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BOOK REVIEWS

The Spirit of the Legal Profession. By Robert N. Wilkin. New Haven: Yale University Press, published for the College of Law of the Ohio State University: 1938. Pp. viii, 178. \$2.50.

Before the fifteen hundreds the English lawyer was first a priest and then a member of a guild, but the notion of a "profession" in the present use was born with the modern age. It is accepted that one mark of a profession is that its votaries have a consciousness of being set apart from other men in a group consecrated to a special ideal. This professional "spirit", it appears, can readily be maintained by our English brothers, even in the stresses of the shuttlecock world of today. The independent and aristocratic position of the barrister, and the sedulously preserved pageantry of wigs, gowns, and processions, make the public too conscious of the lawyers as a class apart, for the lawyer himself to be oblivious of it. But in this country where almost every lawyer devotes a large part of his time to activities which are hardly distinguishable from those of businessmen, we cannot escape uneasy doubts as to how far the generality of lawyers really feel any "spirit" of special consecration or sacrificial responsibility, different in kind from the devotion of the credit manager or the traveling salesman to the standards accepted in his calling.

The bar associations have called upon the law schools to assume the duty of indoctrinating their students with this group consciousness and these ideals and standards, which we regard as the special heritage and hall-marks of the profession. This is no easy undertaking for the schools. Away from the tasks and conflicts, the temptations and rewards of the lawyer's life in office and court, the teaching of the ideals and standards can seldom have the urgency and impact which later the word or the example of some senior in the practice will carry. In the hope of enlivening this teaching with the needed emotional leaven, it is not unusual for the schools to invite leaders of the bar to address the students upon the spirit and traditions of the profession. Frequently, however, such addresses are hasty compilations of platitudes and counsels of perfection, which give an impression that the speaker does not say what he believes, but what he would like his audience to think he believes. The book of lectures under review offers a refreshing contrast to such empty and stereotyped addresses. It bears the marks of study and reflection, and of the sincerity which, in stressing the glories, will not gloss the failures of the profession. The first three parts picture the rise of lawyers as a professional class in Rome, in

England, and in America, and their role in molding the traditions of order and liberty under which we live. The historical statements occasionally suffer from reliance upon outmoded authorities, as where the author attributes an Anglo-Saxon, rather than a Norman origin to the institution of jury trial (p. 35), but the treatment is quite adequate to the purpose of indicating the development of professional spirit by high-lighting a few heroic figures and some significant advances.

In the final part the author describes the influences which have made for professional disintegration. The industrialization of the national economy, the greed of pelf which the lawyer was called upon to serve, the counter-swing (in reaction from plutocracy) from national unity under representative government to the extremes of democracy, which has its most corrosive effect upon professional spirit in the substitution of judges dependent on popular choice for the independent judge of our inherited tradition. On the brighter side he finds a saving remnant of lawyers who have kept the faith in the darkest days of exploitation. "In spite of the self-seeking of politicians, they did not lust for power; in spite of the greed of industrialists, they did not become the victims of avarice. With gracious generosity they stood by and allowed the fruits of their own wisdom and effort to be garnered by ungrateful clients. They served the rich and the poor, the high and the low, with true professional indifference to class or caste. Without fanfare or parade, with little concerted effort and no 'drives,' mindful of the shortness of life and the futility of most human effort, they patiently adhered to the service of the law and the best traditions of their calling."

Moreover, he looks for no lessening of the lawyer's role or of the need for a quickened fire of professional zeal. That extension of individual reason and conscience into rules of decision under new and changing circumstances, which we call the growth of the law, must still go on under the guiding hand of the lawyer. New and ever wider fields must be cultivated; there must be a reign of law instead of a reign of strife between laborer and employer, and between nation and nation.

Finally, the spirit which will animate the profession for these great enterprises must be continually re-lighted at the torch of the school. "If the world is to continue to have men who, in the words of Justice Holmes, can live greatly in the law, drink the bitter cup of heroism, and wear their hearts out after the unattainable, we must preserve the means of charging men with the spirit of the profession. Mainly we must rely on the schools. But the schools must be more intimately supported by the leaders of the profession. That spirit is transmitted, now as always, by association. It cannot be taught like the rule in

Shelley's case, or the definition of murder. It is too great and too vital for definition. We cannot tell exactly how it passes or whom it favors. It is nothing to be dogmatic about. It eludes too definite effort. Being spirit, it moves in spiritual ways. The best way to gain it is to admire it, for what we admire we unconsciously emulate."

CHARLES T. McCORMICK.

Northwestern University School of Law,
Chicago, Ill.

Our Eleven Chief Justices. By Kenneth B. Umbreit. New York: Harper and Brothers. 1938. Pp. xiv, 539. \$3.75.

These individual biographies of those men who have headed the Supreme Court of the United States blend into a composite history of the Court that reads almost like a Horatio Alger tale. Originally booted about by outstanding revolutionaries who declined the office to sit in state legislatures, the position of Chief Justice rose under the deft, sure guidance of Marshall to its present signal importance. Marshall breathed such a lusty breath of life into a Court that had previously been an executive adjunct, that the judicial branch soon grew to a stature equally as full as that of the legislative and the executive. With no armed force to enforce its decrees, with its jurisdiction subject to extensive legislative paring, and with its members appointed by the executive, the Supreme Court has maintained its power and prestige as an equal and separate division of government almost entirely by the respect it has engendered. With the recent controversy about the Court gradually subsiding, timely indeed is this study of the effect of the personal equation, as revealed in the lives of the Chief Justices, on the growth and development of the Court and of American law.

At the outset the author disclaims any intent to expound the "breakfast theory" of jurisprudence, *i.e.*, that the decisions of a judge are so closely affected by his character, background, and point of view that even so small a matter as his breakfast may affect the way he thinks and feels about judicial matters during the day. The volume succeeds a little too admirably in avoiding the "breakfast" theory. Admittedly at times a Chief Justice's decision on broad constitutional policies cannot be explained by the man's background of prior training, associations, and prejudices. Yet in most instances there seems to be a direct relation between that background and judicial attitude in interpreting the Constitution. In these instances the author, where he assumes that cold, pure logic governs the judicial attitude, denies in effect that personal equation which he himself asserts to be so important in the growth of the law.

Though an apparent sympathy with his subjects inclines the author to gloss a bit too lightly over the occasional defects that appear in his characters, the lives and times of the Chief Justices are adequately and fully presented. Legendary figures of history become bone-and-sinew men. As these figures and personalities come alive, the expression "law is a living thing" takes on new meaning. The cross-section of American political and legal history here revealed indeed "is a rich one" (p. xiv).

CLARENCE A. GRIFFIN, JR.

Book Review Editor.

Cardozo and Frontiers of Legal Thinking. By Beryl Harold Levy. New York: Oxford University Press. 1938. Pp. xv, 315. \$2.50.

This volume was published a short while before the death of Mr. Justice Cardozo. It is divided into two main parts: the first, comprising somewhat less than half of the book, contains the main textual material; and the second consists of twenty-two opinions, all except one of which were written by Mr. Justice Cardozo while he was a member of the New York Court of Appeals. These opinions are preceded by a brief introductory comment. Each deals with a different subject and they were selected with a view to affording the reader a broad and accurate view of Mr. Justice Cardozo's judicial qualities. They are indicative of the remarkable breadth of his learning in both public and private law. This feature of the book is of special value to laymen who lack a general familiarity with the legal opinions of Mr. Justice Cardozo, but it will serve as a convenient aid to lawyers as well.

The author's real contribution is in the first division of the book, which in turn consists of three separate parts: Cardozo in Contemporary Jurisprudence, Doing Justice, and The Judge as an Artist. The opening chapter contains brief and interesting biographical data which were verified by Mr. Justice Cardozo a short time before his death.

It is obvious that the author is a thorough student of the subject in which lies his chief interest in the development of the volume under review: "the philosophic approach to modern American jurisprudence"—the theme which pervades the whole work. He analyzes Mr. Justice Cardozo's writings, and against that background discusses them in their relationship to the judicial process and the development of modern American law. There is a discussion of the "dying myth" that judges do not make law, and the reasons for the persistence of the myth are set forth in detail and in an interesting fashion.

Perhaps the principal contribution is in the section dealing with the judge as an artist: in constructing his opinions, in reshaping the body of the law, and in moulding society. Although it is doubtful whether

one could have a subject more appropriate for such an exposition, the author has fully measured up to his opportunity. Cardozo was indeed an artist, a fact which one appreciates to the fullest after reading this book.

Whatever else may be written about Cardozo, this book will retain an important place in the literature concerning his thought and his place in the development of American law. Its content and approach are essential in any adequate treatment of the subject. It is of special interest and help to one who, while as a law student, enjoyed the rare privilege of witnessing in person the delivery of the lectures comprising "The Nature of the Judicial Process", and was thus introduced to Mr. Justice Cardozo's philosophic approach to the law.

DOUGLAS ARANT.

Birmingham, Ala.

Luck and Opportunity. By Francis L. Wellman. New York: Mac-Millan and Company. 1938. Pp. 214. \$2.50.

Mr. Francis L. Wellman has been recognized for years as one of the leading and most brilliant advocates of his time. No one at our Bar has surpassed his achievements and his success in the trial of cases. And then, his books on the subject of advocacy are very widely known and esteemed by a large circle of readers including not only members of the legal profession but intelligent laymen as well. He has rendered a very great service by these books to those lawyers who appear in the courts in the conduct of cases and legal proceedings. Also his style is so vivid and the contents of his books are of such thrilling interest that they give not only instruction but the most delightful entertainment to his readers. In *Luck and Opportunity* Mr. Wellman has presented a most interesting sketch of his professional life, together with some well-chosen examples of the great trials in which he has been engaged, and finally he has elucidated to his readers his philosophy of life and his undaunted outlook into the future. It is, in my opinion, the best and the most useful of his writings. It deserves and will undoubtedly receive the close attention of many readers.

It is customary for the reviewer to approach his work in an impersonal and detached manner. But when he has been associated with his author through many years, it is difficult, if not impossible, to maintain such an attitude. Mr. Wellman first tells us most agreeably of his boyhood and youthful years in his home in Boston, with sketches of his parents and his family, and then of his time passed at Harvard and the beginning of his law practice in the courts of Massachusetts. He soon came to New York, where he received an appointment in the

office of the Corporation Counsel of that city. Although he won success and fame in that office, he came more prominently into the public eye when Delancey Nicoll, who was then District Attorney of New York County, made him his chief trial assistant. In 1893 I became an assistant district attorney and served for about five years under Mr. Nicoll and later under Colonel John R. Fellows. At the time of my entry into the office Mr. Wellman was the chief trial assistant. I well remember listening to him in court with the most intense admiration. There were a number of cases of murder by poisoning which attracted the public attention at that time in New York. These cases, including those of Carlyle W. Harris, of Dr. Robert W. Buchanan, of Dr. Henry C. F. Meyer, and others, were prosecuted with transcendent ability and success by Mr. Wellman. He became and has continued to be a national figure in the ranks of the great advocates of this country. It so happens, therefore, that I had personal occasion to observe his work both as a public prosecutor and afterwards as a trial counsel in our courts. For more years than I now like to contemplate I have always had for him the highest admiration, esteem, and affection. In the course of my own professional work I have met him in court; and I know personally his ability and his achievements as a barrister. He may truly be described as a genius in his profession. He has an unfailing intuition as to the strong point of his own case and as to the weakness of his adversary, which is nothing short of marvelous. He has a power of exposition and of argument before a judge or a jury that I have never seen excelled. The familiar definition of genius as an infinite capacity for taking pains, well applies to the powers of Mr. Wellman. He spares no effort in the preparation and in the presentation of his cases. He is notably fair in his court conduct, and he enjoys the esteem and confidence of the judges before whom he appears and the lawyers with whom he is associated or against whom he contends. His mental alertness and vigor he has maintained not only by his professional work but by constantly reading in fields beyond the strict scope of his profession. By regular relaxation and constant physical exercise he has kept his physical powers at a high pitch of efficiency throughout his life. As a result, and with his tireless industry, he has accomplished an incredible amount of professional work. There is in my judgment no one better qualified to write for his profession as well as for laymen upon the conduct of cases and upon the other lessons to be learned from such a career.

In *Luck and Opportunity* he describes very modestly but in a most interesting fashion the methods used by him in his trials. He emphasizes the necessity for thorough and intensive preparation. In one instance, he studied all of the six thousand recorded cases of morphine

poisoning in order to prove that a unique and ever-present symptom of such poisoning is symmetrical contraction of the pupils of both eyes. He was able to show that in the only case of unequal contraction of the pupils, which was relied on by opposing counsel, the victim had a glass eye. The effect of this evidence was to destroy the defense in the minds of the jury (p. 44). All who knew Mr. Wellman and his methods realized that this kind of conscientious and laborious preparation equipped him to try his cases so brilliantly in court. We who are familiar with the trial of cases appreciate that it is only this careful study and examination beforehand that give the skilled advocate that knowledge of his case and of the subject which enables him to present his evidence and his arguments to the court and to the jury so brilliantly and so convincingly.

It is clear, therefore, that the brilliant, useful, and honorable life of Mr. Wellman as an advocate affords a subject for most profitable and interesting study. The young lawyer who desires to sit at the feet of Gamaliel can find no better opportunity. The student of jurisprudence and of trial procedure cannot do better than to read these annals of Mr. Wellman's legal experience. The stories of the famous trials in which he participated are most intensely interesting. There is in my opinion nothing so dramatic as a court case and of these the most dramatic is a criminal prosecution. There we are dealing with the very warp and woof of human nature itself. No stage performance can equal the interest, the suspense, and the anxiety that accompany a criminal trial.

But even more important and more enthralling than the stories of his criminal trials, is Mr. Wellman's statement of his philosophy of life from its beginning to its end. I think it may safely be said that his philosophy is so to guide and direct his life as to make the most of the great powers with which nature endowed him, to use those powers fairly as well as skilfully, to enjoy the society of his friends, and thus to lead a life which will be pleasant and honorable as well as useful and efficient. And finally, in his last two chapters he treats of Old Age and Destiny in a most wise and fascinating manner. He advises those who are ageing that they should not stop working or retire. As to Destiny, he is a strong believer in immortality. It is incredible to him, as it is to so many others, that there should not be some intelligent sequel to this life. As he puts it:

"The adventures and disciplines of youth; the struggles, failures and successes, the pains and pleasures of maturity; the loveliness and tranquility of age—these make up the fire through which one must pass to bring out the pure gold of his soul. Having been thus per-

fected, what shall nature do with him? Annihilate him? What infinite waste!" (p. 207).

Thus he looks with confidence beyond the present bourne of time and space. And assuredly no one is better qualified to speak on this subject than is Mr. Wellman. He has used his great powers to the utmost through his long life. He has rendered a great service to his readers in stating so clearly and with such dramatic force the lessons which he has learned and the principles which he has followed.

GEORGE GORDON BATTLE.

New York City.

The Administrative Process. By James M. Landis. New Haven: Yale University Press. 1938. Pp. 160. \$2.50.

This book is surely an important addition to the literature on "the administrative process" in this country. There are few whose claim to speak with authority on this subject is higher than that of Dean Landis or perhaps we should say Commissioner Landis. This authority comes not only from active participation in the process as a member of the Federal Trade Commission and later as Chairman of the Securities and Exchange Commission but also from many years of sympathetic study. It is for this reason that one important feature of his work is both disturbing and disappointing.

This is revealed in the introduction. "The administrative process", we learn, has to do with new agencies of government whose functions embrace the three aspects of government, that is, executive, legislative and judicial. "These agencies, tribunals, and rule making boards", we are then told, "were for the sake of convenience distinguished from the existing governmental bureaucracies by terming them 'administrative'" (p. 2). The expression "the administrative process" is then applied to the variety of functions performed by these agencies. This distinction evidently was useful to Dean Landis for it enabled him to concentrate on the part played by the important regulatory bodies in our government but others are not likely to find it either valid or useful. The trouble is that Dean Landis has apparently set apart for treatment on a functional basis those agencies that exercise regulatory powers of some kind. There can be no quarrel with that. The quarrel comes with his conception that only those bodies engage in "the administrative process". "The existing governmental bureaucracies" remain unspecified but, whatever functions they perform, they are in the author's mind beyond the pale of "the administrative process". Dean Landis is far from clear at this point. His analysis leaves much to guesswork

on the part of the reader. The reader will search in vain for some sure clue as to just what it is that differentiates "the existing governmental bureaucracies" from those agencies of government that engage in "the administrative process". Is the difference dependent on whether the agency is new or old, or whether it possesses executive, legislative and judicial powers or only one or two but not all of these powers, or whether it forms part of a regular department or is an independent commission, or whether it performs regulatory or some other functions? The reader who goes through the book with these questions in mind will find no sure answer and as long as the distinction is made at all there should be an answer, for as it stands it does violence to prevailing notions of public administration. Whenever and however government acts to perform its appointed tasks there is public administration and the stuff and material that is the beginning of any problem of the administrative process and administrative law.

With his subject limited in this fashion Dean Landis deals on a functional basis with the many and important administrative agencies that were created to deal with problems of a particular economic or industrial activity or with particular matters that cut across industry as a whole. These agencies are miniature governments vested with legislative, executive, and judicial powers if you like. Carrying out this thesis Dean Landis eliminates from consideration—and apparently from his notion of what is an "administrative agency" (p. 19)—agencies that are merely courts, those that are concerned with the internal management of government, and those that are proprietary agencies set up to conduct particular enterprises. It is interesting though perhaps not surprising to find that Dean Landis champions the independent commission form of organization over the departmental form. At one point (p. 22) he disclaims as sterile any attempt to classify administrative agencies according to whether or not they happen to be independent but in a later chapter on administrative sanctions he develops in detail the advantages of the independent commission over departmental organization (pp. 111-116). It is evident that Dean Landis did not favor the recent proposals dealing with the reorganization of the executive branch of the government, at least in so far as those proposals involved any subjection of the independent commissions to executive influence or control. It is curious that the proponents of the plan see in it a greater degree of public responsibility. Dean Landis splits with them sharply at this point. He prefers the "localization of responsibility" to the "traditional organizational charts, which, like genealogical trees, stem in symmetrical form from one great original source." This last is dismissed as "blue print symmetry" while his own view is described as "realism in organization" (p. 28).

The lines are sharply drawn but there is an important "if" that Dean Landis states but does not discuss and it is this: the specialized and independent agencies are fine and an increase in their number need not disturb us "if appropriate coordination of their policies can be effected" (p. 30). A great argument may some day range itself on each side of that "if". Later in the book Dean Landis dismisses as "more apparent than real" the likelihood that the policy of the independent commission may run counter to the general direction of the executive and finds the real danger in the possibility of inaction along some line (p. 116).

There follows an interesting chapter on the framing of policies by the administrative. The appropriate spheres of discretion as between the legislative and the administrative are discussed with particular emphasis on the dependence of even the so-called independent agencies on other branches of government. It is Commissioner Landis who is speaking with the wisdom born of experience when he tells of the pressure exerted by the legislative on the administrative through its power of the purse and the insistent demands of patronage. Rule making as it is practiced in England is advanced as a convenient device to bring about a greater sharing of responsibility between the administrative and the legislative when action of an important sort is taken in the form of a rule or regulation.

The chapter on sanctions contains an acute appraisal of the advantages and disadvantages of the familiar combination of prosecutor and judge in the administrative. The author makes a convincing plea for further study of the whole matter of sanctions. The final chapter deals with the vexing problems of judicial review and Dean Landis hazards an interesting guess that the future may see the judges accord some degree of finality to administrative conclusions of law in matters where the administrative is recognized as having a special fitness to exercise an informed and experienced judgment. There is a valuable suggestion, too, dealing with the much criticized distinction between questions of law and questions of fact. Dean Landis believes that the distinction should be preserved and suggests that the decision in a concrete case as to whether judge or administrator should have the last word on a particular matter might well be determined with explicit consideration of the special fitness of the one or the other to pass on it.

On the whole this is a refreshing and stimulating piece of work. Throughout it there is constant emphasis on the important part played by ideas taking shape in the form of statutes but stemming always from a popular conviction that government today must perform many and often quite new functions and that it must be adequately equipped to perform them. To read these statutory mandates properly "one must catch and feel the pace of the galvanic current that sweeps through the