

July 1960

Book Reviews

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Recommended Citation

Book Reviews, 6 N.Y.L. SCH. L. REV. 370 (1960).

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BOOK REVIEWS

FELIX FRANKFURTER REMINISCES (*subtitle*: Recorded in Talks with Dr. Harlan B. Phillips). By Harlan B. Phillips. New York: Reynal & Company, Inc. 1960. Pp. ix, 301, and 8 (index). \$5.00.

The substance of this volume consists of a series of interviews, transcribed from recordings, held between the author and the subject personality some seven years ago. This project, the author explains, is part of an archival endeavor instituted at Columbia University, eleven years ago, to the purpose of accumulating "reminiscences by tape-recorded interviews and to file the resultant manuscripts together with supporting papers in a special collection for the use of future scholars." The design of this and its allied projects is to provide the means "whereby a subject, his memory, his accumulated papers and a trained historian are united in a joint enterprise—the creation of a memoir—invaluable elements of human history which might otherwise perish are preserved." The apparatus by which these reminiscences were drawn out consisted of a set of carefully prepared questions which Dr. Harlan B. Phillips evolved after a careful scanning and study of personal papers which escaped the vicissitude of inclination.

The materials of this volume span the Frankfurter years from public school days in Manhattan through to appointment to the United States Supreme Court by Franklin D. Roosevelt, following the death of Benjamin N. Cardozo, in the year 1939. Though the utterances are presented with due regard to chronological orderliness, they do not—nor does the author lay any pretensions to—possess the fulness of either a biographical or autobiographical work. The reader journeys with the Justice through his early years in New York, his law student days at Harvard, his service in the federal government especially under the aegis of Henry L. Stimson, the early years of teaching at Alma Mater, the return to Washington during World War I, and the Peace Conference which followed; the nineteen-twenties with the Zionist Movement, the Sacco-Vanzetti Case, the return to the Harvard Law School under the reins of Dean Roscoe Pound; and then on to the New Deal years with rejection of appointment to the Supreme Judicial Court of the Commonwealth of Massachusetts—on the conviction that the opportunities afforded by the Harvard Law School "were more significant than even membership" on that bench—and acceptance of his present berth on the High Bench in Washington.

A prefatory question is sufficient, in several instances, to elicit the substance of a chapter. Such is the case in: *Job Hunting; Industrial Relations and World War I; Zionist Movement; F D R and the New Deal; Supreme Court Appointment*; and, *Religion*. The chapter content, in a number of instances, does not flow from stated questions. Illustratively: *Harvard Law School [as a Student]; T[hodore] R[oosevelt]; Joseph P. Cotton; Supreme Judicial Court of Massachusetts; Oxford*; and, *Students and Traditions*. It is to be noted that though these foregoing reminiscences are not comprehensive of responsive categories, nevertheless they well serve the purpose of preserving a chronologically narrative style and do fill in otherwise void spaces of time. The remaining chapters revolve around one or more questions; e.g., *Opening [Years]; Student Body [at the Harvard Law School]; Junior to Mr. Stimson; Assistant to Secretary of War [Henry L. Stimson]; Holdover with Wilson[']s Administration; Call to Harvard; Liberty of Contract; House of Truth; The Mooney Case and Other Experiences; Morgenthau Mission; Harvard Law School; Paris Peace Conference; Election of 1924; Sacco and Vanzetti; England as Source [of Experiences]; and, Function of a Judge*.

Justice Frankfurter presents, *inter alia*, a penetrating and rich portrayal of English academic life as well as a comparative summary of English and American students.

These are based upon observations gained while occupying the George Eastman Visiting Professorship Chair of Balliol College. The year at Oxford he describes as the fullest year of his life—"the amplest and most civilized." The comments on legal education gathered from his experiences as a law student and then as professor here and abroad are well worth the reflection and consideration of all in the teaching fraternity.

With respect to the purely autobiographical aspects of the volume at hand, it is to be observed that the papers and addresses of Felix Frankfurter, covering the years 1913 to 1956, have been collected and edited on two separate occasions.¹ Further, the years 1927 to 1938 were productive of a number of published books.² There have been some

¹ *Law and Politics; Occasional Papers of Felix Frankfurter, 1913-1938* (edited by Archibald MacLeish and E. F. Prichard, Jr., with a foreword by Archibald MacLeish) New York: Harcourt Brace. 325 p. 1939.

Of Law and Men; Papers and Addresses, 1939-1956 (edited by Philip Elman). New York: Harcourt Brace. 364 p. 1956.

² *Mr. Justice Holmes and the Constitution; A Review of His Twenty-five Years on the Supreme Court*. Cambridge: Dunster House Bookshop. (Dunster House Papers No. 4.) 53 p. 1927.

The Case of Sacco and Vanzetti; A Critical Analysis for Lawyers and Laymen. Boston: Little Brown. 118 p. 1927. (See, *The Letters of Sacco and Vanzetti* (edited by Marion Denman Frankfurter and Gardner Jackson). New York: Viking Press. 414 p. 1928. *The Public and Its Government* (Yale Lectures on Responsibility of Citizenship). New Haven: Yale University Press. 170 p. 1930.

The Commerce Clause Under Marshall, Taney, and Waite (The Weil Lectures on American Citizenship). Chapel Hill: University of North Carolina Press. 114 p. 1937.

Mr. Justice Holmes and the Supreme Court*. Cambridge: Harvard University Press. 139 p. 1938.

In co-authorship, or appearing in collections:

The Business of the Supreme Court; A Study in the Federal Judicial System (with James M. Landis). New York: Macmillan. 349 p. 1927.

The Labor Injunction (with Nathan Greene). New York: Macmillan. 343 p. 1930.

The Case for the Jews (Felix Warburg and others). New York: Zionist Organization of America. 21 p. 1930.

Cases and Other Authorities on Federal Jurisdiction and Procedure (with Wilber G. Katz). Chicago: Callaghan. 769 p. 1931.

Mr. Justice Holmes; Contributions by Benjamin N. Cardozo, Morris R. Cohen, John Dewey [and others] (edited by Felix Frankfurter). New York: Coward-McCann. 241 p. 1931.

Mr. Justice Brandeis; Essays by Charles E. Hughes, Max Lerner, Felix Frankfurter [and others] (edited by Felix Frankfurter). New Haven: Yale University Press. 232 p. 1932.

Cases and Materials on Administrative Law (with J. Forrester Davison). Chicago: Callaghan, 651 p. 1935).

Earlier works:

A Selection of Cases Under the Interstate Commerce Act. Cambridge: Harvard University Press. 706 p. 1915.

The Case for the Shorter Work Day. New York. 2 v. 1916.

Hours of Labor and Realism in Constitutional Law. Cambridge: reprinted from the Harvard Law Review, v. 29. 353-373 p. 1916.

Criminal Justice in Cleveland (with Roscoe Pound). Cleveland: The Cleveland: The Cleveland Foundation. 1922.

State Minimum Wage Laws in Practice (with others). New York. 1924.

Later works:

The Permanence of Jefferson (in: *The Thomas Jefferson Bicentennial 1743-1943*). Washington: Government Printing Office. 1943.

Some Reflections on the Reading of Statutes. New York: reprinted from the

labors expended by scholars toward the general thesis of legalistic analysis.³ The field, however, remains fallow of a biography, definitive or otherwise, of a leading legal personality of the twentieth century. It is to be hoped that the researches of Dr. Phillips will be the impetus for the necessary scholarship to give us the prose portrait of a varied, highly productive, influential, and inspirational life.

Dr. Harlan B. Phillips has rendered invaluable service in preserving for posterity these snatches of personal history of which biographies are made. This is especially so where the language is that reserved for post-prandial coffee and brandy in the sanctuary of the billiard room—warm, free, and unrestrained; devoid of sanctimony, improbity, and veneer—qualities which make for prime biographical grist.

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PENSION FUNDS AND ECONOMIC POWER. By Paul P. Harbrecht, S.J. The Twentieth Century Fund 1959. Pp. 328. \$5.00.

The effect, the impact, and the influence of pension funds on the economic, political and governmental institutions in the United States is examined by Father Harbrecht in this significant book. The result of that examination is, according to the author, that pension funds are rapidly changing in an explosive manner the very core of Americanism as we have known it in this country for almost two centuries, yet this phenomenon of pension funds has still not been dealt with adequately by those in or out of our government who are able to influence or channel the impact of this explosion on the daily lives of each and every one of us.

A pension fund or trust is a separately set-up entity, generally by an employer, which has as its corpus cash, stocks, bonds and other papers or documents evidencing a right to receive income or money under certain circumstances, and is designed for the benefit under certain circumstances of a group of employees who are the beneficiaries of that pension fund. A pension fund is a means of achieving a type of economic security for an individual in the future. Its general makeup has been utilized in the past by the normal type of trust created during a person's lifetime or through a will. It is similar in many respects in its effect, although different in form, to insurance companies, mutual funds, trusts and holding companies. The tremendous growth of pension funds, both in wealth and in number, has been accentuated in more recent years by the enormous tax benefits which have been accorded this type of undertaking, primarily by the federal government, where the incidents of taxation are so important to a going business.

The author has primarily directed his attention to a factual review of the accumulation of wealth in pension funds and trusts into great bulwarks of power divested from their actual ownership so that today tremendous power is commanded by persons

Record of the Association of the Bar of the City of New York, v. 2. 213-237 p. (The Benjamin N. Cardozo Lecture No. 6.) 1947.

For other works, see note 1, *supra*.

³ *The Juristic Thought of Mr. Justice Frankfurter*, by Moses Judah Aronson. Journal of Social Philosophy, v. 5, p. 151-174. 1940.

The Constitutional World of Mr. Justice Frankfurter; Some Representative Opinions, by Samuel J. Konefsky. New York: Macmillan. 325 p. 1949.

Mr. Justice Frankfurter and the Administration of Criminal Justice, by Patricia Anne Edgeworth. (University of Chicago Thesis.) 163 p. 1955.

who do not own the property they command. Not only may these people in control be disinterested in that property, but in addition they generally have not been elected to control that property, and indeed for the most part are not accountable for their actions with respect to that property either to the beneficiaries thereof or to any governmental authority. The author's general theme to the effect that ownership and control of property are being divested from each other is not a new one, and was initially set forth by Messrs. Berle and Means in their work, *The Modern Corporation and Private Property* published in 1932, and the cudgels have been continued by Professor Berle from then to the present. Father Harbrecht's study is important for provoking the thought of all care about America's future for what it says with respect to the economic facts of life of pension funds, but this study is even more important for what it does not say as directly, namely that our political and governmental heritage likewise is being affected drastically by the rapid growth of pension funds and trusts without our being concerned about it.

Presently private pension funds and trusts total assets of nearly \$40 billion and are increasing at the rate of more than \$4 billion per year. Even greater forecasts of growth are predicted due to the multiplier effect of a trust fund and the initiation of new ones by both old and new companies alike. In addition to this type of "socialization of the wealth of capitalism" which Father Harbrecht comments upon, the lives of a working force of more than 15 million Americans and their families are directly concerned with the existence, administration and benefits of such funds, as are the lives of those who are not directly dependent upon pension funds but who indirectly must support them.

It is all well and good for an employee to be "covered" by a pension fund ostensibly designed to grant him and his family the security they desire when the more productive years of that employee's life have vanished, but it is quite another thing to have such a person rely on those benefits for his livelihood, and to his detriment have a pension fund mismanaged or disbanded at the sole discretion of an employer; likewise it is quite another thing to have this employee and his family receive pension benefits and to have those people who are not covered by similar plans actually pay for those benefits through higher taxes and higher prices for the goods which that employee has helped to produce during the period of his employment. Forty billion dollars worth of pension funds are not generated by beneficence alone; they are generated by higher taxes and higher costs which all of us as taxpayers and consumers must bear.

If these few introductory remarks serve any purpose, it is this reviewer's intent that they serve to indicate that pension funds are not administered or supervised by any public or governmental authority; they are not controlled by those people who are directly benefited by them, or by persons who actually own the property; yet pension funds which exist in a type of limbo are a powerful force—measured monetarily to be far in excess of one-half of our current national budget—and influence and affect each and every one of us without our electing administrators or trustees of those funds, or even having any knowledge of the supervision and control of that power.

Pension funds may be both a stabilizing influence on our economy and, at the time, be disruptive of it. Periodically pension funds are required to purchase income producing and capital increasing stocks, bonds and other instruments, and the author points out that pension trusts are currently buying nearly as much common stock as all individual purchasers together. As a result, money is channeled into those particular industries and businesses which in the judgment of the trustees or investment advisors of pension funds and trusts will produce those results regardless of whether any governmental authorities believe those segments of our economy "need" that money. This is entirely consistent with our capitalistic philosophy of having an individual entrepre-

neur make his own value judgments as to how to invest or spend his own money. However, the thoughts of Adam Smith in 1775 regarding an individual capitalist spending or investing \$1,000 worth of property which he owns, is different from the investing or spending of \$40 billion by individuals who do not own that property. Apparently this difference is not one of degree, but rather one of kind since \$40 billion worth of judgment is far more than our entire national peacetime budget. In addition, the purposes for which these pension funds or trusts were set up, namely the security of employees and their families, may or may not be properly served by the judgment of an investment advisor.

The author also points out that the difficulties in obtaining public disclosure of the operations and investments of pension funds is great, with each fund zealously guarding against disclosure of its own investments, especially since it has apparently spent a great deal of time, as well as a great deal of money, for professional investment consultation, to determine how its funds will be properly invested to achieve the utmost of security and at the same time the utmost in return. Were disclosure required, theoretically the advisory fees to investment counsel and other experts might be useless since the simple act of copying another's portfolio might be the more appropriate method of achieving a good investment policy. Again this position by those in control of pension funds may be consistent with that of Adam Smith in 1775 when the life of only one person hinged on the expenditure and investment of money, although in 1960 a reevaluation might be in order where the lives of 15 million employees in addition to their families hinge on the expenditure and investment of pension funds.

As the author points out:

"The pension funds are becoming one of the primary centers of power in the newly emerging social system. The concentration of power they represent is not the result of a drive for power itself but of social forces that have been at work for other purposes. The pension trusts are the product of the molding influences of our major institutions: the corporation, the government and the labor unions. Only in their relationship to these other institutions will we be able to understand the role they will play in our society."

In order to understand the role of pension funds as the result of these "molding influences," a first step should be the reading of this book as an intelligent and provocative study worthy of the attention of anyone concerned with the future of this country.

PHILIP BLOOM

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POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE. By Alexander Meiklejohn. New York: Harper & Bros., 1960. xxv, 166 pp. \$3.50.

In his latest book, Professor Meiklejohn, a well known champion of political liberties, deals with the problem of free speech. The First Constitutional Amendment aims to protect it, or rather, it forbids Congress to abridge it. What is the scope of this guarantee, and how effective, in practice, has it been? The injunction against encroachment on speech applies to lawmaking only; it did not prevent restrictive executive action. It may be reasoned that a government act, which would be unconstitutional as a formal law, cannot be legal in any other shape. But the Supreme Court has not, with any measure of consistency, supported this thought. It tends to distinguish between "tolerable" and "intolerable" speech, as so dramatically expounded in the "clear and present danger" theory. With this theory, and the arguments behind it, Professor

Meiklejohn takes strong issue. He disputes Justice Holmes' view that the First Amendment guarantees free belief but not free action. Every speech, he reminds us, represents an "action," and if the First Amendment means anything at all, it means to protect "action." Freedom of belief, he agrees, is the fundamental right envisaged by the First Amendment. Again, the guarantee had no meaning if it would not extend to unpopular, even undesirable, beliefs. He cites the example of Socrates to show that unabridged freedom of belief need not encourage lawlessness. Socrates was so deeply attached to this freedom that he would not bargain it away for his life, yet he refused to escape from jail, because his sentence had been passed by lawful procedure. The author's reasoning, for all its originality, seems somehow forced. Not everyone has the moral stature of a Socrates. The stark fact remains that limitless freedom may in the end destroy itself. Historical examples, some of the recent past, have shown that democracies have been strangled by democratic means; the Trojan horse aspect of freedom is too grim to be overlooked. We are forever facing a complex and perplex dilemma: Permitting dangerous speech may finally abolish all liberties; curtailing it could save our freedom while hurting it in the process. Of the two risks, the latter one still seems the lesser. The author's formula for solving the dilemma is not easily discernible, but he appears quite adamant in maintaining full freedom of speech. He draws an interesting parallel between the First and Fifth Amendments. The right of speech is often classified as one of the liberties for which the Fifth Amendment allows curtailment "within due process." Yet in Professor Meiklejohn's view, the First Amendment goes beyond the concept of limitable rights; it covers the area of "public discussion," in contrast to the Fifth which deals with "possessions." In simpler terms: the liberties of the First and of the Fifth Amendments are of a different kind and governed by different rules; if the "due process" test were applied to the right of speech, then, to all intents and purposes, the Fifth Amendment would cancel the First. Speech, which reflects free belief, must remain inviolate; this thesis is the author's credo throughout the book. Quite consistently, he does exempt from protection any speech which is not free in itself, like advertising talk which, as the author puts it, is "in commercial bondage." His observations, even if they occasionally stretch a point, are always stimulating and show great power of thinking. They probe deeply into the anatomy of our Constitution. To Professor Meiklejohn, the Constitution is the sublimation of the people's will; it is not—to cite a well worn phrase—"what the Supreme Court says it is," nor is it an extension of British principles. The Parliament may be above the Constitution, but Congress certainly is not.

To anyone who is interested in a better understanding of political freedoms and its constitutional foundation, this challenging and forcefully written book is mandatory reading.

RUDOLF H. HELMANSON

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MOTIONS DURING TRIAL. By Howard Hilton Spellman. Prentice-Hall, Inc. Pp. 362. \$15.00.

This book is a revelation. It is not generally realized that in the course of one trial an attorney will probably make more motions that he will make at Special Term in a year. Furthermore, the motions made during trial must be made as the occasion arises, right then and there, without time for research or preparation. The words used must be such as will adequately convey the nature of relief sought, as well as the grounds on which it is based, and thought must be given to its effect not only upon the Court but

also upon the jury. Failure to state the motion properly on the record may constitute a waiver of the legal point or render it insufficient for review.

In this volume the author sets forth 317 separate and distinct forms of trial motions which are in common use in every trial. All are clearly and concisely stated in proper form to accomplish the desired end. These forms take one through each and every step in the trial and are arranged in sequence corresponding to successive stages of a trial in progress.

These forms, excellent as they are, are but the least which this book offers. Each form is annotated with citations to recent and pertinent cases, and a succinct text explains the why and wherefore of each motion, the pitfalls to be avoided, and the pertinent legal authorities.

The author is a very experienced trial and appellate court practitioner and the book is studded with his keen observations on trial tactics. His comments are forthright, practical and to the point. The author is always cognizant of the difference in making a motion in a non-jury as compared to a jury trial. He points out that when a jury is present the motion should be stated in colloquial language wherever possible. For example, a motion to strike out an answer, upon the ground that it is not responsive to a question can be stated, thus, when the case is tried before a judge without a jury:

"I move to strike out the answer upon the ground that it is not responsive."

The same objection, when the case is being tried by a jury, is better phrased as follows:

"I move to strike out the answer of the witness because it is not an answer to the question I asked and has nothing to do with the case. I ask your Honor to instruct the witness to answer the questions put to him and I further ask you to advise the jury to pay no attention to the answer the witness just gave."

This work actually constitutes a guide to trial practice, placing at the trial lawyer's fingertips the tools which he needs, ready for use. It can be used both in planning trial tactics before trial as well as during the trial itself. It was ably written by a trial lawyer for use by trial lawyers, and will be greatly appreciated by them.

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