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Book Reviews

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On the ethical side something more than common honesty is needed. If the bar is to maintain its standing as a learned and noble profession, there must be among its members a loftiness of spirit that requires imagination, zeal and intellect. It is perfectly clear that many of those who apply for admission to the bar are intellectually incapable of understanding or sharing the spirit of the profession. A lax system may make them members of the bar, but no power on earth can make them lawyers.

I would not have the bar an aristocracy of rank or wealth or social position; but it is not snobbery, and only an honest recognition of the character of a learned profession, to insist that the bar must be an aristocracy of intellect. Much has been said about the right of the poor and ignorant to advance themselves in life. My sympathies, I confess, are with the poor and ignorant layman, rather than with the ignorant member of the bar, whether poor or not, who practices upon him. I consider that the duty of the Commonwealth not to license an incompetent to bungle the legal affairs of the poor who are most likely to be his clients, far outweighs the desire of a poorly trained man to practice a profession for which he is unfitted. In these days, when the means of education lie in profusion all about us, no man of energy and ability need want for sufficient training.

BOOK REVIEWS

Law and the Modern Mind, by Jerome Frank. New York: Brentano's, 1930. Pp. 362. $4.00.

The subject matter of this scintillating and stimulating book by a practicing lawyer may be drastically reduced to these points: (1) Lawyers and the public accept as their ideal that the law should have a high degree of certainty so that the action of courts may be predictable, but (2) the law does not, in fact, attain any high degree of certainty, and (3) it would be most undesirable if it did. Why then do lawyers and laymen cry for certainty and pretend to believe they have it? (4) Because of a harking back to a childish longing for security which is satisfied for a time by implicit confidence of the child in his father and, when that is lost, seeks a substitute for the father in the dogma of faith in the stable and unchanging quality of the law.

Point four is a constant refrain. Throughout the author's discussion of problems of infinite variety recurs this suggestion of the

"father-substitute." It is an ingenious flash across from the adventurous imaginings of child-psychology into the darker sobrieties of legal philosophy. Certainly it boldly emphasizes a truth often overlooked by lawyers that all of us, as a product of our biological inheritance, find discomfort in physical suspension and mental doubt, and long for a stability and security not found on this whirling globe. That this has great part in prompting our yearning for certainty in law is obvious. But that it can be traced to any unconscious adult hankering for something to fill the place that the father filled in the mind of the child, seems to the reviewer as a "common observer" highly speculative and dubious. It can be filed among those things labeled "interesting if true." The "father-substitute" theory furnishes merely the sprinkling of pepper in the pot which produces that slight irritation of the nerves which is otherwise known as seasoning or flavor. It is in the treatment of the other points that the book's chief value lies.

In discussing how far we have certainty in the law and how far we should desire it, the author gives us the result of acute observation and practical insight as well as wide reading. Law, he thinks, is the way in which cases are actually decided, not the reasons which are given for the decisions. Nearly all cases are such that the judge can, with professed obedience to existing canons, decide them either way. As to how he shall rule in a given controversy, the judge does not make up his mind by going through a process of formal logical reasoning or by applying mechanically a yard-stick of doctrine to a pattern of facts. On the contrary, he arrives first at his own conclusion, by a sort of "hunch," into which his individual experience, intuitions, desires and prejudices play a large part, and then afterwards he devises the formal chain of reasoning which justifies his conclusion. He can do this, because out of a varied and complex group of facts he can select out those which are "relevant" to his conclusion, ignoring all others.[1] Similarly in searching for the rule of law, usually he has at hand a "pair" of rules leading to opposite

[1] The tactical significance of this view, if true, is apparent. The author (p. 102, note) makes this comment: "Years ago the writer, just after being admitted to the bar, was shocked when advised by S. S. Gregory, an ex-president of the American Bar Association—a man more than ordinarily aware of legal realities —that 'the way to win a case is to make the judge want to decide in your favor and then, and then only, to cite precedents which will justify such a determination. You will almost always find plenty of cases to cite in your favor.' All successful lawyers are more or less consciously aware of this technique. But they seldom avow it—even to themselves."

conclusions, either of which rules can be chosen. Having made this selection of facts and choice of rules, he announces the decision, actually reached by an entirely different process, as an inevitable and mathematical result of the application of the "correct" rule of law to "the" facts. But no one in advance could have predicted the result with any high degree of certainty.

Likewise, as a signal example of this desire for apparent certainty and secretly combined with actual flexibility he instances the system of jury trial by general verdicts. The judge in his instructions announces the correct doctrines to the jury. The fiction is that the jurors select out from the doctrines given, the one which applies to the particular theory of the facts which they unanimously adopt from the conflicting testimony, and that they then apply the doctrine to the facts. In truth, they are incapable of doing this, if they so desired, and they actually bring in a verdict motivated by their own beliefs of right, influenced but little by the judge's words. The charge has become an elaborate ceremonial ritual, which if not followed according to routine brings reversal, but which as far as the jury is concerned might as well be in a foreign tongue. In this way, both the desire for coldly impartial certainty and the need for warm human sympathy are satisfied. It is, however, the very worst method of attaining flexibility and adaptability thus to confide the exercise of discretion, relatively free in fact though not in form, to an untrained chance-selected inexperienced group. Flexibility should be attained by vesting in the judge a freedom and responsibility which is denied him by the dogma of the certainty of law. This dogma should be discarded, rules and doctrines should be recognized as convenient mental tools for bringing to bear upon a present problem the distilled experience of the past—a past which never repeats itself and therefore can never furnish ruling precedents for the present. We should give up the childish hope for a government of laws and not of men, and should place our reliance upon judges as men and not as robots. "We want judges who, thus viewing and *employing all rules as fictions,* will appreciate that, as rules are fictions 'intended for the sake of justice,' it is not to be endured that they shall work injustice in any particular case, and [that they] must be moulded in furtherance of those equitable objects to promote which they were designed. . . . We may well want judges 'with a touch in them of the qualities which make poets,' who will administer justice as an

art and feel that the judicial process involves creative skill. This means that we want to encourage, not to discountenance, imagination, intuition, insight."

The foregoing paraphrase is too sketchy to represent adequately the author's well-knit argument and carefully qualified conclusions. Perhaps it may serve to indicate the general direction of his thinking. Aside from the dubious "father-substitute" hypothesis already mentioned, to the reviewer's mind the most debatable position of the author is his thesis of the high degree of uncertainty and impredictability of the present legal system. It is an imponderable question of degree, but to the reviewer the picture seems distorted by an over-emphasis upon the uncertainty of the outcome of cases in appellate courts, and a discounting of the vast range of rules which are reasonably certain and predictable in their operation and which, in consequence, seldom give occasion for court-house controversy. In North Carolina, a lawyer can tell his client rather exactly what will happen if he sues to enforce specifically an oral contract for the sale of land, or the amount of liability upon a forged note. It is their very certainty that makes such doctrines rarely important in court, but it does not follow that they are equally unimportant as guides to conduct. Nevertheless, even with this reservation, the reviewer finds himself in agreement with the author's position that, in the main, the judges exercise a far wider liberty of choice in their decisions than they profess, and that it is desirable that they should exercise an even wider freedom still. This freedom they can attain by the frank recognition that, except in the rare "open and shut" cases where statute or constitution or precedent exactly fits, rules and doctrines are not their masters but their tools, and that the highest judicial function is the art of framing and wielding these tools boldly and skillfully for the attainment of individual justice and the common good.

CHARLES T. MCCORMICK.

Chapel Hill, N. C.

Table Talk of John Selden. Edited by Sir Frederick Pollock, bart. London: Quaritch, 1927. xxvi, 200 pp.

We have here a new recension by an eminent legal scholar of the best known work of the seventeenth century lawyer and antiquarian whose legal studies and stormy parliamentary career together have

made his name a by-word for both legal learning and love of liberty. The new edition appears under the auspices of the Selden Society whose eponymous hero he has become; a choice which Pollock, Maitland and its other founders in 1887 could have amply justified alone by Selden's edition of *Fleta* with its prefixed dissertation of such great and varied learning. There is appended to the present edition the biographical sketch of Selden by the late Sir Edward Fry, reprinted from the *Dictionary of National Biography;* and the volume in addition to being gotten up in a pleasing format is illustrated by several plates, photogravure and half-tone, reproducing portraits of the author, part of a deed executed by him and two pages from the Lincoln's Inn Manuscript of the Table Talk.

For this new edition finds its justification in the better readings of a hitherto uncollated manuscript which has been since 1909 in the possession of the Honourable Society of Lincoln's Inn and was inaccessible to Reynolds when his edition appeared in 1892. Sir Frederick Pollock in an introduction explains that this is one of six known manuscripts, comprising three in the British Museum (Harleian manuscript), one in the Scottish National Library at Edinburgh, and the last in the library of the House of Commons; and he concludes, "Our manuscript stands, in my judgment, in a class by itself, and the learned world is entitled to see it as a whole and apart, and to decide on that view whether, as for myself I think, we have here the best foundation for a future editor's labour" (p. xvi). As is well known, the editio princeps of this famous little book appeared posthumously, in 1689, from the collection of sayings of Selden made by his secretary, Milward, and has since run through a number of editions, notably those of Wilkins (1726), Irving (1854), Singer (1847; to which Edward Fitzgerald is supposed to have made substantial contributions), and Reynolds, above mentioned.

The little book's fame is no recent thing. Dr. Johnson, it may be remembered, when Boswell suggested that "the French . . . have the art of accommodating literature," grudgingly assented, and on his biographer's following up the remark with, "Their *Ana* are good," came out with the pronouncement:

"A few of them are good: but we have one book of that kind better than any of them; Selden's Table Talk."[1]

[1] Birkbeck Hill's Boswell (Journal of a Tour to the Hebrides, 14 October 1773) (Oxford, 1887), V, p. 311.

But here one must not look for the cynical brilliance of La Rochefoucauld nor even of Vauvenargues, but pithy remarks in homely English; resembling somewhat Bacon's Essays, but lacking the polish and rounding out which closet-study gives. Here are a few titles of subjects, taken at random, from those gathered under the letter P: Parliament, penance, people, philosophy, pleasure, Pope, Power: State, prayer, preaching, predestination, preferment, praemunire, prerogative, presbitery, priests of Rome. And a sample of these things, one each for lawyer and layman, must suffice:

"*Equity:* 1. Equity in Law is y^e^ same y^t^ y^e^ spirit is in Religion, what ever one pleases to make it. Some times. they Goe according to conscience some time according to Law some time according to y^e^ Rule of y^e^ Court.

"2. Equity is A Roguish thing, for Law wee have a measure know what to trust too. Equity is according to y^e^ conscience of him y^t^ is Chancell^or^, and as y^t^ is larger or narrower soe is equity Tis all one as if they should make y^e^ Standard for y^e^ measure wee call A foot, to be y^e^ Chancellors foot; what an uncertain measure would this be; One Chancello^r^ ha's a long foot another A short foot a third an indifferent foot; tis y^e^ same thing in y^e^ Chancello^r^'s Conscienc̄e. . . ." (p. 43)

It may be remarked here parenthetically, that this view of the 'Chancellor's foot' was written before Nottingham, Hardwicke and Eldon had shaped the mould.

"*Gentlemen:* 1. What A Gentleman is; tis hard w^th^ us to define. In other Countrys he is known by his priviledges: In Westminster Hall he is one y^t^ is reputed one: In y^e^ Court of Honour he y^t^ has Arms: y^e^ King can not make A Gentleman of blood (what have you sayd? Nor God Almighty) but he can make A Gentleman by creac̄on; If you ask which is y^e^ better of these two. Civilly y^e^ Gen[tleman] of blood, morally y^e^ Gentleman by creac̄on may be y^e^ better for y^e^ other may be A deboist [debauched] man; This A person of worth. . . ." (pp. 5-51)

But we must not forget the man himself. It is not so easy to put Selden in a paragraph: not for a man who earned the praise of his contemporaries, Ben Jonson and Clarendon, and was spoken of by Milton as "Chief of learned men reputed in this land."[2] He was

[2] Areopagitica, in *Works*, v. 4, p. 410 (London, 1851).

most versatile in the range of his studies, saying once, "Nor hath the proverbial assertion that *the Lady Common Law must lye alone,* ever wrought with me." His oriental studies were extensive, including many expositions of rabbinical law and his *De diis Syriis;* his *Marmora Arundelliana* marked an era in the interpretation of ancient inscriptions; his *Titles of Honour* and *History of Tythes* show another aspect of his genius; while his tractate, *Mare Clausum,* was written at King James's command against Grotius's doctrine of the freedom of the seas. These are but a few titles from many, the product of years of unremitting labor. And the astonishing thing is that the greater part of this while (for he died in 1654) he was directly involved in Parliament's long struggle with the King. In 1628 he and Coke drafted the Petition of Right; he was again prominent in the tonnage and poundage debate, and spent a year or so in the Tower as a result of that participation. Through it all, however, he strove to preserve a tolerant middle course: he was at no time a republican in doctrine, and he was no more disposed to tolerate puritanical than prelatical oppression. An Erastian and a Hobbesian, he must be reckoned one of the fathers of the school of English political thought which was dominant until the time of Burke.

If you want a portrait of the man, you have Aubrey's lively description: "very tall—I guess six foot high—sharp, ovall face, head not very big, long nose inclining to one side, full popping eie" (i.e., gray eyes).[3] But the best portrait is that cross-section of his mind which is set down in his *Table Talk:* fully justifying his good sense, his great learning and that love of liberty which made anything but vainglorious the personal motto which he chose and always used: *Περὶ παντῶν τὴν ἐλευθερίαν.*

MANGUM WEEKS.

Washington.

The Public and its Government, by Felix Frankfurter. New Haven: Yale University Press, 1930. Pp. 170.

Here is a series of four lectures delivered at Yale University in May, 1930. The theme is comprehensively stated by the author in the outset. "I invite consideration of the actual tasks of government, the demands citizens make upon government, the instruments by

[3] Brief Lives (Ed. by Andrew Clark, Oxford, 1892), vol. II, p. 223.

which these demands are executed, and the interactions between governors and governed. The essential problems of modern government involve the interplay of economic enterprise and government. . . . What is it that we ask of government today? What are the 'Demands of modern society upon Government?' Is it true that antiquated legal ideas prevent government from responding effectively to the demands which modern society makes upon it? 'Does law obstruct Government?' "

In the first chapter the author considers the "volume and contents of legislation for five early years by the Congress of the United States, and by the legislatures of Connecticut, Massachusetts and New York" in comparison with "the stuff and scope of present day legislation" in the same governmental units and sets this legislation in the general texture of society. "Legislation is the most sensitive reflex of politics."

In the second chapter he points out that "the difficulties that government encounters from law do not inhere in the Constitution. They are due to the judges who interpret it. . . . The framers of the the Constitution intentionally bounded it with outlines not sharp and contemporary, but flexible and prophetic. . . . The great judges are those to whom the Constitution is not primarily a text for interpretation but the means of ordering the life of a progressive people. . . . In the eighties and nineties, society was in process of drastic transformation, but members of the Supreme Court continued to reflect the social and economic order in which they grew up. They sought to stereotype ephemeral facts into legal absolutes. . . . Since 1920 the Supreme Court has invalidated more such legislation than in the fifty years preceding. . . . [This] veto power of the Supreme Court over the social-economic legislation of the states . . . is the most destructive and the least responsible . . . aspect of undue centralization."

The problem presented in the third chapter, Public Services and the Public, he finds in the elementary fact that "our whole social structure presupposes satisfactions for which we are dependent upon private economic enterprise. To think of contemporary America without the intricate and pervasive systems which furnish light, heat, power, transportation and communication, is to conjure up another world. The needs thus met are today as truly public services as the traditional governmental functions of police and justice." The governmental machinery created to regulate these services "is not ade-