in the making, at least in its present stages of development, the more we gain the sense of a gradual striving towards an end, shaped by a logic which, eschewing the quest for certainty, must be satisfied if its conclusions are rooted in the probable." [12] And again, "The principle of relativity in the adaptation of the law to conduct may point the way to change." [13]

In *The Nature of the Judicial Process* [14] Cardozo analyzes the judicial process as being: "logic, and history, and custom, and utility, and the accepted standards of right conduct . . . which singly or in combination shape the progress of the law." [15] As guides in determining the tendencies of development and growth of the law he proposes four tests:"The directive force of a principle may be exacted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the mores of the day; and this I will call the method of sociology." [16] Admitting that there are certain jural principles that limit the freedom of the judge [17] Cardozo nevertheless concludes that "the final cause of law is the welfare of society" [18] and "the law of nature is no longer conceived of as something static and eternal. It does not override human or positive law." [19]

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[7] Swygert, *Bejamin N. Cardozo,* 22 NOTRE DAME LAWYER 144 (1947).

[8] SELECTED WRITINGS OF BENJAMIN N. CARDOZO 115 *(The Nature of the Judicial Process)*.

[9] *id.* at 104 *(Faith and a Doubting World)*.

[10] *id.* at 273 *(Paradoxes of Legal Science)*.

[11] *id.* at 228 *(Growth of the Law)*.

[12] *id.* at 217 *(Growth of the Law)*.

[13] *id.* at 260 *(Paradoxes of Legal Science)*.

[14] *id.* at 107-184.

[15] *id.* at 153 *(The Nature of the Judicial Process)*.

[16] *id*, at 117 *(The Nature of the Judicial Process)*.

[17] *id.* at 160 *(The Nature of the Judicial Process)*.

[18] *id.* at 133 *(The Nature of the Judicial Process)*.

[19] *id.* at 161 *(The Nature of the Judicial Process)*.

At this point we must distinguish Cardozo the jurist from Cardozo the legal philosopher. We may subscribe to the liberal decisions[20] which "weave the precedents of centuries into a new shape to govern a new society"[21] and which logically extended do not conflict with basic tenets of moral law. But it is a far different proposition to espouse the "more articulate philosophy of law"[22] characteristic of his extra-judicial writings. Here again we are faced with the dilemma of conforming to Cardozo's rule for criticism: "It is criticism's part to distinguish and separate in the first instance what has been *well*, from what has been badly said."[23] It will suffice to note the effects of the ingratiatingly popular style of William James who said things well but things which at the same time were philosophically unsound.[24]

Relativism characterizes Cardozo's expressed philosophy of law. Applying the scientific methods of inductive reasoning and generalizations "it accepts a theory of agnosticism which holds that . . . we can know the absolute only in the relative. . . . Since all is change in life, law must correspond to the facts of life and therefore legal rules and principles are not final truths but hypotheses, the only test of whose validity is the pragmatic one of trial and error."[25] What then is to be the criterion in determining whether a thing is lawful or unlawful? "The moral code of each generation, this amalgam of custom and philosophy and many an intermediate grade of conduct and belief, supplies a norm or standard of behavior which struggles to make itself articulate in law."[26]

But are there no immutable principles or is relativity always the test? "Principles are complex bundles. It is well enough to say that we shall be consistent, but consistent with what"?[27] As opposed to this thesis of Cardozo, we say consistent with the natural law. "Natural law is the principle of laws. Laws are the application of that principle in the government of human conduct. Without the laws, the principle is sterile. But without the principle, the laws would be irresponsible and anarchic."[28]

But what of the contention that "law must be stable and yet it cannot stand still."[29] To which we reply: "Law involves constancy and change. The constancy is in the principle, which lies behind the facts; the change is in the rule which includes the facts."[30] And "Positive rules are not deductions from natural law; they are determinations of it."[31]

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20 Wood v. Duff-Gordon, 222 N. Y. 88; McPherson v. Buick Motor Co. 217 N. Y. 382.

21 See note 3 supra.

22 See note 4 supra.

23 SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 68 *(Moral Element in Matthew Arnold)*.

24 Palmer, *The Natural Law and Pragmatism*, 23 NOTRE DAME LAWYER 317 (1948).

25 ROONEY, MR. JUSTICE CARDOZO'S RELATIVISM 36 (1945).

26 SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 261 *(Paradoxes of Legal Science)*.

27 *id.* at 132.

28 McKinnon, *Natural Law and Positive Law*, 23 NOTRE DAME LAWYER 137 (1948).

29 SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 86, 249 *(Growth of the Law)*.

30 McKinnon, *op. cit. supra* note 28, at 137.

31 *id.* at 136.

All of which the sociological jurisprudence theorists may say is a distinction without a difference. And yet the dangers attendant upon discarding the principle of laws, the natural law, for a relativity based upon what the majority deem to be right are ever about us. An outstanding example is the opinion of Justice Holmes in the case of *Buck v. Bell*: [32] "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices (sterilization) . . . in order to prevent our being swamped with incompetence. . . . The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." This is the same Holmes of whom Cardozo wrote: [33] "He is today for all students of law and for all students of human society, the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages." And again, "No one has labored more incessantly to demonstrate the truth that rights are never absolute, though they are ever struggling and tending to declare themselves as such." [34]

Cardozo, like Holmes, is committed to the theory that rights are relative, never absolute. "My admiration for Holmes goes almost to the point of worship." [35] To refute the contention that the theory of relativity is working and has worked in practice with few ill effects, we look to Cardozo, and his discussion of the form and content of judicial decisions: "Most of us are so uncertain of our strength, so beset with doubts and difficulties, that we feel oppressed with the need of justifying every holding by analogies and precedents and an exposure of the reasons." [36] But "one does not need to justify oneself if one is the mouthpiece of divinity." [37] Such would be the effect of relativity run rampant. And yet we find praise and unquestioned endorsement of its ramifications. "Political leaders, newspaper editors and moralists unversed in the law who now grope within the labyrinth of empiricism and subjectivism, would find many of their most perplexing problems elucidated if not completely solved in Cardozo's interpretation of the origin, the nature, the growth and the function of law." [38]

However, neither Holmes nor Cardozo were so convinced of the correctness of their hypotheses as to be free of doubt. "Sceptic of many things, of many boasted certainties, he is sceptic even of himself", [39] Cardozo says of Holmes. And he confesses a similar distrust: "In those hours of discouragement to which not even experience is a stranger, I feel at moments the same doubt, paralyzing effort with its whispers of futility." [40]

In what direction, then, is the science of jurisprudence to turn? Constancy and conviction will be found only in a philosophy of legislation and judicial opinion which is based on a recognition of the fundamental (natural) law and in the application thereto of right reason. The positivism and absolutism which finds expression in the relativistic approach to our present day needs has been ineffective

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32 274 U. S. 200, 207, 47 S. Ct. 584, 71 L. Ed. 1000 (1927).

33 SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 79 *(Mr. Justice Holmes)*.

34 *id.* at 82.

35 *id.* at 103 *(Faith and a Doubting World)*; *cf.* notes 12 and 13 supra.

36 *id.* at 345 *(Law and Literature)*.

37 *id.* at 344 *(Law and Literature)*.

38 Aronson, CARDOZO'S DOCTRINE OF SOCIOLOGICAL JURISPRUDENCE 14 (1938).

39 SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 86 *(Mr. Justice Holmes)*.

40 *id.* at 77.

and has spawned the popular as distinguished from the just approach.[41] Miss Hall, in collecting and editing these extra-judicial works of Cardozo, has served to coalesce one school of thought. But she has done more. Unintentionally she has focused the attention of the discriminating reader on the basic conflict of contemporary society—the inalienable rights of man. "If anything is becoming clear," said Mr. Ben W. Palmer,[42] "to this confused revolutionary generation when the foundations of civilization are shaken to the depths, it is that law like life, needs an integrating philosophy that will give some objective standards, some sure footing amidst the shifting sands of crumbling secular institutions. You and I know that the answer lies in the further invigoration and wider acceptance of scholastic natural law."

Robert E. Sullivan

41 *cf.* ROONEY, RELATIVISM IN AMERICAN LAW (1945).

42 Minneapolis Attorney, speaking before the First Natural Law Institute sponsored by the College of Law, University of Notre Dame, December 1947. Speech printed in 23 NOTRE DAME LAWYER 313. Portion quoted appears at page 340 (1948).

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912.

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Before me, a Notary Public in and for the State and County aforesaid, personally appeared William B. Ball, who having been duly sworn according to law, deposes and says that he is Editor-in-Chief of the NOTRE DAME LAWYER and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc. of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in Section 411, Postal Laws and Regulations, printed on the reverse of this form to-wit:

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