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BOOK REVIEWS

THE PHILOSOPHY OF LAW OF JAMES WILSON. By William F. Obering, S.J., Ph.D. Washington, D. C.: The American Catholic Philosophical Association. 1938. pp. 275.

Of all the savants who have graced the bench of the United States Supreme Court, two stand out as scholars whose genius was recognized even by their own contemporaries. They are James Wilson and Oliver Wendell Holmes. To Wilson's lectures on law in the College of Philadelphia, the world of fashion and letters, even including the first President of the United States, came in admiring throngs. Equally distinguished audiences waited upon Holmes whenever he mounted the rostrum. Perhaps, the popularity of these philosophers was due in some measure to the fact that their words and teachings struck responsive echoes in the breasts of their hearers. Wilson, the intellectualist, the theist, the devotee of natural law, voiced the old fashioned morals and thorough scholarship, characteristic of his generation. Other legal scholars of his day, Madison and Hamilton, marched identical pathways of thought. Holmes, the experimentalist, the pragmatist, the iconoclast, articulated the unanchored skepticism and vague humanism of our modern day. The ranks of our present army of legal scholars are filled with men in the same mental uniform. The fact that Holmes and not Wilson represents the ideals of our own age is distressing indeed, but the very publication of the present monograph of Dr. Obering in appreciation of the work of the almost forgotten Wilson is an omen that brighter times are coming. How long it will be before the generality of lawyers and teachers of law return to the sanity and clarity of a philosophy like Wilson's is not to be estimated. But the day will come.

Dr. Obering's present volume points out that James Wilson, unlike the teachers of our time was not a liberal, he was a partisan. He was a partisan of the sound way of thinking about legal institutions and he did not hesitate to condemn the errors of philosophies adverse to his own. Although he was an eclectic in assembling his materials and illustrations, he did not permit his students to infer that any philosophy of law was worthy of the same respect as any other. He thought too clearly not to see that contradictory propositions could not be equally true. He believed that ultimate truth and untruth could be determined. In this regard he comes into conflict with the many modernists who feed their students a spoonful of this and a bite of that and leave the selection of a final diet to the digestive whims of the pupil.

Wilson is also indicated to be a teacher particularly well equipped to instruct in the philosophy of law. His writings show a familiarity with human psychology, with natural theology and with political philosophy. An understanding of these studies is necessary if one is to understand man, the subject, God, the final source, and the state, the immediate arbiter of law. Too many of our modern law teachers lack this knowledge. Forced by the complexity of modern legal problems, to attempt the formulation of a guiding philosophy they have been deprived of this necessary preliminary foundation by the accident of having studied under positivist professors who considered a philosophical investigation of the nature of man or of God either too insignificant or too dangerous for open discussion in a non-sectarian university.

Dr. Obering applauds Wilson as a teacher of clarity. No other writer in the history of American law has so adequately traced the thread of scholasticism which is woven into the fabric of American institutions nor so convincingly set forth the philosophy of natural law. Generally modern American teachers lost in the mazes of Kantianism and experimentalism, are not equipped to understand and explain with any plausibility this fundamental philosophy of American legal institutions.

Dr. Obering's monograph will then be found to be most valuable to those non-

scholastic law teachers who would secure some accurate idea of the scholastic doctrine of natural law. Indeed, he has added to Wilson's theses. Where Wilson has but sketchily explained the positions of the great teachers of scholasticism, Dr. Obering from his wide knowledge has been able to point out the inadequacy. For example, with reference to Wilson's discussion of the state as a natural institution, Dr. Obering rightly insists that civil authority is not merely the aggregate of the powers and rights previously possessed by individuals before their entrance into the social union. This was Wilson's understanding of the nature of civil authority. The present volume will also throw valuable light upon the problem of those interested in the philosophical justification of our democratic institutions as opposed to the politics of arbitrary dictatorship. Wilson gives the traditional, but unfortunately little known arguments for democracy, based on the psychological doctrine of the essential equality of men. But for the ordinary reader the most impressive part of Wilson's work will be the force of his establishment of natural law itself, which he does according to familiar lines, but with sweeping literary power. He demonstrates the existence of natural law, as all scholastics do, by pointing to the existence of an All Wise Creator of Man and His assignment of an intrinsic end which man must realize in this life. The plan of free action whereby this end is to be realized is obligatory and is natural law.

Here then is a valuable monograph. It comes at a time when a new interest in natural law is beginning to spread to America from the lecture halls of the continent. It will not be welcomed by the pseudo-scientist nor flippant skeptic absorbed in relating child psychology and folklore to our legal institutions. But there are those who will appreciate it, scholastic and non-scholastic.

WILLIAM R. WHITE, JR.†

READINGS ON PERSONAL PROPERTY. By William T. Fryer. St. Paul: West Publishing Co. 1938. pp. xxxii, 1184. \$5.00.

In recent years the case system has been under attack along many fronts. Jerome Frank argues for a virtual abandonment of the technique of case instruction and the substitution of clinical lawyer-schools wherein books would play a minor part.¹ Realists are insisting that law school case books should include extra-legal material from the social sciences and other sources outside of the law.² Just how far the classical case book of the Langdell era will be modified remains in doubt. Harvard Law School has revised its law curriculum and rearranged its courses,³ but the new case books⁴ follow the orthodox pattern and consist mainly of cases, statutes and law text material. As Scott and Simpson express it, "Cases are the backbone . . . of any course in the common-law tradition".⁵

Another experiment in law school books is noted with the arrival of Professor Fryer's *Readings on Personal Property*. He has prepared what he calls a "source book". The

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1. Frank, *Why Not a Clinical Lawyer-School?* (1933) 81 U. OF PA. L. REV. 907.
2. Cook, *Scientific Method and the Law* (1927) 13 A. B. A. J. 303; Patterson, *Can Law Be Scientific?* (1930) 25 ILL. L. REV. 121.
3. Simpson, *The New Curriculum of the Harvard Law School* (1938) 51 HARV. L. REV. 965.
4. See WARREN, *CASES ON PROPERTY* (2d ed. 1938); SCOTT AND SIMPSON, *CASES AND OTHER MATERIALS ON JUDICIAL REMEDIES* (1938).
5. Note 4 *supra* at viii.

contents of his book may be divided into three parts: (1) recent decisions, notes and comments prepared mainly by student editors of the various law reviews; (2) leading articles appearing in the same journals; and (3) a scattering of cases out of the reports.⁶

It thus appears that the "source book" is largely limited to materials obtained from legal periodicals. One wonders whether such a limitation is wise or necessary. Would not excerpts from leading texts on personal property law balance the volume and provide a broader foundation? For example: sections from Pollock and Wright, Williams, Goodeve, Schouler and many others. Such additional materials might do much to acquaint the student not only with the "uncertainties in the rules"⁷ but also with the presence of stabilizing principles and standards long implanted in the common law tradition.

Fryer intends his book to be used principally for the purpose of collateral reading in connection with the study of cases in the orthodox case books. In order to facilitate such use he has somewhat reluctantly adhered to the orthodox classification of topics although he concedes that it might have been desirable to add non-legal material showing the history and function of property.⁸ This brings us to the question whether it would have been more desirable or advantageous to have used the functional approach in the development of his source book on personal property. Having in mind that such reading will be generally undertaken by the student beginning his law course and that the subject matter involves property law, it may be suggested that attempts to "functionalize" the law might well be postponed, if used at all, to other courses in the second or third year of the student's law course. Again, the flexibility of property law, while concededly present, is certainly not so pronounced as in some of the other subjects in the law school curriculum. It strikes the reviewer that although Professor Fryer followed the orthodox treatment from necessity rather than from choice, the approach promises to increase the value of the book to law teacher and law student.

It seems to be unquestionable that *Readings on Personal Property* will be relied upon to a considerable extent by the law student to supplement and to round out the information and discussion centering in the classroom. One of the great advantages of such a source book is that it may be readily keyed to the case books on the same subject and vast areas of analogous cases considered by the law student.

Professor Fryer begins with an introduction which covers various concepts of personal property. Herein he treats of such diverse topics as property rights in a dead body, the right of privacy, companionship of the spouses, rights in an unpatented invention, property in a business plan, etc. At this point it may be noted that he has introduced the student to the outside boundaries of personal property law and has avoided a restrictive approach which would limit personal property to the subdivisions of chattels and choses in action. It is noteworthy that he has not, so far as the reviewer can discover, set down any readings in the law of chattels real, an omission which may have been due to the scarcity of material in the law reviews on this hybrid type of personal property.

Perhaps a preliminary survey of the concept of property in general might have been included since the student, entering upon a study of property law for the first time, does so by way of the beginning course of personal property. What is the nature of property as an institution? Is it a natural right or a creation of positive law? The reviewer⁹ has found that such an approach through the writings of Kent, Cardozo, Pound and others serves two purposes: It brings back materials covered

6. Professor Fryer has included about twelve cases in the course of 1100 pages of text.

7. Preface, v.

8. Preface, v-vi.

9. KENNEDY, *CASES ON PERSONAL PROPERTY* (1932) 1-18.

during college courses in economics, philosophy, sociology and industrial problems, thereby bridging the gap between college and law school. Moreover it enables the student to obtain a broad view of property in general before turning to the refinements of the law of personal property.

Following the introductory chapter on the concepts of personal property, the author offers a collection of materials on the fundamental topic of possession which "still plays a great part in our law".¹⁰ Fryer's chapter on Possession offers a good proving-ground to test out the utility and value of his source book. It seems to the reviewer that the main advantage will be its broadening influence. The reading of articles by Arnold,¹¹ Shartel,¹² Goodhart¹³ and others will supplement the basic, and necessarily limited, consideration of possession in the case books and in the class discussion. It does not suffice to say that these articles are already available in the law reviews and may be cited to the students; they are now packaged in more accessible form and are apt to be more widely read.

Professor Fryer has collected more than thirty leading articles covering the different subdivisions of the law of personal property and his selection of essays is an excellent one. His arrangement of material into "border-type", "conventional-type" and "special-type" cases is unique and helpful to the reader. An excellent and complete index makes his materials more accessible. It is believed that *Readings on Personal Property* will prove to be popular with teacher and student and will be a valuable addition to the law books on that subject.

WALTER B. KENNEDY†

CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW. By Robert Adam Maurer.
New York: The Lawyers Co-operative Publishing Company. 1937. Pp. 589. \$6.00.

This book contains an excellent selection of cases dealing with problems in Administrative Law. The materials used in addition to the cases are most helpful and this is especially true because of the wealth of references to matter in legal periodicals. This book particularly lends itself to a single semester course.

It is interesting to compare the differences in approach and resulting divergence in general and detailed treatment appearing in contemporary casebooks dealing with this subject. In general, they haven't departed a great deal from the illuminating straight lines driven through a chaotic mass by Professor Freund in 1911. The constitutional approach seems ever to be present. Whether it is patent as in Frankfurter and Davison (Legislative Power; Judicial Power; Executive Power) or whether the approach is ostensibly functional as in Professor Sear's late work on the subject, there is inherently a constitutional treatment. This is desirable and to some extent unavoidable. As Professor Freund so soundly wrote, "Administrative Law continues to be treated as law controlling the administration and not as law produced by the administration." The control referred to is a constitutional one and the approach and treatment should be constitutional. Professor Maurer uses the conceptual, constitutional approach.

The table of contents is not topically detailed. He has left analysis to the student in the first instance. But his alignment of cases when comprehended permits of an orderly statement of principles if the order of the cases is followed.

10. WARREN, *CASES ON PROPERTY* (2d ed. 1938) Preface vi.

11. P. 55.

12. P. 130.

13. P. 72.

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In Chapter I, the author deals with "Development in Administrative Law". In this brief chapter he borrows from or refers to Montesquieu, Dicey, Hewart, the Sankey Report, and the Report of the Special Committee on Administrative Law of the American Bar Association (1934). The matter is instructive and provocative of student interest. The second chapter is entitled "Grants of Administrative Discretion"; the third chapter is entitled "Delegation of Legislative Power". The distinction is that Chapter II deals with propriety of granting more or less uncontrolled discretion to *decide*, whereas Chapter III concerns itself with the difference between administrative legislation and legislative administration. Generally the same question is presented: Is there a sufficient standard set up to prevent law-making by the agency? Yet the division is essential because in the one chapter, the authority is to decide *a* controversy, whereas in the other, power is given to make rules to control future controversies. The author's selection of cases in these chapters showing the province of the federal courts as distinguished from that of the state courts is excellent. The cases and materials in the subsequent chapters on administrative adjudication and finality are well chosen. Probably the addition of more state court material would have increased the value of the work, but there is greater similarity between the federal position and the state position in the field of administrative adjudication than there is in the field of administrative legislation. "Due process" is the test in state and nation.

Professor Maurer has included a chapter on the writs which are the vehicles between the agency and the court. In view of the fact that some statutes creating administrative tribunals contain no provision for appeal, material dealing with certiorari, mandamus, prohibition, injunction, and habeas corpus would seem to be essential. The location of this chapter in the book is wise. It follows the matter dealing with the fundamental precepts. It is well to present the substantive before the adjective. True, the writs are helpful substantively, but their assistance would seem more complementary than rudimentary. The substantive element in the writs may to some extent review concepts gained in the previous chapters.

EUGENE J. KEEFE†

OLD YUKON—TALES, TRAILS AND TRIALS. By James Wickersham. Washington, D.C.: Washington Law Book Co. 1938. pp. 500. \$5.00.

To lawyers with a mind for new frontiers, the experiences of Judge Wickersham in Alaska may prove interesting and enlightening. The author of "Old Yukon" was appointed United States District Court Judge for the Territory of Alaska by President McKinley in 1900. In 1908 he entered the private practice of law in Juneau and for fourteen years served as Delegate to Congress from Alaska. *Old Yukon* is an intimate relation of his personal, judicial and political experiences.

The Judge was particularly gifted for the task of establishing American jurisprudence along the rough and treacherous Alaskan trails. He traveled his circuit by dog team, Indian canoe, horseback and at navigable points enjoyed the comforts of the early Alaskan steamers. With his pack, including the Alaskan Code and blank legal forms, "diamond-hitched" to his dog sled, he traveled from cabin to cabin along hard cold trails holding court wherever the need arose. He was always well received by the varied classes of people who crossed his trail from reckless bar maids to charitable Catholic nuns serving the sick and schooling the children, from murderous outlaws to Christian missionaries. The big mining companies welcomed his presence and the protection of the American court. The small pros-

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pectors and gold miners whose claims were constantly in dispute sought his refuge for the establishment of their claims and the personal protection afforded by the enforcement of the laws against the sale of intoxicants to the Indians. The Indians too came to the "White Father" for redress of grievances and tested his resourcefulness from the start of his judicial career. Except for the ordinary hardships of life in the wilds of the northwest, the author discharged his judicial duties with comparative ease, because he enjoyed every day of his work, the adventure of life in Alaska, and the opportunity afforded him in the new territory to broaden his knowledge.

Federal politics reached out to the Territory and threatened his successful career. This phase of the author's experience as likewise his fight with powerful American interests in the Territory is treated in detail. Such must be the common experience of lawyers in territorial practice and to those men this book should be interesting.

Fully half the book is a relation of the author's personal experiences in quest of knowledge of the Alaskan Territory, its history, its people, its geology and its languages. On these adventures enjoyed between terms of court or while awaiting the preparation of cases for trial, the Judge met the Jesuit Fathers who were actively engaged in common quests even at that early date. They exchanged valuable notes and information which are related in detail by the author.

The lure of Alaska is in the narrative. While the gold rush days are over, the looming importance of the Territory of Alaska in the world of tomorrow when globe circling air liners may transform it into a center of world commerce, is but a suggestion of the importance of the work of the pioneer judges, lawyers and missionaries who have been and are continuing to establish Christian and American law in this present outpost of American civilization. To forward looking readers this book should be of interest and value.

ARTHUR J. O'DEA†

ITALY AT THE PEACE CONFERENCE. By Rene Albrecht-Carrie. New York: Columbia University Press. 1938. pp. 575. \$5.25.

Of little technical value to lawyers, this volume is nevertheless important as a thorough survey of the peculiar problems which arose from the peculiar position of Italy. Bargained and bargaining into war entrance on the side of the allies, unable to bring much of worth to the cause save the virtue of not being embarrassingly on the other side, Italy approached the peace conference to see what she could get, and found her allies already in antagonism to her aims, and the United States firmly established on general principles which clashed with Italian wishes. The details of the shifting arguments and tense situations are well and fully exemplified. The entire work shows how little absolute principle, and indeed how little previous understandings, may actually weigh in the balance in more advanced situations. It is an instance of what is often disparagingly termed "power politics" and shows how in the international field what might be termed "law" is of small actual determining weight beside interests.

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