



12-1-1956

Book Reviews

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Recommended Citation

Aaron I. Abell, Roger P. Peters & John E. Tracy, *Book Reviews*, 32 Notre Dame L. Rev. 171 (1956).

Available at: <http://scholarship.law.nd.edu/ndlr/vol32/iss1/9>

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BOOK REVIEWS

THE FEDERAL ANTITRUST POLICY. By Hans B. Thorelli.¹ Baltimore: The Johns Hopkins Press, 1955. Pp. xvi, 658. \$8.00. The author of this book, a Swedish scholar with degrees in law, economics and political science, attempts "a synthesized social science interpretation of the federal antitrust policy" in which "the social, economic, political, . . . ideological and administrative aspects of the subject" are discussed.² Following preliminary studies in his native land, Thorelli, with grants from the Sweden-American Foundation, the Rockefeller Foundation and other sources, carried on research in the United States after 1947, mainly at Northwestern University, the Library of Congress and the National Archives of the United States. In addition to the present volume, the author has published a Swedish Government monograph on American antitrust policy, articles in Swedish journals on various aspects of the subject, and with others (the Ad Hoc Committee on Restrictive Business Practices) a report on the control of international cartels for the consideration of the United Nations Economic and Social Council. He avows belief, "at once vague and deeply rooted, in the aims and potentialities of antitrust as an instrument of public policy"³—a conviction which is, no doubt, both cause and outcome of his monumental investigation.

In Part I, "Genesis of Antitrust," Thorelli discusses in three lengthy chapters the general background—legal, economic, social, constitutional and political—of the Sherman Act, and devotes Chapter IV to the passage of the Act and its provisions. It is the author's view that most Americans subscribed to the philosophy of economic egalitarianism, the mainspring of which was active competition. In passing the Sherman Act Congress aimed to eliminate and prevent restrictions on competition, and to this end made use of (nationalized, that is) common law doctrines against restraints of trade and monopolies, the implications of which are discussed in the first chapter. Thorelli thinks this approach to the trust problem was both "elegant" and prudent: common law procedure made for concreteness and flexibility which were particularly desirable at a time when public knowledge as to the exact magnitude and character of the problem of industrial combination and monopoly was still rather limited.

¹ Ph.D., LL.B. A Swedish citizen who has written extensively on Swedish and United States antitrust problems.

² Text, Introduction at 2.

³ *Id.*, Preface at viii.

But the author makes clear from extensive research in newspapers and periodicals that in passing the Sherman Act Congress reflected strong antimonopoly sentiment, taking issue in this respect with John D. Clark who maintained a quarter century ago in his book, *The Federal Trust Policy*,⁴ that the general public in 1890 was fundamentally indifferent to the rising trust problem. He is only slightly less critical of the traditional view—best represented by Oswald W. Knauth in *The Policy of the United States Towards Industrial Monopoly*⁵—that people and press were in frenzied uproar against monopoly by the late 1880's. Thorelli is at one with Clark and Knauth, however, in the view that intellectuals and social theorists exerted little, if any, direct influence on the drive for antimonopoly legislation. Two schools of thought, the classical economists and the social Darwinists, tended equally to ignore the monopoly problem. Committed to the dogma that competition was automatic and perfect, the classical economists denied or minimized the existence of monopoly, while the social Darwinists pronounced its growth a triumph of fitness over the inefficiency and waste of competitive struggle. In Andrew Carnegie's version, monopoly was the means to great wealth with which to practice a gospel of wealth. The social gospel as expounded by Washington Gladden and other clergymen extolled cooperation as against competition, but was critical of monopoly. It lacked, nevertheless, an antitrust philosophy. Social gospel advocates, for the most part, favored public ownership of natural, and regulation of artificial, monopolies. Much the same attitude was taken by the "New School" economists whose "impact on public attitudes towards the trust problem at the time the Sherman Act was passed appears to have been almost imperceptible."⁶

Only incidentally does the author touch upon labor's attitude toward antimonopoly legislation. He is inclined to agree with Edward Berman (*Labor and the Sherman Act*)⁷ that Congress intended to exempt labor organizations from the law's provisions. He is traditionalist also in his conclusion that John Sherman was truly the author of the law associated with his name. Thorelli's originality and main contribution comes in Part II, "From Form to Substance, 1890-1903," dealing with the interactive trends in business consolidation, public opinion, administration, judicial interpretation and federal law-making as a process which resulted

⁴ CLARK, *THE FEDERAL TRUST POLICY* (1931).

⁵ KNAUTH, *THE POLICY OF THE UNITED STATES TOWARDS INDUSTRIAL MONOPOLY* (1914).

⁶ Text at 120.

⁷ BERMAN, *LABOR AND THE SHERMAN ACT* (1930).

in the institutionalization of antitrust in American public policy. Thorelli discusses these items topically in separate chapters, a method which makes for considerable repetition but also for thoroughness and emphasis. In Part III, a concluding chapter of fifty pages, the author after briefly summarizing the materials of Part I interprets and integrates in masterly fashion the mountainous mass of data piled up in Part II which constitutes the vitally important phase of the treatise.

The author's interest in Part III centers not unnaturally on the failure of the Sherman Act during its first decade to realize the expectations of its originators. Inasmuch as private parties instituted fewer than thirty cases under the Act (to 1904), it was not conspicuously self-enforcing as its authors confidently had assumed it would be. Public authority largely ignored the law until 1903 when the Roosevelt Administration added invigorative measures: adequate appropriations for an antitrust division in the Department of Justice, an expediting act for antitrust cases in the circuit courts, and the establishment of a bureau of corporations in the recently created Department of Commerce and Labor. Thorelli points out that the obvious beneficiaries of the law—farmers, wage earners and small business men—were slow to mobilize in its support: workers lost interest when trade unions were brought under the provisions of the law, while the Populists in their zeal for currency inflation minimized antitrust agitation—a mistake in emphasis which, the author thinks, led to the downfall of the party. Be this as it may, he is on safe ground when he insists that only after 1897 did the experts and the popular writers agree that the philosophy behind the Sherman Act should guide public policy on monopoly and business consolidation. The convergence of these formerly antagonistic groups was evidenced by the two Chicago antitrust conferences of 1899 and 1900, the one called by the Civic Federation of Chicago and the other by the American Anti-Trust League, and by the United States Industrial Commission whose studies (1898-1902) made at the behest of Congress and published in nineteen volumes recommended among other things compulsory publicity of corporate activities and more aggressive enforcement of existing legislation.

This is not to imply that Thorelli thinks enforcement of the Sherman Act necessarily awaited pressure from public opinion. Actually, the executive authority, before Theodore Roosevelt, shirked its clear duty, being either opposed or indifferent to the law. Severely critical of Harrison and Cleveland, Thorelli is amazed at McKinley's "extraordinary torpor." Save only for Judson Harmon, Attorney General in the latter part of Cleveland's

second administration, the occupants of that office largely ignored the Sherman Act until Philander C. Knox, with Roosevelt's encouragement, initiated vigorous prosecution, notably in the Northern Securities and Beef Trust suits. Excepting Richard Olney's actions against Eugene V. Debs in the Pullman Strike, not a single anti-trust suit was initiated by Knox's predecessors, who were notoriously negligent in aiding subordinate law officers to process their fewer than twenty cases through the federal courts. In part Thorelli attributes to careless preparation of its cases the failure of the Justice Department to win crucial decisions before the Supreme Court, including the *E. C. Knight*⁸ (Sugar Trust) case of 1895, which held that the monopolistic control of the manufacture of a given commodity per se affects commerce but incidentally and indirectly. The unanimity by which the Court practically speaking reversed this decision only four years later in the *Addyston Pipe and Steel*⁹ case, along with its earlier refusal in the *Trans-Missouri Freight Association*¹⁰ case (1897) to construe the "due process of law" clause of the Fifth Amendment as a limitation on anti-trust, convinces Thorelli that the judiciary was more friendly to the Sherman Act than was the executive and was not primarily responsible, as Professor Edward S. Corwin contends, for its tardy and haphazard application.

Although this thesis will not be acceptable to every legal scholar, all readers will be impressed by the author's ever-conscious attempt to formulate his conclusions in a cautious and dispassionate manner. The thoroughness of the research is suggested not only by the length of the book but more significantly by the table of cases, the authors' and subject index, the 22 pages of classified bibliography and the 2004 references, the majority of which—some at considerable length—deal critically with disputed points.

Aaron I. Abell*

⁸ *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

⁹ *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899).

¹⁰ *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897).

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THE PRESIDENCY TODAY. By Edward S. Corwin¹ and Louis W. Koenig.² New York: New York University Press, 1956. Pp. ix, 138. \$3.00. Calm appraisal of the present position of the presidency in our constitutional system should be welcome to many readers, and that is what they will find in this little book by Corwin and Koenig. Without bitterness and without hostility, the authors indicate a skeptical attitude towards claimed justification in the language of article two of the Constitution for a number of controversial presidential actions. They relate the principal historical events which have enabled incumbents of the presidential office to win a real if not completely acknowledged primacy in spite of orthodox doctrine concerning separation of powers and co-ordinate departments. At the risk of upsetting a balance of competing considerations discussed in the book, a few will be selected here for brief mention because they seem fundamental.

One factor which has advanced the position of the President is that while urban interests are not sufficiently represented in Congress, they have found receptivity to their views in the person of the President.³ Another factor is the rise of the United States to world leadership. In this connection the authors point out that "... General Eisenhower is the first candidate whose claim to his party's nomination has rested almost exclusively on his prestige and his record in world affairs."⁴ A third factor is of special interest to lawyers. Citing *Kansas v. Colorado*,⁵ the authors state: "In supporting 'executive power' against Congress the Court may very well be fighting its own battle for judicial power."⁶ The foregoing are merely samples of the circumstances detailed in the book which go far to explain the predominance of the presidency today.

The treaty power and executive agreements are, of course, not neglected. Presidential war making, the seizure of the steel mills, and other presidential actions which have been vehemently denounced and as vehemently defended are treated objectively but by no means in a dull manner. A great deal of information, interestingly related, is deftly incorporated into this slim volume.

In the last chapter the authors deal with the selection and tenure of the President. Proposed reforms of the electoral system are critically discussed. The authors also discuss the great unsolved problem of succession to the presidency. They point out that the reluctance of Vice-Presidents to act as President in case of presi-

¹ Professor Emeritus of Jurisprudence, Princeton University.

² Associate Professor of Government, New York University.

³ Text at 64, 65.

⁴ *Id.* at 97.

⁵ 206 U.S. 46, 81-82 (1907).

⁶ Text at 16.

dential inability has, to some degree at least, been due to fear that the Vice-President would thereupon become President. The authors suggest that ". . . Congress would do well to declare its sense that anyone acting as President because of a living President's inability does so only until the inability is removed."⁷ With respect to tenure the authors indicate that it would appear advisable to limit the President to one term. They state: "The real question would appear to be whether any President should seek a second term — whether an untried incumbent is preferable to a tired incumbent."⁸

*Roger Paul Peters**

ESSAYS ON THE LAW OF EVIDENCE. By Zelman Cowen¹ and P. B. Carter.² New York: Oxford University Press, 1956. Pp. xvii, 278. \$5.60. This book, written by two British barristers, is a remarkable example of collaboration in writing under difficult circumstances, for while Mr. Cowen was in Australia, Mr. Carter was in England and part of the time in America.

The book is not a text on evidence law but consists of essays on certain difficult problems which have arisen in that field. The last three of these essays discuss problems arising under English procedural statutes and would be of little interest to American readers. The other six essays discuss problems that have been encountered under American as well as British law and they should be of great interest to Americans. The six problems discussed are: "Statutory Modification of the Law of Hearsay"; "Confessions and the Doctrine of Confirmation by Subsequent Facts"; "The Admissibility of Evidence Procured through Illegal Searches and Seizures"; "The Admissibility of Evidence of Similar Facts"; "Some Observations on the Opinion Rule"; "The Admissibility of Criminal Convictions in Subsequent Civil Proceedings." The authors not only discuss the law as it is now in the light of decided cases but they also express their opinions as to what the law ought to be.

The essay on the statutory modification of the law of hearsay sets out the historical development of the rule against hearsay and the various exceptions thereto and shows how certain of those exceptions have been illogically devised by the courts. The American

⁷ *Id.* at 117.

⁸ *Id.* at 126.

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¹ Professor of Public Law, University of Melbourne, Australia.

² Fellow at Wadhams College, Oxford, England.

statutes discussed are those which have been enacted in Massachusetts and Rhode Island, making admissible a hearsay statement if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant. This statute apparently meets with the approval of the writers as being the best solution of the problem. The British statute, which is a part of the Evidence Act of 1938, is criticized by the authors as long, cumbersome and poorly drafted. The primary suggestions in this essay concern the necessity for the clarification of the statute by additional legislation. They state that the statute as enacted was revolutionary and apparently they doubt that it could be scrapped altogether and a short statute enacted along the lines of the Massachusetts act.

The essay on the doctrine of confirmation by subsequent facts discusses the American as well as the British decisions, including the views of Dean Wigmore. The conclusion at which the authors arrive is that, although there is logical reasoning in the contention that a confession wrongfully induced has the ring of truth if confirmed by subsequently discovered facts, it would be unwise to make a wrongfully induced confession admissible under any circumstance because of the temptation it would offer to the police to obtain a confession in a wrongful manner in the hope that once obtained, its reliability would be subsequently demonstrated.

The essay on the admissibility of evidence procured through illegal searches and seizures discusses the American as well as the British decisions, particularly the decisions of the Supreme Court of the United States. Again the authors, while conceding the logic of the argument of Wigmore that the sole criterion of admissibility should be the danger of admitting false evidence, take the position that as a matter of public policy, to prevent the police from pursuing wrongful practices, they should not be allowed to see their wrongful practices bear fruit by having the courts admit evidence which was wrongfully obtained.

The longest of the essays and the most detailed is that on the admissibility of similar facts, which considers evidence tending to show that the accused in a criminal case behaved on another occasion in a way more or less similar to the way in which the prosecution alleges that he behaved on the instant occurrence.

The essay begins with a very true statement, "Poverty of settled principles in the midst of authority has been the most striking feature of the law relating to the admissibility in criminal cases of similar facts."³ It then proceeds to analyze in considerable detail the leading decisions in the British courts. The American decisions

³ Text at 106.

are not discussed although they are as many and as diverse as those in Great Britain.

The authors point out that in considering admissibility, a differentiation must be made between two categories of similar fact evidence. One category comprises evidence the primary relevance of which is via propensity, while the other comprises evidence which has substantial relevance in other respects.

As to the first category, which the authors state is a much wider category than has often been supposed, they argue that propensity evidence is dangerous because its probative value depends entirely upon the assumption that the accused has not mended his ways. They finally arrive at four conclusions: (1) Evidence of similar facts which is relevant, primarily via propensity is inadmissible unless it is exceptional. (2) Such evidence is exceptional and therefore admissible provided (a) it has great probative value upon any issue on which the jury is likely to use it, and (b) its admission is not unnecessary (*i. e.*, the issue upon which it is tendered can reasonably be regarded as a real one in the circumstances of the case). (3) Evidence of similar facts which has circumstantial relevance otherwise than via propensity (even if as well as via propensity) is admissible provided it is sufficiently relevant. (4) In criminal cases the judge has a discretion to exclude evidence admissible under any of the foregoing rules if their strict application would operate unfairly against the accused.

In their essay on the opinion rule the authors state that its main purpose is to review possible justification for the rule as it is applied in practice by the courts. They quote from such American authorities as Thayer, Wigmore, Maguire, and the American Law Institute Model Code of Evidence, as well as the English authorities. They conclude that the proper administration of the rule should be that proposed by Judge Learned Hand, namely, that the rule excluding opinion evidence should be limited to cases where, in the judgment of the trial court, it will not be helpful to the jury and that the ruling of the trial judge to that effect ought not usually be regarded as subject to review by higher courts.

The essay on the admissibility of criminal conviction in subsequent civil proceedings discusses not only the course of English authority but that in Canada, Australia, and South Africa. As to the law on this subject in America, the authors show that there are wide variations not only in the decisions in the different jurisdictions but even within a single jurisdiction. The rules which the authors recommend for adoption as a solution to these great conflicts of authority are as follows: (1) A conviction following a

plea of not guilty and made by a superior court should be admissible in subsequent civil proceedings as evidence of the facts upon which the conviction was based. (2) A conviction following a plea of guilty should not be admissible. (3) A conviction or finding following a plea of not guilty or denial but not made by a superior court should be admissible in subsequent civil proceedings only if the judge is satisfied that its admission would be in the interests of justice. (4) In all cases where the evidence is admitted, the judge should warn the jury of the dangers of regarding the conviction or finding as conclusive evidence of the facts on which it was based and failure to give such warning should constitute a misdirection.

The book is extremely well written, with the impeccable choice of language and the literary style which always can be expected from English writers on the law. The conclusions of the authors are well reasoned and the book should be of value to practicing lawyers, judges, and other students of the law, and to legislators in helping them to straighten out legal thinking on the difficult problems discussed.

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BOOKS RECEIVED

ACCOUNTING

STANDARDS OF EDUCATION AND EXPERIENCE FOR CERTIFIED PUBLIC ACCOUNTANTS. By the Committee of the American Institute of Accountants. Ann Arbor: University of Michigan Bureau of Business Research, 1956. Pp. xxiii, 151. This report, directed to various educational institutions and to state legislative and administrative bodies, points out goals and standards for the improvement and regulation of the accounting profession.

ANTI-TRUST LAW

*THE FEDERAL ANTITRUST POLICY. By Hans B. Thorelli. Baltimore: The John Hopkins Press, 1955. Pp. xvi, 658. \$8.00.

CONSTITUTIONAL LAW

CHARLES BEARD AND THE CONSTITUTION. By Robert E. Brown. Princeton: Princeton University Press, 1956. Pp. 219. \$3.50. Professor Brown makes a critical examination of the evidence used by Charles Beard in his "Economic Interpretation of the Constitution."

*THE PRESIDENCY TODAY. By Edward S. Corwin and Louis W. Koenig. New York: New York University Press, 1956. Pp. ix, 138. \$3.00.

VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION. By Thomas R. Powell. New York: Columbia University Press, 1956. Pp. xv, 229. \$3.50. *James S. Carpenter Lectures, Columbia University*. These lecture topics include judicial review, intergovernmental immunities, expansion of national power, and state power to tax and regulate commerce.

CORPORATIONS

GIANT CORPORATIONS: CHALLENGE TO FREEDOM. By T. K. Quinn. New York: Exposition Press, 1956. Pp. 198. \$3.50. A challenging exposition which presents in extremely forthright terms the invasion of big business upon the freedom of American enterprise.

*Reviewed in this issue.

CIVIL RIGHTS

FREEDOM IS AS FREEDOM DOES. By Corliss Lamont. New York: Horizon Press, 1956. Pp. xviii, 322. \$3.95. This volume presents a history of the developments of civil liberties generally and in the author's own life with an explanation of the pertinent laws.

CRIMINOLOGY

A GUIDE TO MODERN POLICE THINKING. By Raymond E. Clift. Cincinnati: W. H. Anderson Co., 1956. Pp. xviii, 369. \$7.70. A valuable text supplemented with chapter-by-chapter review questions and bibliographies which provide some modern aspects of police work.

PRISON WAS MY PARISH. By Rev. Baden P. H. Ball. London: William Heineman, Ltd., 1956. Pp. 252. 18s. A portrait by a British prison chaplain of various men who are regarded by society as outcasts but as sensitive human beings by their "padre."

EVIDENCE

***ESSAYS ON THE LAW OF EVIDENCE.** By Zelman Cowen and P. B. Carter. New York: Oxford University Press, 1956. Pp. xvii, 278. \$5.60.

FROM EVIDENCE TO PROOF. By Marshall Houts. Springfield, Illinois: Charles C. Thomas, 1956. Pp. xiv, 396. \$7.50. A searching approach to the methods of transition between practical fact-finding and concrete proof.

SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION. By Edmund M. Morgan. New York: Columbia University Press, 1956. Pp. xii, 207. \$3.50. *James S. Carpenter Lectures, Columbia University.* These lectures deal with judicial notice, hearsay, the function of judge and jury and the relation of pleading to preparation for trial.

INTERNATIONAL LAW

INTERNATIONAL LAW AND COLLECTIVE SECURITY. By Willard N. Hogan. Lexington: University of Kentucky Press, 1956. Pp. *Reviewed in this issue.

202. \$3.50. A consideration of the "principle of concern" and its relation to the effectiveness of the establishment of world peace.

THE LAW OF STATE SUCCESSION. By D. P. O'Connell. New York: Cambridge University Press, 1956. Pp. xi, 425. \$8.50. A volume which considers the change of sovereignty along with related legal principles and consequences.

NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS. By Ann Van Wynen Thomas and A. J. Thomas, Jr. Dallas: Southern Methodist University Press, 1956. Pp. xvi, 476. \$8.00. A modern evaluation of the principle of non-intervention in light of developments since World War II.

REPORT OF THE INTERNATIONAL CONGRESS OF JURISTS. International Commission of Jurists. The Hague, Holland, 1956. Pp. 164. A summary of the proceedings of the Congress whose theme was the consideration of what protection and safeguards must be provided to cushion an individual from arbitrary state action.

JURISPRUDENCE

RELIGION, MORALITY AND LAW. Edited by Arthur L. Harding. Dallas: Southern Methodist University Press, 1956. Pp. xi, 109. \$3.00. These four essays delve into the necessity of the presence of morality and religion in the enactments of our legislatures.

SOCIAL WELFARE

AMERICAN SOCIAL LEGISLATION. By John D. Hogan and Francis A. J. Ianni. New York: Harper and Bros., 1956. Pp. xvi, 713. \$6.50. A comprehensive analysis of numerous aspects of social legislation with emphasis on labor, family, and social security laws.

PARKING: LEGAL, FINANCIAL, ADMINISTRATIVE. By the Joint Committee on Urban Traffic Congestion and Parking. Saugatuck, Conn.: Eno Foundation for Highway Traffic Control, 1956. Pp. xii, 196. A report which explores the problem of parking created by the mechanized age with stress on the prospects of off-street parking.