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Book Reviews

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BOOK REVIEWS

SOME PROBLEMS OF EQUITY. By Zechariah Chafee, Jr.[1] Ann Arbor: University of Michigan Law School, 1950. Pp. xv, 441. $4.50.

The greater part of this book is formed from the Thomas M. Cooley lectures delivered by the author at the University of Michigan in the spring of 1949, though there are also included two articles formerly published: "Does Equity Follow the Law of Torts?"[2] and "Bills of Peace With Multiple Parties."[3] At the opening of his preface the author states that the opportunity to deliver the lectures afforded an incentive to transport ideas from his head to the printed page. It is to be hoped that other such opportunities will be given to Professor Chafee to continue his writings on Equity, even that equity as a course is being abandoned in many law schools makes it all though he is no longer engaged in teaching a course of that name. The fact the more important that those who are supposed to teach the materials in other courses will have the benefit of Professor Chafee's profound knowledge of the history of Equity, and also of his profound realization of the place that equity must occupy in our law of today.

The lectures are phrased in the author's well-known style. Professor Durfee in his introduction comments on the humor in the expression of the ideas, and also of the profound meaning underlying the humor. Professor Chafee, like many other modern writers on legal problems, finds it necessary to adopt new terminology to embody his ideas, but unlike the others he adopts the terminology of everyday speech. For the three classes of representative suits embodied in the Federal Rules based on the nature of the rights involved and often designated as "true, hybrid and spurious" class suits, he would substitute only two classes, "solid" class suits where there is a real class and the interests of the individuals are only the interests of members of the class, and "invitations to come in" where there are individual interests, not embodied in any class but depending on common questions of law or fact which make it desirable that they be tried together. For the determination of the problem of the lack of power in a court to do what it attempted to do, he suggests two principles: the principle of the "bright line," that power is lacking only when its lack is as clearly marked as the bright line on the highway by which the motorist can easily keep on his side of the road and not go into the ditch; and the principle of "first things first," by which the question of power or the lack of it can be determined at

1. University Professor, Harvard University.
2. 75 U. OF PA. L. REV. 1 (1926).
3. 45 HARV. L. REV. 1297 (1932).

the outset of the proceedings. It is obvious that these formulations, like the maxims, are so striking that there is little danger that they will be forgotten, and so plain as to minimize misunderstanding.

The contents of the two reprinted articles are so well known to every student of the subject that comment on them here is uncalled for. The lectures deal with three problems, the unclean hands maxim, representative suits and the distinction between lack of power and mistaken use of power.

To the reviewer the treatment of the unclean hands maxim is the least satisfactory of any. Professor Chafee is so intent on deflating the encomiums that courts and writers have heaped upon the maxim, and on warning against the too frequent use of it in decisions, both desirable and even necessary objectives, that he does not recognize its real function in certain cases. The chief basis of his criticism is that the application of the maxim leaves the issues unsettled, often results in enrichment of the defendant at the expense of the plaintiff and sometimes results in injury to the public, as is the cases of refusal to protect the copyright of an immoral writing or the good-will of a business built upon the deception of the public. He properly makes the point that, correctly interpreted, the maxim does not differ from the similar common law maxim. He does not specifically discuss the question whether "unclean hands" in the equity maxim has a broader meaning than "illegality" in the legal maxim. If the action of *Gomez v. Kiely*[4] had been for damages instead of an injunction, would the court have similarly denied relief because the statement on plaintiff's envelopes which were excluded from the mails was false? The principle of both maxims is the same, to protect the court against the necessity of determining disputes over the division of the spoils of crime or fraud. Everyone will agree with the principle in such a clear case as the *Highwayman's Case*.[5] If its application can be limited to cases where that policy is involved, it will have much less scope than it has had but it will still be a very useful instrument. If some other method for protecting the public interest, or the interest of innocent persons can be adopted, as has often been suggested, such a result is highly desirable, but generally it is not possible under our present court procedure.

The lectures on representative suits are primarily a criticism of Federal Rule 23 governing that subject. The criticisms are chiefly two: that the rule is based on a technical classification of rights which has no relation to the basic problems involved; and that it does not touch the main problem in these suits, the protection of the nonjoined members of the class. The big problem is the effect of the decree as res judicata on the nonjoined members,

4. Discussed by Professor Chafee on p. 10.

5. United States v. United Mine Workers, 330 U.S. 258, 67 Sup. Ct. 677, 91 L. Ed. 884 (1947).

and this is not covered by the rule as adopted. Professor Chafee's solution is to make the decree in "solid" class suits binding on all members of the class, but to secure by some means that enough notice is given to the class to assure them against collusive proceedings. This is especially necessary in suits against a class where the defendant representatives are selected by the plaintiff. In the representative suit which he designates as an invitation to come in, the decree binds only those who do come in, a typical example being suits under the Fair Labor Standards Act. In effect this form is little more than a simpler method of intervention.

On the last topic, Professor Chafee's views are plain. If the sovereign has jurisdiction over the subject matter and the parties, and has conferred that jurisdiction on the court, there ought to be no question of lack of power to administer equitable relief, even though that is erroneous because of the adequacy of the remedy at law. He discusses at length the decision of the United States Supreme Court in the *United Mine Workers* case[6] where a majority of the court held that the Norris-LaGuardia Act deprived the court of power to issue an injunction in a labor dispute, but a majority composed of somewhat different justices also held that such an injunction was not void. The author agrees with the result but would base it on his "bright line" and "first things first" principles and hold that the act did not deprive the court of power, but merely used the term "jurisdiction" to emphasize the policy against the issuance of such injunctions. He admits that this would sometimes defeat the purpose of the act by leaving an injunction in force pending appeal, which would generally be enough to break the strike. This objection could be met by providing some method of review speedier than appeal, perhaps by a motion in the appellate court for a stay of the injunction pending the appeal.

No summary in a review ean give an adequate conception of the author's skill in dealing with difficult problems in the administration of justice. Only after a careful study of his work, does one get an appreciation of the historical scholarship and the practical appreciation of the needs of effective administration of justice which are combined in Professor Chafee. Professor Durfee, at the conclusion of his introduction to this work states that it is by Professor Chafee's great work on *Freedom of Speech* that he has best served his country. The reviewer would disagree. His great contributions to the practical administration of justice would appear to be a service exceeding even that which he has rendered to the cause of free speech.

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FOUR SCORE FORGOTTEN MEN. By Tom W. Campbell. Little Rock: Pioneer Publishing Company, 1950. Pp. 424.

Judge Tom W. Campbell, the author of *Four Score Forgotten Men*, is a distinguished member of the Arkansas Bar, and at the outset of this review it is proper to state that his book concerns all the past and present judges of the United States Supreme Court. In all there are 87 of these men. The first man appointed to the Supreme bench was John Jay of New York, who was selected by President Washington as Chief Justice in 1789. The latest accession to the bench is Sherman Minton of Indiana, who was appointed by President Truman in 1949. Not all of the 87 judges have been forgotten, and the author recognizing this fact has not written full length sketches of seven of them who have escaped oblivion and for one cause or another are still remembered. The outstanding judge of the Supreme Court for all time undoubtedly is Chief Justice Marshall whose supremacy is thus acknowledged by the author:

> "[He] was a distinguished Virginia Statesman and lawyer before he was appointed Chief Justice of the United States, and his more than 34 years of service in that high office during the formative period of our national government and his writing so many opinions of that Court that still serve as landmarks to guide the nation in its functions . . . stamp him upon the mind and memory of the American people so indelibly that he has not been forgotten, and God grant that he may never be forgotten." (Pp. 11-13.)

Among the others who will be remembered, the author mentions Roger Brooks Taney whose opinion in the *Dred Scott* case contributed to the excitement which precipitated the Civil War, Salmon P. Chase who presided over the Senate in the impeachment trial of Andrew Johnson, William Howard Taft, who has the unique distinction of having served his country in two of its highest offices, first as President and then, with greater distinction, as Chief Justice, Charles Evans Hughes, who after serving as an associate justice, ran for President and came near being elected; and was afterwards again appointed to the Supreme Court—this time as Chief Justice in succession to Chief Justice Taft.

It is certainly true that a large majority of the 87 men who have served on the Supreme bench during the 162 years that have elapsed since that court was established, have long since been forgotten by the general public. It is even doubtful whether many of the lawyers who have had occasion to refer in their briefs and arguments to the decisions of the Supreme Court remember the names for instance, of William Patterson, Thomas Todd, John Blair, Robert Trimble, Gabriel Duvall and many others. All these men were able lawyers, well qualified to fill their positions and perform their duties and the reason they are not remembered is not far to seek. The judicial office

is one of extreme isolation. There is nothing glamorous or spectacular about it. Most of a judge's work is done in the privacy of his office or home where he spends days and hours reading transcripts, studying briefs and investigating questions of law, not only in the particular cases referred to him to write the opinion but in all the cases which the Court has heard and which require the concurrence of at least a majority of the members in order to reach a conclusion. Unless a case involves legal questions of wide popular interest affecting the rights of citizens at large they are not concerned about the decision and are wholly indifferent as to the name of the judge who wrote the opinion, who to all intents and purposes is practically anonymous.

The truth is the American people have a way of forgetting their great men. Probably not one person in ten thousand knows the names of all the presidents of the United States. Washington and Lincoln and two or three of the later presidents whose administrations have been extensively praised or criticised in the newspapers are perhaps remembered and that is about all.

One of the most important and highly prized offices in the United States is that of Chief Justice, yet it is questionable if the name of the present Chief Justice is known to any appreciable extent outside the legal profession and the State of Kentucky, where he was born.

It may interest the reader to know that 28 states have furnished all the judges of the Supreme Court. New York leads with eleven, Ohio next with nine, Massachusetts with eight, five from Virginia, five from Tennessee and five from Kentucky. Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Vermont, Washington, West Virginia and Wisconsin have furnished none.

The writer of this review would like to include in it condensations of the interesting and inspiring biographies of several of the more prominent forgotten judges such as Benjamin R. Curtis and Oliver Wendell Holmes of Massachusetts, Samuel F. Miller of Iowa, L. Q. C. Lamar of Mississippi, Edward D. White of Louisiana, Horace H. Lurton of Tennessee and John M. Harlan of Kentucky, but time and space forbid. He however, cannot forbear to say something about Judge John Archibald Campbell, whose career as a lawyer and as an associate justice of the United States Supreme Court is one most remarkable in all judicial annals. A native of Alabama, he was born in 1811, graduated at the University of Georgia, appointed a cadet at West Point by John C. Calhoun, Secretary of War (a position he voluntarily relinquished when his father died because he felt it was his duty to go home and take care of his widowed mother), studied law and was admitted to the bar in 1829 by special act of the Legislature before he reached

his twenty-first birthday, practiced law, first at Montgomery and then at Mobile, where he soon became the leader of the bar. The trial of his lawsuits in the lower courts eventually took him to Washington, where his arguments before the Supreme Court made such a profound impression on the judges that they united in an unprecedented request to President Pierce to appoint him associate justice to fill a vacancy then existing in that tribunal. This the President did on March 21, 1853, and he was confirmed by the Senate four days later. He at once freed the few slaves he owned, took his seat on the bench, where his great ability gained for him nation-wide recognition. In 1861 he resigned and cast his fortunes with the South and was appointed assistant Secretary of War of the Confederacy. When Richmond fell in 1865 he was arrested and cast into prison, where he remained until President Johnson issued him a pardon as the result of the following letter from Judge Benjamin R. Curtis of Massachusetts:

> "I address you respecting Judge John A. Campbell with whom I was on the Bench of the Supreme Court and who is now a prisoner in Fort Pulaski. Though my intercourse with Judge Campbell ceased since my retirement from the Bench I have retained a strong regard for him, founded on his purity and strength of character, his intellectual power, his great attainments and his humane and genial nature." (P. 198.)

After his release, Judge Campbell, homeless and penniless, moved to New Orleans, opened a law office and for the second time achieved fame and success at the bar. His practice often carried him back as an advocate before the Court of which he had once been an honored member. He continued the practice of law for twenty years with unimpaired intellectual vigor. He died on March 13, 1889 and the Supreme Court the following month adopted resolutions in his honor, containing among other things the following:

> "That the Bar of the Supreme Court of the United States do hereby attest their admiration and appreciation of the great career of John Archibald Campbell as a leading practicing lawyer and as a Judge of the first rank, and do hereby commemorate his many public and private virtues, and that modesty and simplicity which were the chaste setting of his great intellect and learning."[1]

The author of *Four Score Forgotten Men* was born on a farm in Arkansas, September 7, 1874 and is a descendant of John Sevier, the first Governor of Tennessee. In addition to a number of other positions of trust and honor, he has served his native state as First Assistant Attorney General and Special Associate Justice of the Supreme Court in lieu of a regular justice who had certified his disqualification in a number of cases. In addition to his other activities he is the author of *Two Fighters and Two Fines,* a dual biography of Matthew Lyon and Andrew Jackson published in 1941.

JOHN W. GREEN*

1. 32 L. Ed. 1107.

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UNIFORM CODE OF MILITARY JUSTICE, EXPLANATION, COMPARATIVE TEXT AND COMMENTARY. By Frederick Bernays Wiener[1] Washington, D. C.: Combat Forces Press, 1950. Pp. 275. $3.50.

The average layman usually experiences considerable difficulty in obtaining the actual text of any law he may be interested in and, of course, when he does obtain it, finds difficulty in understanding it. The average soldier being also an average layman, at least as to law, has the same difficulty in obtaining a text of the military law, but the difference is that the soldier is very closely governed by that text in his daily life and must indeed understand it or face difficulties if not actual trouble.

Colonel Wiener's book is an effort to provide a ready copy of this text in its newest form (*i.e.*, the Uniform Code of Military Justice effective May 31, 1951) and in addition very enlightening comments from the Reports of the Drafting Committees. After each article of the new code, its source is shown, thus accentuating the changes and modifications made in the old law. Pertinent provisions from the 1949 Manual for Courts Martial are also given.

The first 24 pages of the book consist of an explanation by Colonel Wiener of the code in general and the history, meaning and significance of certain particular changes. This is very valuable, for Colonel Wiener has not only had a long and varied experience in Military law, but also was active in assisting the House and Senate Armed Services Committees when the code was being considered.

It is to be regretted however that publication of the book was not delayed until the 1951 Manual for Courts Martial could be referred to, since of course that new manual goes far in explaining and in many cases extending and supplementing the major changes in the new code.

The book will be useful to the ordinary layman for its text alone, but the more technical parts of it will prove of great value to the lawyer or judge advocate whose inquiry must go further into the history and sources of the law.

LEON D. HUBERT, JR.*

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DRED SCOTT'S CASE. By Vincent C. Hopkins. New York: Fordham University Press, 1951, Pp. 213. $4.00.

It is more a compliment to his predecessors than a discredit to Father Hopkins to say that this latest history of the Dred Scott case adds little, if anything, to what has already been written. But for one unfamiliar with the extensive plowing in this field here is a brief, concise, comprehensive and non-partisan resume of what was long ago a crucial controversy. The publisher's blurb notwithstanding, this is essentially a legal study—what it does in the fields of "politics, journalism and theory of government" is neither extensive nor penetrating and I am sure the author did not suppose or intend it to be. The main body of the book, indeed, is an analysis of the precedents for and against the Court's position on (1) negro citizenship (2) slavery in the territories and (3) the conflict of laws problem that arose when Scott moved from a free to a slave state.

The status of Father Hopkins within the Roman Catholic Church, some of his prefatory remarks, the fact that the book was written *cum permissu superiorum* and published by the Fordham University Press, suggest that this is an effort to exonorate the first Roman Catholic to become Chief Justice of the United States—to exonorate him in the face of what is now pretty generally recognized as unfair abuse. If indeed, such be the fact, Father Hopkins has done a fine, inpartial, though largely unnecessary job. But if, pursuing one of his own leads, he had emphasized certain political aspects of the case, he might have done Chief Justice Taney a service which very much needs doing.

Father Hopkins mentions the Clayton Compromise (passed in the Senate and killed in the House) which was designed to pass the slavery buck from Congress to the Courts. What our author apparently does not know is that the essence of that compromise was in fact subsequently adopted by Congress in the great Compromise of 1850 and again in the Kansas-Nebraska Act of 1854 and that virtually all of the leading statesmen of the day, including Lincoln and Douglas, expressly or by clear implication pledged themselves and their parties to accept the Court's decision whatever it might be. For it was obvious long before and indeed after *Dred Scott's Case* that Congress was itself too divided to pass upon the crucial issue (slavery in the territories) which everyone knew had to be decided. These and many related matters, too numerous for mention here, have occasionally been noted, but never very thoroughly investigated. Had Father Hopkins devoted his considerable talents to them it is pretty clear that he would have made a far better case for his prefatory assertion that "Public opinion appeared to demand that the Judges pronounce on [the question of slavery in the terri-