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## Book Reviews

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## BOOKS REVIEWED

**Felix Frankfurter Reminisces.** Recorded in Talks With Harlan B. Phillips. Felix Frankfurter. New York: Reynal & Company. 1960. Pp. ix, 310. \$5.75.

Originally designed a half dozen years ago by Dr. Harlan B. Phillips as a tape-recording for Columbia University's Oral Research Department, my Brother Frankfurter's random recollections of people, places and things, here, there and everywhere, yesterday, today and, on occasion, even tomorrow, will strike the fancy of any man who considers himself a conversationalist, or who simply delights in listening. In fact, a good listener is what the book needs. It has an autobiographical undercurrent, but order and chronology, which were neither desired nor attempted, give way to the vagaries and spontaneity of "discourse, the sweetest banquet of the mind." Felix Frankfurter is not particularly interested in glancing back, save only as an aid in looking forward.

A taped interview is its basic format, but unlike so many of today's popular interviews, it is not the questions which snap and bite, but the answers—the barbs with which they sometimes bristle are worthy of the sharp mind whose penetrating insights prompt them. Acidity *ad se* ("When in Rome . . .") is not their aim, however. They are highly relevant to the over-all purpose of painting an intimate and nonetheless accurate portrait of the workings of one of the most brilliant minds of our times. Indeed, to one who has for a dozen years watched, listened and often participated in its joustings not only with the brethren, but with the Bar as well, the book is genuinely autographic. In fact, not a few of the same random observations and stories about the hot dogs have been heard in our weekly conferences, and many more brightened some otherwise darkly solemn days in either F.F.'s or my own chambers.

Apparently the speed and impatience of my Brother Felix's analytical thought processes, the results of which are so frequently and carefully expressed with *le mot juste*, require a personalized vocabulary when he tentatively plots their course on paper. Witness the memorandum of his considerations in 1913 on whether to teach at Harvard: "So far as contact with [industrial relations] problems goes, *big thinking them out*, I can do more thinking at H.L. School, properly tied up with outside things" (p. 83); and his characterization of some of President Wilson's definition of his own aspirations as "vague—*unthoughtoutly vague*, not vague because big" (p. 83).

Let me emphasize that to read it is not merely to visit Harvard, with its accent and professional manner. Rather, it is a lesson in history and how it is made—learned from the notes of a fellow who was there. Before you will parade a cast of hundreds of V.I.P.'s (to F.F. every person is a V.I.P.) from every walk of life. Among them: Gutzon Borglum, Winston Churchill, Tom Mooney, William Borah, George Bernard Shaw, William Howard Taft, John L. Sullivan, Theodore Roosevelt and a host of authors, playwrights, professors, historians, and the like. Then there are stories and stories often ending with advice so diverse and yet so appropriate that it could only come from a lifetime of activity, *i.e.*, to the conversationalist: the chief necessity of repartee is to cover the hole of the moment; to the lawyer: prepare the other fellow's case as well as he prepares it—usually better; to the politician: a political speech should be a poster, not an etching; and to Supreme Court Justices: be tall and broad and have a little bit of a bay window.

Yes, the book is fun—sparkling with humor, with wit and above all good common sense. It calls to mind an old jingle:

King Solomon and King David led very merry lives  
With very many girl friends and very many wives.

Then old age came a-creeping with very many qualms  
 And King Solomon wrote the Proverbs,  
 And King David wrote the Psalms.

Now I don't say that my Brother Frankfurter has bested King Solomon or King David, but from the first chapter, dealing with P.S. No. 25, where he started school in New York City, to and through the final chapter on the "Functions of a Judge," the reminiscences cover as many lessons. One lesson they have taught even Felix. That it that the word is "rotgut," not "gutrot."<sup>1</sup>

TOM C. CLARK\*

**The Stockholder's Remedy of Corporate Dissolution.** James O'Malley Tingle. Missoula: Montana State University Press. 1959. Pp. 238. \$12.00.

Mr. Tingle's book exhibits an acute awareness of the troublesome situations attendant on majority oppression and deadlock in corporations, particularly in close corporations. The study, which appears to be the first full dress treatment of the problem, is an outgrowth of the author's doctoral dissertation presented to the University of Michigan School of Law. The author has made a thorough analysis and critique of the subject, including an exhaustive treatment of the relevant statutes and judicial authorities. But the book is more than a guide through the authorities. Mr. Tingle vigorously presses for the adoption of proposed legislation—drafts of which are included in the volume—so as to arm the legislatures with more effective measures to protect stockholders enmeshed in the circumstances of majority oppression and deadlock.

Mr. Tingle commendably tries to orient the reader, through an extensive historical review of the case and statutory authorities, in the deadlock-dissolution situations both in the United States and England. In the majority oppression circumstance, unless there is remedial legislation, the author fears that the courts, "even in the face of proved incorrigibility," will continue to apply the "traditional alternatives in lieu of liquidation." (p. 176.) Accordingly, the author argues that "the problems are to make liquidation (1) more definite, and (2) less drastic to plaintiffs and perhaps more drastic to defendants." (pp. 176-77.)

The deadlock problem, as Mr. Tingle is quick to point out, is peculiar to the close corporation. Indeed, the very nature of a close corporation makes it inherently susceptible to a deadlock either in the voting of the shares or in the action of its directors. The author analyzes the theories of liquidation as enunciated by the courts. He concludes that where the deadlock is complete, *i.e.*, where the directorate is unalterably evenly divided, the following descriptive standards of liquidation have been applied by the courts: (1) the partnership analogy; (2) impossibility of functioning according to corporate processes; (3) piercing the corporate veil; and (4) commercial failure or loss. (pp. 123-26.) Where the deadlock is not complete, *i.e.*, where equal factions of stockholders are divided but the directorate, a majority of whom represent one faction, hold over, these standards have been applied for liquidation: (1) the partnership analogy; (2) failure of the directorate to represent a majority of the stockholders; (3) exclusion of the owners of one-half of the voting

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1. James P. Hart, former Chancellor of the University of Texas, called FF's attention to his error on page 31. However, in view of the subject matter, we can't say that Homer has nodded.

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power from corporate management; and (4) impossibility of functioning according to corporate processes. (pp. 126-27.)

The author is of the opinion that existing deadlock legislation is "far too ambiguous" and none suffices to protect the rights of participation of shareholders. (p. 195.) This is, of course, a point on which reasonable men could differ. The author proposes that dissolution be provided,

(2) When participation in the executive management of the corporate business is denied to a plaintiff (or plaintiffs voting continuously as a unit) owning a percentage of the corporation's stock sufficient to cause a stalemate in an election of directors.

- (a) Participation is denied within the meaning of subdivision (2) whenever the plaintiff or plaintiffs,
  - (i) are excluded from the executive management of the corporate business; or
  - (ii) cannot longer participate therein, under conditions of mutual confidence and cooperation, with the stockholder (or stockholders voting continuously as a unit) owning the balance of voting power.
- (b) The purpose of subdivision (2) is to afford the plaintiff or plaintiffs a right to withdraw their investments in a corporation whenever they have been denied participation in its executive management. Participation is not denied if an exclusion has been agreed on by the plaintiff or plaintiffs and the other stockholder or stockholders. An irreconcilable dissension between the plaintiff or plaintiffs and the other stockholder or stockholders must underlie a denial of participation.
- (c) Dissolution and liquidation shall be denied if the plaintiff or plaintiffs are shown to have caused the underlying dissension intending to exclude the other stockholder or stockholders from the corporate business or otherwise to injure their investments herein; provided, that dissolution and liquidation may be ordered even in such a case whenever the court determines that mutually confident and cooperative joint management is impossible or improbable. (p. 196.)

The book is significant in that it could and should serve as a springboard for further consideration of additional means to obtain flexibility for the close corporation. New York is making notable advances in this direction. For example, the proposed new Business Corporation Law<sup>1</sup> sponsored by the Joint Legislative Committee To Study Revision of Corporation Laws, makes it clear that dissension between factions of shareholders which makes continued association unworkable and the continuance of the corporate business no longer advantageous to the shareholders, is a ground for dissolution.<sup>2</sup> The proposed new statute also authorizes a petition for dissolution pursuant to a shareholders' agreement. A shareholder may petition for dissolution at will or on occurrence of a specified event.<sup>3</sup>

Mr. Tingle's scholarly and practical book should be in the library of every lawyer dealing with corporate problems; in the library of every state and federal judge.

WILLIAM H. TIMBERS\*  
BARRY H. GARFINKEL\*\*

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1. N.Y. Senate Int. 3124 (1960).  
2. N.Y. Senate Int. 3124, § 11.05 (1960).  
3. N.Y. Senate Int. 3124, § 11.07 (1960).

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**Political Freedom: The Constitutional Powers of the People.** Alexander Meiklejohn. New York: Harper & Brothers. 1960. Pp. xxv, 166. \$3.50.

In the course of this beautifully written series of earnest talks, essays and letters, Professor Meiklejohn comes to his own interpretation of "freedom of speech" in the first amendment. (p. 20.) Writing as I am for a law school publication, I think it pertinent and not unfair to drop a reminder that the author of this challenging little book is not a lawyer. His definitions are not those familiar to our professional ears. He is permanently startled by the absoluteness of the free speech guaranty, its lack of any qualification or of any exception operative under any circumstance at all. The Founding Fathers must have been aware of necessities of war and national danger, yet they established what the author reads with all literalness as an absolute, unqualified prohibition of any and all abridgements, in any area of freedom of utterance. He considers unescapable the conclusion that this first amendment term means literally what it says. But, he reminds himself and us, that every well-governed society has the right and duty to protect itself by taking action against certain kinds of speech (e.g., slanderous, crime-inciting and treasonable). Thus he discovers a paradox. Absolute is the prohibition against any abridgement of freedom, yet the Founders knew that abuses of such freedom would certainly be attempted and certainly could not be tolerated in an orderly society. One of the purposes of his little book is to solve that puzzle. I doubt that his special solution will be acceptable to many lawyers.

The author's proposal, stating it most simply, is to limit the character and coverage of the guaranteed freedom of utterance by confining it in its absoluteness to discussion of public or, more accurately, political matters. Other types of speech would, in the Meiklejohn formulation, be protected by the due process clause's prohibition of deprivation of "liberty" without due process of law. To the rationalization of this distinction and the description of possible processes which could give it effect, a goodly part of this book is devoted. Mr. Justice Holmes' test of "clear and present danger"<sup>1</sup> is rejected, even as subjected to the later-announced proviso that the excepting danger must be imminent, serious and carry the probability of really serious injury to the public weal.<sup>2</sup> Similarly unacceptable to our author is the sometimes stated distinction between mere speech ("speech-thought") and speech which in its setting, purpose and effect amounts to an "act."<sup>3</sup>

So Professor Meiklejohn would compromise by appraising first amendment speech freedom as absolute in its field but he would give it a field so enclosed as to contain public affairs only. Of course, the more generally accepted view is that the freedom is not absolute at all but subject to a whole series of limitations necessary in the public interest (as to, for example, obscenity, incitement to violence or treason, and "fighting words"<sup>4</sup>).

One can sympathize historically with the author in his attempt to limit speech freedom to freedom to speak about public affairs. There is much evidence that at the time the federal constitution was written the restrictions galling to Americans were those which silenced critics of government and governors. Apparently, no one then had it in mind to knock down the existing bars against obscenity, treason and the like. When the American Revolution broke out there were in Britain's American

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1. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

2. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

3. Pp. 39-40.

4. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

colonies about one hundred newspapers of one kind or other and suppression of such periodicals by the royal governors was not unknown. The British Government for a century had been trying without real success to enforce press licensing laws in England and had brought criminal prosecutions for libel and sedition. There is no doubt at all that the first amendment had for its principal purpose the invalidation of "previous restraints" akin to the abuses of the past, such as suppression of newspapers in the colonies.<sup>5</sup> In *Patterson v. Colorado*,<sup>6</sup> when Mr. Justice Holmes wrote that the main purpose of the first amendment in this respect was "'to prevent all such previous restraints upon publications as had been practiced by other governments . . .'"<sup>7</sup> he was referring to the silencing of political opinions in the colonies and elsewhere in the world.

So it is easy to answer this question: What did the first amendment mean to its authors? Our Revolutionary forbears had not forgotten the monopoly on printing given by Henry VIII to his favorite, nor the practice of the Tudor and Stuart kings of controlling printed views through licensing, nor Milton's ringing attack on that licensing system in his *Areopagitica* (1644). Patrick Henry shouted his fears that Congress "might silence the censures of the people." Chief Justice Hughes pointed out that liberty of the press meant, in the eighteenth century, freedom from governmental licensing, that is, the right to publish without a license that which formerly could be printed only with one.<sup>8</sup> Benjamin Franklin, whose 255th birthday we honor this year, said that liberty of the press is "the liberty of discussing the propriety of public measures and public opinions." If anything were to be accomplished thereby, it would be easy to multiply from historical sources citations and quotations to show that freedom to express opinions on political or quasi-political questions was all the Founders had in mind. The Delaware State Constitution adopted in 1792 guaranteed freedom "to every citizen, who undertakes to examine the official conduct of men acting in a public capacity. . . ."<sup>9</sup> Earlier, the First Continental Congress in a Declaration of Rights had described the importance of freedom of the press, besides advancing truth, science, morality and the arts, as being "its diffusion of liberal sentiments in the administration of government." Any examination of state constitutions adopted before the federal charter makes it clear that it was press freedom as to governmental and political questions that was marked for protection. In *Mattox v. United States*,<sup>10</sup> the Supreme Court wrote that the Constitution should be interpreted as securing to individuals the rights their British ancestors had fought for. Judge Cooley in his monumental treatise wrote that "the evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. . . ."<sup>11</sup> Our constitutional draftsmen were fully aware that it was political freedom that required free speech and a free press and that governmental power to choke off political criticism and agitation is inconsistent with the concept of a democratic state and a free people. They adopted

5. *Near v. Minnesota*, 283 U.S. 697, 713, 717 (1931); *Leach v. Carlile*, 258 U.S. 138, 141 (1922) (dissenting opinion); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

6. *Supra* note 5.

7. *Supra* note 5, at 462.

8. *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938).

9. Del. Const. of 1792, art. 1, § 5.

10. 156 U.S. 237, 243 (1895).

11. 2 Cooley, *Constitutional Limitations* 886 (8th ed. 1927).

Blackstone's dictum that "the liberty of the press is indeed essential to the nature of a free state. . . ."<sup>12</sup>

But enough of nostalgia. Time and the courts have broadened the first amendment's speech coverage to include not only utterances nonpolitical<sup>13</sup> but even drama, fiction and the lowly movies.<sup>14</sup> Recontraction is not to be expected. Attractive as Mr. Meiklejohn's proposals are, there is insuperable difficulty barring the way from construing the amendment to mean freedom absolute but in a limited subject-matter area only. The better view and more practical course is the one advocated by Professor Gellhorn: "to disregard advocacy and teaching, even though its ultimate goals may be acts, unless there is imminent danger that unlawful conduct will be induced."<sup>15</sup> The first amendment's protections and power restrictions should be construed sympathetically and usably but still with idealism according with their lofty purposes.<sup>16</sup>

CHARLES S. DESMOND\*

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12. 4 Blackstone, Commentaries \*151-52.

13. See, e.g., *Carlson v. California*, 310 U.S. 106 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

14. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

15. Gellhorn, *American Rights: The Constitution in Action* 83-84 (1960).

16. Black, *The People and the Court: Judicial Review in a Democracy* 200 (1960).

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