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Recommended Citation

Arthur H. Kent, "Book Review (reviewing Alfred Lief (ed.), *The Dissenting Opinions of Mr. Justice Holmes* (1929))," 25 *Illinois Law Review* 966 (1931).

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BOOK REVIEWS

THE DISSENTING OPINIONS OF MR. JUSTICE HOLMES. Arranged with Introductory Notes, by Alfred Lief. Foreword by Dr. George W. Kirchwey. New York: The Vanguard Press, 1929. Pp. xviii, 314.

The publication of this volume is a tribute to the pervading influence of the great judge whose more important dissenting opinions it contains. It may truthfully be said of Mr. Justice Holmes, unlike so many great men, that general recognition of his greatness has not been deferred until after death. Even those who disagree with his philosophy and technique of constitutional interpretation give full credit to his unique qualities of mind and personality, his disinterested devotion to his judicial duties, and the enduring value and significance of his service in the great court whose bench he has for so many years adorned. The recent tributes of Judge Learned Hand and Professor Laski have given felicitous expression to the attitude of the many who have fallen under his intellectual sway. To these must now be added Dr. Kirchwey's beautifully written foreword to this collection of opinions.

To lawyers, jurists, and social scientists already acquainted with the work of the Supreme Court of the United States, this volume offers little, if anything, which is new. While there may be a certain limited utility in having conveniently at hand this collection of Mr. Justice Holmes's noteworthy dissents, such persons would ordinarily prefer to look to the published reports.

If the purpose of the book is to disseminate more widely among non-professional readers Justice Holmes's philosophy and to provide a picture of some of the great issues and conflicts of ideas and theories in the Supreme Court during the period of his tenure, it has serious limitations. Not that the time spent by such a reader in perusing the contents of this book will be wasted. The opinions are worth reading for their literary qualities alone. The penetrating acuteness and breadth of view of their author's mind and the scintillating and epigrammatic style in which they are written are sources of stimulation and delight. Moreover, this book may render a limited service in helping to correct some of the many false or superficial ideas held by many persons regarding the functions of the federal Constitution and the proper place of the courts in the enforcement of it.

It is by no means certain, however, with full respect to the disarming remarks of Dr. Kirchwey, that the book will afford the uninitiated reader a fair and undistorted picture either of Mr. Justice Holmes as a judge or of the warfare of issues and ideas in which he has played so worthy a part. It is no doubt true that the learned judge has endeavored to state in his dissenting opinions fully and fairly the views combatted by him. It may even be admitted that

he has succeeded in doing so to an unusual degree by reason of his exceptional judicial temperament and qualities of mind. That he has been entirely successful in all cases can scarcely be admitted. His dangerous gift of epigram and the devastating irony which he sometimes uses to demolish the arguments of the majority are very likely to leave a reader who has not read the majority opinion with a distorted view of the merits of those arguments. Mr. Justice Holmes would be more than human if his dissenting opinions were always free from the limitations of advocacy and post-rationalization of judgments which are in origin not infrequently intuitive. Mr. Lief, it is true, has supplied introductory notes to each opinion, but the summaries of the facts and the reasoning of the majority opinions is too brief to provide a very adequate picture.

It is submitted, moreover, that this book would afford a truer picture of Holmes's qualities as a judge if it had contained a few of his majority opinions even though, by reason of limitations of space, this involved the omission of some of the dissenting opinions that this collection contains. Surely no selection of his opinions on due process is complete without *Pennsylvania Coal Company v. Mahon*.¹ His dissenting opinions in *Long v. Rockwood*² and *Panhandle Oil Co. v. Mississippi*³ need comparison with his majority opinion in *Gillespie v. Oklahoma*,⁴ which was strongly relied upon by the majority in the above cases. His opinions in such cases as *New York Central, etc., Railroad Co. v. Miller*⁵ and *Brooke v. City of Norfolk*⁶ illustrate one failing of Holmes as a judge, a certain obscurity which occasionally characterizes his statement of facts or doctrine, thus tending to confuse rather than clarify the issues involved and to leave in uncertainty what the court has actually decided. It is commonly remarked, even by friends of Mr. Justice Holmes, that he is most happy and effective in his dissenting opinions. The reviewer believes that it detracts nothing from his stature as a jurist to recognize the existence of such minor and very human defects. This lack of balance in the collection is not cured by the insertion in the last chapter of a series of epigrams and short extracts from his majority opinions.

A happy feature of the book is the inclusion of the essay of Mr. Justice Holmes on Natural Law, which supplies the key to much of his constitutional philosophy, as expressed in such brilliant dissenting opinions as those in *Lochner v. New York* and *Tyson v. Banton*. The dissenting opinions are grouped by the editor under five headings: On Hampering Social Experiments; On Infringing upon Freedom; On Encroaching upon the States; On Usurping Power; On Escaping Taxes. In addition there is a chapter containing three opinions, concurred in by a unanimous court, in cases arising under the Espionage Act, and the chapter consisting

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1. (1922) 260 U. S. 393, 45 Sup. Ct. Rep. 158.
 2. (1928) 277 U. S. 142, 48 Sup. Ct. Rep. 463.
 3. (1928) 277 U. S. 218, 48 Sup. Ct. Rep. 451.
 4. (1922) 257 U. S. 501, 42 Sup. Ct. Rep. 171.
 5. (1906) 202 U. S. 584, 26 Sup. Ct. Rep. 714.
 6. (1928) 277 U. S. 27, 48 Sup. Ct. Rep. 422.

of excerpts from other majority opinions referred to above. The adequacy of such a classification no doubt permits of reasonable difference of opinion. But the reviewer finds some difficulty in understanding why the editor puts the dissenting opinion in *Hammer v. Dagenhart* in the chapter on Hampering Social Experiments. Unlike the minimum wage case, there was no question of the constitutional validity of some legislative control; rather the majority of the court, whether rightly or wrongly, felt that an attempt by Congress to legislate in the premises was an unconstitutional encroachment upon the powers of the states. The opinions in *Long v. Rockwood* and *Panhandle Oil Co. v. Mississippi* seem more properly to belong in the chapter on Encroaching upon the States.

But such criticisms after all relate to matters of detail, and detract little from the value of this book if it be worthwhile to publish such a book at all.

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CASES ON PLEADING AND PROCEDURE, Vol. 1. By Charles E. Clark. St. Paul: West Publishing Co., 1930. Pp. xiv 674.

Familiarity with procedural principles is of course vital to the law student, presuming, as we must, that he intends to try causes in courts. It is peculiarly imperative that he acquire some of this familiarity during the earliest stages of his law training, that he may properly understand the cases presented in his other courses and measure accurately their comparative conclusiveness. Hence one attempting to conduct a first year course in procedure requires the utmost assistance from the book to be used in the classroom. Professor Clark's work is, on the whole, a valuable step toward the realization of this ideal.

That first year courses in pleading tend to be dry, as pointed out by the author in his preface, is a conclusion in which practically all law students and many instructors heartily concur, although it should be recognized that a large part of this shortcoming is inevitable, as inherent in the student's unfamiliarity with the strange jargon with which he is suddenly deluged.

The general policies of this casebook may be summarized as (1) emphasis upon current rather than obsolescent problems of procedure (nearly half of the 230 cases reported as text have been decided during the past thirty years, and a large proportion during the last decade), and (2) frank disavowal of the adequacy of cases only. Both of these factors are according to the latest trend in law training, and, it might be added, in judicial decisions, under the leadership of Justice Holmes. These two policies are jointly served by the textual summarizing of historical background to recent cases set forth, with references of course to the cases supporting such summaries. The book ought perhaps to have the more descriptive title already being applied to others of the same type, namely, "Cases and Materials, etc."