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The American Doctrine of Judicial Supremacy (2nd Ed.) (Book Review)

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adoption of the Uniform Sales Act. In addition to the lawyer-like presentation of the case and statutory law on the subject, the writer has given considerable attention and thought to our swiftly changing economic system and to the social and historical background which give rise to the present-day trends in the administration of this and other branches of our jurisprudence.

The decisions and the frequent statutory references are carefully interwoven with a thread of interesting comment and we believe that the time and labor expended upon this effort were well spent and that it merits high praise as a textbook, a ready reference and a complete and succinct analysis of the New York Law of Sales.

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THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY. Second edition. By Charles Grove Haines, Ph.D. University of California Press, 1932, pp. 705.

It cannot be too often emphasized that the American system of judicial control of legislative and executive action is peculiarly American, both in conception and practical application. Americans tend to get the idea that because with us the Supreme Court of the United States may declare acts of coordinate bodies to be unconstitutional and therefore void, similar judicial powers are exercised by high courts in other countries. The English doctrine of legislative omnipotence, while taught in our elementary schools, seems to us to some extent unnatural. Almost instinctively we have come to feel that in cases of a conflict the decision must rest with the Court, and even the increasing number of five-to-four decisions has failed to make the average American realize that we are governed essentially by the Court rather than by the legislature. The advent of the New Deal, with its necessary legislative innovations, has caused speculation as to the reasoning the Supreme Court will apply to the constitutional obstacles that will inevitably be raised; and many now see more clearly than ever before that in the last analysis the problem of determining whether the New Deal will or will not stand, will be a judicial problem, rather than legislative or executive. Every fundamental change in our state and federal laws affecting property rights, every legislative effort to readjust the law of the land to the pace of changed economic conditions, runs the judicial gauntlet.

This volume renders an important service by giving a clear and lucid account of the relations between the judiciary, the legislature and the executive in countries other than our own, and by comparing these relations with the American doctrine of judicial supremacy. Perhaps nowhere so clearly as in the United States has the Court secured so large a measure of control over domestic affairs and so important a veto power over legislation, both state and national. There is a familiar note in the protest expressed as early as 1784 against the assumption by the Courts of powers here under consideration: "The

state, instead of being governed by representatives in the general assembly, is subject to the will of three individuals who unite in their own persons the legislative and judicial powers, which no monarchy in Europe enjoys."[1]

Dr. Haines, in an exhaustive and erudite manner, traces the history of American judicial supremacy and gives a complete account of the way in which it became fixed in our constitutional traditions. He also explains the various constitutional views with regard to the power of the judiciary in American life.

For law students the most significant part of the work will, of course, be the account of judicial review since the Civil War and the rise of the importance of the Fourteenth Amendment in American constitutional law. The line marked out by the phrase "due process of law" has involved judicial statesmanship of the highest order and Mr. Haines gives a sympathetic account of the profound manner in which this task was performed by the Court. He is fully aware of the uncertainties that still lie ahead in constitutional theory, and the difficulties which the Court has experienced in setting up positive standards with regard to the limits of the police power in state courts. As America embarks on new economic experiments, it is believed that the Constitution will be found to possess that same flexibility which has made it possible in the past for the Court to find in its text and spirit a safe guide for the destinies of the nation. From a rural and agricultural community, sparsely populated, the United States has become the greatest industrial empire in the world. The founders of the Constitution never envisaged the unparalleled industrial development that took place under its ægis. Little did they dream that it was destined to be regarded as the most important political instrument of modern times. The Supreme Court has been able, by sound theory and logical development, to interpret the original tradition as established by the Constitution itself so that it has been found equal to all changes of our social and economic life. There is great hope, strengthened by its recent pronouncements, that the Court will again find itself able to steer the American ship of state through the rocky shoals of the new economic experiment without too greatly scarring the hull of that majestic vessel.

Decisions, state and federal, which deal with constitutional questions, range the gamut of our whole national life. They touch the political, social and economic experiences of the republic. The courts have exhibited, in the main, a prescience that is truly startling. The journey to judicial supremacy winds its long road from the initial step in Virginia, in 1778 (*re* Josiah Phillips)[2] and in the Federal Courts in 1792 (*re* Hayburn's case),[3] to the latest declaration in the New York Court of Appeals upon the Banking Moratorium Act (March 12, 1931),[4] and in the Supreme Court upon the Minnesota Mortgage Moratorium (Jan. 15, 1934).[5] The author traces the journey with unusual skill and a knowledge of the road and its by-paths that only a trained traveler could

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[1] G. J. McREE, THE LIFE OF JAMES IREDELL, pp. 169, 170.

[2] — Va. —; (1896) 1 AM. HIST. REV. 444.

[3] 2 Dall. 409 (U. S.).

[4] Moses & Berney v. Guaranteed Mortgage Co., N. Y. L. J., March 21, 1934.

[5] Home Building & Loan Ass'n v. Blaisdell, 278 U. S. (5 Adv. Sheets) 255, 54 Sup. Ct. 231 (1934).

possess. The faltering step of judicial adventuring has given place to the sure tread of judicial supremacy.

Professor Haines strips the American doctrine of judicial supremacy of all mystery by a scholarly and analytic study of the historical material. His book is a significant and valuable contribution to legal literature.

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THE LEGAL EFFECT OF ANTE-NUPTIAL AGREEMENTS IN MIXED MARRIAGES. By Rev. Robert J. White. Preface by Clarence E. Martin. Philadelphia, Pa.: Dolpin Press, pp. viii, 80.

The Catholic Church frowns on the marriage of one of its members to a non-Catholic. This is because the Church considers the primary purpose of matrimony to be the procreation of children and the rearing and upbringing of such offspring in accord with her teachings. Naturally where one of the parties to a union is not a Catholic, he will be unsympathetic to the fostering of that faith in his children. Thus it is that the Church of Rome refuses to marry one of its members to a non-communicant without his absolute promise to the other party that in consideration of marriage the children of the union will be educated in the Catholic religion and furthermore that the Catholic party shall not be interfered with in the exercise of religious duties. Concerning the legal enforceability of such agreements as these, Father White, Professor of Law at the Catholic University Law School, has written this interesting little book.

The author holds that the mutual promises of the parties constitute a valid contract which is of such a nature that Equity will decree its specific performance.

Legal precedent is always of paramount importance both to lawyers and courts. It is to this subject which the writer first directs the reader's attention. A careful analysis of the various English and American cases reveals a startling lack of actual authority, as distinguished from dicta, on the subject. The few decisions, actually in point, are shown to be based on prejudice as well as faulty reasoning.

With the first great hurdle overcome, specific performance of the ante-nuptial agreement is reviewed in light of pure legal logic. Into the lawyer's crucible are thrown the mutual promises, proper in form, the consideration spelled out of these promises (free practice of religion and education of the children of the union in that religion by one party against marriage and a change of status by the other), finally the legality of the undertaking and from these the valid contract is moulded. Having demonstrated the existence of a good legal undertaking, the writer states the case in favor of an equitable decree of performance. The nature of the right involved, which Dean Pound has denominated a "right of personality," brings forth a learned discussion of the modern light in which Equity views such a claim. The ancient doctrine