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Book Reviews

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BOOK REVIEWS

LAWYER AND LITIGANT IN ENGLAND: THE HAMLYN LECTURES, 1962. By R. E. Megarry. London: Stevens & Sons Limited, 1962. Pp. x, 205.

The one-hundred per cent American is known even in the law. When in 1906 a young republican lawyer from Nebraska, not yet come to fame, Roscoe Pound, addressed the American Bar Association on "The Causes of Popular Dissatisfaction With the Administration of Justice," there was the threat of condemning him as a dangerous radical.[1]

It is well to remember in these days of world-wide involvement that there are one-hundred per centers in all other countries, too, as China, Ghana and the Soviet Union. For a Russian to go to another country and then write objectively about what he has seen abroad is a sin against Communism. Even England, with her characteristics of restraint and understatement, harbors devoted loyalty. A remote cause of these lectures is the creation of The Hamlyn Trust by an English lady, the daughter of a solicitor, who was so convinced of the superiority of English legal institutions that she desired the English people be made to appreciate their privileges and recognize their responsibilities.[2]

How do English men of law carry on their work? To answer this question Mr. Megarry puts aside as best he can his many badges of distinction in the law, Lincoln's Inn barrister, Queen's Counsel, lecturer in the Inns of Court, author of learned treatises, and editor of the Law Quarterly Review. Assuming the position of the reasonable defeated litigant (if such a creature there be), he considers whether the English system makes even the loser perceive he has had a fair hearing. It is for the English layman he writes and also for lawyers abroad "(not least in the U.S.A.)." He does it with knowledge and insight and wit.

The division of the English profession into two branches is the aspect that first strikes an American. The solicitor is more than the office lawyer whom the client consults in planning business and personal affairs. He is the first of the two lawyers on each side in every case in a major court. Much as it is with the Lowells and the Cabots of Boston, in England the client speaks only to the solicitor, the solici-

1. See Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUD. SOC'Y 176 (1937).

2. The terms of The Hamlyn Trust are given in MEGARRY, LAWYER AND LITIGANT IN ENGLAND; THE HAMLYN LECTURES pp. ix-x (1964).

tor only to the barrister, and the barrister only to the judge. Specialization of function and of field is the justification of the system. The solicitor is a man of affairs, a benevolent spider who pulls together the strands of the client's case. The barrister is "a brain, a voice, a character." Together they form a partnership *ad hoc*. The solicitor as the dominant partner chooses the barrister, works up the case, and sends to the barrister "the brief" embodying its preparation, but in court sits mute. With the two barristers selected by fellow lawyers skilled in selecting, the system has an equalizing function. Very rarely in England is there the disparity in ability of advocates so often obvious in American courts, where the inexpert lay client chooses his lawyer who may be excellent in desk-side manner and miserable in advocacy. The division of the profession solves in a fashion a matter now troubling the American Bar Association, the cooperation of the generalist and the specialist. The solicitor may take the opinion of a barrister in a field in which the latter is expert. Since the lay client cannot approach the barrister except through a solicitor, the danger of the expert wooing away the lay client is obviated.

Litigation is discouraged in two ways. Contingent fees are forbidden and the assessment of costs against the loser results in his payment of the fees of the winner's lawyers, as well as the fees of his own. Cases move swiftly. Nearly all civil cases are tried without a jury. Continuances are not granted for the convenience of counsel even when engaged in another court. In appellate as well as trial courts the whole proceedings are oral with no such thing as the printed argument, the American "brief." Even appellate cases are ordinarily decided from the bench by oral opinions. "The system of appointment to judicial office in England is about as English as it could be: theoretically it is open to great abuse, but in practice it works extremely well."[3] Appointment for life is made by the Lord Chancellor or by the Prime Minister, both of whom are political officers. In recent years at least, appointment has been made without regard to party. The American system of popular election and short terms, with its threat of political pressure, popular clamor, and defeat at the polls is unknown. There is implicit recognition that the trial judge is no less important than his appellate brother through identity in salary of the trial bench and the court of appeal.

Effective leadership of the profession shows itself in various ways, two of which deserve mention. One is "An Honourable Code, Honourably Observed." While the two branches of the profession have disciplinary powers over their members, "what in many ways is more important is the existence of strong and effective professional opinion

3. *Id.* at 117.

. . . this professional opinion is not merely a deterrent to misconduct, but also encourages and sustains all that is best."[4] Again, there is initiative in methods of providing legal services. It was the lawyers who developed and had Parliament adopt the legal aid and assistance plan for civil matters, which is supported by public funds and administered by the lawyers' organizations. Its admirable effectiveness justifies the published notice to the poor and the near poor, "THE SERVICES OF A LAWYER ARE WITHIN YOUR MEANS."

The book brings to mind Justice Jackson's statement "that the most constructive was also the least intellectually isolationist period of our legal history."[5] The author, a frequent and helpful visitor to the United States, has a proposal for reducing intellectual insularity in his country. It is a sabbatical year for members of the court of appeal with encouragement to spend a substantial part of it in other Commonwealth jurisdictions and in the United States of America: "the real value of such visits would lie in the freshening of approach and arousing of interest that would result."[6] Whatever the method, we too can make use of "the freshening of approach and arousing of interest" at least as much as our contemporary ancestors, the English common law profession. Fortunately the attitude of the bench and the bar has changed much since the hostile reaction to Dean Pound's paper of 1906. There is widespread reexamination of our legal system in these changing times.

In a notable paper[7] this year, Dean Blythe Stason, Administrator of the American Bar Foundation, and R. H. Smith stressed the importance of research by the organized bar, the law schools and the social scientists so as to meet wisely law administration's mounting problems. The wisest words of this wise and witty book may well be, "problems are made to be overcome."[8]

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4. *Id.* at 54, 55.

5. Jackson, *The Genesis of an American Legal Profession: A Review of 150 Years of Change*, 38 A.B.A.J. 547, 616 (1952).

6. MEGARRY, *op. cit. supra* note 2, at 163.

7. Smith & Stason, *Income of Lawyers, 1960-1961*, 50 A.B.A.J. 456 (1964).

8. MEGARRY, *op. cit. supra* note 2, at 112.

THE LANGUAGE OF THE LAW. By David Mellinkoff, Boston: Little, Brown & Co., 1963. Pp. xiv, 526. $12.50.

This volume of five-hundred-and-twenty-six pages takes its readers upon the interesting pilgrimage which the lawyers' English journeyed in making its way from the misty Celtic period of ancient Britannia down through the Roman, Saxon, and Norman occupations until eventually the colonists brought the English language to America where the lawyers of the new world took many liberties with it.

The author describes the English language of the time of the Colonists as "a back-water language" and adds that it was "only in fifth place in the roll call of the languages of the west." *The Language of the Law* sparks with ideas and brings to its readers a storehouse of information about our native tongue. The writer traces the sources of words and their history. He discusses at times the composition of a sentence and even the punctuation of written material. The book has no dull passages and no dull moments. It does not hesitate to criticize when criticism will be helpful and impart ideas. Pompous words are not employed. The style of the book is crisp. The commonplace is avoided. In portraying the development of our language—especially our written language—the book gives valuable sidelights upon the origin of an occasional rule such as the hearsay evidence rule. Likewise, as the account marches on in developing the history of our language, it mentions many incidental interesting items. For example, the custom of sealing documents originated in Normandy prior to its introduction in England by Edward the Confessor, The seal keeper was called the "Cancheler" and he eventually became the Lord Chancellor.

The book shows effectively the manner in which law English incorporated into itself French, Latin, Dutch, Greek, Scandinavian and other words of foreign coinage. After English had made converts of these immigrants, it deemed them parts of the expanded English language. Thus, the language which the lawyer in America employs when he writes a will, drafts a lease, prepares a brief, or argues a case is expressed in words which came from many lands in addition to England. Some words, such as "dickering," had their nativity right here in America.

Today the lawyer realizes his need for ability to express himself with clarity. If he undertakes to write a will for a client, and if it develops after the testator's death that the will does not express the deceased's wishes, a tragedy occurred when the lawyer drafted the will.

The lawyer must be a master of the English language. He must have an adequate vocabulary; but above all, he must know which

word or group of words, when reduced to writing, will reflect the precise idea that is in his client's mind. A knowledge of the original meaning of a word accompanied by a knowledge of the evolution through which it went in reaching its present connotation can be the lawyer's best helpmate. For the lawyer who wishes to expand his vocabulary and gain a new insight into the meaning of many words, this book can be a valuable aid. Likewise, every lawyer who, in composing any writing, wishes to avoid needless words will receive many valuable suggestions from this book. A lawyer who can make one word do the work of two is a veritable amicus curiae.

A lawyer who has written a document generally finds that it meets its most severe test when it comes before a court. To write in such a manner that the man on the bench, who will be called upon to construe the instrument, will catch its meaning is by no means an easy undertaking although its difficulty is frequently underestimated. If the instrument is a will, it gives instructions for the disposition of the testator's estate. It may be that the man on the bench and the lawyer who wrote the instrument do not have the same conception of words of art. When that occurs a severe stroke of ill fortune may await the lawyer as well as the family of the deceased.

The best means whereby a lawyer may avoid the ill fortune that occurs when a document is construed contrary to expectations is to acquaint himself thoroughly with the English language. A substantial part of his income is received from writing papers. He therefore should make himself proficient in the art of writing. The acquisition of proficiency in writing can be a pleasure. For those who wish to acquire that proficiency this volume is a valuable aid.

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