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Book Review: Chief Justice Stone and the Supreme Court

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child-killing, assault, and larceny. The treatment of some of these is quite interesting, and of others is quite disappointing.

It is a pity that the collection does not include a discussion of the present English law and administrative experience with respect to the detention and interrogation of arrested persons prior to arraignment, and of the British conception and administrative implementation of an accused's privilege to have counsel. A thorough examination of these topics would have filled in important gaps in the literature, and have been of special interest to the authors' colleagues in the United States.

Perhaps the most interesting of those included is Dr. Radzinowicz's on "International Collaboration in Criminal Science". He reviews the two great movements towards collaboration—the first beginning in 1872 with the work of the International Prison Commission and the Union Internationale de Droit Penal, interrupted by the outbreak of World War I; and that initiated thereafter through the International Penal and Prison Commission, in which the League of Nations eventually played a part. Once again we have been interrupted by war, and it is time to resume. Dr. Radzinowicz's informed account of accomplishment and failure in our earlier attempts at international collaboration for the advancement of criminal science is particularly useful, coming at this time.

GEORGE H. DASSIO


Realizing that the higher one goes in the judicial hierarchy the more judicial doctrine tends to become subjective jurisprudence, and that the Supreme Court is a highly organized political body, the author, a teacher of political science, essays in minor degree by a number of articles the task of giving the public a profile of Chief Justice Stone's contribution to constitutional doctrine. Preceded by an informative personal note from Charles A. Beard, the Dean of American historians, the profile is presented in the light of a few leading doctrines which, while fundamental, do not do complete justice to Chief Justice Stone's magnificent contributions. The author is of course less interested in the Chief Justice's personality than in the constitutional views which are expressed in his many opinions. Also, he is more interested in the Chief Justice's conceptions of the judicial function than in the particular decisions the Chief Justice has written. The author notes, for example, the frequency with which Mr. Justice Stone's dissenting opinions became in a later day the majority opinion of the Court. The Chief Justice is distinguished by a certain prophetic vision of the direction in which public policy is likely to go, and for that reason must have felt himself at home when the five conservatives of the pre-1936 days became gradually a dissenting minority, and the dissenters of those days, led by Holmes, Brandeis, Stone and Cardozo, represented the prevailing majority.

This cannot altogether be attributed to the fact that a single Pres-

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ident appointed the majority of the existing Court. They have been
good appointments because of the flexibility of their orientation. But
their methods reflect a departure from the old days of deciding cases
by maxims, cliches and labels; they present a solid reason for their view
of law and policy.

Mr. Konefsky has written an interesting book. It is hard to lay it
down. He observes, for example, that the Chief Justice in an early day
realized the modest place that courts should occupy in our constitu-
tional processes, giving to legislatures and to states the benefit of any
doubt. Yet in civil liberties cases, Justice Stone has, in the company
of the Court, with the exception of the logical and able Justice Frank-
furter, departed from this premise and substituted the Court's view
of civil liberties for the legislative judgment. While it is true that the
Supreme Court cannot produce tolerance in this country, it exercises
so large an influence upon states and local communities that its ad-
vanced views have done much to preserve civil liberties throughout the
United States. The Chief Justice is also, probably by virtue of his
early training, a strong analyst of the facts and believes that the com-
mon law and constitutional law pursue the same methods of judicial
empiricism. It must have afforded the Chief Justice great personal
gratification to convert his lone dissent in the Gobitis1 case to the ma-
jority view in the West Virginia State Board of Education v. Barnette2
case a few years later.

Perhaps what most distinguishes the present Chief Justice is not
alone his learning and ability but his profound fund of common sense
and a sense of humor, which have endeared him to the entire bar. The
reviewer ventures to believe that his fine company in personal relations
is not the least of his talents. The kindness of his personality is some-
what concealed by the picture which adorns the cover of the January
American Bar Association Journal.

The author's first chapter deals with the growth of the doctrine of
intergovernmental immunity from taxation, and shows the gradual
prevalence of the Chief Justice's views of the wide range of the taxing
power existing in both governments. Yet his ability to abstain from
falling under the sway of generalizations is well illustrated in the
Saratoga Springs decision, State of New York et al. v. United
States.3 This has been handed down since the book under review was written.
The Chief Justice draws the line at federal taxation of instrumentalities
which really affect the state in its sovereign prerogatives. He dissipates
the old distinction between governmental and corporate powers.

In his second chapter, on the commerce clause and state power, the
author works out the development of the clause and its effect in enlarg-
ing federal power. He shows how this was achieved and pays tribute
to the majority justices who accomplished the result. The Chief Justice
played a major part in this development.

The third chapter deals with the scope of the federal spending
power and the power over industrial conditions, in which again the

2. 319 U. S. 624 (1943).
Chief Justice, if not a pioneer, at least took a leading part in dissipating some of the old prejudices. The opinion of Justice Roberts in the Butler case comes in for special condemnation. The welfare clause is competently analyzed to show the breadth of the federal power of appropriating money. The development of the power of government to place limits on laissez faire in business and yet to draw the appropriate line between freedom and regulation is well presented.

The fourth chapter deals with restraining the administrative process and shows the extent to which the Chief Justice would give scope to that process and the limited function and great self-restraint he would impose on the courts. Yet the "substantial evidence" rule enables the courts to do anything they want to. Here again the modern court played a vital part in sustaining those industrial and governmental functions which the Congress anticipated. The Chief Justice tilted with the earlier Court in contending that price fixing was as much an incident of business regulation as any other police power function, a view which finally prevailed, though economically speaking this interference with natural laws doubtless has a limitation in time.

The fifth chapter is entitled "Censoring' State Regulation of Economic Activities". In the struggle for minimum wages for women, which has finally received the green light, the Chief Justice played a powerful part, first as a dissenter, then as the concurring Justice for the majority. So with his work in sustaining unemployment compensation legislation. Business was deemed by Justice Stone subject to public control whenever circumstances required, and he may have initiated the abolition of the old label "business affected with a public interest".

The sixth chapter is devoted to the Chief Justice's contribution to the maintenance of civil liberties. He early took the view that the burden of proof in economic relations is on the one who contests constitutionality, whereas in civil liberties the burden of proof is shifted. Under the head of "Protecting the Political Process" the author analyzes the Hague case and the Classic case very effectively. Able, also, is his discussion under the head of "Guardian of Liberty", of the many Jehovah's Witnesses cases, in which the Chief Justice has finally made his view prevail.

About the section on civil and military relations there will doubtless be much controversy for some time. Here the Chief Justice has pretty regularly sustained the military power which the dissenting opinions of Justices Murphy and Rutledge in the Yamashita case would place under the constant supervision of the due process clause. The Hirabayashi decision is very disappointing, to say the least. The dispossessed nationals if not the aliens should be compensated.

The leitmotif of the work perhaps is presented in the last chapter, entitled "An Enlightened View of the Judicial Function". The Chief

4. 297 U. S. 1 (1936).
Justice’s realization of the importance of judicial self-restraint has enhanced the reputation of the Court beyond all previous levels. It is trite to say that to that distinguished eminence the present Chief Justice has made a mighty contribution.

Minor errors that have been noted, such as the use of the word “reversed” for “overruled” (page 138), the failure to cite the Olsen⁹ case (p. 174), and the typographical error of “off” for “of” (p. 203), do not detract from the value of the present sketch. It leaves unmentioned some of the Chief Justice’s important contributions, such as the fact that he overcame the unfortunate dictum in the Willing¹⁰ case and established for a unanimous court the constitutionality of the declaratory action in Nashville, Chattanooga & St. Louis Ry. v. Wallace,¹¹ and that his dissent in the Pink¹² case is entitled to major credence and weight.

EDWIN BORCHARD


The very apt foreword provided for this treatise by the American Law Institute’s William Draper Lewis, supplemented by able Professor Yntema, leaves little excuse, perhaps, for a review. Their account of the author’s background, their exposition of the necessity for “comparative” studies in Conflicts, and their laudatory, yet deserved and unexaggerated, appraisal of Rabel’s present contribution permit scarcely more than a chorus of “Amen’s” and “Well-dones” on the part of the reviewers of this book.

One considering “comparative” studies in Conflicts is hard put to resist the temptation to elaborate upon the necessity, especially in an age which is “One World” conscious, of seeking an understanding knowledge of our neighbors’ viewpoints. Although Dr. Rabel makes little direct comment on that score, the reader cannot fail to strengthen his convictions on the matter as a result of the mere recital of the diversity of world views; the bare realities inherent in the problems presented are, in themselves, far more eloquent than rhetorical exhortations by reviewers to stress the importance of continued “comparative” studies.

I have set off the word “comparative” because I think the term, and to that extent the title of Rabel’s book, is in one sense inappropriate. In a suit involving purely “internal” application of so-called “substantive” rules, as in a tort, criminal, or contract case having no foreign elements, comparative considerations of foreign law, while useful, interesting and commendable, are not indispensable or inescapable. But in a case involving foreign elements, the foreign rules prevailing at the “domicil” or “locus” of the case, including Conflict of Law rules, become intrinsically

11. 288 U. S. 249 (1933).

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