Maryland Law Review

Volume 1 | Issue 2 Article 10

Book Reviews

Book Reviews

UNCOMMON LAW. By A. P. Herbert. Doubleday Doran & Co. 1936. Pp. xvii, 298.

A shocking blast of fresh air is brought into the stuffy atmosphere of legal procedure (and substance) by this keen, scholarly, and satirical volume by A. P. Herbert. Mr. Herbert, now Member of Parliament for the University of Oxford, has for years engaged in the pleasant task of writing "Misleading Cases" for publication in *Punch,* and these cases have been collected into one volume under the title "Uncommon Law".

No lawyer, however fundamentally he may believe, with Mr. Gilbert, that

> "The law is the embodiment
> Of everything that is excellent",

can fail to be both stimulated and amused by the skill with which Mr. Herbert parodies the opinions of the learned judges of England in deciding fictitious cases, the facts of which he has invented in order to draw attention to some particularly ridiculous, obsolete, or unjust doctrine of the law, or to assert the rights of the citizen against the many tentacled-monster known in England as the "Crown" and in this country as the "Government".

The American lawyer, having for years had dinned into his ears the (probable and/or possible) truths that in matters of procedure the English courts are far in advance of our own, and in matters of substance Parliament enacts legislation that is far more logical, sensible and workable than the horrid product of our statesmen in Congress assembled, cannot fail to rejoice when he reads a passage such as the following from the opinion of the Lord Chancellor in *Sparrow v. Pipp:*

> "Nearly all the laws recently enacted by Parliament are vexatious and foolish, yet we are expected to enforce them as jealously as if they were necessary and good. My Lords, we are venerable, dignified and wise, superior in almost every respect to the elected legislators of the House of Commons, yet like the rest of His Majesty's judges, we find ourselves in the position of hired dispensers, compelled continually to dispense the prescriptions of a crazy doctor, which they know to be ineffective and even poisonous."

The principal theme of the book is stated by his Lordship earlier in the same case:

> "I am not willing to be bound hand and foot by the observations of Lord Mildew made in the year 1834.... So long as I sit upon the Woolsack, whenever an appeal discloses a divergence between the Common Law and common sense, it will be my practice to be guided by the latter."

The character who bears the burden of this struggle is one Albert Haddock, described by Mr. Justice Radish, as "a pertinacious litigant whom we are always glad to see." Besides Mr. Haddock's difficulties with his neighbors, traffic policemen, and the public generally, his principal grievances are against the Income Tax Commissioners. Mr. Haddock is an author, and, believing that his brains and nervous system constitute his manufacturing plant, no less than do the factory and equipment of a soap manufacturer, he applies to the court for an order requiring the Commissioners not only to allow him an annual deduction from his gross income for depreciation upon them, but also to allow him, as expenses of his business, sums expended on doctor's accounts, sunlight treatment, nourishing foods, and champagne, and upon necessary holidays at Monte Carlo:

> "If it is proper", argues Mr. Haddock, "for the soap manufacturer to be relieved in respect to the wear and tear of his machinery and the renewal thereof (which money can easily buy) how much more consideration is owing to the delicate and irreplaceable mechanism of the writer."

The Court (Radish, J.) allows Mr. Haddock's appeal, and, as in another case, states that:

> "The nation has to thank Mr. Haddock, not for the first time, for his enterprise and public spirit."

In the opinion of this reviewer, the decision is sound and applies equally well to lawyers.

On another occasion, again in dispute with the Income Tax Commissioners, Mr. Haddock received a formal "Demand and Final Notice" for payment of a disputed item, which notice concluded with the statement that if the amount should not be paid within seven days, steps would be taken for its recovery by distraint, with costs. Mr. Haddock was advised that a statute of Queen Elizabeth punishes as a felon, guilty of blackmail:

> "A person, who, knowing the contents, sends or delivers a letter or writing demanding, with menaces and without reasonable cause, any chattel, money or other property."

He therefore immediately instituted criminal proceedings against the Collector (*Rex v. Puddle*) and was triumphantly successful. The jury eagerly found the Collector guilty, whereupon Trout, J. sentenced him to penal servitude for life and congratulated Mr. Haddock.

Mr. Haddock's most remarkable exploit, again in controversy with the Income Tax Commissioners, was to pay a disputed item by means of a check consisting of writing upon the back of a cow. Obtaining no satisfaction from his many complaints for relief, Mr. Haddock finally purchased a white cow, and had clearly stenciled in red ink upon her back and sides the following words:

> "To the London & Literary Bank, Ltd.,
> "Pay the Collector of Taxes, who is no gentleman, or order,
> The sum of Fifty Seven Pounds (and may he rot!)
> ALBERT HADDOCK."

He thereupon affixed the statutory revenue stamp for negotiable instruments to her horn, cancelled the stamp, led the cow through the streets of London, and tendered her to the Collector in full payment of his tax. Mr. Haddock argued that there was nothing requiring a check to be written on a piece of paper of specified size, and since he had often written checks on the back of menus, upon napkins, or on the backs of labels of wine bottles, why not upon the back of a cow?

The discussion and decision relative to the juridical status of this alleged negotiable cow may be left to those sufficiently interested to delve further into this recondite question.

That the learned author is alive also to the realities of modern law practice is illustrated by the following quotation from an opinion of Juice, J.:

> "This dispute, as is usual at the present time, is only nominally between the parties named, the real litigants being two insurance companies. If it were not for the insurance companies there would be very little litigation of any kind today, and members of the legal profession owe to them a debt which we can only repay by careful labour and clear decisions."

Mr. Herbert deserves our thanks for providing most amusing reading, the flavor of which can only be appreciated to the full by lawyers; he has shown up in pointed and satirical language a number of unreasonable and absurd judicial and legislative doctrines and practices. The opinions of his judges abound in wisdom which culminates in the admirable, as well as profound words of Lord Mildew on the construction of statutes, that:

> "If Parliament does not mean what it says, it ought to say so."

—EMORY H. NILES.*

THE COMMERCE POWER VERSUS STATES RIGHTS. By Edward S. Corwin. The Princeton University Press. 1936. Pp. xiv, 276.

Two years ago, in concluding his somewhat unfortunately entitled little book "The Twilight of the Supreme Court", Professor Corwin said: "Certain people have recently raised the cry 'Back to the Constitution'. Just how far back would they like to go?" Now it is Professor Corwin himself who—beginning upon the very title page—raises that same cry. Nor is he at all doubtful as to how far back he would like to go.

His call is for a return to *Gibbons v. Ogden* and to what he views as the concept of national power over interstate commerce there enunciated or implied by Marshall. A concept, that is to say, which would recognize "that the power to regulate commerce among the States is the power to govern it, and hence the power to restrain it; that this power, like all other powers of the National Government, is not limited by State power, but overrides any State power with which it comes into collision; that this power, moreover, is reposed by the Constitution in Congress and not in the Court, and so may be exercised for such objectives as Congress may select to promote, whether the Court likes them or not; that Congress has, in short, precisely the same power to prohibit any branch of commerce among the States as it has to prohibit any branch of foreign commerce, in furtherance of what it deems to be the general welfare."

Such a return is regarded as necessary because the Supreme Court, particularly in recent years, has wandered into "by-paths of contradictory doctrine and speculation

---

* Of the Baltimore City bar. Lecturer on Admiralty, University of Maryland School of Law.

regarding the relation of national and State power," and because, as a result of its aberrance, the very existence of Federal power, in the field of interstate commerce, at least, is thought endangered. The "by-paths" are identified under six propositions, which the author argues have no support in the Constitution or in the intention of its framers, and which are inconsistent with Marshall's broad treatment of the commerce power in *Gibbons v. Ogden*. Four of these propositions are particularly challenged, viz., that the national power to regulate interstate commerce is less broad in scope than that as to foreign commerce; that the reserved powers of the States constitute a limitation upon the national power over interstate commerce and consequently withdraw certain matters from the jurisdiction of the latter power; specifically, that production, being a subject within the field of State power, is totally beyond the reach of national power; and, finally, that the purpose of Congress, in enacting a regulation of interstate commerce, is a judicially enforceable test of the validity of such a regulation, if it invades the ordinary field of State power.

It is interesting to compare Professor Corwin's present reaction to the trend of Supreme Court decision with his reaction before the court had acted upon the New Deal legislation. At that time, quoting from Dean Clark's foreword to "The Twilight of the Supreme Court," he sensed a "growing recognition (by the Court) that our present economic and social life cannot be compressed into separate state units." Now, he says, "we find ourselves confronted with the paradox that, with the country an economic and industrial unit, the prevailing trends of constitutional interpretation envisage it, so far as governmental control of business is involved, as a confederation."

His quarrel, then, is primarily with the doctrines of such recent cases as *Butler v. United States* and *Carter v. Carter Coal Co.;* and, to the reviewer, it seems that his six "by-paths" of Supreme Court wanderings reduce themselves to one—to wit, that the reserved powers of the States constitute a limitation upon the national power over interstate commerce, so as to exclude matters within the field of State power from the operation of the National power to regulate. His rather passionately expressed convictions as to the fallaciousness of this proposition would seem to derive, in large part, at least, from the result which its assertion by the Supreme Court seems to him to entail—the result, in brief, that effective regulation of large scale business is not possible by either the States or the National

government. The Supreme Court, he says, has created for business a "realm of no-government."

Professor Corwin is never, of course, a dispassionate observer of the constitutional scene. He is calling here for an overruling of what he conceives to be erroneous doctrines of constitutional construction—for a return to doctrines which he regards as fundamental in our scheme of government. His call, however, is not for a stripping of power from the Supreme Court, nor for an amendment to the Constitution extending powers of the National government. He is speaking primarily to the Supreme Court itself, asking for action by the Court alone. While deploring the recent trend of Supreme Court decision, he nevertheless is content to leave the problem of a return to correct doctrines as one with which the Court is itself competent to deal.

His convictions with respect to such controversial subjects as the proper relationship of the State and National governments and the correctness of recent Supreme Court doctrines, will not, of course, be accepted by all who may read his little book. This should not alter the fact that the book is well worth reading,—and particularly by those who may not agree with all its conclusions.

Certain minor inaccuracies might be mentioned. At page 96, in discussing *Champion v. Ames,* the author speaks of the debate between Mr. Carter and Mr. Beck, although on page 89 Mr. William D. Guthrie is correctly stated as having argued the case against Mr. Beck; Mr. Carter, of course, appeared in the earlier case of *In re Rapier,* in which Attorney General Miller and Assistant Attorney General Maury represented the Government. The case of *Whitfield v. Ohio* is throughout cited as *Whitefield v. Ohio.* Also,—presumably in an effort to prove the errors of the Court's recent doctrines out of the mouth of the Court itself,—Professor Corwin quotes so largely from the cases that, to this reviewer, it somewhat impairs both the effect of his argument and the readability of his book.

—ROGER HOWELL.*

* Dean and Professor of Law, University of Maryland School of Law.