

BOOK REVIEWS

THE SUPREME COURT AND THE NATIONAL WILL. By Dean Alfange. Doubleday, Doran & Co., New York, 1937. Pp. xiii, 297. Price: \$2.50.

This book was awarded the first Theodore Roosevelt Memorial Award. It is stated by the publishers to be "lucid and eminently readable, designed especially for the layman . . . who wants to see this country's most important problem clearly rather than through a mass of accumulated prejudice."

Movement in the field of constitutional law has been rapid in recent months, and, whatever may otherwise be the merits of this volume, its longest and most important chapter (Chapter VII, "Interstate Commerce—The Key to National Power") is out of date before the publication of the volume, and this defect is not corrected by the epilogue dealing with the decisions of April 12, 1937, with respect to the National Labor Relations Act.¹ With respect to the taxing power and due process of law, the *Social Security Cases*,² decided May 24, 1937, were of course too late to be considered; and the Washington minimum wage case—*West Coast Hotel Co. v. Parrish*³—decided March 29, 1937, receives only slight consideration.

The basic idea of the author with respect to the Supreme Court is perhaps best expressed in the concluding paragraph of the volume:

"The Supreme Court has survived many storms and much more or less merited obloquy because, in the last analysis, the American people have faith in it and in the beneficence of judicial review. It is admittedly a conservative institution. But a conservative institution at its best is of unquestioned social utility. It can be a bulwark against revolution and dictatorship—its inevitable concomitant; especially against revolution from the Right, due to the resistance of large and powerful sections of the community to what they consider hasty and drastic innovation. At such a critical juncture a conservative institution like the Supreme Court may, by a wise use of its suspensive veto, either secure revision or facilitate the consolidation and clearer expression of the national will and, hence, the eventual acquiescence of the protesting minority. It can thus help to bring about social change by consent and, at the same time, preserve the framework, the machinery and the *habit* of free government. This is a high and an eminently political mission. And the first requisite for its successful accomplishment is frank recognition of the political implications of judicial review. Such recognition might, for one thing, influence executive and senatorial policy with respect to appointments. It might also help to effect such modifications in the Court's powers and procedure as will make judicial review more compatible with democratic government."

This statement may be supplemented by that on page 102 to the effect that "constitutional interpretation cannot be dissociated from the economic and political realities of a given period of history"; and by the statement on pages 40-41 that "it must be admitted that the Court has not infrequently lagged behind popular sentiment on momentous issues; but whenever it disregarded the popular will on vital questions affecting the whole nation, it either modified or reversed its position subsequently, or, less frequently, it acquiesced in its reversal by the people through the process of constitutional amendment."

1. 49 STAT. 449 (1935), 29 U. S. C. A. § 151 *et seq.* (Supp. 1937).

2. *Steward Machine Co. v. Davis*, 57 Sup. Ct. 883 (1937); *Helvering v. Davis*, 57 Sup. Ct. 904 (1937).

3. 300 U. S. 379 (1937).

There is little basis for criticism of the author's thesis. The United States Supreme Court is an important element of our political structure. To it, as a body more removed from political relations than the President or the Congress, has been committed the preservation of the balance between the federal government and the states and the enforcement of the guarantees of individual rights. The governmental bodies which alone can violate the constitutional restrictions are not vested with final authority to determine whether such restrictions shall be observed. This is the fundamental difference between our government and that of other countries. The merits of such a plan must be determined, not by theoretical discussion, but by the results. The function of the United States Supreme Court involves a wide discretion in construing language necessarily general in character, and in the application of such language to new issues and new conditions as they present themselves. It also involves, as do all human institutions, the possibility of error, and the power to correct such error. The most striking illustration of such correction, not referred to by the author, is found in the opinion of Chief Justice Taney in *Genesee Chief v. Fitzhugh*,⁴ reversing *The Thomas Jefferson*,⁵ and extending federal admiralty jurisdiction to all navigable waters.

But while one may agree with the author's point of view, this forms no basis for the assumption that substantially all important decisions of the United States Supreme Court are the result of pressure politics, or for the misconstruction of American history in the attempt to support such assumption. In the effort to sustain a supportable position the author has over-argued his case and defeated the purpose of presenting a fair and accurate discussion. While the author mentions the fact that changing conditions have presented new issues or new phases of issues to the Court, his dominant view is that the Court was influenced by external conditions rather than by the facts and issues presented by new cases. This attitude characterizes the style of the volume, and is often implied rather than expressly stated, as where he says on pages 134-135 that "the decision of *Gibbons v. Ogden* is a salient example of the adaptability of constitutional law to dominant economic trends." Accuracy would have dictated a statement that the language of the Constitution was broad enough to include navigation by steamboats, together with all later methods of transportation and communication, with a reference possibly to *Pensacola Telegraph Co. v. Western Union Telegraph Co.*⁶ The author says at page 78 that the Court "ingeniously avoided the constitutional question" in *Georgia v. Stanton*,⁷ but does not call attention to the fact that in declining jurisdiction it was following long-established practice; and then says at page 79 that the Court assumed jurisdiction in *Ex parte McCordle*,⁸ "despite its decision in *Stanton v. Georgia*", without indicating that the jurisdictional issues in the two cases were essentially different. These illustrations are but typical. In his text the author says at page 39 that with the exception of the National Industrial Recovery Act, the major measures of the New Deal adversely reviewed by the Supreme Court were struck down by majorities of one or two, leaving to a note at the end of the book a passing reference to the decision adverse to the first Frazier-Lemke Act. Some degree of error may be excused, but the reader loses confidence when he finds a systematic use of erroneous statements in support of the author's position.

But the reader who places confidence in the author will be misled, not only by specific statements, but by general conclusions as well. The lay reader will

4. 12 How. 443 (U. S. 1851).

5. 10 Wheat. 428 (U. S. 1825).

6. 96 U. S. 1 (1877).

7. 6 Wall. 50 (U. S. 1867).

8. 7 Wall. 506 (U. S. 1869).

be led to believe that the judicial power over legislation was "masterfully ingrafted upon our constitutional system" by John Marshall, and that John Marshall believed that the national government possesses inherent power to act in all matters where the states are incapable of acting. The author takes the traditional view of Taney, a view recently shown by Felix Frankfurter to be largely baseless, and fails to recognize that the court under Taney was not seeking to restrict federal power but to give scope to the exercise of state power in fields where regulation was necessary but in which the federal government was not exercising its superior powers. With respect to interstate commerce, we may say that there have been three types of issues before the United States Supreme Court: (1) those involving the prevention of state interference; (2) the upholding of proper state regulation in the absence of federal action; (3) the replacement of state regulation by federal action. These issues are not conflicting. *Gibbons v. Ogden*⁹ and *Brown v. Maryland*¹⁰ fall into the first group; *Cooley v. Port Wardens*,¹¹ is the first full statement as to the second, but does not conflict with Marshall's view as to the first group—in fact it finds basis in an opinion by Marshall.¹² Modern conditions of transportation and communication have produced the third, with its origin in the Interstate Commerce Act,¹³ and with a mass of recent statutes and decisions.

Mr. Justice Holmes is the usual hero, and perhaps justifiably so, in view of his opinion in *Swift v. United States*,¹⁴ but the author ignores the *Northern Securities Case*¹⁵ in which the Court took the most important forward step in its construction of the Sherman Anti-trust Act,¹⁶ and in which Holmes wrote a reactionary dissent.

In tracing the development of due process of law the author summarily disposes of the important development with respect to freedom of speech and of the press, and gives no attention to the equally important procedural development with respect to fair trial in state courts.

In summary, the volume may be said to be based largely on secondary material; to cover inadequately the subject of judicial review; and to add little in aiding the layman to form an accurate and intelligent view of the problem with which it deals.

Walter F. Dodd.†

THE SALE OF FOOD AND DRINK. By Harry C. W. Melick. Prentice-Hall, Inc., New York, 1936. Pp. xlii, 346. Price: \$5.00.

The purpose of this book, as the reviewer sees it, is to show that the public policy of the early English law which by statute put an absolute liability, through criminal penalty, upon victuallers, vintners, brewers, butchers, cooks and other dealers in food or drink for immediate human consumption, still exists and that the civil recovery cases in implied warranty should follow the early cases, analogous in kind, found in the Year Books and other early decisions. The author would have the course of decision law emphasize what he considers the best public policy and virtually hold the retailer as an insurer of the food he sells in the hands of purchasers and others who might reasonably be expected

† Member of the bar, Chicago.

9. 9 Wheat. 1 (U. S. 1824).

10. 12 Wheat. 419 (U. S. 1827).

11. 12 How. 299 (U. S. 1851).

12. *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245 (U. S. 1829).

13. 24 STAT. 379 (1887), 49 U. S. C. A. § 1 (1929).

14. 196 U. S. 375 (1905).

15. 193 U. S. 197 (1904).

16. 26 STAT. 209 (1890), 15 U. S. C. A. § 1 (1927).

to consume his wares. He favors also the abolition of the doctrine of privity in the case of manufacturers and growers so that the ultimate consumer may, if he wishes, pursue these persons. He is convinced that "policy" is best served by holding the retailer even though he has no opportunity to inspect what is in a can or sealed package or, in the case of arsenic in the lettuce or cabbage, or trichinae in the pork, where it is impossible to discover this condition without an examination too complicated to require him to make.

The reviewer would, at the outset, question whether there is any scientific evidence pointing to the fact that it is better "policy" to hold the retailer to this tremendous liability. He would also question the writer's conclusion that conditions today are sufficiently comparable to those existing at the time of the early statutes and decisions he cites to warrant a change of direction in decision law in a jurisdiction which has established another "policy". And he would most certainly question whether, since the adoption of the Uniform Sales Act, a consumer-buyer should be presumed to have relied upon the judgment of the retailer in a case involving canned or packaged food. Professor Waite, in an article which cuts deeply into the analyses courts have made in these warranty-food cases, has these trenchant questions to ask:

"Can it *reasonably* be said that when the seller handed the can of beans to the buyer, he *impliedly* represented that there were no stones in the can?

Or only that *so far as he had reason to know*, there were no stones in it?"¹ Furthermore, if reliance is an important element in finding liability in implied warranty cases, and it is, can it be said, with any truth, that in such cases the buyer does rely upon the seller's skill or judgment?

Mr. Melick's book is written in a considerably different manner from the general run of texts from the hands of practitioners. He uses the traditional historical and analytical approaches and emphasizes at various points in his text the social ends which he deems important in the holdings in this field. He writes with the knowledge that courts will be more likely, in the present state of judicial development, to make deviations from established rules if shown that, historically or analytically, there has been error in the past. The sociological material is lumped in as additional reason for changing the direction toward ends that seem important to the writer. However, the feeling that one gets in reading the book is that the author favors the last approach. But, in his particular manner of handling the materials, he has written a text which is cumbersome and at least fifty per cent longer than would have been necessary had he collected all of his cases according to the particular factual patterns involved and drawn his own conclusions as to the rules or principles established. More particularly, his method is this: His heading under a particular chapter will be jurisdictional, as "New York". He then takes each case in its chronological order in that jurisdiction, gives the facts to the last detail, states the holding, then quotes verbatim what he considers the important statements in the case. Then, under a heading labeled "Comment", he gives his own views as to the correctness or incorrectness of the case, showing where the court cited authority not in point, and analysing the case sufficiently to show that it might have been "properly" decided on some foundation not argued. This necessarily involves a large amount of repetition of the statements and, from chapter to chapter, one does find a number of the same cases set forth in the same laborious manner, and thus comes needless repetition. The book thus resembles the notes of a careful writer who is preparing an article or series of articles for law review publication, has arranged them in the order in which he hopes to develop his ideas and then has decided to publish his notes instead of going through the tedious proc-

1. Waite, *Retail Responsibility and Judicial Law Making* (1936) 34 MICH. L. REV. 494, 501, commenting upon *Ward v. Great A. & P. Tea Co.*, 231 Mass. 90, 120 N. E. 225 (1918).

ess of synthesizing his materials and putting them in the briefest possible form consistent with accurate and interesting statement.

What seems to be his thesis, namely, that "under the early common law food sold for human consumption occupied a preferred position over other goods, the dealer therein being made an absolute insurer of his product," is so frequently repeated that it becomes monotonous before one has read half the book. His analysis of what the early law was, beginning with note 1, page 1, was a good starting and stopping point on this matter.

But the book does have merit despite these facts, particularly in those comments which the writer always makes after his statement of the case and the holding. Not satisfied with a statement of the rule, as are most practitioner-writers, he gives us his own ideas concerning the matter. If you agree with the results which he is attempting to reach, and there is certainly something to be said for his point of view, you will like his praise or disdain for a particular view. His criticism of the Mississippi holdings (and others) not recognizing an implied warranty in the case of the retailer who sells canned food, is excellent, and you will like it unless you feel that there is no basis for reasonable reliance upon the seller's judgment in such a case. His data on the canning industry are interesting. There are valuable criticisms of the rule requiring privity in these cases and in his discussion of the liability of restaurateurs. Particularly illuminating is this latter chapter on restaurateurs, hotel proprietors and inn keepers. The reviewer is inclined to believe that what is there said is worth the price of the book to any lawyer who has a case coming within the chapter limitations. If any real contribution has been made to the law of implied warranty in food cases, it is in this chapter.

The author is to be complimented on his use of a large number of law review citations and statutes besides the Uniform Sales Act and the English Sale of Goods Act. The publishers should be praised for the use of print of a size both in the text and notes that is gentle to the eyes. The indices are adequate and useful.

Norman D. Lattin.†

LABOR TREATIES AND LABOR COMPACTS. By Abraham C. Weinfeld. The Principia Press, Inc., Bloomington, Ind., 1937. Pp. vi, 136. Price: \$2.00.

By the citation and concise review of statutes and court decisions in various fields, Mr. Weinfeld presents cogent evidence in support of the following theses:

(1) It is reasonable to expect that the Supreme Court of the United States would recognize labor conditions as a proper subject of international treaties.

(2) The treaty-making power of the Federal Government has been uniformly upheld when its exercise conflicted with state statutes.

(3) The Federal Government has the power to regulate by treaty with foreign nations labor conditions within the states, although such regulation in the absence of a treaty would not be within its power.

(4) The Federal Government has the power to regulate by treaties conditions of labor that, in the absence of such treaties, are under the legislative control of Congress.

(5) Limitations on the treaty-making power of the Federal Government consist of (a) that which the Constitution expressly forbids, (b) the bill of rights, which includes the due process clause. Mr. Weinfeld says (Feb. 20, 1937), "A majority of the present Supreme Court will most probably hold the due process clause of the fifth Amendment to be a limitation on the treaty-making power in the field of labor relations." In the Preface he states, "A change

† Professor of Law, Ohio State University.

in the Court's personnel would probably eliminate the due process clause as a barrier to labor treaties." Since he wrote this, a change in the personnel has taken place. Possibly then the barrier has been removed.

(6) "But in view of the *Adkins* and *Morehead* cases it seems advisable for the United States government not to ratify international labor treaties dealing with fixing minimum wages until the Supreme Court changes its mind on the conflict between the due process clause and the fixing of minimum wages." Since the publication of this book, the Supreme Court, in the decision rendered March 29, 1937,¹ overruled the case of *Adkins v. Children's Hospital*² and established the constitutional power of the states to enact minimum wage laws for women. Thus the Supreme Court *has* changed its mind on the conflict between the due process clause and the fixing of minimum wages. This removes a legal obstacle to the ratification of treaties on the subject.

(7) There is no legal obstacle to the ratification of treaties limiting hours of labor or prohibiting child labor, or regulating any other labor condition as long as such regulation is not held by the Supreme Court to be a violation of the due process clause.

(8) Therefore the United States is not a federal state whose power to enter into conventions on labor matters is subject to limitations because of powers reserved to the states by the Constitution, and the United States is not entitled to claim the privilege (granted by Article 405 (9) of the Constitution of the International Labor Organization) to treat a draft convention as a recommendation only.

The weak points in the author's argument are:

(1) The assumption that the Supreme Court will recognize all labor conditions as a proper subject of treaties.

(2) The conclusion that the United States is not entitled to the aforementioned privilege of Article 405 (9).

(3) The failure to discuss the question whether, if a treaty is held to be within the treaty-making power, all Acts of Congress presuming to give effect to the treaty are necessarily valid and not subject to annulment as misinterpreting the treaty or being violations of powers reserved to the states, due process, bill of rights, etc.

If the United States were to ratify all or many labor conventions submitted by the I. L. O. and Congress were to pass laws giving them effect while the Supreme Court proceeded in case after case to nullify their effect on any of the grounds just suggested or on any other grounds, the fact would establish the right of the United States to the privilege granted by Article 405 (9).

In the latter part of his book, Mr. Weinfeld devotes a chapter to the discussion of Canadian constitutional problems in relation to labor treaties. In 1935 the Parliament of Canada passed legislation to give effect to three I. L. O. conventions. This legislation was held invalid by a judgment of the Privy Council at London in 1937, as involving matters assigned exclusively to the Legislatures of the Provinces under the British North America Act of 1867. Mr. Weinfeld comments: "Canada has clearly the right to treat a draft convention as a recommendation only in accordance with Art. 405 (9) of the Constitution of the International Labor Organization.

"A comparison with the legal situation in the United States shows the outstanding difference: Whereas the Canadian Constitution (B. N. A. Act) provides only for legislation to give effect to 'Empire treaties' and does not take care of other kinds of treaties, the United States Constitution expressly provides in Article VI that '. . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .'

1. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937).

2. 261 U. S. 525 (1923).

The clause refers to *all* treaties, and makes all of them the *supreme law*. Hence, the ground upon which the Canadian statutes were invalidated could not possibly be relied on in the United States."

The last chapter discusses the regulation of labor conditions by compacts between the states. "States", says Mr. Weinfeld, "may with the consent of Congress enter into compacts dealing with labor conditions . . . Interstate compacts regulating labor conditions can perform a useful function in the absence of international regulation by treaty, or by way of supplementing international regulation."

This book is written in a clear-cut style that makes it a pleasure to read and it goes far in establishing the competence of the United States to ratify labor treaties in general.

The author abides strictly by his declaration that he makes no attempt to argue for or against regulation of labor conditions by treaty. He points out that no member of the I. L. O. is under obligation to ratify any draft convention or to carry out through legislation the principles contained in a recommendation, but he adds "a member is not entirely without any obligation with reference to such recommendations and draft conventions."

Now that the United States has become a member of the International Labor Organization in which it has recently played a prominent part both in shaping policy and in collaborating on recommendations and draft conventions, to this reviewer it seems hard to dodge the issue of its moral responsibility to ratify and apply some of these measures.

Boutelle Ellsworth Lowe.†

STATE AND NATIONAL POWER OVER COMMERCE. By F. D. G. Ribble. Columbia University Press, New York, 1937. Pp. vii, 266. Price: \$3.00.

This study of one of the most difficult and important phases of American constitutional law seems to have been offered as a graduate student's dissertation. It is an attempt to show the origin and development and vital change in the law which governs the division of power between nation and state in the ever-expanding field of commerce. In his preface the author states that, "The purpose is to view the division of power in the present in the light of this evolution through the past." This is done by extensive examination of decisions and opinions of the Supreme Court. In his introductory chapter the author further states that, "Changing construction is manifestly affected by innumerable factors. These factors are present in economic forces, in social and ethical ideals, in outstanding individuals whose personalities have marked the law and in other ways." He avows that he is not attempting to consider this melange of interacting forces which has shaped the law but rather the law itself which has thus been shaped.

We find the first century of the regulation of commerce characterized by judicial activity and relative legislative inaction, with a gradual trend toward legislative awakening due to changed conditions. Roughly that period comes to an end with the adoption of the Interstate Commerce Act in 1887.¹ This early period is shown to be further characterized by natural law wherein social problems are to be solved by a process of judicial reasoning. Consequently we find Marshall's doctrinal basis for the division of this power in the nature of the power itself. The legal philosophy of the time was that of natural law. From that the court veered in another direction and began to invoke the doctrine of the "will of Congress". This will was to be found not only in the voice of Con-

† Junior College of Bergen County, N. J.

1. 24 STAT. 379 (1887), 49 U. S. C. A. § 1 (1929).

gress but in its silence as well. In this silence the Court found both authorization and limitation of action by the states.

In his discussion of *Gibbons v. Ogden*² the author states that this decision was not thought to render insecure those monopolies which were being granted to carriers on land. This protection was necessary in order to attract capital to the development of inland transportation then so much desired, and yet a field into which the state and federal governments had largely refused to enter.

It is said that Marshall's theory was that the power over commerce among the states is an indivisible unit residing wholly and exclusively with Congress. This concept was due for change. From the death of Marshall to 1847 there was only one case of importance interpreting the commerce clause. During that interval there was a succession of nine new members of the court. In the latter year the *License Cases*³ were decided. The author says concerning this change of personnel: "It might be expected that there would be an influx of new ideas and that old statements of doctrine would receive new constructions." The idea of states' rights and nullification, according to the author, did not appear only in the south but also in all other parts of the country. This was "part and parcel of a great political and social controversy" and furnished the atmosphere in which the commerce cases at the middle of the century were decided by the Court. Marshall's theory of the unity and exclusiveness of the power went into eclipse because it was incompatible with the states' rights doctrine. From 1847 to 1851 the *License Cases*,⁴ the *Passenger Cases*⁵ and *Cooley v. The Board of Wardens*⁶ were decided. The Taney doctrine in effect held that under situations therein found, the commerce power was not a unit vested exclusively in the federal government, but was divisible as to certain subjects of commerce. These decisions, according to the author, furnished a foundation for the subsequent Webb-Kenyon Act⁷ and similar legislation. So we find a shift from dissertations on the nature of the power, to examination of the subject matter regulated.

Referring to state laws affecting commerce it is shown that the Court drew a distinction between those which promoted a valid end such as health and those which improperly fostered local commercial advantage. Out of this grew the doctrine of direct and indirect burden upon commerce.

There is some treatment of due process of law, so far as that principle enters into the regulation of commerce. It is shown that due process was but a matter of procedure for a full century of our constitutional interpretation. Only during recent decades has it been expanded into the realm of substantive law. This and other inventions by the Court leads the author to say: "American constitutional law is to a striking extent the product of judicial manufacture." He finds in the *Schechter Case*⁸ a turning back to states' rights and to the judicial invention of direct and indirect effect upon interstate commerce. Furthermore, he finds in the *Schechter Case* a victory for Jefferson and Madison and a defeat for Marshall and Hamilton.

In considering the judicial development of the power of Congress to regulate intrastate rates which followed close upon a very great change in the personnel of the Court, the author says: "It is readily recognized that changes in constitutional theory the more readily follow changes in the Court. Only three Presidents since Washington have appointed a majority of the Court and one of

2. 9 Wheat. 1 (U. S. 1824).

3. 5 How. 504 (U. S. 1847).

4. 5 How. 504 (U. S. 1847).

5. *Smith v. Turner*; *Norris v. Boston*, 7 How. 283 (U. S. 1849).

6. 12 How. 299 (U. S. 1851).

7. 49 STAT. 877 (1935), 27 U. S. C. A. § 122 (Supp. 1936).

8. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

these three was President Taft." Very soon after the last of the Taft appointees took his seat on the Court came the dictum in the *Minnesota Rate Case*.⁹ The dictum in the *Minnesota Rate Case* was quickly followed by the actual decision on that point in the *Shreveport Case*.¹⁰

The problem of excluding certain articles from interstate shipment and providing penalties for movements across state lines is skilfully treated. Thus far the matter culminates in the *Dagenhart Case*¹¹ and the *Schechter Case*.¹² He says: "The Court may well ask itself two questions: (1) how important is it to several states that each be allowed to handle this situation within its own borders? (2) how important is it to the several states that no state be allowed to be a free lance in the matter?" To this he adds a further question to be held constantly in mind: "What effect is to be given to the fact of Congressional determination?"

The chapter on State Power also shows a skilful analysis of the cases which have undertaken to draw a line of demarcation between state and national action. The conclusion is that, "It would seem well to realize that such divisions are rules of convenience, and not observations of past phenomenon. It would also be well to refuse to let repetition obscure their real nature, so that rules of convenience may not become burdensome technicalities defeating their own ends."

In discussing the Will of Congress and State Laws Affecting Interstate Commerce it is repeated that the categories of burdens and state laws "directly affecting" interstate commerce have their origin in Marshall's doctrine, while theories as to the silence of Congress are the outgrowth of Taney's. It is there observed that, "when diverse theories cohabit, the miscegenation may produce strange progeny. It may be surprising that the results of this particular mating have not been more curious." It is also said here that: "It is more than suspected at times that the 'will of Congress' as so frequently used, in cases where Congress has been silent, is simply the will of the Court." The period of the Court's deference to "the will of Congress" is shown to have begun in the *Cooley Case*¹³ in 1852 and it has steadily increased since that time, but only within the area which the Court is willing to recognize as interstate commerce. It is found that: "The Chief stumbling block in the way of recent federal legislation has been in the ancient doctrine of 'states' rights' in modern garb."

In the summary of his book the author says: "From the assembling of the Constitutional Convention until the latest relevant decision, there has been a struggle over the division of powers between the states and the nation: . . . the Court has rarely declared rigid lines of division capable of ready application to specific situations. Rather, it has in general established working hypotheses, permitting substantial freedom of choice in dealing with particular types of commerce with which it is confronted, . . ."

Anyone interested in the subject of Interstate Commerce will find the book very much worth reading. The reviewer has found it "hard" reading and at times a little confusing, probably because in the twelve chapters into which the subject is divided the same matter is in many instances approached from a variety of angles and in different parts of the book.

There is a Table of Cases, a Table of Leading Articles Cited, and an adequate index.

Robert McNair Davis.†

† Professor of Law, University of Kansas.

9. *Simpson v. Shepard*, 230 U. S. 352 (1913).

10. *Houston, E. & W. T. Ry. v. United States*, 234 U. S. 342 (1914).

11. *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

12. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

13. *Cooley v. The Board of Wardens*, 12 How. 299 (U. S. 1851).

BOOK NOTES

LAW AND OTHER THINGS. By Lord Macmillan. The University Press, Cambridge; The Macmillan Co., New York, 1937. Pp. 284. Price: \$3.00.

"It has always been a favorite reproach against the lawyer that his intellect is hide-bound and his interests narrow." Happily for the reader, Lord Macmillan's description of so many of his brethren is inapplicable to himself. This little collection of essays—chiefly addresses delivered over a score of years to learned societies and bar associations—is more catholic, more tolerant, and more pleasantly written than one would expect from a man whose profession has cluttered the Reports with so many dull rationalizations. But do not expect to find in this Law Lord the sparkle of Holmes, the richness of Cardozo, or the greatness of More and Bacon. Qualities so excellent are indeed rare.

The author talks of a number of things; not of cabbages to be sure, but occasionally of kings. He speaks of Man versus the State, of the ethics of the advocate, of the role of the law as the social art, of religion and literature and history, and of their relation to the law and their lesson for the lawyer. He touches upon several topics of particular present interest: predilections, judicial uncertainty, and the functional approach. Fortunately, Lord Macmillan has the good sense to recognize the obvious, that "law is not an exact science", but "a very human affair". And he says it without losing his temper or invoking any shibboleths. Acrimony is rather futile in disputes old when Coke bearded James.

Moderation and little novelty mark the opinions expressed in this book. As the dust wrapper puts it, the writer brings "the truth acceptably home to readers in general". But I suppose there are not many new ideas after four thousand years of the humanities; but neither is venerability synonymous with banality.

Harold E. Kohn.†

HOW LAWYERS THINK. By Clarence Morris. Harvard University Press, Cambridge, 1937. Pp. xiv, 144. Price: \$1.50.

This book is, in the author's contemplation, intended to benefit the lawyer or student of the law by setting forth a systematic theory of legal problem-solving. Unfortunately, it falls short of this goal, in that the reader carries away the impression that a lawyer's problems can not be met by any hard and fast method of reasoning, nor even by one moderately flexible. The greater part of the book is devoted to pointing out wherein the rules of logic do not extend far enough to serve the lawyer's purpose, and need not be strictly followed in order to attain an acceptable solution. The chief benefit to be garnered from this book is an awareness of the danger of applying any one specific and localized method of thought to the solution of legal problems, to the exclusion of all others. But this pitfall is made known to the most recently apprenticed student of the law by his study of the cases set before him. Obviously, then, the analogy drawn by the author between this book and one giving the technical theory of the game of golf is not exact, because the former does not contain theory which can be more readily learned apart from practice, and no great reliance may be put on any rules other than the rule that there can be no single and unfailling rule.

† LL. B., 1937, University of Pennsylvania.

The value of "How Lawyers Think" is scholarly rather than practical; it is for the man who wishes to know "why" rather than "how". Admirably written, and free from the burden of footnotes, it clearly sets forth in sharp and colorful illustration and in terms of logic the nature of a lawyer's problems. It is only to be regretted that in showing how not to apply processes of reasoning, the author has almost completely failed to indicate a constructive method of approaching those problems.

R. N. C.