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Book Review

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BOOK REVIEWS

READINGS IN AMERICAN LEGAL HISTORY. Compiled and edited by Mark DeWolfe Howe. Cambridge: Harvard University Press, 1949. Pp. 529. $7.50.

THE GROWTH OF AMERICAN LAW: THE LAW MAKERS. By James Willard Hurst. Boston: Little, Brown and Co., 1950. Pp. xiii, 502. $5.50.

"The faculty of the Harvard Law School recently approved a plan for reorganization of its curriculum. One element in the plan calls for the offering of a two hour elective course in American Legal History in the first semester of the second year. The materials collected in this volume have been brought together with the immediate purpose of meeting the needs of that course."

Thus Professor Howe accounts for *Readings in American Legal History*. By reason both of exigencies of time and of the primitive state of studies in American legal history, the method of the book is selective: "its materials are concerned with a selected group of problems and a limited number of periods of American legal history." The book's five chapters are entitled: "The General Problems of the Reception and Rejection of English Law" (pp. 1-71); "The Condition of the English Law, 1550-1650" (pp. 72-99); "The Law in Massachusetts Bay Colony" (pp. 100-267); "Critical Problems of American Law, 1790-1820" (pp. 268-432); and "The Nineteenth Century Movement for Codification" (pp. 433-529).

In illustrating these themes, Professor Howe has made use chiefly of case reports, but also of statutes, codes, treatises, scholarly articles and other sources. The material so assembled is richly varied; in addition to raising problems important in the development of legal institutions and doctrines, many of the selections are intrinsically interesting or entertaining. For example, early in the first chapter, which deals somewhat generally with American attitudes towards our English legal heritage, we find Thomas Jefferson arguing with learning and some heat that Christianity is no part of the common law, and Sampson in the *Discourse Upon the History of The Law* (1823) stating this view: "Let us keep in mind, that we too must become ancestors and be judged by posterity. We cannot altogether foresee what may be said of us, but part we may imagine. These people (it may be said), long after they had set the great example of self-government upon principles of perfect equality, had reduced the practice of religion to its purest principles, executed mighty works, and acquired renown in arts and arms, had still one pagan idol to which they daily offered up much smoky incense. They called it by the mystical and cabalistic name of Common Law. A mysterious

essence." By means of cases chosen from several jurisdictions there is developed in the latter half of the first chapter the problem of reception in this country of the English law of charitable uses.

The material on "Critical Problems of American Law, 1790-1820," and especially the section on "The Common Law and Federalism," which commences with the question of a Federal common law jurisdiction in criminal matters and concludes with *Swift v. Tyson,* seems to me the core of the book. "The Nineteenth Century Movement of Codification" is a much less obvious selection for a course of this sort, yet it furnishes an angle of approach to the entire problem of flexibility—or—certainty in law. The final selection in the book, an article from the *Los Angeles Weekly Express* of December 18, 1873, amusingly points up the issue. An Englishman named Oades had settled in San Bernardino and married a young widow, by whom in time he had a child. Thereafter, his first wife, accompanied by the three children of her marriage to Oades, arrived and joined the menage. Oades was indicted for bigamy. At the trial he proved that eight years before, in New Zealand, his house had been burned and his wife and children presumably killed in a Maori raid while he was temporarily absent from home; and he relied on the provision of the Penal Code to the effect that one whose spouse had been absent for five consecutive years should not be convicted of bigamy provided he did not know the missing spouse to be alive. Verdict was directed for the defendant. When Oades continued to live, and even to attend church, with both his wives, an annulment was proposed; but section 83 of the Civil Code required the action for annulment to be brought by one of the parties to one of the marriages and no such party was willing. At a public meeting called to consider the situation, someone suggested petitioning the legislature to dissolve the second marriage, but Oades invited attention to the prohibition in the California Constitution on legislative divorce. A constitutional convention next was urged, but Oades informed the meeting that a state may not impair the obligation of contracts. Finally, when a minister was sent to call upon him, Oades rejected the appeal to religion and declared: " . . . such matters, after all, are to be settled in each State as the legislators in their wisdom should deem best, it being now a settled principle in jurisprudence that all rights and obligations have their sources solely in legislative enactment; . . . this being the fundamental idea upon which the Civil Code is based. As to the old notion of natural right," concluded this somewhat pedantic bigamist, "that is entirely exploded. Nous avons changé tout cela." Unfortunately, the rest is silence.

My only complaint with the book is the brevity of Chapter Two. "The Condition of the English Law, 1550-1650" and the relatively great length of the succeeding chapter, "The Law in The Massachusetts Bay Colony." I do not intend, in the words of the Preface, to attribute this material to "the arid

enthusiasm of an antiquarian"; on the contrary I found much of the material far from arid. It is undeniably interesting, if not edifying, to observe the appeals to the "judicials of Moyses"; and the zeal for justice that discriminated so nicely between the use of the oath (prohibited) and of the rack and hot irons (permitted) in the extraction of confessions; and the even sterner zeal for the suppression of heterodox opinions. Yet these interests, even for New England, represent a sort of blind alley; The common law like the Anglican communion came late to Massachusetts, but when it came it conquered.

It is not necessary, I suppose, either to welcome the course for which these readings were selected or to apologize for giving the student more than the bare minimum of obviously practical training. Such a course cannot help but unify and illuminate the rest of the curriculum. And in the presence of a law as intensely historical as ours, it could hardly be a mistake to offer work in legal history.

The Growth of American Law is widely different in nature and purpose from *Readings in American Legal History*. The task Professor Hurst sets himself is to present, in terms of national and state legislatures, courts, constitution makers, bar, and executive, the functioning of American law from 1790 to 1940. This he does in 472 pages of text and bibliography, with, it seems to me, really astonishing success. The book should find a general and, it is hoped, an extensive audience, although it will of course be especially meaningful to law students and lawyers.

Research for the book was evidently assiduous, and an impressive serving of facts is offered the reader. The author's method is one of criticism and analysis, however; he appraises his facts, and if the evidence seems thin he says so plainly; once the facts are in he sets about establishing their meaning. His conclusions are not controlled by the prevalent opinion or the mere appearance of things; in speaking of the seniority rule in assignments to congressional committees, for example, he does not fail to mention the contribution it makes towards continuity in the work of the committees.

It is impossible to do more here than indicate very generally the excellence of *The Growth of American Law*. The writing is all that law writing should be and frequently fails to be: clear, direct and wholly free of jargon. Much of the information will be unfamiliar even to lawyers, and little of it is easily obtainable elsewhere. The book can be put to excellent use, it seems to me, as an adjunct, in a course in American legal history, to a compilation of materials such as that made by Professor Howe. It also should afford a convenient starting point for further, more specific, studies in the field.

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REASON AND LAW. By Morris R. Cohen. Illinois: The Free Press, 1950. Pp. 211. $3.50.

AN INTRODUCTION TO LEGAL REASONING. By Edward H. Levi. Chicago: The University of Chicago Press, 1949. Pp. 74. $2.00.

LIVING LAW OF DEMOCRATIC SOCIETY. By Jerome Hall. Indianapolis: Bobbs-Merrill Company, Inc., 1949. Pp. 146. $2.50.

The demands of the lawyer's professional life are such that there is not too much time left over to examine the premises upon which that professional life is being conducted. Any such inquiry into the bases of habitual conduct it certain to be difficult. The requirement that one extract himself from his very life is the major obstacle. How does one look objectively at his own prejudices? Probably the best and easiest way is to select a capable guide and simply let yourself be led by him through the woods. Morris Raphael Cohen was—and in his books, still is—such a guide. A philosopher and logician, he took the instruments provided by these studies and used them to probe and measure the production of the human mind. *Reason and Law* is a selection of his articles and book reviews in which the ideas of others on legal matters are examined with an unsurpassed eye for confusion in premises. One of Cohen's basic principles is the necessity for distinguishing *what is* from *what ought to be*. History is tale of what was and is. Ethics devotes itself to what ought to be the story. A second principle is that logic has no necessary reference to what actually exists. The objective of logic is the validity of the inferences drawn from propositions; not the truth or falsity of the propositions so used. The possibilities of these two principles in application as demonstrated by Cohen, will enlighten and perhaps sober the most expansive spirit. As an example, the essay, "Absolutisms in Law and Morals" (p. 63) is recommended. Or, if you believe you know why criminals are punished, try "Moral Aspects of the Criminal Law" (p. 15). A tremendous learning is unveiled in these pages and yet it never interferes with a graceful clarity of style that should intrigue anyone who has ever thought that he could prove that the earth revolves around the sun.

Edward Levi's theme is the narrow one of showing the judicial mind using logic on existing precedents, a statute or a constitution to decide new cases. As pointed out above, when logic is applied to two related premises, nothing more can emerge than a valid inference. If you want true or desirable conclusions, the preliminary task is in the choice of premises. The great judge finds the premises he wants in the existing precedents—a little twist and *MacPherson v. Buick* [1] has appeared. Without the twist, the commentators deplore the mechanical jurisprudence which preserves the symmetry of the

1. 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F 896, Ann. Cas. 1916C 440 (1916).

law without consideration of society's needs.[2] The twist is the judicious selection of the appropriate premise out of the existing mass of adjudicated decisions. But how do you know when the time for such selection has come? Levi says simply that an expansion of the law occurred when "The point of view of the society changed. It could not have been planned; it happened" (p. 73). Perhaps this is not too helpful a guide; but then this is history, not ethics. Professor Levi's tale of the judicial expansion of the Mann Act will interest every student of the law. If a Congressional attack upon the white slave traffic is used to include Mormons traveling with their plural wives, then we can realize that when logic alone is applied to unlimited numbers of possible premises, we are left without a fully predictable future in legal development.

The developments related by Levi serve excellently as a background for the primary question raised by both Morris Cohen and Jerome Hall—that is, "What is law?" In the initial essay in Professor Cohen's work, he states the outlines of his philosophy of law and then, in the light of the principles there stated, he examines other and narrower problems that arise within the field of law. Jerome Hall's volume is devoted entirely to the answering of the basic question. It is a devious and, all too often, obscure trail. Cohen's essay on his own legal philosophy seems the most useful and illuminating guide through Hall's endeavor, for in the end they are both in rather similar positions. Professor Hall finds that "in its totality, law is a distinctive coalescence of form, value, and fact." (p. 131). The form reveals what we recognize as the operation of the State enforcing its commands. But as we know it, commands of the State are not arbitrary, they have some ultimate basis in what ought to be. There is inherent some ruling concerning the rights and duties of citizens. Laws must have an ethical content. Hall claims that by his definition, rules of procedure, the regulation of corporate activity, and tax liability are excluded from the orbit of positive law (p. 140). But surely the ends of justice are served by instituting a simplified and speedier form of procedure for the resolution of litigation. This is a safe assertion since a basic conclusion advanced by Hall is that "the objective validity of moral judgments is known intuitively or, as regards problematic situations, it is established by analysis, discussion and reflection, coherence with wider experience, the consensus of informed unbiased persons, and the universality of the solutions among diverse cultures" (p. 80-81). I am not prepared to admit that either personal intuition or a majority vote is a proper test of the objective validity of an ethical principle, but the necessity for a consideration of what ought to be and its actual presence in our law are beyond debate. A truly difficult moral problem in

2. Pound, *Mechanical Jurisprudence*, 8 COL. L. REV. 605 (1908); Kales, *"Due Process," The Inarticulate Major Premise and the Adamson Act*, 26 YALE L.J. 519 (1917).

our world today is one that Hall assumes as being already settled. Almost casually, he advises us that "If we cast a reflective glance at a typical American scene, we may well agree, in these days of stress and challenge, that the finest product of human thought and moral insight is the democratic way of life" (p. 8). It is hoped that this was only a friendly greeting to the audience he was addressing, because it is most certainly no sort of a premise for a serious student to use in a search for objective validities—particularly since the volume ends with Hall exhorting the scholars of the world to unite in a research to determine which of conflicting theories of law fits "significant fact and experience, past and present, better" (p. 141). It would have been more profitable to tell these scholars what to look for than to advise them of what they would find.

The third element in Hall's definition is the insistence that the law is a cultural fact. Law is not merely an idea, it is an integral part of the society in which it operates and is made apparent by means of an elaborate set of institutions. Hall gives us at least one example of this: "A prison viewed as a pile of bricks is not an instance of the factuality of law. But a prison viewed as the concretization of a legal sanction, viewed as part of the actualization of the thought, 'must be imprisoned for five years,' does represent an instance of the factuality of law" (p. 119). This stress upon the facts of the culture within which the law operates does serve to emphasize the continuing need for examining these facts. The change of attitudes towards "liberty of contract" is an example of an adaptation to facts that is within our own legal experience.

In the beginning of this review, it was suggested that there was probably only a limited time available to the busy lawyer for consideration of the problems raised in these books under discussion. Professor Hall feels that "we are diverted from the path of knowledge by our addiction to the practical, professional problems" (p. 134). Addiction to the task of earning a living is admittedly time-consuming; nevertheless it cannot be denied that clarity of thought and a riper understanding of what one is doing may have some significance, and even some material value. If so, Morris R. Cohen is the man to see for counsel on these matters.

STANLEY D. ROSE *

LAW AND TACTICS IN JURY TRIALS. By Francis X. Busch. Indianapolis: Bobbs-Merrill Company, 1949. Pp. xxvii, 1147. $17.50.

SUCCESSFUL TRIAL TACTICS. By A. S. Cutler. New York: Prentice-Hall, Inc., 1949. Pp. ix, 319. $5.35.

Mr. Busch's work, *Law and Tactics in Jury Trials,* also bears the title "The Art of Jury Persuasion," and is an excellent one-volume text book on

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the conduct of jury trials. The author observes in the introduction that the advocate has the office of selling his client and his client's case to the jury. He notes that this is seldom accomplished by argument alone, but that the "persuasion is a gradual process commencing when the jurors take their seats in the jury box and catch their first glimpse of the lawyers and their clients, and continuing until the triers are consigned to the custody of the bailiff and confined for their deliberations."

The work is copiously footnoted by references to cases and text authorities, and, while it does not purport to be a work on evidence, it nevertheless has some value on this subject. It contains 25 chapters which may be grouped under the following five general subheads: (1) a brief history of jury trials, including a discussion of the nature and extent of the right to jury trials in the United States, and a consideration of the constitutional and statutory restrictions and limitations; (2) the selection and impaneling of the petit jury, including considerations of the qualfications of the jurors, the grounds of challenges to the array and challenges for cause, together with sound suggestions as to when the right of peremptory challenge should be exercised; (3) a discussion of the relative duties and responsibilities of the court and jury, and a brief chapter emphasizing the importance of preparation both on the law and the facts—which is, of course, the secret of all successful law practice, whether in the court room or the office. The fourth general subhead deals with the actual conduct of the trial; and the fifth concerns instructions to the jury, the conduct and deliberations of the jury and the form and nature of their verdicts.

The bulk of the work falls under the fourth subdivision mentioned above —the actual trial. Here are included some eleven chapters on the subjects of opening statements, the marshaling and presentation of evidence, direct and cross examination of witnesses, with a separate chapter on redirect and recross examination, rebuttal and surrebuttal evidence. There are also three very fine chapters on opinion and expert testimony, and the suggestions in these chapters as to proper methods of laying the grounds for the admission of such testimony, and the proper approach in examining and cross examining expert witnesses are very ably and clearly presented.

A number of the chapters are divided into Parts A and B; A contains the text, which is annotated, and B comprises verbatim excerpts from recorded examinations and arguments, cross-indexed to the text and designed to illustrate the text. Each excerpt is preceded by a brief statement of facts and an explanation of the purpose of the testimony, and is followed by comments on the results obtained, together with a critical discussion of the methods employed.

Success in trying jury cases is usually the result of much practice and experience, and cannot be obtained from books alone. "The Art of Jury