

Circuit Courts of Appeals, and that only an increasingly small fraction of the number of patent litigations of the past one hundred and forty odd years have reached the United States Supreme Court by way of appeal, writ of error and writ of certiorari (there are less than one thousand decisions pertaining to patent law to be found in the United States Supreme Court Reports), it is really surprising to note how large a proportion of present day patent law is contained in these comparatively few decisions of the United States Supreme Court. Most of the fundamental issues are covered, but a few lacunae do exist. For example, there is no United States Supreme Court decision modifying and extending the doctrine of *Pickering v. McCullough*² as to patentable combinations, as it has been modified and extended by the United States Circuit Courts of Appeals.³ Yet this lack is not a serious one, for I have no doubt that were a decision upon this subject handed down by the Supreme Court, it would but confirm the decisions of the lower federal tribunals. But as I have pointed out elsewhere, a decision of the Supreme Court, which will definitely determine whether true chemical compounds, as such, are, or are not, patentable subject matter, is badly needed.³ Mr. Stedman certainly must not be censured, however, for the deficiencies in his materials, for he has made the most skillful use of what he had on hand. Moreover every page of his book is an example of conscientious authorship, while a very superior index, evidently the result of painstaking efforts, adds immensely to the usefulness of his work.

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The American Governor. By Leslie Lipson, with an Introduction by Marshall Edward Dimock. Chicago: University of Chicago Press, 1939. Pp. xxi, 282. \$2.50.

A democracy must revolve around the legislature. If it does not, it cannot be democratic. Yet a democracy does not prevent such a separation of powers as exists in the United States. A legislature cannot administer successfully, and in the United States under our doctrine of separation of powers administration is an executive function. How to make both the legislative function and the executive function successful is the great problem of a democracy. Both the legislative and executive branches of government must have leadership. The way to get legislative leadership is either through the executive (the governor or President, as the case may be) or through the legislature developing a leadership of its own, as for example by the use of legislative council. But then arises the problem of how to keep the legislature from trying to administer and absorb the power of patronage. Executive leadership can be obtained through control by a strong executive who supervises all of the executive bureaus and departments, that is, by concentration of power in the chief executive. But then arises the problem of how to prevent the executive from subverting the legislature and thereby destroying both our separation of powers and democracy.

The solution of these problems of democracy is not easy. The English system of choosing a leader who is a member of Parliament is not available under the United States constitutional system. Under the doctrine of separation of powers which exists in the United States it would seem that the best way to get legislative leadership is through executive leadership, at least until the legislature itself develops a better leadership than we have as yet had in the United States. Probably the Supreme Court

² 109 U.S. 310 (1881). ³ E.g., 53 Fed. 367 (C.C.A. 3d 1892). ³ 89 Science 387 (1939).

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will have to be relied upon to keep the legislature from invading the executive powers, but as yet the Supreme Court has not solved the problem of patronage. Under our doctrine of separation of powers there is no way to obtain executive leadership except by the concentration of powers in the President and governors. But to prevent their subverting the legislative power some scheme must be evolved to make them responsible. A system of audit would seem to be the best method; therefore a comptroller should not be a member of the executive but of the legislative branch of government, and to that branch he should be responsible.

Even Russia has discovered, though Lenin argued to the contrary, that distinctions between officials and the population as a whole will never disappear and that a modern state, whether socialistic or capitalistic, can never do without a bureaucracy, and that the problem is to evolve some way to control it.

Professor Lipson has written a little book to rationalize the problem set forth above and to show how the state governments in the United States have undertaken to solve it. He has shown how at first in the United States it was attempted to solve the problem by making the executive as weak as possible and to trust in freedom and *laissez faire*. This solution worked fairly well so long as our country remained rural, but it was not adequate when our economic life began to be dominated by corporate control. Then a stronger government was necessary. But the people of the United States could not at first decide how to create such a strong government without making the executive so strong as to destroy the end of democracy, which for the most part was freedom. They discovered that without a strong government democracy could not survive, and yet were afraid that they would create a government so strong that it would destroy democracy. In the Continental Congress both the legislative and executive powers were exercised by legislative committees. In the first state constitutions the executive was made subordinate to the legislative. The federal Constitution when adopted exalted the executive as no state constitution had as yet done. The state constitutions between 1820 and 1830 began to increase the powers of the executive and to free him from control by the legislature. Jacksonian democracy limited executive power but did make the executive independent of the legislative. Jacksonian democracy provided for the election of almost all officials, adopted the view that there was no need for experts, and provided for rotation in office. Instead of making the governor responsible to the people for the executive and administrative branches of government, it tended to cripple the executive branch; and now the people began to mistrust both the legislative and executive branches.

With the growth of our country and the rise of the corporation it became evident that more and better state governments were necessary. The legislatures at first provided this through commissions independent of the governor. They did this in order not to strengthen the governors, and they reduced to an absurdity the scheme of checks and balances. The result was that there was no head to administration. Boards and officers were independent of each other and of the governor. The governor was without power and was wasting his time on minute details required by law because of his position as *ex officio* member on boards. He was unable to exercise financial control and to supervise the executive and administrative branches. The legislature could not supervise and, of course, the people could not supervise; therefore no one could. This facilitated the "boss" and the power of the political party. La Follette and Johnson, when governors, supplanted the bosses and became heads of their own political parties, but this practice was unusual. Some governors gained leadership over the legislature

rather than executive leadership. The result of this was that the legislature was controlling the administrative branch of government and the governor the legislative. This happened under Governors La Follette, Johnson, Roosevelt, and Hughes.

Following this era came an era of planning for efficiency and economy. It was accomplished first in Illinois, Massachusetts, Virginia, and New York. It involved the executive budget, the short ballot, the appointment of executive and administrative officials by the governor, and the limitation of the number of departments as much as possible. The executive thus obtained executive leadership. He also more or less obtained legislative leadership through his executive powers, his veto power, his party leadership, his power of patronage, and his power to call special sessions.

Thus the states are in the process of solving the problems referred to above in much the same way that the federal Constitution originally solved them and in the way that they probably should finally be solved. The reorganization plans, however, are good only when the states have good governors. They are bad when the states choose bad governors. Therefore, it would seem that what the states should now do is to keep their new plans but get good governors.

Mr. Lipson has given us a penetrating and refreshing study of American state government. It seems as though visiting Britishers are the best men to diagnose our governmental problems in the United States. This little book of Mr. Lipson's is a worthwhile contribution to the science of government.

HUGH EVANDER WILLIS*

Lawyers and the Promotion of Justice. By Esther Lucile Brown. New York: Russell Sage Foundation, 1938. Pp. 302.

This is a useful survey of the activities of the profession. After a very brief historical introduction, about 100 pages are devoted to legal education and bar examinations. A brief survey of national professional associations follows.

The study then deals with the critical problems of the practitioner. Here, there is first a summary of surveys of the demand for and supply of legal services. Next, there is a brief treatment of criticisms of the bar and the bench.

Finally, the most interesting portion of the book deals with "New Trends in the Promotion of Justice." Here the lawyer sees, in relation to each other, the various group efforts at improvement in the law, improvement in administrative and judicial procedure, and improvement in the effectiveness of the law office and the bar. This section of the book reminds laymen and lawyers alike of the significant constructive efforts which the profession is making.

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