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BOOK REVIEWS

Yankee Lawyer: The Autobiography of Ephriam Tutt. New York: Charles Scribner's Son. 1943. Pp. xiii, 464. $3.50.

Is Ephriam Tutt a living person? Does he actually practice in New York City, stalking the courtrooms, confounding learned judges with his wisdom, and moulding juries through his wit and eloquence? Many persons believe so strongly that Tutt is living, still practicing law (and administering the "Pidgeon Fund") and assuaging the struggles of the little people, that they have refused to be convinced that *Yankee Lawyer* is a fictitious biography.

That distorted notion has its basis, to some degree, in the authentic appearance which author Train has purposely given his book. The title page, the apparently genuine photographs, the citing of individual cases, and the mention of actual people and places with which most readers are familiar not only is not conducive to having Tutt accepted as a mere literary character; but they fan into reality the already existing notion that he is a famous person. However, more than these technical reasons is responsible for the belief in Ephriam Tutt's actual existence. The skill of the author as a writer and as a student of the habits of the minds of the human race, his acute sense of humor and his extremely human outlook, plus his own wealth of experience as a lawyer, are what really created the illusion. It did not grow because of the gullibility of the reading public; rather it was the discerning mind of Arthur Train which proffered the legend. By presenting Tutt as a man with an humble beginning, who rose to the heights through his own initiative to live the useful life, and as an ideal lawyer, willing to give his talents in assisting the desperate, not for money but from an innate faith in the human race—by these devices he insured his acceptance by a mass of readers. Certainly he captured the attention of the American public by retelling its favorite folktale.

Yankee Lawyer is a mythical autobiography. Beginning with his birth and childhood, Tutt tells of his early years, his education at Harvard, his first practice in a rural community, his initial and subsequent romantic ventures, his struggles for success, and his crowning achievements. In the interim, Train's views are expounded by Tutt, both by his direct statements and, more subtly, in situations. The distinction between law and justice is well-drawn, and also aptly presented is his idea of the jury's rendering justice by serving as a bulwark between the accused and the frequent strictness of the letter of the law.

Tutt's career can be divided into four phases. As a country lawyer

he learned that an attorney does not practice merely to make money. He realized that one practices law to know the law, and that the only way to know it is to practice it. "There is no better training for the law than general practice in a country town." A city lawyer might spend a decade representing a large corporation, or running titles to real estate, and at the end of that time he would have represented no client of flesh and blood; his legal knowledge would be limited to those subjects alone. A country lawyer seldom represents soulless clients; he has human beings whose lives and liberties depend upon his sense of responsibility and his knowledge of every subject. Thus he is familiar with "fence-line" law, domestic relations and indiscretions, wills, torts, criminal law, and—most important—"he must personally draft every paper from the original summons to the final judgment." A country lawyer has a full life; the loves, passions, hatreds, and longings of generations disclose themselves in his unpretentious office. "He becomes the father confessor to the inhabitants of his town; and, though his income in cash is negligible, what he learns is beyond price."

Tutt's career as a prosecuting attorney in New York began by sheer luck. The position was a reward to him from "Boss" Croker, the "Master of Manhattan" and "Uncrowned King of New York City," for aid given to him by Tutt when the former was injured in an accident. "As a prosecuting attorney Tutt saw the criminal bar unfold itself—a collection of 'down-at-the-heel' lawyers, drunkards, ex-police magistrates, unfrocked priests, and political riff-raff." Here Tutt learned the "ins-and-outs" of criminal procedure in the metropolis, its connection with politics, and the fact that law and justice do not coincide because justice is too often a "luxury that the poor cannot afford." He also found that the constitutional guarantees of right to a jury trial, right to representation by counsel, and the protection of due process of law are phrases of no meaning to the ignorant person accused of crime. He discovered that one of the foremost duties of a lawyer is to see that the provisions of the Bill of Rights are applied to all people, regardless of creed, class, or race. It would have been easy for Tutt to have become so entangled in the political web of his job that he would have devoted a lifetime to it; but he learned his second lesson: that the "law is a jealous mistress and brooks no rival"—not excepting politics.

When the inevitable reform movement overthrew "Boss" Croker's rule, Tutt joined a "Wall Street Legal Factory," the well-publicized firm of Hotchkiss, Levy and Hogan. This writ mill did not practice law; it conducted a business. One member was a "joiner" to get the business, another was the "brains" who planned the court campaigns, while another was the "court lawyer" who represented the firm and

clients in court. "Here Tutt's clients were bankers, industrialists, and railroad presidents; not humble folk. . . . Here he did not fight for civil liberties; he merely quarreled over a wad of money." He resigned from the firm in which he had become one of the "brains" when it attempted to break a will on the ground of insanity, a wholly unwarranted claim. It was then that he learned that, above all else, a lawyer must be honest.

After resigning from the "Wall Street Factory," Tutt entered into private practice in New York City. He had a sound background: the legal knowledge and sympathy for human suffering of a country lawyer, the acumen and acquaintances of a prosecuting attorney, and the business contacts of a writ mill. He then reached the pinnacle of his success and the enviable financial position which carried the luxury of being able to select his cases. Case after case came to him—ordinary cases, and some extraordinary, one taking him to England; but all of them involved the struggles of people. Between cases Tutt spent most of his time fishing, and reading Shakespeare and the *Bible*. He had learned his final lesson: that the highest reward that the law offers is not a judgeship or a political job, but the fact that a lawyer is his own boss, and that his time, his mind, and his life belong to himself—not to a labor union, a university, or an employer—but to himself alone.

Yankee Lawyer could have been written only by a lawyer with a varied background. It, furthermore, could not have been written by any man, though he be a lawyer and an author, who did not possess a love for humanity, a marked sense of humor, and a belief in the dignity of the individual.

ENSIGN BARNARD T. WELSH, U.S.N.R.
Member of the Maryland Bar.
U. S. Naval Pre-Flight School,
Chapel Hill, North Carolina.

Governmental Adjustment of Labor Disputes. By Howard S. Kaltenborn. Chicago: The Foundation Press, Inc. 1943. Pp. xi, 327. $3.50.

The reader who would come for knowledge and understanding of methods of adjustment of labor disputes will find the book a barmicidal feast. Presumably the book deals with the systems established by the states and municipalities as well as by the Federal Government, but the treatment afforded by the author is elementary, uncritical, and incomplete in scope at that. Thus, the Wisconsin experience, which is probably the richest among the states, is passed over altogether.

Professor Edwin E. Witte, who wrote the Foreword, may be pardoned for his pride in his former student. It is evident that the author is faithful to his tradition, but it is unlikely that the discerning reader

will agree with Professor Witte that the book "is such a contribution to the literature of labor relations that any one working in this field would gain credit as its author." The reviewer has not had the opportunity to check dates and figures but he believes that the volume will prove very useful as a compendium of vital statistics on the subjects of conciliation, mediation, arbitration and compulsory investigation. The reader will find out when, how, and by whom certain agencies were organized; what the provisions of certain statutes are; but no critical examination of the issues and problems involved. The author is chief wage analyst of the Detroit Region of the National War Labor Board and has undoubtedly had opportunity for first-hand knowledge of such crucial problems of labor relations as union security and wage stabilization, but their treatment in the book is on a perfunctory level. Not only is the forest invisible, but even the trees are missing.

In only one respect is the fossorial evident in the author: his first and only love—mediation. On the very threshold of the study the reader is informed that "After careful study, the author has reached the conclusion that mediation is by far the best and most successful method of governmental intervention in the adjustment of labor disputes."[1] From then on no opportunity is lost to drum this into the consciousness of the reader. At least this reader was not persuaded, though frequently annoyed by the unnecessary reiteration. The figures marshalled by the various mediation agencies to indicate the effectiveness of the mediation technique are not very reliable because it is possible to approximate one hundred percent success by the simple device of keeping a case open until the labor dispute is over.

More important, mediation is a complex itself undergoing transmutation with the variation in the nature of its components. Thus what is referred to as mediation now is quite different from what it was a decade ago and what it will be in the future. The author declares that "Mediation involves the intervention of a third party *who has no compulsory powers* but who merely attempts to *persuade* the parties to reach a settlement. The mediator may merely act as a 'go-between' in the negotiations between the parties, or he may make definite suggestions as to the terms of settlement."[2] Before the enactment of the National Labor Relations Act the primary and most difficult function of the mediator was to persuade the employer to meet with the union. Now that is established as a legal duty. As to the union, save in the case of unauthorized "quickies," it is doubtful whether there is any great inclination to empty the chairs around the conference table to fill the picket line. Where an impasse develops between great industrial units and great labor organizations it is unlikely that the charm and tricks of the trade of the mediator will dissolve it. The resolution

[1] P. 2. [2] P. 2, n. 2.

of the conflict in such cases is more likely to result from the totality of pressures, obvious or hidden, both political and economic, that may be present. The mediator about the premises may at best help to save face by suggesting terms of settlement but a closer examination would reveal the workings of compulsive imperatives.

The National Mediation Board is pointed to as proof of the success of mediation. But important factors are ignored: existence for a long time of strong labor organizations and the duty to bargain collectively, and the fact that a railroad strike on a national scale, even in time of peace, would be intolerable. Hence the tendency in recent years in peace as well as in war, for outstanding railroad disputes to be settled through recommendations of emergency boards appointed by the President rather than by the National Mediation Board. At any stage of adjustment of a railroad labor dispute, the element of compulsion is present though not visible to the uncritical eye.

Compulsion with very definite sanctions is of course the foundation of the National War Labor Board. No pretense of voluntary mediation can be made in behalf of that body.

As to the post-war period voluntary mediation will undoubtedly play an increasingly important role, but in the peripheral areas of industry. With the spread of collective bargaining and strong labor organization government intervention to decide the crucial provisions of the trade agreement will become inevitable. There will also prevail the significant practice of impartial arbitration to administer the terms of a trade agreement. Of course, both labor and industry appear to be anxious for a relaxation of wartime restrictions, and they may succeed but only temporarily. From a long range point of view—within a generation let us say—the trend is definitely in the direction of compulsives. The reviewer does not believe that strikes can be eliminated by compulsion, but for better or worse more and more of the employment relationship will be regulated and controlled by the government. Both industry and labor will have to function on the administrative level, not autonomously. This is implicit in our technological civilization and the large scale organization of both industry and labor.

The author relies as authority for his thesis about voluntary mediation on the Webbs' *Industrial Democracy* and on a 1916 work by other authors.[3] The reviewer suspects, however, that something has been happening in the world since then.

JOSEPH ROSENFARB.

Labor Relations Editor,
The Research Institute of America,
New York City.

[3] P. 218.

Radio Networks and the Federal Government. By Thomas Porter Robinson. New York: Columbia University Press. 1943. Pp. 278. $3.50.

One enters upon the review of this volume with an interest stimulated by the newness of the subject matter and by its fundamental importance in the political and economic life of present-day America. The radio rivals the press if it has not surpassed it as a means of carrying vital communications to the whole people. Its proper regulation and control is therefore a matter of supreme importance.

The work is centered around the growth and operation of the great nationwide broadcasting networks and the Federal Communications Commission as the established agency for their regulation. The author does not state his purpose in writing the book. This, however, becomes apparent as one proceeds through it. The publisher states that it "is the first comprehensive history of network broadcasting and its relation to the Federal Government."

We are all, perhaps, too well aware of the fact that in this country broadcasting is supported financially by advertising. The three networks, N.B.C., C.B.S., and Mutual, produce programs in their studios which are sponsored and paid for by advertisers. These programs are carried by wire to affiliated broadcasting stations, where they are put on the air. By extending coverage to all the more important cities in the country, these programs can be heard throughout the nation. Because of the great multitude of listeners such sponsored programs become very effective as a means of advertising. The financial returns from this business are becoming very large.

The great majority of broadcasting stations are independently owned. All must be licensed by the Federal Government. These independent stations become affiliated with the networks by contracts. By agreement the networks engage what is called "option time" from the stations. That is, the right to broadcast through the individual station programs at certain selected hours. For this right the network pays at stipulated rates. The local station is at liberty to broadcast its own programs or features during the time not sold. Each of the networks has its own affiliated stations and by exclusive dealer contracts agrees not to broadcast through other stations in the local area. These agreements are the heart of network broadcasting. By them the network secures dependable outlets for its commercial programs to a nationwide audience and by them the local station secures desirable programs and financial returns. A very peculiar thing about these contracts is that the local station can reject the network programs at will, provided the local station deems them not in the public interest. The author points

out that such rights of rejection are "perhaps the most illogical aspect of the situation." This peculiar power in the local station is fostered and sustained by the Communications Commission.

The work is obviously not intended for the legal profession. Regarding the question of appeals from the Commission, the author says, "This is a highly legalistic matter and need not concern us." The author is, however, dealing with materials that the law deals with, and one could wish that for the sake of clarity, he had employed more of the legal approach. The basis of Federal regulation is statutory. If the Radio Acts of 1927 and 1934 are too long to be given in full, a summary would aid the reader. The Communications Commission made an extensive investigation into network broadcasting, out of which came certain rules laid down by the Commission which vitally affect "chain broadcasting." The author spends much time criticising these rules, yet he does not give us the complete set of rules adopted. A reader seems justified in wanting to know what rules were adopted under the Commission's rule-making powers. A summary of the report of the Commission's long investigation would also seem justified.

In addition to his comprehensive evaluation of Commission regulation of this growing business, the author develops some interesting technical phases of the subject. Thus an explanation of the fact that there are not more networks in competition with each other is said to be the limited range of radio wave frequencies available for use. This natural barrier, the author thinks, will be overcome by further scientific development in the future in the realm of short wave broadcasting.

While the radio has come to be a necessary means of supplying essential information as well as programs of cultural and recreational benefit, neither the network nor the broadcasting station has been legally classified as a public utility. The U. S. Supreme Court has held in the Sanders Brother's Case, 309 U. S. 470, 60 Sup. Ct. 693 (1940) that the radio field is open to free competition. This ruling places the industry in the category of "a business affected with a public interest," being subject to governmental regulation. The opening of the field to private enterprise amounts to little, however, because the spectrum of radio wave frequencies does not provide room for many newcomers.

As has been the case with many other large business enterprises, the broadcasting networks have run afoul of the Antitrust Laws. A suit under these laws is now pending having been instituted by the government in 1941, charging unlawful combination and conspiracy in restraint of inter-state commerce. This was followed in 1942 by a suit for $10,275,000 for damages by the Mutual Broadcasting System vs.

the Radio Corporation of America and N.B.C. These cases have not been decided.

In chapter fifteen the author gives his estimate of the Communications Commission as a regulative body.

1. He says that the "Commission can fairly be charged with political bias and favoritism in the past."

2. The regulations passed by the Commission were conceived "in an atmosphere of acrimony and intense partisanship"—"an atmosphere alien to an intelligent and calmly deliberated plan."

3. The regulations "were adopted in haste, without adequate consideration and in the absence of full understanding of their import."

To the author, Chairman James L. Fly's contention that under the adopted rules "the network is free" and "the station is free" is utterly fantastic. He says, "If chain broadcasting is to be preserved on any kind of stable and efficient basis it is a sheer impossibility to have the network entirely independent and the stations entirely independent."

Finally, the author definitely favors the American system of broadcasting in preference to government-owned and operated broadcasting in use in all other large countries. He thinks "advertising should continue to be the major means of financing broadcasting" and that it is "to the public interest to have both individual stations and networks."

In the appendix the N.B.C. and C.B.S. forms of contract for use with individual stations are given. In the Bibliography the absence of reference to Cushman's valuable work on *The Independent Regulatory Commissions* is noted. Neither is reference made to a forty-page chapter on "Communications" in *Government and the American Economy* by Fainsod and Gordon. The author lists five decisions of the Supreme Court of the United States as source materials. For effective use these decisions should have volume and page numbers given. Some statutes affecting radio in the years 1928, 1929 and 1930 are not mentioned. A ten-page index adds to the value of the work as a reference book.

The work is free from bias and is unflinching in emphasizing shortcomings of the Commission and network officials alike. It is a valuable appraisal of Federal regulation in this field.

R. J. M. Hobbs.

Professor of Business Law,
University of North Carolina.

The Day of Reckoning. By Max Radin. New York: Alfred A. Knopf. 1943. Pp. 144. $1.75.

This is a fascinating little book and its perusal will delight all who feel an interest in the application of legal principles and processes to the problem of the punishment of the Hitler gangsters after the coming of peace. Instead of a philosophical treatise on the issues which their trial will raise, Dr. Radin uses the method of a dramatic description of a supposititious trial held in Luxembourg in 1945. This distinguished scholar, German born but American bred, author of a wide range of volumes on Comparative Law, lecturer in several of our best law schools, is well equipped to explore the juridical suppositions upon which such an actual trial may some day rest.

By 1945, the resistance of the Third Reich is assumed to have collapsed and the United Nations are in military occupation of Germany and her associated and satellite countries. A High Commission has been constituted, consisting of five members. The President, representing Great Britain, is from Belfast. The others are a former Chinese Ambassador to France, a Russian Professor of Law, a former Solicitor General of Australia, and a retired Circuit Judge of the United States. The defendants are Hitler, Goebbels, Himmler, Funk, Gastein, Milch, and Ribbentrop. Goering had been killed in an air raid during hostilities. The Prosecutor is a Dutch lawyer, the leading counsel for the defense a German lawyer never associated with the Nazis and enjoying a high international reputation.

At the outset, an issue arises as to the language in which the proceedings are to be conducted. French had been intended as the traditional language of international diplomacy, but the point is made that French is not understood by one or more of the defendants and, with a scrupulous fairness, the Commission announces, with understandable dissatisfaction of the audience, that the proceedings will be in German. The composition of the audience, limited rigidly to the available seats, and the measures taken to avoid disorder, attempts at rescue of, or violence to, the defendants, reflect the care with which the arrangements have been planned.

The precise charges against the culprits are illuminating reflections of the historical development of Criminal Law. Hitler *et al.* are not accused of bringing on war. War is a traditional and recognized instrument of national policy which no race of people has ever succeeded in *outlawing*. They are not brought before the bar of world opinion for the incalculable misery they have inflicted on mankind and the millions of deaths they have caused. The charge is simply "murder," not murder of a generation, of a race, of a nation, of a city.

Nothing so grandiose! Hitler is not to be played up as was Napoleon. "Did not Bonaparte produce his *Napoleon Opera* with all too stupendous stage setting? With music of cannon volleys and the murder shrieks of a world, his stage-lights were the fires of conflagration, his rhyme and recitative the march of embattled hosts and the crash of falling cities." Hitler *et al.* are charged with the simple murder of three obscure individuals: one a Frenchman shot as a hostage, one a Czech hung because on his apartment house scurrilous epithets were scrawled in association with the Führer's name, one a Russian Jew bayoneted when too weak to continue the forced labor to which he had been assigned.

And so the trial opens. The arguments on the jurisdiction of the Court and the basis upon which it is sustained are perhaps the most interesting part of the play of intellect between Court and counsel. The deaths are proven by actual eyewitnesses, in some cases by Gestapo agents promised immunity. Then comes a gap, not satisfactorily bridged for one with the traditions of English common law. The personal responsibility of the defendants, members of the German Inner Council of Defense, is established only by statements of the President that members of the Commission had in *advance of trial* examined the records of the Council of Defense and become satisfied that each of the defendants had personally participated in the formulation of the instructions under which death had been visited on the victims in question.

But enough of this description of the trial. Read it and feel the nervous tension of the audience when the defendants repudiate their counsel and decline to enter the court room except by force. Thrill at the dramatic power with which this temperate German, who hates the Nazi concept of superior-inferior races, nevertheless describes the power of such an ideology to destroy the inhibitions which civilized people otherwise feel. Share the final verdict of the newspaper men that Hitler is merely a common ruffian heading a gang of rats and that the lawyers are, after all, a little bit of all right.

KEMP D. BATTLE.
Member North Carolina Bar,
Rocky Mount, North Carolina.

I Can Go Home Again. By Arthur G. Powell. Chapel Hill: The University of North Carolina Press. 1943. Pp. 301. $3.00.

A North Carolina lawyer, appearing by comity in a Texas court, asked the jurors on *voir dire* only one question: "Is there any gentleman on this jury who is under the impression that a man from North Carolina is a damn Yankee?"[1]

[1] Hon. Walter D. Siler of Siler City, N. C., at Conroe, Texas, in the case of *Heirs at Law of Wilson Strickland v. Humble Oil Co. et al.*

No Tar Heel lawyer after reading this book by a Georgia judge will fear being misunderstood in Georgia, for he finds that down there also, folks who don't have to buy them call gardenias *cape jessamines* and the "Big Road" means just what it does here. Nice children say "bad man" and "bad place" instead of using the proper names permitted their elders; and intelligent people—although they do not believe in it, of course—turn their hats out of an abundance of precaution when a rabbit crosses their paths. The Hardshell Baptists of Georgia think good liquor never hurt any man; the Methodists preach the doctrine of "falling from grace" and practice what they preach; the Baptists preach against the doctrine but they also practice what the Methodists preach—at least, so says Judge Powell.

Likewise in Georgia "Big Court" is held at the county seat and Judge Guerry who presided there in 1891 would find that few North Carolina "Big Courts" today dissent from his ruling then "that in this state a judge of the Superior Court has but damned few privileges, but one of them is to do just as he damned pleases." It was not Judge Guerry but another Georgia jurist, Judge Powell reports, who frequently said to counsel: "Oh, I know you can take me to the Supreme Court and reverse me, but this plaintiff is not entitled to recover and I am not going to allow it if I can help it." Judges, it seems, are very much like judges.

This book, however, is the story of the first thirty-three years of the author's life in Blakely, the county seat of Early County, in the southwest part of Georgia "where the states Georgia, Florida, and Alabama corner." Here Arthur G. Powell was born in the tallow-candle days of 1873 and here he lived until January 1, 1907, when he went to Atlanta as a judge of the Court of Appeals. The story in between is told in terms of his "piney-woods" environment. Environment, as used by Judge Powell, includes his ancestors as well as all the people who made an impression on his youthful mind or adult life. Their vignettes are as delightful as a box of old pictures.

Arthur Powell's paternal grandfather, a Baptist preacher who sired twenty-four children, told his son, Richard Powell, the author's father, that unless he would forego his ambition to be a lawyer he would not send him to school "as all lawyers were liars." Came the War Between the States and nineteen-year-old Richard volunteered. In the last year of the war he lost his right leg and returned home to find his father dead. He passed the bar examination on his record as a Confederate soldier and, for his time and day, became a successful lawyer. It was inevitable that his son should follow in his footsteps. Before he was six years old the author was accompanying his father to the justice courts in various parts of the county. By the time he was ten he was

copying legal documents and attending to the practice in the justice courts when the defendant made no appearance. At fifteen he was a Deputy Clerk of the Superior Court. At eighteen he secured his law license, thus acquiring the title of "Colonel" and then began to ride the backwoods circuits with his father. At twenty-one he was a judge of the County Court and at thirty-three he was on the Court of Appeals.

The anecdotes and legal lore acquired during this remarkable career are all in the book. It offers no profound philosophy of the law nor attempts any searching analysis of social problems although the author gives his views on the Negro problem, expresses his fears of "New Deals," and affirms the belief in government under laws developed "out of the time-tried experience of mankind under evolutionary processes." The real purpose of this book is to charm and entertain. It does both and more. It is a documentary film of an era—an era in which a post-war generation grew away from the bitterness and hatred of sectional ways; an era when the best citizens sold liquor without criticism, and when four dollars was a good fee for taking depositions. It was the day when church members were expelled for dancing (the author was himself), and when schools lasted only thirty weeks a year. Hangings were public; verdicts always went against the railroad, and no judge would endanger his popularity by forbidding jurors and spectators to chew tobacco in the courtroom and spit on the floor!

Although his formal education was scanty, Judge Powell aptly demonstrates that "education is not to be found in the schools alone" and that while "law is a science, the practice of law is an art." He pokes a little fun at the Yale law professor with whom he associated in the trial of a case when he says that the professor's brief came down to this: "The courts of the country are badly divided on the question, but the majority of the courts and the greater weight of the authorities are with us. Yet the question is a doubtful one." The professor will not, but most lawyers will pardon the author's pride in the story of how he moved the teacher's dead horse to a street the name of which he could spell. Judge Powell, however, would not go so far as the old lawyer who advised him that "a knowledge of the law is a bad thing for a lawyer, for it may be against him and give him less confidence in his case."

Judge Powell's keen sense of humor keeps in check the egotism which, he says, his father developed in him. His closest call occurs in the last chapter when he includes the superlative praise of a campaign endorsement written for him by Chief Justice Bleckley "not for what it says of me but because it is so characteristic of Judge Bleckley's

style." Every lawyer knows, of course, that any evidence admitted, however restricted, is in the jury box for all purposes.

In a closing chapter the author discusses the celebrated case of Leo Frank who was convicted of the murder of Mary Feagan and lynched when Governor Jack Slayton heroically forfeited all his political ambitions to commute the death sentence. It is a matter of real regret that Judge Powell made any reference to his own contact with the case, particularly since he had no official connection with it. He says he knew Leo Frank to be innocent and that he also knew who did kill Mary Feagan. This boast, coupled with the statement that he got his information in such a way that he could not honorably make it public and that he did not reveal it to his close friend the governor when he was considering Frank's application for clemency, lays him open to the criticism which he has received from many quarters.[2]

Indeed, so great was the criticism that Judge Powell rewrote this section of the book for its second edition. Nevertheless, most readers will conclude that he greatly weakened his position by so doing. In the first edition, with reference to his knowledge, he says: "Intimate as I am with Jack Slaton I have never discussed this fact with him, but I am quite sure that I know how he knew that Frank did not kill Mary Feagan." From this one might easily conclude that since the responsible official already knew that Frank was innocent there was no duty on Judge Powell to speak.

In the second edition, however, after explaining that he learned who killed Mary Feagan subsequent to Frank's trial, he says: "Without ever having discussed with Governor Slaton the facts which were revealed to me, I have reason to believe, from a thing contained in the statement he made in connection with the grant of the commutation, that, in some way, these facts came to him and influenced his action." Thus it appears that it was not until Frank's fate had been determined and announced that Judge Powell learned the governor knew the man was innocent! The governor had struggled with the problem, so far as he knew, unaided by the truth. While he does not say outright that he acquired his information from the attorney-client relationship he obviously intended to leave that impression by remarking that lawyers, when admitted to the bar, take an oath never to reveal a communication made by clients, or by prospective clients attempting to employ a lawyer, and that such communications would not be received in evidence if a lawyer attempted to reveal them.

A North Carolina lawyer takes no such oath as Judge Powell says

[2] To list a few: *Tampa* (Fla.) *Sunday Tribune*, Dec. 12, 1943; *The Daily Hebrew Journal*, Jan. 10, 1944; *Burlington Times News* (N. Car.), Nov. 23, 1943; *Greensboro Daily News* (N. Car.), Dec. 5, 1943, and Dec. 10, 1943.

lawyers take.[3] It is true that rules of evidence do not ordinarily permit a lawyer to testify in court as to a confidential communication made to him by a client on the faith of their relationship, but if the client sought advice to aid him in some act criminal *per se* such communications are not privileged. However, since the executive applies no rules of evidence at a clemency hearing, this law did not apply to Judge Powell's situation. Even if Georgia required such an oath from its attorneys as the author indicates, few right-thinking people would regard it as binding when silence would cost the life of an innocent man. Such a communication as the one Judge Powell regarded as so highly privileged is also so highly criminal that whoever received it, "attorney or not attorney, lies under an obligation to society in general, prior and superior to any obligation he can lie under to a particular individual, to make it known."[4]

Such a question of morals and legal ethics should not have been introduced into this pleasant book. The author himself, however, seems to have had no doubts at all as to the propriety of his silence and this apparent callousness is like an ugly ink splotch on a lovely filigree. We cannot but hope, the elaboration in the second edition notwithstanding, that there are still undisclosed facts which would temper our judgment of him if we knew them all. In mentioning the matter in the book Judge Powell talked out of turn, for there are times when, if all cannot be told, nothing should be said. The author's failure to speak, when his silence was calculated to shield a guilty man and execute an innocent one, was not consistent with the character developed throughout the pages of his autobiography.

In spite of a splotch, however, this book is a delightful visit with a "superlative lawyer," to borrow a phrase from Chief Justice Bleckley. Every attorney who reads it will agree that he never enjoyed himself so much at any bar meeting.

SUSIE SHARP.

Member of the North Carolina Bar,
Reidsville, N. C.

Social Control Through Law. By Roscoe Pound. New Haven: Yale University Press. 1942. Pp. 134. $2.00.

This little book is the publication of the Mahlon Powell Lectures delivered by Dean Pound at the University of Indiana. The first of

[3] A N. C. attorney swears allegiance to the state, to support the constitution of the U. S. and to honestly demean himself in the practice of an attorney to the best of his knowledge and belief. N. C. CODE ANN. (Michie, 1939) §§197, 3199, 3193, 3194.

[4] This was the argument made in 1743 in the somewhat similar case of Annesley v. Earl of Anglesea, 17 How. St. Tr. 1229, cited in 5 WIGMORE, EVIDENCE (2d ed. 1923) §2298.

the lectures is entitled "Civilization and Social Control"; the second, "What Is Law"; the third, "The Task of Law"; and the fourth, "The Problem of Values." The titles indicate the course of the argument; and those who know Dean Pound do not need to be told that what we have is a brilliant inquiry into the major problems of legal philosophy.

The question, "What Is Law," is one that has been a source of controversy among lawyers for hundreds of years; and the controversy is still going on with unabated interest. At one extreme, we have those who see nothing in law but the ideal element; at the other, those who see nothing but the exercise of force. The truth, as is generally the case, is to be found between the extremes in a synthesis of the conflicting views. In these lectures, Dean Pound, with his varied learning, his wide experience and his vast common sense, makes the synthesis for us, and in so doing points out the important part which legal ideas have played in the development of civilization and the present importance of a correct concept of the nature and functions of law on the part of those who teach and apply it.

Much of the confusion about the nature of law has arisen from the fact that in talking about law men have had in mind three very different things: (1) what jurists now call the legal order—the regime of adjusting relations and ordering conduct by the systematic and orderly application of the force of organized society; (2) the body of authoritative materials, such as statutes, decisions, etc., which are used in applying the force of society in the legal order; and (3) the process in which the authoritative materials are used. Dean Pound suggests that these three meanings can be unified by the idea of social control. "We might think," says he, "of a regime which is a highly specialized form of social control, carried on in accordance with a body of authoritative precepts, applied in a judicial and an administrative process."

In his first lecture, Dean Pound shows the part played by the agencies of social control—religion, morals and law—in the development of civilization, and how, in the modern world, law has become the paramount agency. He makes clear, however, that law must be conceived of as representing far more than the mere force embodied in the administration of the state. It must be thought of also as the reason which guides and directs that force, and of the principles, rules and standards for the carrying on of the task which are evolved by reason in the process. "Civilization rests upon the putting down of arbitrary, wilful self-assertion and the substitution of reason." There is real danger inherent in the heresy which sees in law only the force of organized society or a threat to exercise that force. "Theories of what is have marked effect on ideas of what ought to be. . . . If law-

maker and judge and administrative official are taught that a law is a threat of exercise of the force of politically organized society they tend to leave out of account what is to be the content of the threat and consider only how far, in common speech, the threat can get by. Such ideas have come into vogue with the rise of absolute government throughout the world and give the autocrat the aid and comfort of scientific theory."

The task of law is to reconcile conflicting interests or claims or rights of individuals or groups so that the social organism can function with the greatest good to the greatest number. "A legal system," says Dean Pound, "attains the end of the legal order, or at any rate strives to do so, by recognizing certain of these interests, by defining the limits within which these interests shall be recognized and given effect through legal precepts developed and applied by the judicial (and today the administrative) process according to an authoritative technique, and by endeavoring to secure the interests so recognized within defined limits." The denial by the skeptical realists of the reality of rights or claims or interests is dealt with and effectively answered; and the danger involved in such denial is thus cogently portrayed:

"This idea that there are no rights, that there are only threats announced by the ruling organ of a politically organized society, from which, if executed, individuals may obtain certain advantages, is a symptom of the rise of political absolutism all over the world. Under an absolute polity and under the reign of such juristic theories there is no need for the autocrat or the bureaucrat to be troubled about the rights, that is, the interests or claims or demands (whether rightful or moral or just or reconcilable with those urged by others) of anyone. Constitutional guarantees are guarantees of phantoms. They may be ignored. It is enough that the ruler has issued threats and has a strong political organization under his control to make them good. It is enough that an administrative official has been given power to execute certain threats. No one has any standing to set up rights against his manner of exercising that power. Such ideas on the part of administrative agencies, not at all uncommon in the government of the time, are the fruit of theories that we can't prove anything in the nature of a claim to be secured, that we can't establish with assurance of any measure of values, that there is no way of reaching conviction that, on the one hand, claims which we recognize should be limited in view of other claims or, on the other hand, that one claim should be preferred to the other on the basis of ascribing to its values and weighing those values, and that there is nothing in law but an aggregate of threats. We cannot do better than we try to do. If we give up what we have sought to do in the past and say 'let those who control the force of politically organized society make such threats as seem good to them, either upon such reasons as appeal to them or without reasons,' we give up what has made law a prime agency of civilization since the days of the classical Roman jurists.

"It is a boast rather than a description to call such teachings 'realism.' They ignore one of the most significant features of social control by politically organized society, namely, the attempt to carry it on upon a basis of reason and toward what is conceived of as justice. . . .

"What is significant is the claim behind the legal right. Without a recognized claim, recognized on a basis of reason, there is only an arbitrary exercise of force for its own sake, something against which we rebelled at the Revolution and to prevent which we set up frames of government founded on a separation of powers with a bill of rights in the forefront of them on the very morrow of the Declaration of Independence."

The reconciling of conflicting rights or interests involves necessarily their valuation in the social scheme; and the problems involved in this valuation are the subject of the fourth lecture. Dean Pound points out that the problem of reconciling conflicts and valuing the conflicting rights or interests has involved: (1) ascertaining through experience how conflicts may be resolved with the least impairment of the scheme of interests as a whole and giving that experience a reasoned development; (2) "valuing with reference to the jural postulates of civilization in the time and pleace" and (3) valuing with reference to a "traditionally authoritative idea of the social order and hence of the legal order, and of what legal institutions and doctrines should be and what the result of applying them to controversies should be." Of the present traditionally authoritative idea of the social order, he says:

"It is one which has governed from the seventeenth to the nineteenth century, getting what is likely to prove its final form in the latter. It is a picture in which relation is ignored and each man is made to stand out by himself as an economically, politically, morally and hence legally self-sufficient unit. He is to find his place for himself by free competition. The highest good is the maximum of free self-assertion on the part of these units. The significant feature of these units is their natural rights, that is, qualities by virtue of which they ought to have certain things or be free to do certain things. The end of law is to secure these natural rights, to give the fullest and freest rein to the competitive acquisitory activities of these units, to order the competition with a minimum of interference. Only a decade ago one had outwardly to do lip service to this picture on pain of being branded socialist or communist. It could hold no longer with us than elsewhere because it did portray reasonably well a pioneer, rural, agricultural society in a land with a great unsettled public domain and natural resources awaiting exploitation. But it has ceased to be a true picture of the society in which the legal order must be carried on today."

After pointing out the important changes in our thinking in the last fifty years, all pointing in a new direction, Dean Pound very correctly, I think, emphasizes the increasingly important part which co-

operation must play in the social order and in the valuing of conflicting interests. He says:

"If cooperation is not to be the whole idea, it is to be a large part of it. But I prefer to think that the recognition of cooperation and new emphasis upon it in all connections is a step toward some ideal involving organized human effort along with free spontaneous individual initiative, and I seem to see such an ideal in the idea of civilization. . . .

"An ideal of civilization, of raising human powers to their highest possible unfolding, of the maximum of human control over external nature and over internal nature for human purposes, must recognize two factors in achieving that control: on the one hand, free individual initiative, spontaneous self-assertion of individual men; and on the other hand, cooperative, ordered, if you will, regimented activity. Neither can be ignored if we are to maintain, go forward with, and hand down control over nature. . . . We are not compelled, because we recognize cooperation as a factor in civilization, to sacrifice all that was achieved in the last century by working out a system of individual rights, or what has been achieved through and since the Puritan revolution toward securing individual freedom as a no less essential factor."

So-called legal realism has rendered a service in emphasizing that law is not something imposed upon the social organism from without but something that arises from within and that, in consideration of law, the element which gives it authority or binding force may not be ignored. Some of its adherents have rendered a disservice which has become a source of real danger in ignoring the ideal element and teaching that law is nothing but the application of force. Broadly considered, law is the life principle of the social organism—the categorical imperative of organized society. This life principle must be interpreted in terms of rules and standards, and these must be enforced by the power of the state; but the source of the law is not the power which enforces the rules and standards, but the life of the state itself, and the source of the rules and standards is not that power, but reason applied to the life of the state. It is not possible, of course, to deduce a system of law from abstract reasoning about human rights. On the other hand one is not realistic who does not see the organic nature of society and the necessary relationships existing among its members. And to ignore the fact that these necessary relationships form the basis of the laws by which society lives and that the rules of law are deduced by applying reason to these relationships, is to close one's eyes to the most obvious fact with which the lawyer must deal.

In the changing concept of society to which Dean Pound refers, legal philosophy has a most important task. It abdicates its function when it abandons the search for the ideal and is willing to accept blind force as the ultimate reality. The greatest danger that confronts civil-

ization today is not the physical power of the totalitarian states, but the false philosophy of law and government upon which these states are founded. It will avail little to defeat their armies upon the fields of battle if their philosophy is allowed to triumph so that government based upon reason must give way to government based upon arbitrary will. In pointing out the dangers inherent in the skeptical realism which is in essence the philosophy of the totalitarian governments, Dean Pound is rendering a service of the highest value. We are fortunate that the task has been undertaken by one of his learning and intellectual power, who holds in such an eminent degree the respect of lawyers and scholars everywhere.

JOHN J. PARKER.

U. S. Circuit Court of Appeals,
Charlotte, N. C.