

Book Reviews

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BOOK REVIEWS

The Gateway to Citizenship. By CARL B. HYATT. Washington: U. S. Government Printing Office. 1943. Pp. vii, 133.

The Congress passed in 1940 a joint resolution which reads in part as follows:

Either at the time of the rendition of the decree of naturalization, or at such other times as the judge may fix, the judge or someone designated by him shall address the newly naturalized citizens upon the form and genius of our government and the privileges and responsibilities of citizenship; it being the intent and purpose of this section to enlist the aid of the judiciary, in cooperation, with civil and education authorities, and patriotic organizations in a continuous effort to dignify and emphasize the significance of citizenship.

The manual is designed to be of assistance to the courts in their efforts to carry out the spirit of this resolution.

It is an official publication of the Immigration and Naturalization Service. As stated in the preface it is not a collection of directives. "Rather it is a series of suggestions, ideas, and materials gathered from survey of practices everywhere."

The study was initiated by the National Citizenship Education program and carried on in cooperation with the Citizenship Committees of the American Bar and Federal Bar Associations. Acknowledgment is made to many eminent judges and members of the bar.

The need and appropriateness of impressive ceremonies in naturalization are stressed. The pages of the manual, though few, are packed with a wealth of patriotic and inspirational material, which is available to the judges, or other persons designated to make addresses to newly naturalized persons. Appended are a number of sample programs which may be used as naturalization rituals. As suggestions they should be most helpful and instructive. There is sufficient variety to afford selection by judges of varying tastes.

It is pointed out that today fully sixty-five per cent of naturalizations take place in federal courts where examinations and investigations are now made by the Examiners of the Immigration and Naturalization Service. At present about ninety-nine per cent of those recommended by the examiners are accepted without question by the federal courts. These figures direct especial attention to the observation of Judge Phillip Forman of the U. S. District Court, District of New Jersey, quoted in the footnote on page 10 of the manual:

No amount of ceremonial at the time that citizenship is finally presented can erase from the mind of the petitioner brusque and harsh treatment received during the course of the prosecution of his application.

It may seem to some readers that further suggestions might have been

directed to the federal examiners as to attitudes and procedures in their field. However this may be, the courts may well heed the admonitions contained in the manual, and avail themselves of its assistance. It is designed to help correct careless or perfunctory procedures in the courts. For this purpose it seems wholly admirable.

B. B. Conable*

Warsaw, New York

The Mind and Faith of Mr. Justice Holmes. By MAX LERNER. Boston: Little, Brown & Co. 1943. Pp. 1, 474.

This volume is made up of speeches, essays, letters and judicial opinions of Mr. Justice Holmes, selected and edited by Max Lerner, with an introduction and commentary. The introduction is entitled "Holmes: A Personal History." It is about thirty pages in length. The book is divided into three parts, which are labelled "Campaigns of Life and Law," "The Supreme Court Justice" and "The Savor of Life."

In Part II are to be found nearly fifty of Mr. Justice Holmes' opinions, ranging from his first United States Supreme Court opinion in 1903 to his opinion in *United States v. Schwimmer*¹ in 1929. Of course, many of these are dissenting opinions. Most of them can be safely classified as landmarks in social pioneering. They betoken the adventurous and courageous spirit of a resourceful jurist. One may mention *Lochner v. New York*² (1905), *Adair v. United States*³ (1908), *Coppage v. Kansas*⁴ (1915) and *Truax v. Corrigan*⁵ (1921) to indicate the range of his vision and the quality of his prophetic insight. To glance in Part I(4), one finds in Holmes' Massachusetts opinions the companion cases of *Vegelahn v. Guntner*⁶ (1896) and *Plant v. Woods*⁷ (1900), which give evidence of his still greater range of vision.

Throughout the book one finds the material preceded by prefatory comments by the editor which are extremely helpful. If it is an opinion which is presented, the editor may give a brief account of its historical or social setting as well as his evaluation of it. In the *Adair* case,⁸ the comment concerns the liberty of contract and its hold upon the majority of the court.⁹ In *Bailey v. Alabama*,¹⁰ the comment is captioned "Peonage in Alabama" with the

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¹279 U. S. 644, 653, 49 Sup. Ct. 448, 451 (1929).

²198 U. S. 45, 74, 25 Sup. Ct. 539, 546 (1905).

³208 U. S. 161, 190, 28 Sup. Ct. 277, 287 (1908).

⁴236 U. S. 1, 26, 35 Sup. Ct. 240, 248 (1915).

⁵257 U. S. 312, 342, 42 Sup. Ct. 124, 133 (1921).

⁶167 Mass. 92, 44 N. E. 1077 (1896).

⁷176 Mass. 492, 57 N. E. 1011 (1900).

⁸208 U. S. 161, 28 Sup. Ct. 277 (1908).

⁹P. 150.

¹⁰219 U. S. 219, 245, 31 Sup. Ct. 145, 153 (1911).

admonition that the "lingering belief that Holmes was a humanitarian in his impulses" may be a matter of doubt if that opinion should happen to be used as the test.¹¹ The comments on the opinions are rather strikingly captioned. Some critics may think that some of the captions are rather journalistic. To caption the comment¹² on *Lochner v. New York*¹³ with "Herbert Spencer in New York Bakeries" may be psychologically effective, yet scarcely justified solely by Holmes' declaration that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Nor is the comment¹⁴ upon the protection which the law extends to the owner of copyrighted music when sung by professional singers, accompanied by an orchestra, in a Broadway restaurant, finely symbolized by the caption "Music with Meals." And where the validity of a Texas statute was sustained, although directed solely against railroads for allowing Russian thistle to go to seed upon their right of way under penalty of \$25 recoverable by the owner of the contiguous farm, the character of Holmes' technique can scarcely be regarded as well exemplified by captioning the comment¹⁵ "Allowing Play for the Joints." To be sure, Holmes did say:¹⁶

Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

The metaphor may reveal a lack of felicity of phrase. At least one need not be squeamish to feel that a homely metaphor degenerated into a poor caption.

Throughout the book, the reader is well aware that the selection of the material is well made. Those materials classified in Part I under "A Fighting Faith: The Civil War" inspire the belief that "Out of heroism grows faith in the worth of heroism."¹⁷ In his commemorative speeches on the Civil War, the editor thinks that now and then Holmes "spills over into the sentimental and slightly mawkish."¹⁸ If most of Holmes' comrades in battle were from 18 to 20 years of age, they would have had, according to the mortality tables, a life expectancy of 42 to 44 years. If they had lived until 1884, when Holmes delivered the memorial address in their honor, they still would have had a life expectancy of 24 to 26 years. In one conflict, half a company fell into a single minute. When the memories of their courage and sacrifice crowded upon him, was it sentimental or mawkish to say,¹⁹ "Such hearts—Ah me, how many! were stilled twenty years ago"?

¹¹P. 336.

¹²P. 143.

¹³198 U. S. 45, 25 Sup. Ct. 539 (1905).

¹⁴P. 216.

¹⁵P. 141.

¹⁶P. 143.

¹⁷P. 23.

¹⁸P. 5.

¹⁹P. 16.

The material which the editor has chosen for "Law as Civilization" has been perhaps among the most accessible. Much of it is chosen from *The Common Law* (1881) and *The Path of the Law* (1897). Part III, which is dedicated to "The Savor of Life," although brief, is climactic. "Men and Ideas" and a few of Holmes' "Letters" to William James, John Wu and the Pollocks, precede "His Last Words." The affecting quality of his faith, fortified by hope, is embodied in the words addressed to the Federal Bar Association:²⁰ "If I could think that I had sent a spark to those who come after I should be ready to say Goodbye."

Many a reader will feel that the editor vacillates excessively when he admits that Holmes brought to his task a large philosophic view and broad intellectual and literary interests, yet forthwith declares²¹ that "he was only an amateur philosopher." This attitude colors the editor's entire outlook. It is reflected in the distinction which he seeks to make between Holmes and Brandeis.²² "But the differences between the two were profound. Brandeis was an economist where Holmes was a philosopher." Quite clearly the two categories are not mutually exclusive, as the editor seems to think.

When Holmes said, "To have doubted one's own first principles is the mark of a civilized man," the philosopher spoke.²³ When Holmes shied away from Bradley's *Essays on Truth and Reality*, he doubted if Bradley had anything to offer to him.²⁴ Despite their profound insights, he believed the systems of Kant and Hegel dead.²⁵ When Holmes declared that the Fourteenth Amendment did not embody Herbert Spencer's *Social Statics*, did he speak as a philosopher, or as an economist, or as a sociologist? Who shall say? Even "philosophy" may be a weasel word. It epitomizes a diversity of human thought that is coextensive with recorded history. Dewey says that the cultural role of philosophy has been extensive in social theory; Ellwood says that social philosophy has controlled the social tradition of our civilization. It is interwoven with many social problems. Holmes was permeated with a social philosophy. Its currency today is convincing evidence that it was not amateurish. That Holmes and Brandeis may not have been equally interested in the same social problems scarcely justifies calling the latter an economist and the former a philosopher.²⁶ Nor could one deny that Brandeis had a philosophy of labor and capital, although the diverse aspects of the problem are grounded dominantly in economics. Certainly it aligns itself within the scope of social philosophy. Legally it involves the ordering and control of human relations.

According to the Foreword the editor sought through the diverse selec-

²⁰P. 451.

²¹P. 129. Cf. p. 367: "During the last quarter-century of his life he emerged as easily the most important legal philosopher of America."

²²P. xli.

²³P. 394.

²⁴P. 425.

²⁵P. 419.

²⁶"How easy it is to damn a man with a phrase. * * * 'The leading English sociologist, Hobhouse, is primarily a philosopher.' Primarily a philosopher!" CARTER, *THE SOCIAL THEORIES OF L. T. HOBHOUSE* (1927) 3.

tions of Holmes to give a well-rounded portrait of one of the great personalities in American thought. He had a desire to portray Holmes, the humanist. That he has succeeded admirably, the readers of this volume will readily admit. It is a multi-faceted portrait of a great jurist.

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Ithaca, New York

Cases and Materials on the Law of Possessory Estates (Second Edition).

By RICHARD R. POWELL. St. Paul: West Publishing Company (1943). Pp. xxxix, 565.

Of course Powell wrote a good book and university presidents and law school deans ought to be interested in it. All of the customary first year Real Property topics are covered except adverse possession. The book is cleanly done; not a typographical error could be found, and what reviewer would be bold enough to look for any other kind? But beyond all this, it is a splendid answer to that long pedagogical search for "An Introduction to the Study of Law."

The first pages are filled with plainly stated, interesting, text material of the sort that is written for Liberal Arts students who are expected never to become professional historians, economists or psychologists. The transition to professional law sources does not begin until page 40, and then is very gradual, as is shown by this tabulation:

<i>Approximate page numbers</i>	<i>Approximate number of pages of cases.</i>	<i>Approximate number of cases</i>
1- 50	8	2
51-100	10	5
101-150	25	7
151-200	27	9
201-250	49	15
251-550	190	43

Powell obviously does not teach the students to swim by the good old method of pushing them overboard into deep water, and one wonders why. Motives of human kindness, mercy and sympathy cannot be suspected in anyone who will teach the law of property. There must be a sterner reason, and there is.

The old sink or swim idea is good enough if the only purpose is to let the students learn how to flounder to shore when they find themselves accidentally in deep water, but if the purpose is to train strong, confident and skillful life-savers, there must be a more thorough technique. The clue to Powell's cautiously thorough method in this book is this: He is preparing men to encounter those two volumes of his on Trusts and Estates. Men who have been intellectually and spiritually, and also morally and physically

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prepared for that experience may face with confidence whatever fate may befall them in this world or the next, including three or four years in the law school of any university.

The study of the law of property is almost irresistably the study of legal history. The fossils that lie exposed on the surface of a modern deed drive the mind into curious investigations and imaginings. Powell makes the most of this, and shows the students a law of estates which emerges from the vague and virile magnificence of feudalism, pushes steadily through centuries of renaissance, imperialism and Americanism, and which is now perpetuated in the scriptures of the American Law Institute. The story sweeps over a millenium and yet there are included many of those trivial bits of lore which the property lawyer cherishes, such as: the controversy over *scintilla juris*, a few sarcastic words about Mansfield and, at page 306, an illuminating footnote in law French.

The account is flavored with ancient and modern illustrations of the presently emphasized doctrine that law is the resultant of social interests. For example: at page 63—"At least two all pervasive social struggles of magnitude characterize the period (prior to 1300). First of these was the struggle between those forces tending to consolidate, upbuild and preserve the feudal state and those forces tending towards its disintegration and the substitution of a government more similar to modern institutions. Secondly was the struggle for power between the Church and the King. To the varying fortunes in these two struggles can be traced most of the known steps in the evolution of the law of succession"; and at page 412—"The social function of law is the moulding force back of the law of waters. The student should keep constantly on the alert, in order to discover this force which often lurks concealed in words and concepts of a most legalistic exterior."

The professional skills which are developed in the book include the statistical methods of actuaries, advice on the drafting of instruments and some orthodox casebook material of the sort that makes for cautious word-by-word reading, and so conditions the law students that throughout their professional careers they will, patiently and without complaint, take up a document or a book and read all the fine print which their humblest clients would not deign to notice.

There are some eighty principal cases, including about a dozen each from England and New York, half a dozen each from New Jersey and Federal courts, four each from Massachusetts and Pennsylvania, and fewer from each of twenty-four other states; and, with Powell's characteristic emphasis, statutes from all states except Indiana, Louisiana, and Mississippi.

An adequate introduction of the study of law must include the Hohfeldian techniques of legal analysis, which are perpetuated in the Restatement of the Law of Property as little more than perfections of nomenclature, and are given like treatment in this book. Of course, if it were not for such references, the students of the present day would be liable to be entirely oblivious to the fact that there have been laid these foundations for a development in legal analysis comparable to that which changed alchemy into analytical chemistry.

Some day some student who grasps the amazing significance of the Hohfeldian theory will resume the task of its development. It is fortunate that a book which is as sure to be widely used as is this book, contains references which may arouse that student's interest. It is to be regretted that neither here nor in the Restatement is there given any indication of the existence of "Jural Relations" in which Kocourek, in 1927, carried the theory forward to the verge of a remarkable unfolding.

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