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Background of Administrative Law (Book Review)

Edward D. Re

of St. John's University School of Law in 1928 when he compares the law to a flirt who like other beauties "can speak with a double meaning, and is not above playing a sly trick on those whose sighs and service are offered at her feet." [8] He warned the newly graduated audience that "Our Lady of the Common Law . . . is no longer an easy one to please. She has become insatiate in her demands. Not law alone, but almost every branch of human knowledge, has been brought within her ken, and so within the range of sacrifice exacted of her votaries. . . ." [9]

Cardozo's stature grows with the passing years and this volume though replete with the wisdom of the ages will prove upon careful reading to be also as fresh and timely as tomorrow's newspaper. The validity of the liberal ideal, his life illustrates and his philosophy of law illumines. Publication of his collected writings nearly a decade after his untimely death is appropriate recognition of his tremendous contribution to the literature and philosophy of American Law.

SEYMOUR LAUNER.*

BACKGROUND OF ADMINISTRATIVE LAW. By Milton M. Carrow. Newark: Associated Lawyers Publishing Company, 1948. Pp. ix, 214, index.

When your reviewer first heard that an up to date treatise had been written on the subject of administrative law, in the hope that the book would to some extent satisfy the long felt need of the student of administrative law, and of the general practitioner, he immediately proceeded to obtain a copy. The new book was entitled, *Background of Administrative Law.* The title seemed to create an uncertainty as to its contents. It was believed, that in all probabilities, the author was primarily concerned with the historical background of the subject. A reading of the book revealed that the author did not limit himself to an historical background, or to a treatment of the growth and development of administrative law, but rather, treated some of the main headings of the entire field of administrative law.

In the Preface, the author states the objective to be as follows: [1]

"This book is intended to present a synthesis of the fundamental principles underlying the vast body of cases, statutes, rules and orders which constitute the field of administrative law. There is no dearth of discussions on isolated aspects of these principles but there has been little effort to treat them in a unified manner. It is the aim of the present work to achieve this objective in some measure." The author further states that, ". . . an effort is made to describe the growth of the administrative process, to define the subject of

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[8] P. 87.
[9] P. 88.
* Member of the New York bar.
[1] P. v.

administrative law and to clarify the essential elements of its confusing terminology." [2]

The author is to be commended for this well written little book that states in clear and accurate language the rudimentary principles of administrative law. The finished product might perhaps be called "Principles of Administrative Law," or a "Preliminary Survey of Administrative Law," for it gives the reader an orientation and an introduction to the field of administrative law. Perhaps it was in this sense that the author intended the title, for the book does give the reader a certain background that qualifies him for further study of the subject. It would be too much indeed to expect that a book containing 166 pages of text could possibly cover all of the various topics of this ever-expanding body of law. However, the topics covered, by and large, are discussed admirably and adequately.

The book contains as appendices, the Federal Administrative Procedure Act,[3] the "Model State Administrative Procedure Act," [4] drafted by the National Conference of Commissioners on Uniform State Laws, and a bibliography.

Mr. Carrow's position on the question pertaining to the necessity for the existence of the many "administrative tribunals," is made quite clear. He states that, ". . . castigation of the administrative process as a sinister infiltration undermining our tripartite form of government is not only unreal but futile." [5] After a brief survey showing the increased use of the administrative process in the performance of governmental functions, the author states:

"The power lodged in administrative agencies is the most important aspect of government today. Its growth, however, has been in response to need and not by malicious usurpation of power." [6] Actually the great legal problems of administrative law do not deal with the question of the necessity of these agencies and commissions, but rather, deal with the method and extent of control to be exercised over them. Conceding the positive need of administrative agencies, the concept of due process of law—the basic heritage of our jurisprudence—cannot vanish with the advent of the expanding administrative process. It is certainly a desirable goal to attain, as some state, "efficiency and economy" in government, but are individual rights and liberties to be sacrificed in the attainment of this standard of "efficiency and economy"? Surely this standard is not to be a substitute for the historic concept and reality of due process of law. Referring to this problem, conventionally dealt with

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[2] P. vi.
[3] Appendix A.
[4] Appendix B.
[5] P. 5.
[6] P. 12. For an interesting comparison, see Arnold, *The Role of Substantive Law and Procedure in the Legal Process,* 45 HARV. L. REV. 617, 624-625 (1932), wherein the author declares: "The distinction between bureaus and courts is important. Courts are bound by precedent, and bureaus are bound by red tape. . . . bureaus in allowing themselves to be bound by red tape do so out of pure malice and lack of regard for the fundamentals of freedom, because they have taken no oath not to violate the rules and analogies of the past."

under the heading of "Judicial Review," the author asserts, that, "The rule of law is not the same concept today that it was in the past." Referring to the famous sentence from the Massachusetts Bill of Rights about "a government of laws and not of men," the author quotes Woodrow Wilson who wrote: "There was never such a government. Constitute them how you will, governments are always governments of men, and no part of any government is better than the men to whom that part is entrusted." [7] Surely the statement is true as a problem pertaining to the choice of personnel, but still the question of the availability and scope of judicial review is not answered. When and under what circumstances may there be a resort to the courts, and what shall be the scope of review of administrative action when a violation of fundamental rights is asserted? What is in origin authority may soon become sheer power, and may soon thereafter be abused at the expense of the rights and liberties of the citizen. In such a case what is the remedy available to the person aggrieved? This important phase of administrative law is not treated. It was this view of administrative law that interested Ernst Freund.[8]

The author continues: "In a democratic state, law is not a self-sufficient or transcendental body of principles which requires only the application of the judicial mind to reveal its truths, but a dynamic set of rules to which all are subject, which can be changed, made and unmade by the men in government who have their ultimate source of authority in the people acting through their established political organization." [9] Are these "men in government" of whom the author writes, members of the legislature, or are they the administrators? How does the author propose to have the men in government change, make and unmake this "dynamic set of rules"? It is explained that this means "rules of conduct founded in reason and fairness by which administrative officials must govern themselves in exercising their powers. Such rules of conduct obviously cannot be left to haphazard development by the case to case methods of the courts, often beclouded by sententious and ill-adapted concepts." [10] There surely exists quite a gap between those that regard our courts as intruders impeding the administrative process, and those who feel that the courts already have gone too far in according the administrative pronouncement a degree of finality not warranted by our system of law and government. A treatment of administrative finality and scope of judicial review does not seem complete without a discussion of the doctrine expounded in the *Hope Natural Gas Company* case.[11]

At the end of most of the chapters there is found a "Conclusion," in which the highlights of the chapter are summarized.

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[7] P. 161.

[8] See Vanderbilt, *One Hundred Years of Administrative Law*, 1 LAW: A CENTURY OF PROGRESS, 1835-1935 (1937) 117, 121.

[9] P. 161.

[10] *Ibid.*

[11] Federal Power Commission v. Hope Natural Gas Company, 320 U. S. 591, 88 L. ed. 333 (1944); *see also* Colorado Interstate Gas Company v. Federal Power Commission (No. 379), Canadian River Gas Company v. Federal Power Commission (No. 380), 324 U. S. 581, 89 L. ed. 1206 (1945).

Although, with few exceptions,[12] the book deals primarily with the federal administrative law problems, the principles of law stated are equally applicable to the administrative law problems of the various states. The discussion of the Federal Administrative Procedure Act in those situations where the Act has sought to cope with some of the problems raised, is an excellent feature of the book.

Background of Administrative Law, appearing at a time when a positive need exists for a better understanding of the problems of administrative law and what has sought to be accomplished by the Federal Administrative Procedure Act, is a book that doubtlessly will be welcomed by the student of administrative law and by the general practitioner.

EDWARD D. RE.*

CASES AND MATERIALS ON SECURITY TRANSACTIONS. By John P. Maloney and Harold F. McNiece. New York: St. John's University Press, 1947. Pp. xi, 738, index. $8.00.

In this book the authors, following the present tendencies in legal education, include materials which traditionally appeared in independent law school courses under the headings Suretyship and Mortgages. The success in recent years of similar volumes, such as *Cases and Materials on the Law of Credit Transactions* by Dean Sturges of Yale and *Cases and Other Materials on Security* by Professor Hanna of Columbia, bears out the soundness of such an approach. While the numerous security transactions cognizable by the law often differ in syntax and legal principle, yet the policy considerations involved are essentially the same. Since it is the effect of the transactions upon basic economic values of the commercial world that is of utmost importance, it would seem desirable to inculcate in the student a knowledge of the essential nature of the security transaction as such, rather than to weigh him down with a multiplicity of varying legal concepts.

The sections of the book devoted to the law of personal security have been edited primarily by Professor McNiece. The plan of organization is first to analyze the fundamental nature of the contract, and then to consider the relationships of rights and duties arising from it. The rights of the surety against the principal, the rights of the creditor, and those of the cosurety are dealt with in detail, as are the defenses of the surety. A section has also been included relating to the obligations of the surety toward third-party beneficiaries. This phase of the law, while yet in a somewhat amorphous state, is

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[12] See p. 84, note 71, wherein is stated the holding of Staten Island Edison Corporation v. Maltbie, 296 N. Y. 374, 73 N. E. 2d 705 (1947). Another recent New York State decision that perhaps warranted treatment is New York Post Corp. v. Kelley, 296 N. Y. 178, 71 N. E. 2d 456 (1947).

* Instructor in Law, St. John's University School of Law.