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Book Reviews

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BOOK REVIEWS

CRIMINAL JUSTICE IN AMERICA. By Roscoe Pound, Henry Holt & Company, 1930. Pp. xiv, 226.

This work, consisting of a series of lectures, by a great legal scholar, is the product of a wide learning and a deep practical insight into one of the most perplexing problems of modern times; the problem of criminal justice. Complaint of non-enforcement is as old as the law itself, but there are several reasons peculiar to America that have tended to aggravate the problem in this country. (1) The *pioneer spirit* is largely responsible for our inefficient administration of criminal justice. As the pioneer saw himself, his virtues were independence and self-reliance, versatility and a preference for short cuts and easy methods. (p. 123). He favored decentralization and a diffusion of responsibility (p. 182). Being a strong individualist, he was hostile to discipline, good order and obedience (p. 51). These pioneer ideas have done much mischief in the development of our criminal judicial machinery. (2) *Democratic ideas* reinforced the pioneer attitude toward the criminal law. Our polity had its roots in the era of the Puritan Revolution. The whole emphasis was on liberty as contrasted with order, on rights as contrasted with duties, on checks upon government as contrasted with efficient government, on the danger of governmental oppression as contrasted with the menace of anti-social individual action (p. 132). The feeling that each man, as an organ of the sovereign democracy, is in some sense above the law which he helps to make, fosters impatience of legal methods, disrespect for legal institutions and even a spirit of resistance to them (p. 52). The fear that experts and specialists might get on top have prevented them from being on top. (3) The *belief in natural rights* is closely associated with the above, and has contributed to the maladministration of justice. The founders of our polity believed in a "natural right of revolution" and argued that conformity to the dictates of the individual conscience was the test of the validity of a law (p. 52). Dean Pound says, "Yet so deep-seated is this mode of thinking that the same conscientious and well meaning citizens who challenge private judgments in others, insist that even constitutional guarantees, as well as the settled common law safeguards of accused persons, shall give way to what their private judgment assures them is enforcement of the paramount law." (p. 131). This is the only reference in the book to prohibition enforcement and the author accounts for this in the preface by stating that these lectures were delivered in 1923 and should speak from that date. "This caution seems expedient lest they should appear to pass a present judgment on what I am now required to look into more deeply." The experiences of Dean Pound on the Wickersham Commission should serve as the basis for a valuable supplement to this work.

Another factor making for difficulty in the administration of criminal justice is that of (4) *political influence*. Pressure from

politicians and from professional bondsmen, which no political officer can ignore, makes for a lax administration. Further, throughout the course of a prosecution the exigencies of politics urge utilizing of the opportunities of publicity at the expense of efficiency (186). (5) *The growth of urban industrial centers* has made our nineteenth century judicial machinery which was adapted to a rural, agricultural society an intolerable anachronism (p. 155). (6) *The creation of new crimes by legislative fiat* has added to the difficulty of enforcement and the disrespect for law. Taking the State of Rhode Island as a typical illustration, the author shows that the number of crimes for which one may be prosecuted has very much more than doubled in fifty years, and has multiplied by eight in one hundred years (p. 17). A portion of this increase is to be expected from the very growth and complexity of modern life but it would seem that Dean Pound has not laid sufficient emphasis on the fact that many of these new crimes are to be accounted for as the result of a present day obsession that it is possible to create morality by law. The growth of sumptuary legislation and the attempt to pass a law and save a soul, has done much to account for the present disrespect for law and the breakdown of the machinery of criminal justice. There is food for reflection in the Nicholas Murray Butler thesis that in a search for the causes of lawlessness we should look first of all at the law. Calvin Coolidge, when Vice president of the United States, had the same thought in mind when he declared, "Real reform does not begin with a law, it ends with a law. The attempt to dragoon the body when the need is to convince the soul will end only in revolt." In the diagnosis, we believe there is one other important factor that Dean Pound has omitted. That is the influence of the war-psychosis on the present lawless enforcement of the law. The precedent established by patrioteer organizations and voluntary law enforcement auxiliary agencies, motivated by a zealous belief that the end justified the means, has done much to contribute to our present sorry plight.

(7) *The present administrative machinery of criminal justice is inadequate* because there is a lack of proper organization, a diffusion of responsibility, a faulty esprit des corps negating cooperation as between officials and a want of continuity of personnel. So much for the diagnosis.

Dean Pound suggests some constructive proposals for improving our criminal judicial machinery. (1) A unified judicial organization for the whole state (p. 202); (2) an improvement in legislative technique (p. 208); (3) a reform of judicial procedure not so much by legislative dictation of minutiae as by judicial rule making with the aid of judicial councils and (4) an adequate provision for petty prosecutions (p. 189). Along with these structural changes, there is a need of educating our people to accept a new juristic philosophy. "The orthodox natural-rights individualism is as obsolete as the orthodox Marxian socialism. Instead of valuing all things in terms of individual personality, or in terms of politically organized society, we must value

them in terms of civilization, of raising human powers to their highest possible unfolding—towards which spontaneous free individual action and collective organized effect both contribute" (p. 215). Three special ends should be kept in view in the endeavor to reach this ultimate aim under the conditions of the time—namely, preventative justice, a system of individualized treatment of offenders, and a readjustment of our legally received ideals as to the balance between the general security and the individual life (p. 213).

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PATENT ACCOUNTINGS. By Bert Louis Klooster, New York: Prentice-Hall, Inc. 1930, pp. xxvii, 795.

This is a study of the method of executing the interlocutory decrees entered by courts of equity pending the final award for patent infringements. It is a compilation of quotations and excerpts of court opinions upon rules of damage in patent infringement. Liability is determined in one of three ways: (a) Profits which the infringer earns by the infringement; (b) The reduction which the infringer caused in the patentee's profits; (c) A reasonable royalty.

The poor organization of the material is the chief criticism to be made of the book. The section on "Profits and Deductions" contains forty chapters and one hundred and eighty-six pages. Chapter forty is composed of two and one half lines and cites one case. This we submit is a challenge to Professor Himmelblau's observation in the "Foreword" that, "Here in convenient form is contained *all available information* which an accountant needs before proceeding with his 'field work'." (Italics are those of the reviewer.) Whatever might be the author's scruple upon the ethics of individual accountants advertising, he apparently sees no objection to advancing the cause of the trade as a whole. Instead of basing the final award upon the report of the master, he recommends that it be based upon the report of a disinterested accountant. After reviewing the difficulties of the courts in arriving at a satisfactory measure of damages, he recommends that the courts and the lawyers step out of the picture and let the public accountant perform the service. The savings emphasized by such a procedure are the fees of the master and the attorneys during long periods of accounting; and the expense of the parties employing their own accountant to make special reports to the master. It has the further advantage of expediting the procedure so that the period of accounting might be reduced from years to a few weeks or perhaps months. He also suggests that in making the report to the court, the accountant should be subject to cross examination by the attorneys for both parties.

The aim of reducing the cost of the accountings is undoubtedly a laudable one. Following the well known rules of value however, one is inclined to question how much the fee would be of that prodigious

individual who would be willing to assume the responsibility; who would have the legal training and judgment; and who would perform the services of a master and counsel for both parties, in a few weeks or a month, which ordinarily requires years to perform. Weighing the supply of available individuals against the demand for their services one is inclined to anticipate a value for those services which greatly exceed the usual fee of the practitioner.

The expression of the belief that a great part of the difficulties can be overcome by means of educational forces seems sound. Accountants of the future by proper training will anticipate the difficulties of "apportionment of profits" in the event of patent infringements. As a consequence proper records will be provided. If the profits of the patented article are segregated from the profits of the non-patented article most of the difficulties have been avoided.

The sections upon "Damages", "Profits and Deductions", "Apportionment of Profits", and "Reasonable Royalty" should be of interest to both the Patent Lawyer and the Public Accountant. The problems of the appendix are worthy of consideration by teachers of Cost Accounting.

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LAW AND THE MODERN MIND. By Jerome Frank, New York, Brentanos, 1930. Pp. xvii, 362.

In our opinion, "Law and the Modern Mind" constitutes the most effective attack that has been made on legal fundamentalism. In a series of brilliant and thought-provoking chapters, Mr. Frank criticises the basic myth underlying the orthodoxy of the old legal school, to-wit: that the law must be uniform, general, continuous and predictable. The author stresses the complexity and the dynamic character of modern life both of which make anything like complete legal certainty impossible of realization. After exploding the myth that the law is a "brooding omnipresence in the sky", there is an affirmative defense of the thesis that much of the uncertainty of law is not an unfortunate accident; it is of immense social value. In evaluating the conflicting demands of the need of stability and the need of change, Mr. Frank has drawn heavily from the juristic philosophy of Holmes, Cardozo, Cook, Demogue and Wurzel. Several chapters are devoted to an analysis of corollaries growing out of the basic myth of certainty. Because lawyers, more than most men, are compelled to reconcile incompatibles, there are more rationalizations discernible in their reasoning than in most other fields. Also, the myth that the judges have no power to change existing law or make new law is a direct outgrowth of a subjective need for believing in a stable, approximately, unalterable legal world. Further, a belief in legal absolutism leads to word-worship and a reliance on word-magic and talismanic phrases. It also leads to an undue emphasis on formal logic. As Mr. Frank remarks,

"the syllogism will not supply either the major premise or the minor premise. The 'joker' is to be found in the selection of these premises." (p. 66).

"Like Plato, the further the legal philosopher of the nineteenth century was from the facts, the nearer he thought himself to truth". (p. 97) The political, economic and moral prejudices of the judge are largely responsible for the judge's hunches that select the major premises and make the law. When it is frankly recognized that the "idiosyncratic biases" of the judge have much to do in the making of law, much of the certainty and predictability of the law vanish. Men are prone to see what they want to see and this is true also after they don the judicial robes and consequently there is some truth in the witty remark that the United States Supreme Court is the "court of ultimate conjecture." (p. 46). Lawyers are constantly looking into the motives and biases of clients and witnesses, but those of the old school are peculiarly reluctant to look into the motives and biases of judges (p. 177). Another evil growing out of the basic myth and the attempt to mechanize the law is that human beings are treated like identical mathematical units. Under this theory little allowance can be made for justice in the particular case.

The average judge sincerely believes that he is using his intellect as "a cold logic engine" in utilizing the doctrine of stare decisis. Mr. Frank says, "A satirist might indeed suggest that it is regrettable that the practice of precedent-mongering does not involve CONSCIOUS deception, for it would be comparatively easy for judges entirely aware of what they are doing, to abandon such conscious deception and to report accurately how they arrive at their decisions. Unfortunately most judges have no such awareness. Worse than that, they are not even aware that they are not aware. Judges Holmes, Cardozo, Hand, Hutcheson, Lehman and a few others have attained the enlightened state of awareness of their unawareness" (p. 153). In his plea for individualization and fluidity in the law, Mr. Frank suggests that the "good judge would do well to take over into the law something of the golfer's technique of keeping the eye on the ball with regard to present facts and future consequences". (p. 156).

In conclusion, two criticisms should be considered. (1) It seems to us that the author gives undue emphasis to "childish thought ways" in endeavoring to explain why legal fundamentalism is the orthodox view of the legal profession. Mr. Frank says that "the child is (1) a wishful thinker who, (2) in the interests of his desires for harmony, chancelessness and certainty, builds for himself an oversimplified, over-unified, novelty-less world to conform to his desires, heedless of the lack of correspondence of this construction with the world of actual experience, and (3) who is aided in contriving this world by his implicit belief in the magic efficacy of words". (p. 75). He concludes that the lawyer seeks unrealizable certainty in law because he has not yet relinquished the childish need for an authoritative father and unconsciously has tried to find in the law a substitute for

those attributes of firmness, sureness, certainty and infallibility ascribed in childhood to the father, (p. 21). We believe that the author has given too much emphasis to this "partial explanation" especially in view of the fact that he has failed to show clearly why men (who are also grown up children) in other fields of knowledge have not been similarly influenced by childish thought ways. But this point is not of great importance anyway. The chief value of the work is in showing the evils that flow from legal fundamentalism.

The most serious criticism that can be made of the book is that the author in attempting to demolish the static, absolutist conception has over-stated his case. In the brilliant marshalling of facts and the keen use of analysis and satire, Mr. Frank has given the fundamentalist a naivete and an inanity that he does not possess. It is much like the treatment accorded John Austin by the pluralistic school. Mr. Frank's proposal is obviously more applicable to the field of public law, than in that of private law. Dean Pound, in his writings, has shown the need for greater certainty and rigidity in cases relating to "property" and "commercial and business transactions" than in those cases raising problems of "human conduct" or involving "the conduct of enterprise" where the question at issue depends on fraud, bona fides or negligence. Granting that it is difficult to draw a sharp line of demarcation between the two classes, we are still of the opinion that the Pound idea has not been undermined. The Frank thesis is peculiarly susceptible to abuse in its interpretation by faddists who would like to overemphasize the elements of complexity and flux in our modern life. No doubt many readers who are sympathetic with the Frank point of view will go much further than the author and will frown upon the attempt that is being made by the American Law Institute to restate portions of the law. But in spite of its exaggeration, which we believe is intentional, the book has great value as a challenge to those of the orthodox school. We trust that the work will have a wide circulation, and if so, we believe that it will do much to dispel the judicial somnambulism that is at present the curse of our craft.

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TENURE OF OFFICE UNDER THE CONSTITUTION. James Hart. The Baltimore, Johns Hopkins Press, 1930. Pp. viii, 384.

This book is an expansion of an article that originally appeared in the *American Political Science Review* under the title "The Bearing of Myers v. United States Upon the Independence of Federal Administrative Tribunals." The Myers case is one of the most important constitutional decisions of recent years raising the question as to the respective powers of the President and the Congress over removals of federal officials. The Supreme Court realizing the significance of the case allotted two days for the argument. James M. Beck presented the case for executive removal and George Wharton Pepper defended the doctrine of legislative control over removals.

Professor Hart by way of introduction points out the rapid growth in the last two decades of federal boards and commissions which are outside the ten great executive departments. His primary thesis is to present a case for some independence of tenure for these commissions. He stresses the desirability of guaranteeing such independence through the interposition of legal restraints upon the President's power of removal as a matter of legislative policy. In defending the constitutional argument in favor of the validity of such Congressional legislation he attempts to show (and we believe successfully) that the Myers case, interpreted in the light of a strict application of the principle of stare decisis, does not necessarily preclude the application of the constitutional theory advocated by the author.

The Constitution is silent on the power of removal and administrative supervision. The Convention debates do not afford an answer to the problem. From the fact that the Constitution specifies tenure during "good behavior" for judges alone, may the inference be drawn that the framers did not intend to guarantee other officers such tenure? And does Congress in relation to the other officers have the right to determine not only the maximum term but also have the power of plenary control over the whole problem of tenure? If such is the case, in the absence of such legislation, are we to infer that Congress intends tenure during good behavior, or are we to infer a conditional power of removal on the part of the President? Or are distinctions to be drawn on the basis of the character of the office?

The main contribution lies in the technique of approach utilized by the author in the examination of this knotty problem. In the words of Professor Hart, "In primary aim, it is a study in politico-legal processes from the point of view represented by John Dewey in logic, philosophy, ethics and politics, and by Mr. Justice Holmes and W. W. Cook in law." It constitutes a departure from and a protest against barren logic and formal legalism. It is a profound analysis, cleverly executed and represents in the opinion of the reviewer one of the best applications of the Pound-Cardozo sociological method. In a situation where there is a choice of competing premises, the court should select those which lead to the socially more expedient consequences.

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FEDERAL JURISDICTION AND PROCEDURE. By John C. Rose. Fourth (4th) Editions. Albany, N. Y.: Matthew Bender and Company, Inc. 1931. Pp. xxxix, 1138.

Mr. Rose, United States Circuit Judge, is one of the greatest contributors of manuals and reference books on the jurisdiction of and procedure in the Federal Courts. He has revised his last authoritative manual of Federal Jurisdiction and Procedure (3rd edition) to embrace the many important changes that have been made since its publication in 1926, namely (1) the enactment of the new United

States Code; (2) the passage of several important acts by Congress amending the Judicial Code, particularly in reference to Appellate Procedure; (3) Writ of Error which has been abolished in federal appellate practice, substituting appeals in lieu thereof (A); (4) revision of the Rules of the Supreme Court of the United States on July 1st, 1928 (B) and (5) the adoption of a new Equity Rule 70½, by the Supreme Court the latter part of the past year. It is apparent, after noting the above important changes in the rules of federal jurisdiction and especially procedure, since the author revised his earlier works (1st and 2nd editions) on the subject in the third edition, that this book will be a welcome addition to our libraries. The book is the last word in the field it covers—the Bible for controversies in Federal courts.

Mr. John C. Knox, United States District Judge of the Southern District of New York, speaking of this book said, "When Judge Rose wrote his book on 'Federal Jurisdiction and Procedure' he conferred a favor on all of us who have anything to do with the Federal Courts. With clarity, conciseness and directness, he stripped the mystery from his subject matter, and has enabled us to see an important branch of jurisprudence as it actually exists. It is seldom that a book is based on such wide experience and breadth of learning as buttresses the text of this volume. Truly indeed, his work lives after him."

The purpose of the book, according to the author, is to state and briefly explain the general rules which determine the jurisdiction of the Federal Courts; to give some account of the organization of the Federal judicial system; to point out the more important respects in which the procedure of these tribunals differs from those of the states; and to say a little about those subjects of general law upon which they do not feel themselves bound to follow the decisions of the state courts.

The book deals first with the important question of jurisdiction. Chapter one, entitled "The Origin and the Limits of the Jurisdiction of the Federal Courts", includes sections which explain the details of bringing and maintaining actions in the Federal Courts. The second and third chapters, deal with the Supreme Court of the United States and its jurisdictional limitations, and the history and organization of the inferior courts of the United States. Special emphasis should be placed upon the chapter on Criminal Procedure, which is clear, coherent and complete. The author retained a description of the practice of equity as it existed before the promulgation of the new rules.

Mr. Rose, in the opinion of this reviewer, has done a good piece of work covering a large subject in some eleven hundred pages. The only animadversion that may be made is that the procedure in Bankruptcy, the subject of perhaps the greatest number of cases in the Federal district courts with the possible exception of those dealing with infraction of the Eighteenth Amendment, is passed over with few comments.

Procedure is a technical subject; yet the author is not concerned

other than to tell the practitioner what steps to take. He is not a reformer.

A valuable collection of forms is appended, along with: The original Judiciary Act (1 Stat. 73); The Judicial Code, with amendments as contained in the U. S. Code annotated; Equity Rules (28 U. S. C. A. sec. 723) and Revised Rules of the Supreme Court of the United States with index thereto.

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WILLIAM B. GESS.

CASES ON THE LAW OF INSURANCE. By William Reynolds Vance. St. Paul: West Publishing Company, 1931. Pp. xxiii, 1020.

The second edition of Professor Vance's well known case-book on insurance contains approximately one-third more material than the first edition contained. His statement in the introduction, that he has made a shift of emphasis from history to economics, is well sustained. The reason for this, as he says, has been the separate development of American Insurance law, which has been more varied and functions far more for social welfare than the rules developed in England. Like the second edition of Professor Vance's treatise, the case-book lays considerable emphasis upon risk-bearing, risk-shifting and risk-distribution which was not found in the old editions.

An excellent chapter is inserted on state control of insurance with respect to insurance as commerce, with respect to insurance as affecting the public interest, and with respect to the power to control rates. A considerable working over of the material on insurable interest is also found, a distinction being drawn more closely between property and life insurance than between the different types of property insurance on the one hand and life insurance on the other.

There are few chapters dealing with the premium as the distributive share of the risk that falls upon the insured. Concealment, representations and warranties are dealt with as methods of ascertaining and controlling the risk. Here again Professor Vance breaks away from the historical method of approach.

The chapter on Waiver and Estoppel well illustrates the thorough-going revision of the book. In the first edition seventeen cases were used. In the new edition there are thirty-two cases, of which 24 are either new cases or cases not used before, leaving eight of the old cases republished in the new edition, and nine of the old cases discarded. Professor Vance inserts the definition of waiver as found in the Restatement of Contracts Section 291, and also the explanatory notes thereto. It is not clear however, that he adopts that definition of waiver, and it would seem that possibly two fact situations found in his article in 34 Yale Law Journal (834 at pages 843-4, cases 6 and 7 dealing with what he calls "waiver proper") would not be waiver, or at any rate the same result would not be reached if the Restatement definition were followed. The topic "Rights Under Policies" has been very greatly expanded, and especially has there been expan-

sion of the problems under subrogation. There has also been a very considerable expansion of the chapter dealing with "Construction of the Policy". In the last chapter, the law of various other types of insurance policies not dealt with at all, or at least not largely, in the earlier edition, is dealt with.

This reviewer believes that this is by far the best case-book published on insurance. It perhaps more nearly illustrates the "functional approach", than other orthodox case-books. The chief difficulty that most instructors will find will be its size. At best not more than three hours are usually given to the subject of Insurance. A great amount of selection must be made. This however, is probably not a fair criticism, since the cases selected by Professor Vance will be suggestive for the instructor and leaves him a considerable choice.

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