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Book Reviews

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BOOK REVIEWS

THE LAWYER FROM ANTIQUITY TO MODERN TIMES. By Roscoe Pound. St. Paul: West Publishing Company, 1953. Pp. 404. $5.00.

The primary purpose of this book is to trace the development of bar organization in the United States, and most of the volume is devoted to this purpose. As a background for this discussion the author has provided a brief account of lawyers or their counterparts in Ancient Greece and a somewhat longer sketch of Law and Lawyers in Rome. There are also chapters on The Organization of Lawyers in the Ecclesiastical Courts and Civil Law Tribunals and in Medieval England, as well as one on the organization of the profession in England from the end of the Middle Ages to the American Revolution. For the busy lawyer whose historical studies have been somewhat limited these parts of the book will prove most enlightening. The latter chapter is especially informative in indicating the historical origin and model for the organization in this country.

Chapters VI, VII, VIII and a part of IX really tell the story of the legal profession in America. I shall try to indicate the high spots of the ups and downs of our profession from the colonial period to the present day, as reported by Dean Pound. In the English-speaking world law as a profession dates from the later Middle Ages when the lawyers in the common law courts at Westminster began living together in Inns with a common table, and assumed control over training for and admission to the bar, as well as discipline of the members. In this country there was little progress toward development of a legal profession until the middle of the eighteenth century. Lawyers as a class were unpopular in early colonial history, and in the beginning there was an attempt to administer justice without them. Virginia produced no trained lawyers for nearly a hundred years. In 1743 there were

only eight members of the Bar in New York City. Many American lawyers of the later colonial period "studied in the Inns of Court in London and they and the lawyers who studied under them were brought up in the idea of the bar as an organization of professional brethren not soliciting employment nor in competition with each other, but on cordial terms with each other in the common exercise of a learned art." Under the influence of such men we have the beginning of real professional organization in America in meetings of the whole bar framing rules for all its members, including education, training in law, character, admission of law students and standards of professional conduct. These Bar meetings appear to have originated in New England around 1750. By the time of the Revolution the legal profession in most of the colonies had become well established in the public estimation, well educated and well qualified by law study. The old prejudice against lawyers had about disappeared. Twenty-five of the fifty-six signers of the Declaration of Independence were lawyers as were thirty-one of the fifty-five members of the Constitutional Convention.

After the Revolution a period of reaction set in. While the Bar meetings survived the Revolution, as time went on the Bar lost substantial control of preliminary education, professional training and admission to practice. One result of the Revolution was to put the practice of law chiefly into the hands of lawyers of a lower type and of less ability and training. A widespread economic depression gave rise to dissatisfaction with law and distrust of lawyers. Political conditions caused hostility toward English law and lawyers trained in the common law. Social conditions likewise played a part. There was a strong feeling against professions and a belief that all callings should be on the same basis, that of a business. To dignify one calling by terming it a profession was undemocratic, un-American.

It seems a strange paradox that the period from the Revolution to the Civil War is in one sense the golden age of American law.

Within this period the seventeenth-century English legal materials were made over into a common law for America, which was controlling in all of our states except one. The creative legal achievements of that time are unsurpassed. But this was the work of great judges and great lawyers, the upper level of the profession, practicing throughout this period. Many of the great names of our judicial history belong to this era. At the same time the profession as a whole was losing ground continuously. During the first third of the nineteenth century there was constant and increasing legislative breakdown of requirements as to education and professional training of lawyers. To illustrate, in 1800 eleven of the fourteen states prescribed a definite period of preparation for admission to the Bar. But in 1840 only eleven out of thirty jurisdictions had such a requirement, and in 1860 only nine out of thirty-nine. Eventually came legislation abolishing all educational requirements. By 1850 several states had opened the pratice of law to all citizens or residents. But this was not all. There was strong objection to an organized Bar. Dean Pound calls the period from 1836 to 1870 the Era of Decadence. The lowest point in the process of de-professionalization was reached immediately after the Civil War.

The voluntary, selective bar association, as we know it, is a characteristically American institution. It came into use on the cessation of the old Bar meetings and especially during the first part of the nineteenth century. But the era of modern bar associations began with the organization of the Association of the Bar of the City of New York in 1870. Article II of its constitution declared its purpose as follows: "The Association is established to maintain the honor and dignity of the profession, to cultivate social intercourse among its members, and to increase its usefulness in promoting the due administration of justice." This awakened lawyers generally to the need of effective professional organization. In rapid succession there followed organizations of the Chicago Bar Association, Cincinnati Bar Association, Iowa

State Bar Association, Bar Association of the City of Boston, and the New York State Bar Association.

This revival of professional organization, which began with the Bar Association of the City of New York and was followed by the organization of several states, as well as many city and local associations, was given great impetus by the organization of the American Bar Association in 1878. The story of the American Bar Association is not a part of the present volume. Its origin, history and achievements are the province of another portion of the Survey of the Legal Profession, prepared by Professor Edson R. Sunderland. During the first decade of the American Bar Association state bar associations were organized in twenty-five states, although it was 1923 before there was an active bar association in every state or territory. The movement for integration of the Bar of the state as a whole began with North Dakota in 1921, and today there are some 24 integrated Bars. The last step in professional development came with the reorganization of the American Bar Association in 1936. The object was to provide a scheme for coordinating the activities of the general Association with those of the state and local associations. This was achieved by creating a House of Delegates to control the administration of the Association, with membership in the House allocated to the various states, state Bars, and local Bars on a fair representative basis.

Some seventy pages of the book are devoted to The Local Bar Associations of today. In the last twenty years there has been great increase in the activities of local associations. The old type of social organization has been replaced by associations with the avowed purpose of advancing the profession and improving the administration of justice. The account of activities as well as the list of local bar associations is most incomplete. A simple questionnaire (four questions) sent in the spring of 1950 to over twelve hundred associations brought replies from only twelve per cent. This is certainly an indictment of the local groups. Either their

secretaries are inefficient, or they have little spirit of cooperation in this fine undertaking. In this connection we should be embarrassed to learn that the only reply from Texas came from a bar association no longer in existence. No replies came from the local associations which have received awards of merit from the American Bar Association.

In the first chapter of the book Dean Pound has an excellent statement of the elements of a profession. These are organization, learning, *i. e.*, pursuit of a learned art, and a spirit of public service. These are the essentials. When any of these has been missing, the legal profession has been retarded or actually slipped backward. Lawyers now recognize what had almost been forgotten in the last century that an inclusive and responsible professional organization is extremely important. Historically and idealogically a profession means a group of learned men pursuing a learned art. In the frontier days when there were no educational requirements or standards for admission to the bar, the profession became just another calling or vocation. The most important element of the three is that the profession be practiced in a spirit of public service. It is this which distinguishes the profession from a trade. The gaining of a livelihood is only incidental to a profession, whereas in a trade it is the main purpose.

An unusual feature of this book is the Epilogue. Here the author calls attention to the threats to the profession. One is the increasing bigness of things in which the individual lawyer's responsibility as a member of a profession is lessened or lost. Another is the economic pressure upon the lawyer which tends to make the money-making aspect the primary or even the sole interest. Too frequently the young lawyer is lured into a position of seeming financial security as an employee of some business or corporation. A third threat is the rise of the service or welfare state which aspires to take over the service rendered by the profession and replace it by service performed by administrative bureaus of the government. Lawyers should be in the forefront

of the opposition to socialized medicine and to government subsidies to professional education. These strike at the very foundation of free professions, and the danger is more real than fanciful. In times like these a strong integrated bar is the answer. Its mission is well stated by Dean Pound in these words: "By keeping the followers of the different specialties of practice, the different groups into which lawyers in the large cities of today tend to group themselves, conscious of a higher organization of which they are members and to which, as the profession itself they are responsible, it can stand fast against the disintegrating tendencies which, threatening professions, threaten ultimately the law."

The volume is equipped with a good index of some 25 pages. There is also an extensive table of books and articles quoted and cited, as well as a bibliography. The West Publishing Company is to be commended on a job well done as well as thanked for its generous assistance in this enterprise.

This book was published for the Survey of the Legal Profession as a part of its broad program of study of the function of lawyers in a free society. The Survey, begun in 1947, and financed jointly by the American Bar Association and the Carnegie Corporation, is now almost completed. The guiding genius of the Survey has been its Director, Reginald Heber Smith of Boston, and more than 150 separate reports have been made. Only two final reports remain to be submitted. One will be that of the Director containing the Survey's final conclusions and recommendations and the other by George Waverly Briggs of Dallas who will appraise the whole Survey undertaking from the point of view of an informed layman.

The Survey was especially fortunate in being able to enlist the services of Roscoe Pound to prepare this historical study of our profession. His contributions to legal education and to the improvement of the administration of justice are too well known to recount here. It is enough to say that no living lawyer was better

equipped to undertake the difficult task of tracing the strange and checkered history of bar association development in our country. He has written what in all probability will come to be recognized as the definitive statement. His efforts deserve the thanks of the profession, and his words warrant a reading by its members.

*Roy R. Ray.**

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CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION. By Arthur T. Vanderbilt. New York: Washington Square Publishing Corporation, 1952. Pp. xx, 1390. $8.50.

CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE. By Robert Wyness Millar. New York: Published by The Law Center of New York University for The National Conference of Judicial Councils, 1952. Pp. xvi, 534. $7.50.

These two books are expressions of one influence — the movement for reform of procedure and judicial administration — which has accomplished notable changes in the last two decades and is active today. They are, moreover, designed for the advancement of that influence, in the one instance by furnishing a study of the historical background of this movement, and in the other instance by providing a classroom tool for introducing students of law to this movement simultaneously with their introduction to the procedural system on which it is operating.

Professor Millar's book is unique as a brief summary of the development of each important aspect of modern Anglo-American trial procedure. Two examples will serve to illustrate the nature of this treatment of trial procedure in historical perspective. Chapter XV, on the pre-trial hearing, refers briefly to kindred practices under Greek, Roman, and German law, notes the absence

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of such a practice from Anglo-American law until the English Rules of 1883, the increasing authority of the master under the English practice, and the more recent development of "pre-trial" hearings in American jurisdictions with less judicial authority in such hearings than in England, and compares the advantages of the English and American procedures. Chapter XVII, on voluntary dismissal, notes the principle of early English law and equity that a plaintiff may abandon his suit without prejudice, refers to the very slight common law and equity limitations on this principle, traces increasing limitations by statute and decisions in the last century in England and America, and concludes with comparison of the current federal and English patterns nearly reaching complete rejection of the principle of dismissal without prejudice.

Professor Millar succeeds, as few could have done, in condensing centuries of development into a small number of readable paragraphs. The book was apparently inspired (at the instance of Chief Justice Vanderbilt, the author states in his preface) to serve persons interested in improving judicial administration, by providing a reliable source of information concerning the historical background of currently controversial principles of procedure. Being concerned with "perspective," it necessarily has the characteristics of lack of detail and dependence on interpretative opinion. In turn, this means that some of the conclusions will be subject to difference of opinion. For example, those accustomed to the more nearly complete fusion of law and equity existing in Texas, with jury trial throughout, will probably be disappointed in the conclusion (which is at least clearly implied in the book, if not expressed) that the way out of the complex problem of right to jury trial under a partially blended system is by modification of the constitutional guarantees of jury trial, rather than by extension of jury trial to issues of fact bearing on equity. Professor Millar discusses (p. 267 *et seq.*) the rejection by several states of the chancery procedure of assigning to the judge

the decision of fact as well as law, but concludes elsewhere (pp. 69-72) that constitutional preservation of jury trial stands in the way of more complete merger of law and equity than has occurred in the federal system. This conclusion is sound, of course, as applied to the English approach of accompanying the merger with judicial discretion in the allowance of a jury. It is not sound if one is willing to accept the extension of jury trial to fact issues bearing on equity. Professor Millar's reluctance to do so is consistent with the prevailing view, and is not without support in principle. But fear of the unknown doubtlessly contributes to the prevalence of that view in many quarters; there seems little disposition within states allowing jury trial on equity fact issues to retreat to more restrictive use of the jury.

While the book thus includes some interpretation of the data presented, it is primarily a factual summary. That it also includes some interpretation lends both to its interest and to its value.

Professor Millar's book is one of The Judicial Administration Series, published by The Law Center of New York University for the National Conference of Judicial Councils. Chief Justice Vanderbilt has previously contributed to that series by editing *Minimum Standards of Judicial Administration.*[1] The casebook which he (Chief Justice Vanderbilt) has now completed leans heavily on his earlier book for materials aimed at stimulating the student's interest in a comparative study of procedural practices in the federal courts and courts of the various states.

This casebook is edited on the stated premise that the system of procedure established by the federal rules is the best thus far developed in Anglo-American judicial administration. The heart of the book, which includes the subjects ordinarily signified by the term "procedure," is based entirely on these federal rules. This part of the book is composed of ten chapters (III-XII), the

[1] New York: Published by the Law Center of New York University for The National Conference of Judicial Councils, 1949. Pp. xxxii, 752. $7.50.

titles of which were obviously selected for the purpose of impressing the student with the functional place of their subject matter in the procedural system:

III. In What Court May Suit be Brought — Jurisdiction
IV. Who May Sue Whom — Parties
V. Where May Suit Be Brought — Venue and the Transfer of Cases
VI. How to Get the Defendant or His Property Into Court — Process
VII. What Relief is Sought — Remedies
VIII. How to State the Controversy — The Pleadings
IX. How to Prepare for Trial — Pre-trial Procedures
X. How to Litigate the Controversy — The Trial
XI. How to Correct Trial Errors — Judicial Review
XII. How to Enforce a Judgment — Execution

The treatment of jurisdiction is cursory — 11 pages of text concerned with generalities, and without consideration of any of the knotty problems of federal jurisdiction (reserved for treatment in a separate law school course) or jurisdiction of state courts (inappropriate in a book based upon the federal practice). The form of the other nine chapters in this part of the book is consistent with the customary "casebook" approach, though the content is quite different from that appearing in other procedure casebooks currently in use. Rules and cases make up the bulk of the materials; nearly all of the cases are concerned with application and interpretation of the rules, and therefore have been decided since 1938. The emphasis is strictly "modern," as the title of the book indicates. In fact, considerable emphasis is devoted to the future; Chief Justice Vanderbilt frankly hopes that the comparative study of the federal rules with those of a state where a particular student intends to practice will lead him to become an advocate of their acceptance there. To facilitate comparative study, he has used numerous comments taken from *Minimum Standards of Judicial Administration,* as well as maps graphically classifying the 48 states according to the practice followed on particular points of procedure.

The criminal rules as well as the civil rules are the subject of the materials in the casebook. The editor's stated aim is to present them together as "component parts of a single procedural system." Because of the many differences, however, it is not surprising that in general the most that is done toward unified treatment is to follow the treatment of civil rules on a given major problem of procedure with a treatment and comparison of the practice under the criminal rules. The materials could not be developed successfully with less distinct treatment of the two.

The scope of the casebook is also broader in other respects than the usual course in Procedure. The chapter on Trial includes a general treatment of Evidence, in 60 pages. Chapter I adds a textual treatment of the place of procedure in the work of the lawyer, and the place of the federal rules in reform. Chapter II consists of Pound's St. Paul address of 1906 and Wigmore's appraisal of that address as "the spark that kindled the white flame of progress." Then, after the intervening Chapters III-XII (discussed above), follow four chapters of text on judicial selection and related problems (XIII), jury selection and service (XIV), the legal profession (XV), and judicial administration (XVI). The appendices include Maitland's seven lectures on *The Forms of Action at Common Law* and excerpts from the introduction to Langdell's *A Summary of Equity Pleading*. References to these appendices appear at various points in the principal part of the book.

With these materials concerning such broad scope, the editor suggests that the course may be taught in four semester hours. He conceives the course as a "panoramic" view of procedure (criminal and civil, trial and appellate, in principle and as administered), and favors its being placed at the earliest possible moment in the student's law study. It is inevitable that such a

course will not be intensive,[2] and must be supplemented by other procedure courses if the student is to acquire a reasonably adequate appreciation of the "difference between law in the books and law in action" (one of the stated objectives of the editor). This book, therefore, cannot serve as a replacement for more intensive courses on parts of its broad subject matter, particularly for schools teaching primarily students intending to practice in one jurisdiction, or for students who intend to enter practice alone. There is need in the curriculum of every law school, however, for some attention to the federal practice, and for more critical and comparative study of procedure generally than is likely to occur in the teaching of a single procedural system (whether it be the federal system or that of some state). This casebook deserves consideration for such a course.

*Robert E. Keeton.**

[2] The ambitious scope of the book results in reducing to less than 30 pages all material on the court's charge and the verdict, in both civil and criminal cases. Special verdicts and special interrogatories accompanying general verdicts are assigned eight pages of this space, devoted to a quotation of Federal Rule 49, a note and map taken from *Minimum Standards of Judicial Administration*, and two cases. The note and map, appearing on pp. 847-849, concern the practice in the 48 states, and classify all of them in one of two categories, "Submission of special interrogatories, with general verdict authorized," or "Special interrogatories not submitted to jury." The map includes in the later category the courts of Texas, where no provision is made for submission of special interrogatories with a general charge; "special interrogatories not submitted to jury" is at least a misleading description of the prevailing Texas practice of submission by special issues alone, particularly in view of the omission from the casebook of the explanation, at pp. 237-243 of *Minimum Standards of Judicial Administration*, that a distinction is drawn between the "special verdict" (which designation would apply to the Texas practice) and the "general verdict accompanied by special interrogatories."

Obviously, such limited materials, even with the wisest selection, can do little toward giving the student an appreciation of the problems and merits of submission by general verdict, as compared to special verdict, or to general verdict accompanied by special interrogatories. They may serve the good end of exciting the student's interest.

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