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Book Reviews

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BOOK REVIEWS

HANDBOOK OF THE LAW OF EVIDENCE. By Charles T. McCormick. St. Paul: West Publishing Company, 1954. 774 pages. $10.00.

In this admirable text, the author has produced a scholarly and readable concentrate of the law of evidence. If one wants an exhaustive treatment of the multi-faceted problems of evidence law, he must still turn to Wigmore's opus. But for the neophyte practicing attorney who wants a bird's-eye view of the highlights of the principles of evidence, this volume is unsurpassed. The older practitioner or judge will likewise find it to be clear and concise refresher and a useful tool with which to begin his unraveling of the web of authority encompassing each evidence problems as he encounters.

Professor McCormick in his preface admits that his treatment is highly selective, with no pretensions to completeness. Although it is true that the book does not cover the complete field of evidence law, nevertheless all the highlighted areas of the law are thoroughly developed. Not only is the existing practice reported, but the author has soundly and ably expounded his views as to changes needed to improve the administration of justice. Undoubtedly this work will have a telling impact upon the future trend of many rules of evidence.

After an opening chapter on preparation and presentation of the evidence, the author proceeds to discuss problems inherent in the examination of witnesses. He advoactes a general relaxation, especially in trials before the judge without a jury, of the exclusionary rules, and he urges a modification of the rules of privilege for confidiential communications, in the interest of ascertaining truth. Arguments are well-supported with common-sense reasoning and frequent references to recent findings in the fields of psychiatry and psychology.

Rules of competency and privilege are thoroughly discussed and many are soundly criticized as barriers to the ascertainment of truth. The author favors a general lowering of these barriers. The privilege against self incrimination, legislative investigations, immunity statutes, and laws relating to wire-tapping are well considered, and the practical problems inherent in the area where police powers clash with individual liberty are convincingly submitted and solved.

Other suggestions advocated by Professor McCormick include greater use by the Court of its powers to call expert unbiased witnesses, and restricted use of the unwieldy hypothetical question in favor of straightforward examination and cross-examination.

The chapters on experimental and scientific evidence contain authentic up-to-date information on such controversial subjects as lie-detector tests, chemical tests for drunkenness, and blood tests to determine paternity.

Of course the "best evidence" rule and the "parol evidence" rule are thoroughly treated, and as in any work on evidence, the "hearsay rule" and its exceptions are analyzed. Nine chapters consisting of more than 200 pages are devoted to this phase of the law of evidence. The closing chapters are dedicated to an understanding of the burden of proof, presumptions, and judicial notice.

Generous case citations are supplied throughout the text, with references to Wigmore, A.L.R., the West Digest System and other volumes accessible to the average lawyer. There are numerous citations to legal periodicals, and discussions by the author of the merits of the Uniform Rules of Evidence.

Professor McCormick in this work has furnished the legal profession with an able, scholarly and concise treatise upon the law of evidence.

DAVID KESSLER*

THE FEDERAL ANTITRUST POLICY. By Hans B. Thorelli. Baltimore: The John Hopkins Press, 1954. 658 pages.

Out of the annual maze of social science literature there comes upon occasion certain classic works that show every sign of enduring significance. Such a work is *The Federal Antitrust Policy*. Hans Thorelli, as historian, economist, and lawyer, is emminently qualified for the grandoise task of historically disecting the government's approach to the ever unpopular dragon of "big business". He is a Swedish observer surveying the anti-trust scene with detached perspective yet with the authoritative familiarity born only of extended research. The anti-trust problem, as distinguished from the English monopoly and cartel problem, is uniquely American, nevertheless few scholars have attempted to go beyond legal concepts to consider the interplay of group interests and popular opinion. Moreover, only cursory attention has been given in the

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past to the early years of the Sherman Act on the assumption that prior to Theodore Roosevelt there was little worth noting in anti-trust development; that the only policy was an absence of policy. This assumption, well subscribed to, is not completely amiss although Author Thorelli very effectively challenges the concept.

The background of the Sherman Act is traced to its origins in English common law. Covenants in restraint of trade were held unenforceable only because of a feeling that the person so disabling himself would become a public ward. The undermining of the guild system and the corresponding demand for greater contract flexibility brought about a relaxation of the rule against contracts in restraint of trade. Early 17th century English cases first defined the distinction between general and partial restraints and declared partial restraints, *i.e.*, those relating to a certain time and place, were enforceable. It is from these early cases that American judges later developed the much-controverted "Rule of Reason" which was to guide judicial interpretation of monopolistic practice for over a century. The impulse of laissez-faire economics gradually smoothed the way for an almost complete abandonment of English anti-monopoly policy.

The golden era of trade, 1750-1850, was marked by almost unrestricted contractual freedom. While there were numerous divergencies of opinion as to the applicability of common law to American monopoly cases, Thorelli found that almost invariably business arrangements involving trade restraints before the Sherman Act were held unenforceable. In the United States, all of these common law concepts were applied by state and not federal courts due, in large part, to absence of a federal common law which necessarily caused a lack of uniformity in judicial direction. The end of the Civil War marked the start of the big business problem in America. The newly found corporate device created the huge (in terms of 19th century thinking) industries which were to become problem children. Semantically, there were few real trusts, most of the businesses being loose associations or pools. Thorelli gives a vivid insight into the workings of a real trust, notably the infamous Standard Oil Trust of 1882.[1] "Economic Darwinism", the premise that survival of the fittest was good law for business as well as humans, emerged as the rationale

1. It is interesting that this trust was one of the few that was broken up state action. Had all the states enforced their existing statutes there would have been no federal trust problem.

for the gospel of wealth as preached by Andrew Carnegie. Thus the cut-throat competition of the trust was equated with nature's continuing struggle for existence and therefore sanctioned as a natural right. The industrialist warned Congress not to regulate or tamper with this jungle law but asked for postive assistance in making it work by receiving land grants, tariffs ,and subsidies.

In an era where regulation of business receives unquestioned acceptance, it is difficult to realize the lack of alarm over the increasing complexity of financial pyramiding. It was not until the middle 1880's that the major political parties gave token recognition to the trusts by incorporating anti-trust planks in their platform. The newspapers began blasting the big interests editorially and the muckrackers shined the first light of publicity on trust activity. In 1888, the Sherman Act was introduced and amid constant attack as to constitutionality, it survived a two year intermittent debate. The objective sought was a moderate limitation on freedom of contract without unduly hampering freedom of enterprise. The value of the Act in its early years was that it became an instrument of preserving a psychological climate favorable to competition. The wording of the Act was vague and needed interpretation by the courts but the corporations were quite unwilling to press the issue. There was no active enforcement of the Act under Presidents Harrison, Cleveland and McKinley—all of them giving verbal acquiescence on principle but none willing to pioneer enforcement. Thorelli sets 1903 as the date anti-trust was institutionalized. It was on that date that the three concurrent objectives were achieved necessary to limiting monopoly: 1. The Act passed the test of constitutionality; 2. Broad terms of Act became sufficiently defined; 3. The executive, in the person of Teddy Roosevelt, aggressively enforced the Act.

Mr. Thorelli has indeed made an exhaustive evaluation of this period, drawing upon administrative archives of the Department of Justice as well as significant works of previous scholars. Combined with much original research, he substantiates his statements with over 600 case citations, many reported in detail. While studies of this period are by no means rare, the signal importance of this work lies in his delicate synthesis of the three forces operating upon trusts: law, economics and public opinion. On the basis of this he takes an iconoclastic delight in demolishing many accepted ideas: *e.g.*, that the courts were primarily responsible for the weakness of law enforcement in the early years; that the

reliance upon the offices of the United States attorneys was the principle administrative weakness; that private litigation was unimportant; that the Northern Securities case[2] was the legal turning point.

Too much of the author's time is spent in spinning a fine web of insignificant legislative history, however, such minor faults of verbosity and pedantry can be overlooked for the purpose of exploring all avenues of the problem. Throelli does not speak from the all too common 'point of view' angle but rather is devoid of predetermined concepts in an area where prejudice can often obscure vision and where opinion is not always labeled as such. The work is enthusiastically endorsed for all who believe law, to be fully understood, must be studied in historical retrospection with the attendant desire to grasp the socio-economic patterns working upon it.

JAMES H. O'KEEFE

THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT. By Robert H. Jackson. Cambridge, Massachusetts: Harvard University Press, 1955. 92 pages. Price: $2.00.

This book consists of three lectures which were to be delivered by Mr. Justice Jackson[1] as the Godkin lecturer in February 1955.[2] The author demonstrates an ability to express himself clearly and concisely. In the first lecture entitled "The Supreme Court as a Unit of Government", the author points out the independent characteristics of the Court when contrasted with the English system. Yet, upon close scrutiny, the interdependence of judiciary of this country upon the other two branches of government in relation to finance, enforcement of orders, appointment of judges and right to jurisdiction is made apparent. Following this the author discusses the importance of the Court's function accompanied by the following general observation: "The real strength of the position of the Court is probably in its indispensability to government under a written Constitution." The Justice also illustrates in brief form, the routine of the Court in handling the

2. Northern Securities Company v. United States, 191 U.S. 555 (1903). Generally thought to be the leading case as to the government's power to effectively regulate business associations under the provisions of the Sherman Act.

1. Robert H. Jackson died on October 9, 1954.
2. The Godkin lectures were established at Harvard University in memory of Edwin Lawrence Godkin (1831-1902).

flood of cases which seek determination in the country's highest legal tribunal.

The second lecture is entitled "The Supreme Court as a Law Court". Due to the unpopularity of British law in the late eighteenth century, it is pointed out, the Court was "launched without a jurisprudence". Add to this the fact that the Court was provided with no books, which the author states "probably accounts for the high quality of early opinions", and the result was that the law followed politics and public opinion closely. Mr. Justice Jackson severely criticizes federal jurisdiction based on diversity of citizenship. He attributes crowded federal calendars and the consequences to this unnecessary "dual jurisdiction" of state and federal courts. Historically such federal jurisdiction was justified by unfair treatment which a foreign litigant was likely to receive in a state court. The author insists this objection is no longer present and feels that state courts should handle these cases, thus relieving the federal courts of about one half of their present case load.

The third lecture is entitled "The Superme Court as a Political Institution". Throughout this chapter state v. federal power is discussed with an obvious tendency on the part of the writer to look with disfavor on federal usurpation of state powers. Here the Tenth Amendment[3] gains a distinguished advocate.

Mr. Justice Jackson was at all times keenly aware of the methods employed by ideologies inconsistent with democracy. He wrote, "I cannot say that our country could have no central police without becoming totalitarian, but I can say with great conviction that it cannot become totalitarian without a centralized national police." The book is not without humor, and its humor is not without a point. Speaking of administrative agencies the author said, "The right of self-correction is not an exclusive prerogative of the judiciary. But different questions arise when the change is retroactive." Fundamentally, however, this book gives the reader insight to the thoughts of one who has had great influence on our jurisprudence, politics and sociology.

JON N. VOGEL

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3. U. S. Const. amend. X, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

LAW OFFICE MANAGEMENT. By Dwight G. McCarty. New York: Prentice-Hall, Inc., 1955. 525 pages. Third edition.

The practicing lawyer, rapt in the solution of legal problems, is seldom an efficient office manager. This would not seem to be a matter of great concern unless inefficiency in firm management materially effects the quality or quantity of his work. If this be the case, then one need only turn to McCarty's *Law Office Management.*

An encyclopedia covering the business side of the law practice, it is a highly specialized work. The topics covered range from well planned filing and bookkeeping systems, to the keeping of "golf-ball" suckers handy for the restless child client.

Office management of a law firm would normally be viewed as no more than a necessary evil. This might make excellence in the field a dim achievement to most. McCarty, of course, is of a different mind. Picturing the lawyer in these changing times as one, "who grinds out his life in hopeless bondage to the practice," and "burns himself out day and night trying to keep up with the load," McCarty finds efficient office management an effective panacea.

The place of a specialized study of this nature can readily be conceded. The need for accurate and systematic handling of routine office work is often overlooked by the practicing attorney. McCarty's book competently covers this field. The work, however, suffers from trite observations and excessive detail. It is doubtful that many attorneys would lend attentive ears to the author's discussion of the "proper" law office pencil, or the "proper" position of the telephone on the attorney's desk. The extreme detail, in many instances, however, is justified. This to the lawyer seeking information on a particular topic or suggested method of procedure, could be most beneficial. Even the well established firm might well consider the suggested filing system, bookkeeping system, time cards, dockets, ticklers, reference files, and the innumerable other items. The work presents well tested office procedure, and has been carefully adapted to fit the needs of both the large and small law firm. Any attorney who is conscious of the awkward features of his present practice will surely find the solution in McCarty. However, in some instances, the revolution in procedure and the tiring conformance to detail might offset the efficiency to be gained.

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