Denver Law Review

Volume 42 | Issue 1 Article 6

January 1965

Book Review: Perspectives of Law

Harold E. Hurst

Book Review: Perspectives of Law

Perspectives of Law

Essays for Austin Wakeman Scott

EDITED BY POUND, GRISWOLD AND SUTHERLAND

Boston: Little, Brown and Company, 1964. Pp. xx, 386. $10.00

Inspired by Roscoe Pound, this collection of seventeen essays was written and published as a tribute to Harvard's Austin Wakeman Scott, a law teacher for more than half a century, and the leading authority on trusts for longer than most lawyers can remember. It purports to be a group of essays by Scott's "sometime students" which seems not quite accurate because one of the essays was written by Pound.[1] All essays were written by law teachers.

Sure to catch the attention and re-kindle the memory of Austin Scott's former students is the collection of photographs and the Scott letter to Professor Barton Leach appearing in the front of the book. Harvard law graduates will want the book because the prefatory materials permanently record the warm, giving, and scholarly Austin Scott. The book will also be cherished by all who revere Dean Pound because his essay, "The King Can Do No Wrong," is the last published work of the venerable and respected dean.

Anyone who attempts to read this collection of essays from cover to cover will find them disconnected and widely diverse in content and quality. It is perhaps to be expected that few of the essays approach the precision and lucidity of the man in whose honor they were published. But it is disappointing to find so many pedestrian, circumloquacious—and even dull—essays in the volume.

The collection does, however, include some valuable and well-done works that lawyers, scholars and librarians should know about. Only a few can be reviewed here.

Master of both legal concepts and communication arts, Professor Cavers presents a brilliant and important discussion of the premises upon which a choice of law should be made in considering the effect to be given to an oral agreement to make a testamentary disposition, where the agreement is valid in the state where made but invalid in the state in which legal effect is desired — or conversely, where the agreement would be invalid under the laws of the

[1] The reproduction of a delightful letter from Scott to Professor Leach, among the introductory materials in the volume, indicates that Scott and Pound were appointed Assistant Professor and Story Professor respectively on the same day, May 9, 1910.

state in which the agreement was made, but valid in the state in which legal effect is sought.[2] Professor Cavers analyzes the two major considerations in making a choice of law: fairness to the promisee in light of his reasonable expectation under the circumstances, and the scope of the protection of a promisor's estate intended by a state statute. His analysis leads him to a discussion of the more difficult problems arising when the transaction is so divided between two states that it is hard to assess the expectations of the promisee, and when the reasonable expectations of the promisee point to the law of a state which would defeat the promise.

Perhaps one of the most important essays of our time, done with his characteristic logic and clarity, is Professor Kenneth Culp Davis' work on judicial notice. Davis is concerned with making judicial notice more useful in non-jury cases and in administrative hearings. He expresses the fear that John T. McNaughton's revision of Wigmore's treatise on evidence will constitute a long step backward in the sensible use of judicially noticed facts by adopting the view that judicially noticed facts are not rebuttable. If the McNaughton view[3] should prevail, Davis fears that the embryonic trend toward utilization of the talents of social scientists in resolving disputes will be retarded — or killed.

The Davis view is that the trier of fact should be permitted to take judicial notice *as a matter of convenience,* that most facts noticed are so obviously true (such as that an automobile has four wheels) that nobody would question them, but that, *in the interest of fairness,* any party should be permitted an opportunity to rebut. Essentially, Davis favors leaving the matter of taking judicial notice and affording a right to rebut to the instinct for fairness of the trier of fact, rather than impose a rule under which judicial notice could be taken only when the fact noticed is so clearly indisputable as to admit no rebuttal.

In the realm of legal philosophy, the best essay is that of Julius Stone entitled " 'Result-Orientation' and Appellate Judgment," concerning the proper process for judgment making. He discusses the problems inherent in the opposed "neutral principles of law" and the "result orientated" approaches to decision making, and finally concludes that assurance of good judgments lies not in one process

---

[2] Professor Cavers' essay is entitled "Oral Contracts to Provide by Will and the Choice-of-Law Process: Some Notes on Bernkrant." His study particularly examines Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P. 2d 906 (1961); Emery v. Burbank, 163 Mass. 326, 39 N.E. 1026 (1895); and Rubin v. Irving Trust Co., 305 N.Y. 288, 113 N.E. 2d 424 (1953).

[3] McNaughton, *Judicial Notice — Excerpts Relating to the Morgan-Wigmore Controversy,* 15 VAND. L. REV. 799 (1961).

or the other but in the "endowments and trainings of those who judge."

History and philosophy are sometimes difficult to separate, but in whichever category the reader wishes to put them, the essays of Pound on sovereign immunity,[4] and of Sutherland on two centuries of Blackstone[5] must be mentioned.

Pound traces the historical foundations of sovereign immunity and points out that "the historical immunity of the sovereign was becoming intolerable under modern conditions of economic, industrial, and social activity in the complex organization of a free political government of today." He indicates why and how the intolerability of the doctrine led to establishment of the Court of Claims in 1855[6] and later to the Federal Tort Claims Act.[7] He points out that today persons can sue the United States on matters of express or implied contract, and on tort liability, but that the private citizen has no recourse for property taken by the United States, in spite of the constitutional prohibition against taking private property for a public use without just compensation.[8] Then, philosophizing that "all remnants of the King's immunity should have ended," Pound calls for enactment of a statute permitting recovery of damages from the United States for the taking of property needed for public purposes.

Professor Sutherland's essay on Blackstone is an entertaining and readable piece that every lawyer should enjoy and that every law professor should read. In this brief essay, Sutherland incredibly accomplishes a number of things. He reviews the *Commentaries,* he reviews the life of Blackstone, he reflects upon Blackstone's influence on American law, he admonishes law teachers as to what they should be doing, and he contributes a literary gem that cannot fail to quicken the pulse of Austin Wakeman Scott.

In my view, the five essays just discussed are the standouts in originality and importance. The balance of the seventeen essays include a number of solid works worthy of publication in a good journal, including Havighurst's "Reflections on the Executory Accord," Leach's "Perpetuities: Cy Pres on the March," Rice's "States as Suitors in Interstate Litigation in the Supreme Court," and the

---

[4] Entitled *The King Can Do No Wrong.*

[5] Entitled *Blackstone After Two Centuries.*

[6] 10 Stat. 612 (1855).

[7] 60 Stat. 842 (1946), 28 U.S.C. § 2671 (1958).

[8] U.S. CONST. amend. V.

historical piece by Haskins, "The First American Reform of Civil Procedure."

It is regrettable that only about half the essays in the volume suitably reflect the scholarship, precision, and style that Austin Wakeman Scott must have desired from his students and colleagues. It is regrettable, too, that they have not appeared in journals covered by standard indexes. As for the rest, —.

*Harold E. Hurst**

*Dean, University of Denver College of Law.