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Book Reviews

John A. O'Leary

Edward Francis O'Malley

James J. Kearney

BOOK REVIEWS

CASES AND OTHER MATERIALS ON JUDICIAL REMEDIES: By Austin Wakeman Scott and Sidney Post Simpson. Published by the editors. 1938.

The subject matter of the volume is the usual material available for treatment in a course of this kind, and for the purposes of this review will be summarily disposed of, since it is not because of the subject matter that the book is worthy of report, but because of the manner in which it is treated.

Proceeding from a somewhat historical synopsis of the essence and nature of the judicial system, its origin, and gradual development into the subsequent efficient organization, the book then treats of the nature of actions at Law, stating in outline form the proceedings at Law, which treatment is given a parallel in a subsequent chapter on the forms of actions in Equity. The two great divisions of the book are, of course, dedicated to the distinction between legal and equitable actions, with the closing section being dedicated to a treatment of the two great bodies as unified, as far as the mode of pleading is concerned, under the modern codes of procedure.

The book appears coincident with a revision of the curriculum of the Harvard Law School, and is obviously intended to give the first year law student a comprehensive survey of what lies ahead of him on his journey through the courses of adjective law. The teaching of the old methods proceeds upon the theory that modern students of modern forms of procedure can most clearly see and understand the modern form when seen in the light of historical development. The virtue of this theory becomes apparent to the law student only upon his attainment of a more or less heightened perspective in his last year, from which he is able to look down upon those old forms and see their application *in substantia*, if not *in forma* in the modern codes of procedure.

The somewhat imposing size of the volume is a result of carrying into practice the authors' ideas on the most expeditious way of making plain to the student the nature of the general, as well as the particular, problem with which he is faced—thus the book contains sections wherein the authors felt that a knowledge of a particular subject could best be exposed by explanation other than case exemplification, and to that end, explanatory paragraphs in the nature of a professor's lecture, showing what the section deals with, and definitive of the substance therein, as well as modern statutory material, has been inserted wherever the authors thought such material necessary and salutory. That the book might closely approach that of a text, as opposed to a case-book, is effectively answered by the authors, when they say, "Cases are the backbone of the course which this book contemplates, as of any course in the common law tradition."

Wherever the book is to be put in use, it is my contention that strong emphasis should be placed upon the general plan upon which the course proceeds. A thorough understanding on the part of students of the nature of the problem with which they are presented, and the manner in which this problem is going to be attacked, and the manner of exposition of the conclusions reached after the study—these things should be necessary to derive from the use of this book the possibilities that it contains.

To this end, the *introductory* material of chapter one is most important, and is a forecast of the general style to be followed, as well as the subject matter of the course. It is most important for the student to remember, in a course of this kind that there is no *separation* in matters of substantive and adjective law, but the difference is one of *distinction* only, and very often an understanding of the substantive nature of a case will cast light upon the necessity of pleading the case in such and such a way, and the contrary is also generally true.

Preceding a large division of the book, as e. g. Part II, is informative material in a textual nature, explanatory and expositive of the material to be treated in the subsequent cases; somewhat startling is the immediately following case material, for in this same section, Slade's Case, 1596-1602, is printed, immediately following by a complete record of the modern Palsgraf case from the state of New York, from the service of summons, through the pleadings, the trial, the motions, the judgment, subsequent execution, and appeal process and review, illustrating the form of procedure completely from beginning to end.

In conclusion might I say that the one possibility that I can think of in objection to a book of this type is that it may possibly not be fully appreciated by students in the first year, and that its full worth becomes apparent only when a student looks back upon his preceding years and sees the actual material through which he has traveled; then what this book might have done for him had he understood what its aims and objectives were when he read it becomes apparent, but only then. So I restate what I think is most necessary to the use of this excellent book, and that is that the student who is to use it become thoroughly acquainted with what the book is trying to do for him, and it will then become an effective vehicle to enable him to arrive at a fuller and better understanding of the Judicial Process.

John A. O'Leary.

OUR ELEVEN CHIEF JUSTICES: By Kenneth Bernard Umbreit. Published by Harper & Brothers. 1938.

This volume is in no sense a "must book." Nor could it be said that it is essential for the embryo or practicing lawyer. However, it can easily be claimed that it deals uniquely with a subject which has been elaborated in a multiplicity of approaches. Because of that fact alone, the professional practitioner or jurist, as well as the law student, should have at least read it. There are additional reasons why it would be even better to have the work in one's own personal library. Its treatment of the "personal equation" in the written legal opinions, its wealth of historical background, and its delightful handling of the various biographies — together make readable the pages of this well-styled chronicle of the eleven Chief Justices of the United States Supreme Court.

The reader scarcely notices the succession of life-sketches in the easy transition from one subject to the next. Mr. Umbreit states that his chief purpose was biographical rather than historical. He treats cases as "themselves factors in the illumination of character rather than as the facts to be explained by the knowledge derived from the study of character." Still he could not avoid the ultimate cross-sectioning of American history, cut at a new angle. That can well be understood, and for it the reader is indeed grateful. After all, people prefer to read and talk about people, and if at the same time, a better grasp of constitutional history results, a double purpose has been served. The reader adds to his general store of historical knowledge while he avidly follows the lives and fortunes of the particular individuals most responsible for its trend.

It is not always remembered that the Chief Justice exercises a good deal of influence on the Court decisions. He presides over the Court in both conference and the regular court-rooms, controlling the course of argument before and discussion among the other Justices. He is in a splendid position to direct attention to or from a particular point insisted upon by one or more of his colleagues. Neces-

sarily, the Chief Justice would prefer a particular approach to the problems as they arise. By assigning the writing of the majority opinion to the Justice whose views most nearly coincide with his own, he can leave his own impress on the law.

Most lawyers, and many laymen, are more or less conversant with the momentous decisions of the Supreme Court — that is with their effect. But coming to an explanation of the factors causing the reasoning to these decisions, the answer is cautiously and hestitantly given. The written opinions of the Court are the attempted rationalization of various factors, namely legal training and experience, human emotions and even preconceived prejudices and passions.

There is no denying that our Constitution contained and still has certain vague phrases, the character of which opens the door to judicial interpretation, molded along the lines of the several Justices' views of our social and economic needs. There has always been the explosive political nature inherent to the task of interpreting the Constitution. We have witnessed this in our own day, as well as in the past. Possibly, it does not go to the extent of the statesman's "keeping his ear to the ground", but at least, there is an impartial attempt, generally, to ascertain the economic or political cause of a certain item of legislation.

Then, too, there is always that utter unpredicability of the Court's decision on so many vitally important cases. For example, there is the complete reversal of judicial viewpoint of the Hon. Morrison Remick Waite, after his accession to the Chief Justiceship, when, in the famous case of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, he upheld the first governmental attempts at rate regulation. He had been until then the brilliant railroad and utilities expert, a lawyer's lawyer, and had strongly leaned to the exactly opposite view of that very problem.

Summing up, the book affords the reader an unusual opportunity for a glimpse of the Supreme Court from an unusual and quite interesting angle.

Edward Francis O'Malley.

THE ADMINISTRATIVE PROCESS. By Dean James M. Landis.* Yale University Press. 1938.

The title of this book, and its genesis compels an immediate comparison with *The Nature of the Judicial Process,* by the late Mr. Justice Benjamin N. Cardozo. Both works are based on Storrs' Lectures given at Yale University, and each treats of an all important process of government.

Even a cursory examination of Dean Landis' work will reveal that it does not suffer in any particular from a comparison with any of the work of prior Storrs lecturers. It follows the tradition of such lectures in combining simplicity of presentation and style with an exhaustive consideration of the problems involved. To write simply, complete mastery of the subject is essential. Dean Landis, because of his research and scholastic activities plus his experience as a member of the Federal Trade Commission, and as Chairman of the Securities Exchange Commission, has been able to achieve the requisite mastery.

Because of the mention of the report of the President's Committee on Administrative Management, and the report's excoriation of the administrative process, it was feared that the author intended to take this report as his "straw-man" and attack it as the "defender of the administrative process." It was a relief,

* Dean of Harvard Law School.

therefore, to see that the author did not undertake any such attack, but that he relied purely upon a constructive exposition of his own rather than upon the deficiencies of the report.

At the very start the author gives the *raison d'être* of the administrative process when he says:[1] "In terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems. It represents a striving to adapt governmental technique, that still divides under three rubrics, to modern needs and, at the same time, to preserve those elements of balance that have distinguished the Anglo-American government." To enforce this idea that the administrative process is not inimical to the basic concept of American constitutional government, it is later[2] said: "The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power. If the doctrine of separation of power implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine."

Division I, relating to "The Place of the Administrative Tribunal", traces the growth of the administrative process, and its development from the concept of "police" to that of "governance," and shows how the administrative tribunals have multiplied with the growth of democracy, which form of government ostensibly stresses the protection of the common man.

Although Dean Landis calls attention to the great increase of such agencies and the enormity of output of their regulations and opinions he definitely denies that a simple increase in their number is to be feared. As reasons for the increase of the number of such tribunals, if the demand for expertness in regulation and promotion of the ailing industry is to be fulfilled, the author gives three: Specialization of responsibility resulting in the increase of direct responsibility to the public. Necessity of expertness and the inadequacy of the existing method. And, enforcement of law cannot in some instances be left to public initiative, not only because of the inertness thereof, but because "The test of the judicial process, traditionally, is not the fair disposition of the controversy; it is the fair disposition of the controversy *upon the record as made by the parties.*"[3]

Division II, relating to "The Framing of Policies: The Relationship of the Administrative and Executive," treats of the problem of delegation which is fundamental to a study of administrative law. Herein Dean Landis again exhibits a definite appreciation of the difficulties inherent in this problem when he says:[4] "A principle that runs through the many decisions on delegation of power, however, is that the grant of power to adjudicate must be bound to a stated objective toward which the determination of claims must tend, and, further, that the grant of the power to regulate must specify not only the subject matter of regulation but also the end which regulation seeks to attain. Manifestly, the precision with which these objectives are expressed will vary with each piece of legislation because of the literary qualifications of the particular draftsman as well as the susceptibility of the subject matter to precise delineation."

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1 P. 1.

2 P. 46.

3 P. 38. The italics are Dean Landis'.

4 Pp. 50-51.

To the author the area of administrative discretion is a variable that is affected by divers influences and facts. The area varies according to the field to be regulated, and even within the field it varies at different periods in the existence of the adminstrative agency. The personnel of the agency definitely affects the area of its influence. And finally it is shown that irrespective of the apparent independence of the agency it is often politically expedient for it to let the legislature make some important decisions. Thus it was good policy to make Congress decide whether the so-called "death sentence" should be included in the legislation concerning holding companies, rather than to leave that decision to a rule of the agency administering the statute.

In connection with the treatment of delegation of power and the exercise of discretion the author makes a comparative analysis of the English and American technique, with the inference that perhaps the English method of having the administrative agency submit its rules to Parliament for either its approval or disapproval is preferable to the American method of Congressional investigation into the exercise of discretion by the agency.

Division III, concerns "Sanctions to Enforce Policies: The Organization of the Adminstrative," and in it Dean Landis gives an excellent exposition of the "armory of government" which contains the sanctions or implements available to effectuate policies. The author laments a catalogue of such armory, and sounds the tocsin for research in this field.

Contrary to the modern conception of the administrative tribunal as a Janus-like combination of judge and prosecutor, Dean Landis shows that it is not the combination that is to be really feared but the prosecutor's role which is the important factor in the agency. This is true, because in most cases the mere threat of prosecution is so damaging that the issue is infrequently reached for judgment.

Then, too, there are many checks placed upon the arbitrary use of the combination of prosecutor and judge. Among them Dean Landis lists: The limited area of operation of the combination; professionalism of spirit within the agency; the tendency to follow precedents; statutory requirements of findings of fact, detailed and informative; the adjudications must be "right" or the agency fails; independence of the administrative agency; and, judicial review.

Division IV, relates to "Administrative Policies and the Courts," and treats of the judicial check upon administrative action, and the supremacy of the "rule of law." The clarification of this problem alone would make this book mandatory reading for every lawyer, and indeed for every layman who dares give thought to the subject.

Relying greatly upon the theory that "expertness" is the *desideratum* of administrative law the author examines the conflicting cases and theories on the problem of the supremacy of law, and concludes that those now representing the minority opinion on the subject will eventually prevail.

By drawing on his experience in administrative tribunals Dean Landis has made this book more valuable than most works on the subject. Its masterful simplicity stamps it as an unique contribution to the jurisprudence of administrative law. It quite comes up to the standard of previous publications of Storrs lectures.

*James J. Kearney.**

*Member of the faculty of the College of Law of the University of Notre Dame.