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# Book Reviews

# *BOOK REVIEWS*

THE LAWYER FROM ANTIQUITY TO MODERN TIMES With Particular Reference to the Development of Bar Associations in the United States. By Roscoe Pound, Dean Emeritus of the Harvard Law School. A Study prepared for and published by the Survey of the Legal Profession Under the Auspices of the American Bar Association. St. Paul, Minnesota: West Publishing Co. 1953. Pp. xxxii, 404. $5.00.

WHEN Reginald Heber Smith, Director of the American Bar Association's Survey of the Legal Profession, was casting about for someone to write a history of lawyers from the earliest days of organized society to the present time, he had none too large a group from which selection might be made. However one scholar, Roscoe Pound, eminent authority of the law of European civilization and culture, stood out above all others in the field, and to him Director Smith instinctively turned. The choice was a natural one, and could not have been more wisely made since no American through training, knowledge and inclination was better qualified than the Dean Emeritus of the School of Law of Harvard University. Each page of the finished work testifies not only to the wisdom of the selection but also to the complete absorption in the story that is told, brief as may be the treatment accorded some topics.

How many times Mr. Smith and Dean Pound conferred in regard to the history that was to be written, I have no knowledge. Probably few conferences were held; perhaps none at all. This was as it should have been for both men on numerous occasions, and over a long period of time, had attempted to convey to those who understood the published word as well as what lay between the lines, the same message,—that lawyers if they would survive must raise high the professional standards under which they claimed the right to exist, and adhere unfalteringly to them. Not that alone, but that members of the legal profession right across America must establish Bar Associations on an integrated basis if their ideas of justice and service were to be popularized, accepted and survive. A history of the profession, both men believed, would serve as a backdrop for a platform on which the future plans and efforts of American lawyers and their bar associations could be staged. It would demonstrate how uneven, how full of pitfalls, how lacking in steady direction, had been the progress of the profession over the years. It would constitute an introduction to the marked professional growth that has taken place since 1870 and instill a determination that the mistakes of the past must not be repeated; that the years must be not only meritorious but glorious.

In other words, that the practice of law must be the noblest of all of the professions in America, and that this status can be achieved and maintained more readily and more fully through the establishment of an integrated, associated American Bar.

This was the aim; this the purpose. In a broad sense the whole of this book, pages 3 to 349, was composed in order that the "Epilogue," pages 351 through 362, might be written since it is in these few pages that Dean Pound sets down what the lawyers of America must resolutely do if they would be members of the profession meriting the highest trust and confidence of client, of court and of public, and assist in the administration of justice.

After listing the Director, Officers, and Council of "Survey of the Legal Profession Under the Auspices of the American Bar Association," page v; the "Scope, Methods and Objectives" of the Survey by Reginald Heber Smith, pages vii-xx; an "Introduction" by Robert G. Storey, pages xxi-xxii; a "Preface" by Roscoe Pound, pages xxiii-xxviii, in which law and its meaning and function throughout man's history is explained; the "Table of Contents", pages xxix-xxxi, and a "Bibliography", page

xxxii, the study is separated into ten chapters, pages 1 to 362. In order these are: What is a Bar Association; Origins: The Lawyer in Antiquity; The Organization of Lawyers in the Ecclesiastical Courts and in Tribunals of the Civil Law; The Organization of Lawyers in Medieval England; The Organization of the Profession in England from the End of the Middle Ages to the American Revolution; The Rise and Organization of Lawyers in Colonial America; Bar Organization in the Formative Era; The Era of Decadence—1836-1870; The Revival of Professional Organization, and, Epilogue. Pages 363-379 are devoted to a "Table of Publications and Articles Quoted or Cited" while an "Index" covers pages 381-404.

Although this book is not a definitive study of the many subjects and periods of time covered in its pages, it does for the first time, and in one volume, give an historical account from the earliest times of who a lawyer has been held to be whether his title be *procurator, avocat, Attorney at Law,* or *Counselor at Law;* what function the lawyer class filled; what training for his work a lawyer through the centuries and in various countries received, especially in England and America; how well, as evidenced by the place in society he occupied, the lawyer performed the duties and services entrusted to him; in what manner he and his fellow practitioners organized themselves in order more adequately to serve their clients, and what practices and procedures he must institute and follow to justify his claim that his is a profession with obligations, rights and privileges. The account is an informative one and leaves an impression of continuity even when for long periods of time, to whatever country and day for the moment attention is being directed, retrogression rather than growth is dominant. As would be fitting, nearly two-thirds of the story concerns itself with the lawyer and his organizations in America from the time of the earliest settlements along the Atlantic seacoast to the present day. The very nature of the subject matter as well as the goal the author set himself to achieve causes the report at times not only to appear to be, but actually to be superficial. Otherwise not one but several volumes would be the end product.

To complain of such a study, or to point out defects either of fact, of viewpoint, or in emphasis may seem uncalled for, or may imply a lack of appreciation of the true merits of this outstanding work. Certainly whatever criticisms may be offered are devoid of a disparaging motivation. They relate only to one period and one area,—the lawyer in Colonial America and in particular of the Province of New York, of which I have some knowledge.

It would seem that Dean Pound not only relied too trustingly upon a few of the writings of a legal nature of the North American Colonies, but that he failed to avail himself of recent studies in the field of colonial legal history. He was unaware, it would appear, of a study, *Legal Education in Colonial New York,* which I made and which was published in 1939. Familiarity with the contents of this book would, I am sure, have caused him to present a number of statements, estimates and interpretations regarding the legal profession of New York in a far different light from that which occurs in his volume. Investigation of original sources has shown that the account as usually given, and here again repeated, of the reception of the Common Law, of the social, economic and political status of lawyers, of their number, of their education, of their bar associations, of their learning, of their libraries, law and otherwise, of the effect of the Revolutionary War upon the profession, as well as of a number of other conditions surrounding the practice of law in Colonial New York, has been both deficient and inaccurate. Research of the records of New Jersey and North Carolina has likewise been sufficient to warrant a belief that the existing legal histories of those colonies are deficient. As a matter of fact it is quite probable that investiga-

tion of the other North American Colonies will demonstrate a need for revision of their legal histories also. If so, the task should be undertaken at the earliest possible moment.

Dean Pound's *The Lawyer From Antiquity To Modern Times* has appeared at an appropriate time and will be read with profit by lawyers and laymen alike. They will cherish it because it traces the history of one of man's greatest institutions and of a segment of society which through the ages has served mankind.

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CIVIL LIBERTIES AND THE VINSON COURT. By C. Herman Pritchett. Chicago: The University of Chicago Press. 1954. Pp. 297. $5.00.

THE Vinson Court, which dated from 1946 to 1953, should have been almost constantly in the public spotlight because of the great number of decisions it rendered touching on crucial aspects of civil liberties. Yet the Court and its justices did not appear to stir public response or interest to any notable degree. Notwithstanding its opinions on restrictive covenants, school segregation, loyalty oaths, powers of investigative committees, freedom of speech in public places and released-time programs, it was a quiet Court as far as the citizen in the street was concerned. The two cases that roused some interest were the appeals of the eleven Communist leaders and the Rosenberg proceedings. The decisions in these matters coincided with popular opinion, and thereafter the flame of public interest flickered low again.

It is somewhat paradoxical that the surface impression made by the Court and its justices was one of placidity, for internally the Court was harassed by strong clashes of personality: difficult issues were often faced and unanimous opinions were few. However, it is not altogether callous to regard the time of the Vinson Court as a period of passivity. The political turbulence in which the predecessor Roosevelt Court existed had been smoothed over and many basic social and economic questions were already resolved. The ending of World War II had relaxed popular pressing interest in the state of the nation. Finally, America appeared to have entered upon a time when the discussion of public issues and the acts of legislators was not encouraged.

However, Professor Pritchett does not undertake a sociological study of the nation and its highest court. He early states his objective as the presentation of the growth process of a judicial institution, and especially of the individual justices as participants in the manufacture of an institutional product. Before he is through, he has on a secondary level presented us with a picture of the liberal legal mind reacting to the conflict between his predilections and the temper of the times. It happens that his study deals particularly with the ratiocinative processes of Justices Black, Douglas, Frankfurter and Jackson—thus covering the left and never-quite-center-and-shifting-wings of the Court. Of the right wing, only Chief Justice Vinson is discussed at any great length, and the author makes it quite clear that he considers Vinson's position confused and his juridical abilities limited.

The major portion of Professor Pritchett's book is devoted to a readable, incisive survey of the Court's decisions in the major areas of civil liberties in the immediate postwar years—prior restraints on free speech and free press; subsequent punishments for the exercise of the freedom of speech, with particular attention to the changes made in Holmes' clear and present danger test by *Dennis v. United States*; the status of

witnesses before investigative committees and the question of loyalty oaths; actions taken against resident aliens and denaturalized citizens; segregation; and due process in searches and seizures. Following this analysis, the author attempts to summarize and explicate the liberal attitude. In doing so, he places considerable reliance upon a series of charts which purport to classify the justices on the basis of their agreement and disagreement with their colleagues. Professor Pritchett is careful to point out that such a method is open to extensive criticism, and that he presents these "box scores" only to highlight or codify findings in support of more orthodox inquiry.

What does he tell us about the Vinson Court? First, it was a Court apparently greatly concerned with political realities and necessities. Next, it was reluctant to come into conflict with the executive or legislative branches of the federal government. Third, in such areas as school segregation and prior restraints on free speech and press, it moved forward with giant steps from the "libertarian" viewpoint; in other sectors it backed and filled and cast about for means to avoid taking a positive stand. Fourth, its aversion to the exercise of judicial review was manifest, both in the opinions it rendered and by the sparse totals of cases it heard on argument. Finally, because it was a body without a strong director, the Vinson Court spoke in several tongues and left many questions unresolved.

Professor Pritchett divides the justices during Vinson's tenure into three groups: the "libertarian activists," represented by Justices Black, Douglas, Murphy and Rutledge; Justice Frankfurter as the representative of a libertarian attitude affixed to a compelling belief in judicial self-restraint; and everybody else—Justices Burton, Clark, Jackson, Minton, Reed and Vinson—on the other side. Perhaps unfortunately, in contrast to some Courts of the past, there is no real right wing on civil liberties, and the "other side" on the Vinson Court is probably merely "less libertarian." It would appear that the author makes clearer distinctions among members of the Court when he links the aforesaid Black, Douglas, Murphy and Reed as emotion-oriented, *i.e.*, prone to giving greater weight to personal impressions as to the individual litigant's background, character and status than to the rigid requirements of a constitutional doctrine or a regulatory enactment. A little later he scores another telling point when he sees the activist quartet as leaping to the defense of predetermined concepts rather than attuning their deliberations to practicality. Professor Pritchett states this philosophy in his closing pages:

". . . a Supreme Court justice has a task which is broader than that of safeguarding or enforcing one set of values. He must balance the competing claims of liberty and authority. As Jackson has well said:

'The Court's day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend existence of our society, and to reject as false, claims in the name of security which would undermine our freedom and open the way to oppression.'

"If a justice automatically takes the libertarian side on every issue, he is scarcely functioning in a balancing capacity, no matter how persuasive his opinion may seem . . . .

'Label thinking unfits a justice to make distinctions based on matters of degree, and it results in the kind of absolutistic standards seen at work in Black's steel seizure decision. Label thinking leads a judge into a world of abstractions in which the facts of a particular case are unimportant, as Douglas demonstrated by his unrealistic approach to the Terminiello case. Label thinking encourages a justice to apply to a statute legal rather than empirical tests, as Murphy did when he declared the Thornhill antipicketing act unconstitutional 'on its face.' It would have been a better guide for future decisions if he had set the holding in a framework of circumstances rather than of concepts. . . ."

The impression persists that the author is not criticizing these justices for speaking abstract defenses of the "correct" attitude toward civil liberties so much as he is chiding them for being so exuberant in their statements that they fail to fit their views into the customary formality of an opinion by a Supreme Court justice, and thus weaken the effect of what they have to say. Aside from these remarks about individual justices, he finds the entire tribunal guilty of contentment with the court's position as the weak sister of our tripartite system of government. Too often, Professor Pritchett finds, the justices are willing to leave national policy on political and social matters to determination and enforcement by the executive and legislative branches.

It is this reviewer's belief that the Vinson Court was not atypical in this respect as far as civil liberties are concerned; and in other fields the Court was as conscientious in its surveillance in a guardianship role as its predecessors had been. If because of hard cases and pressing circumstances the Vinson Court may appear to have retreated from the full exercise of its constitutional powers and duties, it must still be kept in mind that historically the Supreme Court has no legislative responsibilities. There is small danger that our system of checks and balances will be lost so long as the Court still renders decisions forthrightly and fairly. The system of separation of powers is a fluid one, as are most societal schemes, and when each of the governmental entities acts to the full and with due regard to circumstances and the times, a proper and effective mixture results.

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FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY. By J. W. Gough. New York: Oxford University Press. 1955. Pp. ix, 229. $4.00.

WHEN Professor A. V. Dicey, the great latter-day interpreter of English constitutional doctrine, identified the "sovereignty of Parliament" as the dominant characteristic of English political institutions, he meant three things:

"First, there is no law which Parliament cannot change . . . acting in its ordinary legislative character . . . .

"Secondly, There is under the English Constitution no . . . distinction between laws which are not fundamental or constitutional and those laws which are fundamental or constitutional.

"Thirdly, There does not exist . . . any person or body of persons, executive, legislative, or judicial, which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution, or on any ground whatever except, of course, its being repealed by Parliament."[1]

This was not always true of the English Constitution. Mr. Gough's book is devoted to a detailed examination of the constitutional struggles of the 17th century before the political supremacy of the forces of Parliament was finally established with the Glorious Revolution of 1688 and the flight of James II. Much of Mr. Gough's study is concerned with the early part of the 17th century when Parliament was still conventionally styled as a Court—the High Court of Parliament—and when both supporters of the monarchy and the adherents of the mounting opposition forces in Parliament invoked "fundamental law" arguments to bolster their rival claims to power—the Crown lawyers and pam-

[1] Dicey, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 88-91 (9th ed. London, 1939).

phleteers taking their stand on fundamental rights of government which were so intrinsically inviolable that even an act of Parliament purporting to curtail them would be void, and the Parliamentarians for their part maintaining fundamental rights of personal liberty and property which even the King could not abridge.

As an historian, Mr. Gough is both scholarly and temperate. He carefully avoids the extreme positions of enthusiasm taken by partisan commentators (both 17th century and modern) on either side, and frankly acknowledges the fortuitousness, not to say the expediency, with which both sides arrived at philosophic arguments in support of their ultimate political claims. Thus he recognises (among other considerations which moved them, of course) the economic special interests of the leaders of the Parliamentary forces, the nakedness of which, after Parliament's victory in the Civil War and the execution of Charles I in 1649, did so much to promote popular, equalitarian, movements like the Levellers. It was this group which soon began to press demands for a written constitution in resistance to the new dominant legal claims to legislative omnipotence:

"To men like Coke, or even Hampden, the fundamental rights of liberty and property were rooted in the common law and the historic constitution, but by now not only was parliament threatening to become more arbitrary than the king, but the attitude of officers like Ireton made it clear that common-law rights meant only the rights of the well-to-do." (pp. 115-6).

Again, Mr. Gough is at pains to point out, in contrast to American commentators like McIlwain who seek to find in the English appeals to fundamental law in the 17th century some anticipation of the American constitutional law doctrines of the end of the 18th century, the lack of any very precise, constant meaning of the phrase "fundamental law" in the England of that day.

With the enunciation of the doctrine of sovereignty by Filmer and Hobbes, its further development by Locke towards the close of the century, and the achievement of the political supremacy of Parliament after 1688, concepts of fundamental law yield, in terms of dominant English constitutional theory, to the major proposition of the sovereignty of Parliament. But recourse to fundamental law notions does not disappear altogether. We can find such notions, expressed in terms of respect for natural law, in Blackstone's famous "Commentaries," first published in 1765, somewhat quaintly juxtaposed with the doctrine of Parliamentary sovereignty.

And Professor Laski has found fundamental law doctrines involving absolute rights to property and contract lurking in the English judges' application of common law presumptions to the interpretation of the statute law of the modern welfare state. Though concluding that Professor Laski has been unduly critical here, especially if we compare the views of contemporary authorities like Lord Justice Denning and Professor Goodhart, Mr. Gough seems to find in the traditional notions of self-restraint of English decision-makers—(the "rules of the game" as Professor Laski called them; the "respect which, in our experience hitherto, majorities have not failed to pay to the rights of minorities" as Mr. Gough himself describes it (p. 211) )—ample safeguards to any dangers of arbitrariness flowing from the present-day legal omnipotence of Parliamentary majorities under the English constitution:

"To an American writer like Professor McIlwain, safe under the protection of a written constitution and judicial review, this seems an intolerable risk, but there is no prospect of an American kind of constitution being adopted here, and few Englishmen would welcome it if there were. Englishmen may well feel that, in spite of the American constitution, there is less liberty in the United States than in England." (p. 211).

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