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ADMINISTRATIVE AGENCIES AND THE COURTS. By Frank E. Cooper. Michigan Legal Studies. Ann Arbor: University of Michigan Law School, 1951.

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BOOK REVIEWS

ADMINISTRATIVE AGENCIES AND THE COURTS. By Frank E. Cooper. Michigan Legal Studies. Ann Arbor: University of Michigan Law School, 1951. Pp. 470. $5.00.

The importance of the administrative law field has become more and more recognizable in the United States. The creation and expansion of new governmental agencies, the restrictions and new revenue measures and the enormous number of regulations to be followed by the administrative agencies have necessitated a number of authors to assemble materials necessary to clarify this comparatively new field. Consequently, it is not surprising that the editor of Michigan Legal Studies has added to his list of renowned books the one of Professor Cooper, a member of the Detroit Bar and Visiting Professor of Law at the University of Michigan, on the subject of administrative agencies.

The book under review, *Administrative Agencies and the Courts*, is a modern approach to the subject matter. In it the author attempts to describe the standards which the courts impose upon administrative agencies, whereby they control and limit the powers of the agencies. The 470 pages have been divided into five parts with the Administrative Procedure Act[1] serving as the final guide.

Part one has been set out as the Place of Administrative Agencies in the Judicial System. Mr. Cooper defines administrative law and gives the reader an insight into the historical background of this branch of law. The most recent changes in the administrative law field came after 1932 when many new federal agencies exercising important regulatory functions came into being.[2] The author states that many administrative agencies serve primarily the function of accomplishing what ordinary legal remedies cannot normally achieve; in other words, by the particular regulation the party can be protected or preventative measures can be asserted prior to harm being done. This particular phase is dwelt upon, giving first-hand information as to the individual functions of the specific agency. Cooper feels that the task of the lawyer in conducting cases before administrative agencies is a difficult one. As an example he cites the fact that when the lawyer is searching for the law concerning administrative procedure he finds himself involved in the process of sifting the information from the numerous headings in the law digests and encyclopedias. Consequently, much time is spent

1. 60 STAT. 237, 5 U.S.C. § 1001 (1946).

2. *E.g.*, Securities and Exchange Commission, National Labor Relations Board, Wage and Hour Division of the Department of Labor, Social Security Board, Bituminous Coal Division.

in the preparation of cases in only seeking previous court decisions. The attorney will find that there is quite a difference between administrative and judicial proceedings. One must bear in mind that the attorney's role is more difficult in that the opponent is quite frequently the administrative agency itself; whereas, in judicial proceedings, the practitioner is not as much concerned with whom his adversary might be.

The second part of this book concerns itself with the Underlying Constitutional Question: effect of separation of powers doctrine on delegation to administrative agencies of legislative and judicial powers. The author writes that administrative agencies are permitted to exercise powers which logically belong to the courts or to the legislature, so long as the independence of the courts or of the legislature is not impaired. Many of the agency problems are discussed, such as the delegation of powers by an agency to its employees. It is pointed out that in the decision of a case wherein an agency employee is delegated to use his discretion, he, the employee, will often make such a determination as he thinks will please his employer, in the hope of obtaining a promotion. By the same token, if the employee is impressed with a belief that the agency likes decisions which find an employer guilty of unfair labor practices, or a commercial concern guilty of unfair trade practices, or an employee entitled to receive workmen's compensation, then much consideration and thought has to be given to these matters to avoid the same problem of pleasing the officials, who will pass upon the employee's personal advancement. However, the Federal Administrative Procedure Act goes far toward alleviating this problem in many of the federal agencies.[3] Cooper recommends that much might be accomplished by 1) careful formulation for the guidance of agency employees of instructions for the application of those policies which have been crystallized; 2) consideration by the agency heads of cases where the application of established policies is difficult or where policies have not been definitely formulated (with encouragement for the referral by agency employees of cases thought to fall within this category); and 3) the requirement of periodic and informative reports by those employees entrusted with power to make decisions.

At times statutes do not have an affirmative requirement of notice and hearing. *Query:* Is the statute void because of such omission? By the clear weight of authority there is no deprivation of due process if notice and hearing were in fact afforded by the administrative authorities, even though the statutes do not specifically require such procedure.

Part three has been pegged, Procedure in Adjudication of Cases. In this section Cooper delves into the matter of parties and pleading. It must be remembered that unlike judges, administrative officers are almost always concerned with the outcome of the case as parties in interest. Undoubtedly, the decisions will have an effect upon future cases arising on the administra-

3. ADMINISTRATIVE PROCEDURE ACT, *supra* note 1, see § 8a, b.

tive level, and the aforementioned is probably the main factor in differentiating the administrative from the judicial procedure. At times, the administrative agencies allow an interested party, not connected with the case, to enter and introduce testimony, cross-examine witnesses, etc., similar to an *amicus curiae's* part in judicial proceedings. This is a healthy situation, because it tends to make for better informed administrative action, saving much time, and eliminating the introduction of extraneous issues. He dwells at length on the prehearing conferences and informal procedures, right to a fair trial, presentation of evidence, official notice and the role of discretion.

Rule Making is the subject matter of part four. The author begins with the development of rule making activities and points out that as far back as the first Congress (1790) authorization was given by that body to the President to promulgate rules and regulations. Emphasis is placed upon the legal effect of rules, criminal penalties for violation of rules, effect of reliance on regulations and problems of retroactive application. The general tests of the validity of the rules or regulations are discussed, as for instance, conflicts with statutes, non-relationship to statutory purpose and violation of due process.

The last part, part five, is based upon Judicial Review. It is believed by many that the courts should exercise a general superintending control over the actions of administrative agencies. This has proved to be impractical. The general trend of court decisions (except in cases where a statute prescribes a broad review) is in the direction of *reducing* the scope of review. Delay involved in judicial review is a determining factor, *e.g.*, business transactions cannot always await the final outcome of lengthy appellate procedures, and administrative orders might have been changed by the time the case comes to trial, thus making the questions involved moot before the court can pass judgment on the case. Issues of law, jurisdictional facts and constitutional facts are not overlooked. We must recognize the fact that the litigant is required to address his complaint initially to administrative tribunals, rather than to the courts. He is further required to exhaust *all* possibilities for obtaining relief through the agency before appealing to the courts. The common law and statutory methods of review are considered under the general heading.

The reviewer, in reading this book, was reminded of an earlier administrative law casebook which he had the pleasure of using in the classroom, namely that of Dean Stason,[4] who incidentally wrote the foreword to Cooper's book. After having re-read both the textbook and casebook, it appears that Mr. Cooper has very commendably followed to a certain degree the organizational pattern used by Dean Stason. It is obvious that much

4. STASON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE TRIBUNALS (2d ed. 1947). For reviews see 33 IOWA L. REV. 427 (1948), 96 U. OF PA. L. REV. 923 (1948), 26 TEXAS L. REV. 250 (1947), 27 TEXAS L. REV. 11 (1948).

time has been spent by Cooper in the preparation and assembling of these materials, as evidenced by several hundred cases advantageously used to emphasize his opinions. The author has used clear and concise language. He has approached the subject matter from a very practical point of view. In my opinion Mr. Cooper's book would serve a useful purpose in the library of the student, the practitioner and the theorist.

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DUE PROCESS OF LAW 1932-1949: THE SUPREME COURT'S USE OF A CONSTITUTIONAL TOOL. By Virginia Wood. Baton Rouge: Louisiana State University Press, 1951. Pp. ix, 436. $6.00.

This is a valuable study of the work of the Court in an era in which a substantial percentage of its work has been concentrated during the past two decades and in which there are fewer than usual signposts in the Constitution to guide the justices in their deliberations. The principal purpose of Professor Wood in her analysis of the Court's interpretation of the due process clause is to demonstrate that the "Constitutional Revolution" of 1937 was already well under way five years earlier insofar as this part of the Constitution was concerned. Employing the categories of the freedoms of the First Amendment, socio-economic legislation, criminal proceedings, administrative actions and the tax power, she finds that in each of these areas the Court had laid down the precedents which enabled it in 1937 and thereafter to build a new structure of values for due process.

While it has been generally recognized that the pre-Roosevelt Court considerably extended the scope of the due process clause to the freedoms of the first amendments and the rights of the accused in criminal proceedings, this reviewer for one had not fully realized that in the other areas—socio-economic legislation and administrative action (the dividing line here being most tenuous)—the great majority of decisions favored the states in the first four or five years of the period under consideration. Starting with Justice Sutherland's statement in *Stephenson v. Binford* (1931) that the Court would not overrule the legislative judgment as to the necessity of a given economic policy, Professor Wood builds up a line of decisions in which the Court displayed willingness to permit a greater degree of economic experimentation by the states. She states that after 1932 "generally speaking, a majority of the justices . . . had held that our constitutional system does not require judicial protection of the free enterprise, laissez-faire system."

There are, it is true, few exceptions to this statement but the pattern they seem to form is interesting and has not been noted by Professor Wood, although she has written that they are some of the most momentous decisions of the 1930's. The exceptions as listed by the author are *Carter v.*