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Recent Legal Lit

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RECENT LEGAL LITERATURE

THE AMERICAN CONSTITUTIONAL SYSTEM. By Westel Woodbury Willoughby, Associate Professor of Political Science at the Johns Hopkins University. New York: The Century Co., 1904. pp. 318.

This book constitutes an introduction to a series of eight volumes, issuing under the general title, "The American State Series," the series being prepared under the editorial supervision of the author of the volume under review. The subject covered by Professor Willoughby is a wide and intricate one, and is full of speculative difficulties which are too likely to carry an author far afield unless he is constantly on his guard against digression into philosophical discussions. And we confess to having felt some misgivings on this very point when taking up the book, in view of the very able but academic treatise on "The Nature of the State," published by him some eight or nine years ago, in which his close logical power and wide acquaintance with abstract theories of political philosophy were devoted to a purely speculative end. But such misgivings have proved wholly groundless. Indeed, this book excellently demonstrates how valuable a thorough mastery of elementary philosophical concepts may become, as a groundwork for a lucid analysis and exposition of practical political problems. Throughout the volume the main purpose is never lost sight of, and there is no confusing use of technical terminology, no profitless rambling into the esoteric domain of abstract politics, no tendency to subordinate clearness and directness to mere profundness of scholarship. Professor Willoughby has undertaken to give a brief and logical account of the origin, growth and character of our constitutional system, and he has succeeded admirably well.

Enough is said by way of introduction respecting the nature of a federal state to give a sufficient general setting for the particular topics that follow. The question of the divisibility or non-divisibility of sovereignty, as between the state and national governments, which has been the occasion of so much useless and tiresome controversy, is clearly, and, we think, satisfactorily disposed of, both theoretically and historically, and in connection therewith, the question of the right of nullification and secession.

But the chief merit of the book—and here, of course, it fulfills its main purpose—is the clearness and ease with which it unravels the tangled elements of our complex system of constitutional government, and presents to the reader, in delightful simplicity, a well balanced and co-ordinated survey of the whole. What are the rights of the states as against the national government, and vice versa? Within what limits is each supreme? What power of supervision has the United States over state action? What power has the United States to acquire territory, and in what modes and for what purposes may it be exercised? What are the political and civil rights of the inhabitants of the territories? What are the incidents of citizenship, both national and state? These questions are fundamental, and a reasonable acquaintance with the answers that have been worked out through more than a century of national life, is invaluable to every American citizen. And we

know of no book which presents in so available a form the history and present status of this whole subject, as the book now before us. The decisions of the United States Supreme Court are of course the basis for such a treatise, and they have been carefully studied and well presented. The recent startling innovations in constitutional interpretation growing out of our Spanish War are discussed with vigor and impartiality in their various phases, the development of this branch of constitutional law being carried down through the case of *Gonzales v. Williams*, decided last year. In the present period of stress and strain, both domestic and international, into which recent events have carried us, such a book as this is particularly opportune, and a reading of it will do much to make clear the real significance of present national problems.

EDSON R. SUNDERLAND.

HANDBOOK OF THE LAW OF PUBLIC CORPORATIONS. By Henry H. Ingersoll, Dean of the University of Tennessee School of Law. St. Paul: West Publishing Company, 1904. pp. xvii, 738.

Judge Ingersoll has perhaps been as successful as it is possible to be, in his effort to treat in such small compass of subjects as important as those covered by the title "Public Corporations." He has followed the orthodox classification of public corporations into quasi, municipal and quasi public corporations. This is, of course, a field so large and one bristling with so many unsettled problems, that one could not hope to cover it exhaustively in a book of seven hundred pages. And so we find that Judge Ingersoll has not endeavored to trace the history of his subject nor to discuss many of the legal problems concerning it which have grown out of very recent conditions. For example, but one page (p. 608) is given to the question of municipal ownership, a problem which seems likely to become, if it is not already, the burning issue in municipal life. But the book should be estimated by the degree of success with which it serves the functions for which it was designed. It is not an original contribution to the literature of the subject, for it follows rather closely the treatment of the same subject by Judge Dillon and others, nor has it to any extent developed the field, for the author has made little use of recent case material, but it is a careful and concise statement of the elements of its field of law as developed in earlier works, which merits commendation and which should prove distinctly useful as a text-book for use in schools in which these topics are treated by text in one course. Perhaps a just criticism of the book is that comparatively few recent cases are cited. As an example of insufficient treatment in this respect may be mentioned the subject of the effect of recitals in municipal bonds, which are unauthorized or otherwise defective, upon the validity of such bonds in the hands of innocent purchasers. This is an important and much discussed topic, but Judge Ingersoll, in his treatment of it, has cited no case decided within the last fifteen years, and the latest United States Supreme Court case cited by him on this point is *Dixon County v. Field*, 111 U. S. 83, decided in 1884, thus entirely overlooking the important case of *Waite v. Santa Cruz*, 184 U. S. 302, in which the whole question is exhaustively discussed and put at rest so far as our highest court is concerned. Notwithstanding these

defects, the book contains a statement of the law on the subject in more concise form than is to be found in any other work of the same scope; and besides its value as a book for students, it should be distinctly useful to practitioners, citing as it does more than 6300 cases. Leading cases are cited in large type, and as the selection seems to be a discriminating one, that feature adds to the book's usefulness.

HENRY M. BATES.

STREET RAILWAY REPORTS, ANNOTATED. Edited by Frank P. Gilbert. Albany: Matthew Bender, 1904. Vol. II, pp. xix, 1051.

In this second volume, a number of faults that were pointed out in this Review (III, p. 171) upon the appearance of the first of these reports have been corrected. Now, the citation to the official reports is given where available. The index has been condensed and the references increased and improved. However, cross-references like "etc.," as under the head of Negligence, are not very definite and should be omitted. Some other changes for the better can also be noticed.

This volume contains more cases than the last one, and the notes are more full and complete. The principal annotations are: Fellow Servant Rule as Applied to Street Railways, Eminent Domain by Street Railways, Imputed Negligence, Municipal Control of Street Railways, What Deemed Street Railways, Horses Frightened by Negligent Operation of Street Car, Opinion Evidence as to Speed, Street Car Transfers, Aged, Infirm and Helpless Passengers, Injury to Alighting Passengers. A feature of these, lacking in other annotated reports, is the citation of text-books, so that not only the opinions of courts are presented, but also the labor of specialists. It would be well when adducing the authority of treatises to give the edition when they have run through more than one. So on p. 394 the quotation from Shearman and Redfield cannot be found in the third edition of their work on Negligence, but is in the fifth edition. The notes are exhaustive in regard to street railway decisions, and should be of value to those engaged in that kind of litigation.

GUSTAV STEIN.

THE UNITED STATES AND THE STATES UNDER THE CONSTITUTION. By C. Stuart Patterson. Second Edition. With Notes and References to Additional Authorities by Robert P. Reeder. Philadelphia: T. & J. W. Johnson & Co., 1904. pp. xli, 347.

In absence of a larger preface than a mere note of acknowledgment, we must look elsewhere for the purpose of the book. It would appear from the title and from the opening paragraphs that an attempt has been made to define and limit the powers of the United States as against the states, and *vice versa*. As stated in the preface to the first edition of this work in 1888, then called Federal Restraints—omitted in this revision for some unknown reason—the object is to show "what the relations of the United States and the states are under the Constitution, as judicially construed by the court of last resort." The author has restricted himself to the decisions of the United States Supreme Court, and even to illustrate certain points has (so far as may be noticed) only twice cited opinions from state tribunals (pp. 125, 131). This

is to be regretted, as it excludes many valuable constitutional decisions of some of the ablest judges in the judicial history of the country, and might have illuminated a number of passages more than references to *Mogul S. S. Co. v. McGregor* (Eng.), Lecky's Democracy and Liberty, Mrs. Green's Town and Country Life in the XV Century, and the Autobiography of Senator Hoar (§ 53). In carrying out his plan the author has discussed the cases under the following heads: The Implied Powers, Taxation, Regulation of Commerce, The Impairment of the Obligation of Contract, Ex-Post Facto Laws and Bills of Attainder, The Prohibition of State Bills of Credit, State Compacts, Fugitives from Justice, The Judicial Power, Rights of Person and of Property, The Federal Supremacy and The Reserved Rights of the State.

As a treatise or law text the book cannot be called a distinct success, and criticism may be made both of the manner of writing and the method of discussion. The work has varied contents. It contains, in addition to the pertinent subjects, economic theories, a panegyric on the Supreme Court, criticism with the most partisan enthusiasm, and similar matter foreign to the nature of a text-book. No particular regard has been paid to style. It consists largely of long paragraphs composed of short briefs of cases loosely fastened together. So § 60 is five pages long; § 117 has eight pages; § 131 contains eleven pages. These are but samples of the extreme lack of rhetorical arrangement. In § 52, the writer, speaking of the state police power, commences twenty-seven sentences by "a state may," and in § 131 there are fifty-three sentences beginning "it may." Constructions of like character abound throughout the book, making most monotonous reading. Except in a few instances there appears to be no co-ordination of ideas. No principles are stated, no rules found around which to group the decisions or which may be used as a guide to future action or opinion. What may or may not be taxed is indiscriminately shoved into one section (p. 45). The whole subject of equal protection of the laws is contained in a long paragraph (§ 131), where every ruling cited appears of equal importance. This lack of ability to give the proper value to matters appears elsewhere. So while the most important decisions are passed over with mere mention, the writer has found space to give us a treatment of the theory of the judicial system at the common law in five pages of elementary discussion. In a book so variously limited, such matter for lawyers is superfluous, and even for others is the repetition of truisms. What the author himself calls the most important case that ever came before the Supreme Court, *Ex parte Milligan*, he passes over in eight lines (§ 111), but he has devoted two pages to a eulogy of the Federal judiciary (§ 104) with which everyone agrees, but which has no apparent logical foothold in this book.

The indeterminate way of hanging together the most far-reaching decisions, contrasts strangely with the elaborate argument on propositions which arouse the combativeness of the author. To the recent and important case of *McCray v. U. S.*, 195 U. S. 27, scant notice is given in a short reference and a passing mention in a footnote (pp. 25, 251), altogether inadequate to its weight and consequence. But to the Insular Cases a different treatment is accorded. Here the writer becomes interested. He has stated his side of the question ably indeed, and the several pages which he has filled with his

arguments (pp. 11, 13, 19) present a valuable brief. However, to one who is concerned in knowing the law as laid down by the majority of the court, this partisan view is of little aid. The writer is too much taken up with establishing his thesis opposing the decision to do full justice to the opinions of the five judges. The material point of the *Lottery Case*, 188 U. S. 321, has been overlooked. The question earnestly discussed whether *regulate* in the Constitution can be extended to mean *prohibit* is not commented upon in the two brief references to the litigation (pp. 64, 119). On the other hand, the discussion of the Anti-Trust Act and *N. S. Co. v. U. S.*, which in a great part rest upon this proposition (see *Lottery Case*, 188 U. S., p. 359; also *N. S. Co. v. U. S.*, 193 U. S., p. 336), takes up about nineteen pages (pp. 114-133). It may be well to examine for a moment to what the author has devoted so much space. At considerable length the writer denies the necessity of a Federal anti-trust law, for the reason that by rules of political economy the trust prices can never become extortionate because "intelligent managers of a successful business" will never advance them to a point where the "large amount of uninvested capital seeking profitable employment" will be invited to compete (p. 117). Aside from the fact that such arguments have no place in the book, experience has disproved the writer repeatedly. It is only necessary to point to the continued depredations of the Beef Trust (see e. g., *State v. Armour Packing Co.*, 173 Mo. 356) and the disclosures made in the recent war on the Standard Oil Company by the State of Kansas to show the fallacy of the theory and to prove again that law moves with experience. Another objection to the Federal act stated in the text is that action by the states is appropriate and efficient. This remedy has been proved inadequate. 2 MICHIGAN LAW REVIEW, 358; 3 Id. 264. The author would deny any particular value to legislation which seeks to regulate trade (p. 117), and he would rely more upon the wisdom of those in whom, by reason of organization, oppressive powers of monopoly are lodged than upon the sense and needs of the people as drafted into their laws.

These are some of the objections to the views and results presented by the author. The book is little more than a digest of the decisions, and their import is not always well indicated. The purpose of the book to show the powers of the Federal government and those of the states under the Constitution is only so far attained as a bare enumeration of the decided cases shows them. As for any guiding principles to find proper lines of demarkation of the orbits of these sovereignties, or principles generally, the reader is left to his own resources.

It would not be just, however, to end without calling attention to some of the more valuable features of the work. The notes are very rich and contain nearly all the late cases on the topics covered. As a reference digest the book will have its worth. Occasionally, also, the text embodies an analysis that is striking in its clearness. Such is the one of the decisions under the Anti-Trust Act (pp. 123-129), even if its value is slightly impaired by the bias of the author (pp. 129-133). These efforts, and the fact that the writer can state his own position so lucidly, make it a matter of regret that he has not oftener used that ability to bring out the views of the Court, which, after all, is one of the principal considerations in a law book. GUSTAV STEIN.