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Book Reviews

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BOOK REVIEWS

HOW TO PREPARE A CASE FOR TRIAL. By Elliott L. Biskind. New York: Prentice Hall, Inc., 1954. Pp. 197. $5.65.

Here is a book that can be used as a guide by the novice in preparing a case for trial. Those problems which confront every attorney in assembling and preparing facts and law for presentation are anticipated and answered. The book is written to be of assistance in interviewing clients and witnesses, finding facts, applying the facts to the law, and preparing the facts and law for presentation in the court room. These problems are dealt with by the author in a simple, explanatory manner. Beginning with how to interview a client in order to determine the strong and weak points of his case, the book then explains how to handle and understand witnesses. The author goes into detail and makes many suggestions on how, when and where witnesses should be interviewed and what to do with the friendly as well as the unfriendly witness.

Chapters four and five explain how to investigate the facts and how to prepare the law. A trial chart is included, showing what facts to use and how to prove them. This is followed by an outline on legal points and supporting law, with a general explanation on where to look, how to test what is found and how to select the material to be used. Early and thorough preparation are stressed, with seven basic elements listed: collecting the facts; acquiring of general, special and scientific knowledge; examination of substantive law; preliminary motions, examinations and requests for admissions; outline of elements to be proved in accordance with the rules of evidence; preparing for opponent's proof; and, preparation of data for examination of jurors, opening to the jury, closing motions, requests to charge and summation.

Two chapters deal with final preparation for trial. Chapter nine explains how to get facts admitted as evidence by preparing key questions and by being ready to prove documents, letters and telegrams. Chapter ten deals with those things that should be readied in advance so that adequate attention can be given them, such as the opening statement to the jury, requested instructions to the jury and motions to be made at the close of the case.

These chapters, together with chapters on final conferences with witnesses, contents of trial memorandum, how to prepare expert testimony, preparation of hypothetical questions, expert assistance, the possibility of retaining trial counsel, selecting the jury and how

to handle emotions, gives a picture of what to do, and, in a general way, how to do it, in preparing a case for trial.

NEIL H. THOMPSON.

THE STRANGE CASE OF ALGER HISS. By The Earl Jowitt. New York: Doubleday & Company, Inc., 1953. Pp. 344. $3.95.

It is not necessary to look far to observe the widespread effect the case of Alger Hiss has had on current governmental and political affairs. The author, a noted English jurist, has in this book attempted to give the reading public a scholarly approach to a controversial matter. Though the book is very well written, the injection of a certain natural bias in favor of English trial methods detracts from its effectiveness. The trial practice which might serve English courts quite adequately is not necessarily adapted in all of its details to the American courts, and vice versa.

The author attempts to divorce Hiss's political sympathies from the actual issue at the trial, namely, whether Hiss committed perjury. Apparently he feels, with considerable logical basis, that only by doing this and thereby clearing away much of the emotional smoke screen which tends to cloud the issues in cases of this nature can the matter be properly analyzed. The result is a book in which many questions are put to the reader. Thus, in the author's view of the matter it is hard to see why, if Hiss gave the famous "pumpkin papers" to Chambers, as Chambers claimed he did, he should have made the elementary blunder of passing them along in his own handwriting. It would seem that a person educated at Harvard Law School and graduated with an excellent record, who subsequently pursued a highly successful career in public life, would be discerning enough to avoid such an obvious pitfall.

Why, he asks, was not another damning piece of evidence, the typewriter used to copy several of the other documents, also destroyed? It was an ancient machine, readily traceable by experts, but instead of destroying it as a guilty man would be likely to do, Hiss simply made a gift of it to the family of some former household servants. The author observes that such conduct is scarcely that to be expected of a competent spy. The author further points out that since Hiss in his position with the State Department, had constant access to the documents and paraphrased them for his superior as a matter of routine, it is not beyond the realm of possi-

bility that someone else in the department could have stolen the documents and passed them on to Chambers, the two using Hiss as a convenient scapegoat to camouflage the identity of the real thief.

However, even the author admits that the typewritten documents are far more difficult to explain away. It was claimed by the prosecution that Hiss's wife typed them. There is, however, a somewhat far-fetched possibility that some third party might have gained control of the typewriter for the purpose of copying the papers.

One of the most absorbing chapters in the book is that dealing with trial by jury. In Jowitt's view, trial by jury in the United States too often generates into trial by newspaper, since as a practical matter it is virtually impossible for any well-informed juror not to have a preconceived opinion in a celebrated case due to the extensive press coverage and commentary. This is, of course, a clear reflection of the English attitude on the matter, since English law prohibits all but the most cursory factual comment on trial proceedings.

Whether the book will change the opinions of the persons who read it on the question of Hiss's guilt or innocence is difficult to say. Generally speaking, however, it provides interesting reading despite its somewhat annoying and seemingly ethnocentric emphasis on the superiority of English legal methods.

DOUGLAS BIRDZELL.

POLITICS AND THE CONSTITUTION. By William Winslow Crosskey. Chicago: The University of Chicago Press, 1953. In two volumes. Pp. xi, 1410.

This is probably one of the most magnificently controversial works on the Constitution of the United States which will ever be written. It has already stimulated intense discussion among lawyers and judges. An entire issue of the *University of Chicago Law Review* has been devoted to presentation of views concerning it, with contributions from men like Judge Charles E. Clark of the Second Circuit Court of Appeals praising the book and other eminent lawyers describing it as "biased" and "unobjective." The host of reviews it has engendered have been of a similarly divided character.

William Winslow Crosskey is a member of the faculty of law at the University of Chicago who has for many years been engaged in

teaching constitutional law. What might be termed his "angle of approach" has not been via the usual law school method of case-book study and discussion. The distinctive feature of his course has been a historical-semantic method involving close examination of the history of the Constitution and the usages of language prevalent at the time it was drafted. This does not sound particularly revolutionary, but no one else seems to have done it.

The basic thesis of this book is that it is impossible to understand what the Constitution was intended to accomplish until one understands what its words meant to its authors. If, for instance, the word "state" meant one thing to the founding fathers—as Crosskey contends that it did—and something entirely different to succeeding generations, then the succeeding generations could not have understood the Constitution as the founding fathers intended. As Crosskey sees it, this is precisely what has happened. He argues that years of political discussion and debate constantly flowing around the basic charter have brought about changes in the interpretation of vital provisions and phrases. Original meanings have first become blurred, then discarded, then forgotten; new understandings and in some cases new political shibboleths have grown up to create a substantially altered document.

Obviously, if this major premise is granted, it becomes a matter of considerable importance to discover precisely what changes have taken place over the years. Crosskey furnishes the answer by a process of reconstructing a specialized vocabulary consisting exclusively of words defined as his evidence indicates the framers of the Constitution understood them. This leads, at times, to much difficult reading. It is necessary to delve through page upon page of intricate discussions centering around word usages in Blackstone, Samuel Johnson's dictionary of 1755, pamphlets used by southern states-righters arguing in favor of slavery and the like. It also leads to some startling and unorthodox conclusions.

Probably the most illustrative of the results Crosskey reaches is found in his treatment of the clause giving Congress the power "to regulate commerce . . . among the several states." Traditionally, the courts have supposed this clause to limit the jurisdiction of the federal government to the regulation of trade flowing between a citizen of state A to a citizen of state B and crossing a state line in the process. But in Crosskey's view of the matter, this result is justified only if the word "commerce," the word "state," the phrase "to regulate commerce," and the phrase "among the several states"

—which are the operative core of the commerce clause—are being used now in the same sense they possessed in 1787.

His book commences, in fact, with a discussion of this precise question. His conclusion is that the word "state" was generally used at the time the Constitution was written in what he calls a "societal" sense, as denoting the *people* who "belonged to" the state. This transforms "state" into a plural noun in the same class as "tribe" or "society," indicating a multitude of individuals. "Commerce" and "among" undergo a similar broadening, as do the other phrases mentioned.

How far this technique carries him is illustrated by the conclusion he reaches concerning the scope of the congressional power over commerce. "By way of summary, then, upon the subject of the national commerce power: it has been established, on the basis of strictly neutral, unsuspect evidence,[1] that in the years 1777-1780, only a short time before the commerce clause was drawn, the American people still generally understood 'the regulation of commerce,' or the 'regulation of trade,' in an inclusive sense; a sense which comprehended not only foreign, or external commerce, but agriculture, manufactures, inn-keeping, horsekeeping, *and every other branch of the internal business of the country.*"[2] The emphasis is supplied.

It understates the matter to say simply that this is a conclusion completely at variance with the general understanding of the subject and bound to be hotly disputed. Attempt to visualize, if possible, the code of this state without the provisions governing the subjects listed above and it is possible to perceive how far-reaching his arguments are. Yet Crosskey goes much further than simply making an argument in favor of a unitary national power over commerce. His contention is that the federal government possesses unitary power in many other fields as well, and that the present jurisdictional divisions between state and federal authority are radically different from what was originally contemplated. If accepted, this theory of the Constitution would result in a lessening of state and an increase in federal authority of very considerable proportions.

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1. Crosskey's glowing description of his own supporting materials is typical of the literary style employed throughout the book. It is a fair sample of the vigour of his presentation; there is nothing half-way about his views. To do him justice, the material he has presented appears to generally bear out his characterization of it.

2. 1 Crosskey, Politics and the Constitution 290-91 (1953).

All this, of course, is completely unorthodox. But that does not necessarily mean that it is also completely unsound in its reading of history and language. For it is one of the sometimes uncomfortable features of the book that it cannot all be shrugged off as simply a personal eccentricity of its author, or as a grandiose rationalization for the extension of federal jurisdiction. Crosskey's discussion of the commerce clause, for example, is backed by something like three hundred pages of closely-reasoned argument, evidence and documentation, all of it drawn from the time of which he writes, representing years of first-hand examination of the original documents of the period. And quite often he is successful in establishing a strong case; his analysis of the ex post facto clause—another good example—would appear to be convincing in its assertion that the men who wrote the Constitution intended to prohibit retroactive laws of *either* a civil or criminal nature.[3]

The coverage and extensive character of the work may be indicated by an enumeration of the parts into which it is divided. The National Power Over Commerce takes up Part I of the book. Part II discusses the "Interrelationships Between the Commerce Clause and the Imports-and-Exports, Ex-Post-Facto, and Contracts Clauses of Section 10 of Article I; Part III represents the logical culmination of his thinking and strikes out boldly for "A Unitary View of the National Governing Powers." Part IV discusses the "Supreme Court's Intended Place in the Constitutional System," and Part V takes up "The Supreme Court and the Constitutional Limitations on State Governmental Authority."

Throughout his writing, Crosskey returns constantly to the same single theme: that as the courts are now interpreting the Constitution, the federal government is being denied powers which it was the clear intent of the founding fathers it should exercise. His explanation is logical enough, if one grants his major premise: the present division of power between the states and the federal government rests upon a series of compromises forced by the political necessities of the Republic's early years, when north and south were split over the slavery issue and the other matters which eventually led to the Civil War. This may sound impossible. Yet when it is recalled that recent history furnishes examples of statesmen giving away whole nations—Austria and Czechoslovakia—to avert World War II, the idea that statesmen of an earlier day might sacrifice

3. At present the clause is judicially interpreted as forbidding only retroactive criminal legislation.

points of constitutional principle to prevent secession becomes much more acceptable. Moreover, during much of the period with which Crosskey is concerned, southerners were in control of the main branches of the government and thus, in his eyes, found it possible to interpret the Constitution as the exigencies of their cause demanded.

Viewing the matter in this light, Crosskey is enabled to draw a number of further conclusions which sound at first strange and indefensible. The career of John Marshall thus becomes a stubborn rear-guard action in defense of the Constitution as he understood it (Crosskey thinks he understood it as Crosskey does, of course), rather than an exercise in the judicial broadening of governmental power. The Dred Scott case falls into the pattern as a temporary surrender to the political demands of the South, which it undeniably was. The entire government of the United States becomes a far more powerful mechanism than has heretofore been supposed.

If all these ideas sound controversial on first reading, they become even more so on a second time through the book. Crosskey himself obviously expected contradiction and disbelief, and he wrote in a sustained strain of scholastically vehement and at times belligerent assertion which makes the work read at times more like a pamphleteer's tract than an academic inquiry into the origins of the Constitution. It is, in fact, unmistakably reminiscent of the literary style employed to debate these precise issues in the early days of the Constitution, and he probably picked up much of it through his research. As one reviewer has already pointed out, few controversialists in modern times have gone so far as to personally compile an index to a book in such a manner that it will tend to sustain their basic arguments; but Crosskey did precisely that.

The summary given should probably be sufficient to indicate in a general way why this book is arousing heated discussion. Left unanswered is the question of how influential the book will prove to be. It seems probable that on a short-term basis it will be largely disregarded. The theories it propounds are so far out of accord with previous thinking that the initial general reaction must almost necessarily be one of disbelief. And even if Crosskey's thinking and research are accepted as valid, the forces which molded the Constitution in the shape it has taken are still with us today, reinforced by long usage and fortified by judicial precedent piled upon judicial precedent. Thus, to expect the courts and the congress to reverse the pattern of a hundred and sixty years of Constitutional history

overnight is obviously out of the question. It may well be, therefore, that Crosskey's analysis will slip into obscurity as a curious and anomalous discussion of matters past and done with.

But when this is said, mention should also be made of the other possibility. If, over the years which lie ahead, Crosskey's interpretations and the evidence he has developed stand the test of further research and inquiry, it seems difficult to say that the book will be without its influence. Constitutional writings tend to have their influence felt slowly and gradually. They become authoritative by slow degrees, as the truth—or untruth—of the things they say is developed by the passage of time. What the standing of the book will be fifty years from now, only time itself can answer. Crosskey may go down in history as a lawyer who turned historian and lost his way in both fields; but there is also a substantial possibility he will be remembered as the constitutional scholar whose studies have made all other writings on the Constitution obsolete. His book represents an attempt to do nothing less.

One thing, at least, may be said with complete certainty. Whatever the book's final fate, no work on constitutional law can hereafter fail to deal with the questions it raises. Crosskey must be taken into account. In that accomplishment alone, he has performed a remarkable achievement.

CHARLES LIEBERT CRUM.*

Correction

In the January 1954 issue of the North Dakota Law Review, the publisher of the book "Psychiatry and the Law", by Manfred F. Guttmacher and Henry Weihofen, was erroneously listed as A. A. Horton and Company. The actual publisher is W. W. Norton Company, 101 5th Avenue, New York 3, New York. We extend our apologies for this error which misled our readers.

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