

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1932

Book Review (reviewing Felix Frankfurter & J. Forrester Davison, Cases and Other Materials on Administrative Law (1932))

Ernst Freund

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Ernst Freund, "Book Review (reviewing Felix Frankfurter & J. Forrester Davison, Cases and Other Materials on Administrative Law (1932))," 46 Harvard Law Review 167 (1932).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

WORKMEN'S COMPENSATION ACTS — RECOVERY AGAINST THIRD PARTY — IMPLEADING NEGLIGENT EMPLOYER AS JOINT TORTFEASOR. — A workmen's compensation act provided that after an employee had accepted its provisions, he should have no other right against his employer, and the latter should be subrogated to the employee's rights against third parties responsible for his injury. N. C. CODE ANN. (Michie, 1931) § 8081(r). According to another statute, in all cases where recovery was sought against one joint tortfeasor, the defendant could implead the others as parties defendant. *Id.* § 618. The administrator of an employee brought an action for his death alleging that it was caused by the negligence of the defendant. The latter pleaded that the plaintiff had been awarded compensation, and moved that the employer be made a party defendant, alleging that the accident was due to his negligence. From an affirmance of an order granting this motion, the plaintiff appealed. *Held*, that the employer could not be joined as a tortfeasor. Order reversed. *Brown v. Southern Ry.*, 162 S. E. 613 (N. C. 1932).

By virtue of the subrogation provisions of most compensation acts, a negligent employer who has paid compensation may exact full recovery therefor from his co-tortfeasor. *Otis El. Co. v. Miller & Paine*, 240 Fed. 376 (C. C. A. 8th, 1917); *Shreveport v. Southwestern Gas & Elec. Co.*, 145 La. 679, 82 So. 785 (1919); see (1921) 34 HARV. L. REV. 562; *cf.* JONES, DIGEST OF WORKMEN'S COMPENSATION LAWS (12th ed. 1931) § 32. In holding that the contribution statute did not remedy this anomalous situation, the court reasoned that the employer was not a joint tortfeasor within the meaning of the statute since he was relieved of tort liability by the employee's acceptance of the remedy provided by the act. *Cf.* N. C. CODE ANN. (Michie, 1931) § 8081(k); *O'Brien v. Chicago City Ry.*, 305 Ill. 244, 137 N. E. 214 (1922); *Mercer v. Ott*, 78 W. Va. 629, 89 S. E. 952 (1916); see (1918) 18 COL. L. REV. 598; (1931) 1 IDAHO L. J. 97. Had the compensation act given the employee the option of suing his employer for negligence, the latter would have been a joint tortfeasor at the time of injury, and the contribution statute might have been construed to apply in order to prevent the employee from throwing all the loss on the third party by choosing his statutory remedy. See N. H. PUB. LAWS (1926) c. 178, § 11. The Illinois statute avoids the result of this case by denying subrogation to a negligent employer. ILL. REV. STAT. (Cahill, 1931) c. 48, § 229. But this solution seems equally undesirable since it not only fails to apportion the loss but apparently allows double recovery. This result might be avoided by allowing the third party to plead the award in mitigation. *Cf. The Emilia S. De Perez*, 248 Fed. 480, 483 (C. C. A. 5th, 1918); *Hoehn v. Schenck*, 221 App. Div. 371, 375, 223 N. Y. Supp. 418, 424 (1927). But *cf. McDowell v. Rockey*, 32 Ohio App. 26, 167 N. E. 589 (1929). However, at least where the tort recovery is less than twice the award, a preferable method would be to subject the negligent employer to contribution without denying subrogation. In such a case, the loss would be divided equally in accord with the purpose of the contribution statute and, at the same time, the burden on the employer would be reduced.

BOOK REVIEWS

CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW. Edited by Felix Frankfurter and J. Forrester Davison. Chicago: Commerce Clearing House. 1932. Pp. xvi, 1177. \$7.00.

Through teaching and writing, and perhaps no less by an exceptional gift of inspiring and guiding the work of others,¹ Professor Frankfurter has placed

¹ Note the seven page list of unpublished theses in the Harvard Law Library.

himself in the forefront of the field of administrative law in this country, and a collection of cases of which he is the co-editor is a welcome contribution to the literature of the subject.

This substantial volume of 1177 pages is divided into three main parts: Separation of Powers, which includes a chapter on Admixture of Powers; Delegation of Powers, including Flexible Tariffs; and Individual Control of Administrative Action. The subdivisions of the third part show principal attention devoted to public utilities, taxation, and control of aliens. Those three subjects cover about 360 pages, while eight other topics (trade regulation, workmen's compensation, postal regulation, public domain, prohibition, veterans' laws, patents and trademarks, police regulations) have in the aggregate only about 130 pages allotted to them. This proportion is, however, altered, if we take into account a number of cases in the second part which deal with administrative aspects of the police power, including the important English cases that have arisen under the Housing Acts.

The collection is not an easy one to appraise. Administrative law has no definite content, and, under that name, no common-law status. In the reviewer's mind, it is identified with that body of principles which govern the grant and exercise of official powers and the system of remedial control by which they are checked. Those to whom administrative law conveyed something exotic and derogatory to the common law might have accepted the first half of that meaning but not the second. The preface gives us several intimations of the meaning attached to the term by the editors of the present collection:

"Governmental regulation of banking, insurance, public utilities, industry, finance, immigration, the professions, health and morals, in short, the inevitable response of government to the needs of modern society is building up a body of enactments not written by legislatures and of adjudications not made by courts, and only to a limited degree subject to their revision. These powers are lodged in a vast congeries of agencies. We are in the midst of a process, still largely unconscious and unscientific, of adjusting the play of these powers to the traditional system of Anglo-American law and courts. Systematic exploration of these problems is the concern of Administrative Law. . . .

"In a field as vast and unruly as is contemporary Administrative Law we must be wary against premature generalization and merely formal system. . . .

"Even a case book must be organized by some concepts and reflect some attempt at systematization, however tentative. But it is idle to pretend that this collection does more than adumbrate the considerations that underlie the creation of administrative bodies, the sphere of their respective activities, the different procedures to which they are subject, the boundaries of their discretion, and the standard which courts invoke in scrutinizing such discretion."

The authors clearly do not wish to lay down a definite program and prefer to let the cases and other sources speak for themselves.

While no casebook can carry on its face a clue to all that it contains, and while it is not only possible but very likely that by a judicious use of the rich material placed before him a teacher will be able to give the student as wide and varied an outlook upon administrative law as the Preface foreshadows, it cannot be said that the selection or arrangement of the cases fulfills the expectations aroused. Throughout fully one-half of the book, delegated administrative powers, if they come into play at all, stand remotely in the background. In the First Part we feel that the editors' main preoccupation is with the constitutional status of the Judiciary; in the Second Part, with the legitimate or permissible share of the Executive in the process of legislation;

and it is only in the Third Part that administrative action comes quite definitely to the front. Two-thirds of the book could have been fully described as cases on the separation of powers, and it is doubtful whether anywhere else an equal collection of material on that subject can be found.

In probably every American jurisdiction there are some applications of the doctrine of separation of powers that are of practical importance and must be reckoned with. More particularly, a theory of non-delegability of legislative powers may set limits to permissible administrative discretion; and courts may be debarred from a share in administrative determinations involving considerations of expediency. But by and large the whole law of administration operates with an adjustment between the three functions of government which defies a doctrinaire formula. Tying up administrative law with the separation of powers may be legitimate enough if "separation of powers" is merely a label to illustrate compromises with the doctrine, and the prominence given to it by the editors should probably be understood in that light. The traditional Anglo-American judicial control of administrative powers is the negation of the French doctrine of separation of powers. It is to this control that the Third Part of the book is devoted, and it is this part that comes nearest to fulfilling the program outlined in the Preface. We are here face to face with a progressive adjustment of legal checks to official powers, which has become a vital factor in the working of economic and social legislation, and in which many observers will be inclined to find the essential contribution of administrative law to our jurisprudence.

Even where the authors give their attention entirely to delegated administrative powers, their interest is concentrated on problems of constitutional law, which dominate the entire book, and this phase of the collection calls for some comment.

Upon the constitutional aspect of administrative law the reviewer has not perhaps an entirely open mind, having constructed a casebook on a different theory. All law schools offer courses in constitutional law, and the standard casebooks on that subject, while, perhaps, emphasizing legislative at the expense of administrative powers, offer enough material to introduce the student into the technique of handling and solving a constitutional issue no matter what its particular subject matter may be. On the other hand, there is in the present law school curriculum relatively little opportunity to become acquainted with the technique of administrative powers in their non-constitutional aspects, this technique being assumed rather than systematically set forth in the growing number of public law courses, such as public utilities and taxation. It would, therefore, seem desirable to concentrate on what may be called the common law of administrative powers as forming, together with the general course in constitutional law, a connecting link between the many important subjects that modern legislation commits to departmental or bureaucratic administration.

Administrative powers being matter of statutory creation, it is, of course, true that assuming the statutory provision to be clear, there can be no legal question other than a constitutional one; but how many cases are there in which no problem of construction can be raised? Very frequently, the question whether the grant of an administrative power is valid as a matter of legislative competence comes very close to the question whether its exercise is valid as a matter of legislative intent, as indeed the Dominion cases in the collection show. Moreover, the question whether an administrative act can

be justified as a matter of legislative intent may be indistinguishable from the question whether it is justifiable according to the nature and purpose of the power, and whether the exercise of the power is judicially reviewable may likewise be considered as a question of legislative intent, or it may be determined upon the basis of common-law doctrine. Putting it in another way, not only may questions of interpretation resolve themselves into essential problems of administrative law, but there are three possible aspects to controverted administrative power that do not involve constitutional law to one that does.

To teachers and students alike a well-considered and well-written discussion of a constitutional problem generally appears as the last word of juristic performance, and the reviewer acknowledges the spell exercised by some of the very decisions in the present collection, the permanent value of which he is strongly inclined to regard with skepticism. His attitude of doubt with reference to the editors' heavy commitments in the way of constitutional cases is due to the feeling that they involve serious losses in other directions, and that it is largely owing to lack of space that the non-constitutional side of administrative law receives such relatively meager treatment.

A very considerable proportion of administrative law controversies present to the student the application of forms of remedies with which he has not otherwise become familiar. If this were altogether a matter of form or technicality (as to a certain extent it is), it might be taken care of by incidental explanation. Not so, however, if there is an organic relation between forms of remedies and the substance of administrative powers; if, for instance, *mandamus* and *certiorari* illustrate the difference between jurisdiction, law, fact, and discretion. It is one thing to omit from a casebook on administrative law the law of office and officers, the organization of local government, the position of the chief executive, or the administrative share in enforcement, and quite another thing to omit the common-law system of remedial relief. The editors must have given the matter thought, but it is not quite clear why they decided in favor of exclusion. By devoting one-third of the book to the subject of judicial review, they have, in the opinion of the reviewer, made that section practically the most important part of the book. A treatment of the remedial system and of the types of official power would have been equally possible. A casebook is not the place for exhaustive elaboration; its function is to outline a system and its categories, and present illustrations that will enable students to understand problems and pursue them further with some sense of perspective. An introductory treatment of a subject can hardly do much more.

To the reviewer, the omission indicated means a certain lack of balance in the material presented; but on so vital a matter as the entire scheme of the collection the editors are entitled to their point of view. It is difficult to set one's mind entirely free from preconceived notions. The reviewer's own ideas about administrative law were undoubtedly influenced by Goodnow, who in his turn was influenced by continental jurists and treatises; but the process of transmission brought eliminations and substitutions; and now the presentation of an entirely new plan appears to break the old tradition completely.

The reviewer has raised questions which he does not profess to be able to answer to his entire satisfaction. Since his own conception of the subject differs very considerably from that of the editors, he is all the more ready to testify to the very high merits of the selections considered as source material.

The range of research displayed is enormous. The extracts from valuable sources² other than cases will be welcome to all students of administrative law; and American students will particularly appreciate the British and Dominion cases in the collection, with which they might otherwise have remained unacquainted. The examination of the material has been to the reviewer a matter of the keenest interest; the selection of the cases is such that the reader moves almost constantly on a high plane of thought and expression; and a thorough study of the book under a competent leader must be a great educational experience.

ERNST FREUND.*

PROGRESS IN INTERNATIONAL ORGANIZATION. By Manley O. Hudson. Stanford: Stanford University Press. 1932. Pp. ix, 162. \$1.50.

The papers collected in this little volume were delivered as lectures by Professor Hudson, of the Law School of Harvard University, at the University of Idaho in the autumn of 1931. The lectures were made possible through the establishment of the Borah Foundation for the Outlawry of War by Salmon O. Levinson, of Chicago, a friend and admirer of Senator Borah, in recognition of what he described as Mr. Borah's "priceless contribution . . . to the cause of world peace through his masterly advocacy of the outlawry of war. . . ." The unconscious humor of this tribute to the great objector is heightened by Mr. Levinson's further statement: "The purpose of the Foundation is to establish in the University of Idaho, a lectureship for the promotion of a better understanding of international relations, of the age-old struggle with the baffling problem of war, and of the vital part played in its solution by William Edgar Borah."

In his introduction to these lectures, Professor Hudson refers to the fact that for a quarter of a century Mr. Borah has served in the Senate "and for a large part of that period he has had an influence second to none in moulding both public opinion and governmental action on international issues. As chairman of the Senate's Committee on International Relations since 1924, he has been a great power in shaping our policy during a critical period and the effect of his influence will doubtless live long beyond his days."

Professor Hudson added that he could think of no better program for the immediate purpose of this Foundation than "to explore some of the themes to which Senator Borah has addressed himself during these critical years, with such honesty of purpose, such intensity of zeal, and such probity of intelligence." Of course, Mr. Hudson warned his hearers, the object of such exploration would be neither to confirm nor to refute Mr. Borah's conclusions, but, in a spirit conforming to the ethical standards of a university, to face all the facts "as they can be ascertained in accordance with the conceptions, the standards, and the ideals of the time." Thereupon, Mr. Hudson proceeded to discuss in nine lectures the following subjects: International Organization Before 1914; The Influence of the World War; The Establish-

² For example, in the Introduction may be found extracts from such political philosophers as Aristotle and Locke.

* Deceased, October 20, 1932; at his death Professor of Law, University of Chicago Law School; author of ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928), CASES ON ADMINISTRATIVE LAW (1911, 1928).