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Book Reviews

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BOOK REVIEWS

Brandeis: A Free Man's Life. By Alpheus T. Mason.[1] New York: The Viking Press. 1946. Pp. ix, 713. $5.00.

Members of the bar and law students alike are familiar with the notable career of Louis D. Brandeis as an associate justice of the Supreme Court of the United States from 1916 to 1939. Less familiar, but no less stimulating, is the unusually dynamic career of Brandeis as a practicing lawyer in Boston during the long period from 1879 to 1916. Brandeis emerged as a neophyte from Harvard Law School in 1878 with the highest scholastic record ever earned before or since that time by any student at that institution, and after a false start in St. Louis for one year, formed his own law firm in Boston in 1879 at the age of 23. Not long after, his earnings from his largely corporate law practice began to average $73,000 a year, while simultaneously he began to devote his unbounded energy and ability to a large number of public causes in the role of an unpaid crusader, thereby gaining for himself both devoted support and bitter enmity on a nation-wide scale.

Professor Mason has given us the first full-length story of Brandeis. It is an official story, the preparation of which was personally authorized by Justice Brandeis early in 1940. However, it should be made plain that the author has not written a biography. There are huge gaps in the story, both in chronology and subject matter. We are furnished a mere ten pages concerning Brandeis' youth, no material whatever concerning what must have been a fascinating period from 1879 to 1897 when he and Samuel Warren were building up a successful law firm, and no analytical picture of the full depth of the man in his social or family relationships. In other words, this is not the story of Brandeis as a living person in all of his moods and activities, but is primarily the story of a brilliant advocate, commencing with his active participation in public affairs as the "People's Attorney" at the age of 41. Judged solely on this basis, Professor Mason has produced an extremely readable and valuable book which contains innumerable kernels for lawyers and law students.

It is not strange that Brandeis should have aroused such deep hatred that seven distinguished lawyers,[2] all past presidents of the American Bar Association, should have stated on March 14, 1916, when the Senate was considering President Wilson's nomination of Brandeis to the Supreme Court:

[1] Professor of Politics, Princeton University.

[2] William Howard Taft, Elihu Root, Joseph H. Choate, Moorfield Storey, Simeon E. Baldwin, Francis Rawle, and Peter W. Meldrim.

> "The undersigned feel under the painful duty to say to you that in their opinion, taking into view the reputation, character, and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States."[3]

Neither the beliefs nor the methods of Brandeis were orthodox. During the period from 1897 to 1916, Brandeis appeared as the "People's Attorney," among others, in opposition to the attempts of the Boston Elevated Railway Company to obtain long term franchises without payment of compensation to the City of Boston, in opposition to the plan of the consolidated gas companies of Boston to gain legislative approval for extortionate rate practices, in opposition to the plan of the New Haven Railroad to obtain control of the Boston and Maine Railroad, in opposition to monopolistic practices by the United Shoe Machinery Company, and in opposition to an application by the railroads for approval of rate increases from the Interstate Commerce Commission.

Brandeis received no fee from any source for his services in such matters, although they occupied substantially all of his time over a period of twenty years. This fact in itself was sufficiently unorthodox to cause many of his brethren at the bar to raise their eyebrows as a sign of distrust. Furthermore, Brandeis took pains to emphasize publicly, and the press never failed to point out, that he was serving without any fee. He thus appeared in the public eye as a lone crusader battling single-handed against "the interests" solely because of his deep convictions, a state of affairs not calculated to endear him to his more orthodox colleagues at the bar. The most unique illustration of Brandeis' self-imposed standards of conduct occurred when he was retained by large stockholders of the Boston and Maine Railroad to fight the New Haven Railroad's attempt to gain control. Brandeis accepted the case but declined any fee for his services on the ground that it was "a matter of great public interest."[4] He felt, however, that it was unfair for the other partners of his firm to suffer financially because of this decision, and adopted the unusual course of substituting himself as the client of his firm and actually paying to the firm from his own pocket the sum of $25,167.32 over a six-year period because of his work in the matter.

Brandeis was also unorthodox in his methods. He fought not only in the courthouse and in the halls of the legislature, but also in the newspapers. He had positive ideas concerning the value of an informed and mobilized public opinion, and never overlooked the importance, as he saw it, of keeping the press fully informed. The result was that large corporations, formerly accustomed to the airing of any possible scandal only in the relative privacy of a courtroom or a legislative committee

[3] P. 489. [4] P. 180.

session, found their activities uncomfortably reported on page one of the daily press. Furthermore, if the immediate question was one of persuading the members of a legislature, Brandeis wrote editorials for friendly newspaper editors and saw to it that editors not personally known to him were approached by his allies. The net effect, of course, was the crystallization of public opinion by perfectly proper methods, but it is easy to understand how the novelty of such tactics created dislike.

In addition, Brandeis brought to the law an entirely new approach in his passion for knowing and emphasizing the precise facts of a case plus all the facts on the periphery as well. He established for himself and rigidly followed the maxim, "It has been one of the rules of my life that no one shall ever trip me on a question of fact."[5] At a time when the courts were steeped in conceptualism, Brandeis breathed the fresh air of facts. In the famous case of *Muller v. Oregon*,[6] in which Brandeis appeared before the Supreme Court in 1908 representing the State of Oregon and which first sustained the constitutionality of a state statute establishing maximum hours of work for women, Brandeis submitted his notable brief containing only two pages of legal argument and over 100 pages of reports and statistics concerning the actual effects of long hours upon the health of a working woman. Again Brandeis had broken with tradition and pursued the novel course, forsaking lengthy arguments concerning the abstract right of freedom of contract and advancing instead for the first time the social and economic justification for the statute.

Overshadowing these factors, however, were Brandeis' often-repeated views concerning the economic problems of the period. He was against "bigness" in any form, arguing that:

> "Human nature is such that monopolies, however well intentioned, and however well regulated, inevitably become, in course of time, oppressive, arbitrary, unprogressive, and inefficient."[7]

Such beliefs naturally brought him into opposition against the rapidly expanding corporations and holding companies of the period and identified him with the so-called trust busters. Those who viewed Brandeis as a radical at the time because of his passionate beliefs against big business overlooked his equally passionate and consistent beliefs against bigness in labor unions and in the processes of government. Indeed, when he was called to New York City in 1910 to settle the serious strike of garment workers then prevailing, he accepted the task only upon the condition that the union first eliminate from the settlement negotia-

[5] P. 69.
[6] 208 U. S. 412 (1908).
[7] P. 181.

tions its demand for a closed shop. As early as September 6, 1910, he stated:

> "The objections, legal, economic, and social, against the closed shop are so strong, and the ideas of the closed shop so antagonistic to the American spirit, that the insistence upon it has been a serious obstacle to union progress."[8]

Here then is the picture of an able lawyer who has made an invaluable contribution to the law, not only as a Supreme Court Justice but also as a private citizen practicing law. It is the picture of a man whose motives and methods varied widely from the norm followed by a young lawyer seeking success in his profession. The author presents this picture largely in an impartial tone, relying almost exclusively upon quotations from well-documented sources for the development of the story. In his occasional departures from the impartial, the author reveals an attitude toward Brandeis unnecessarily bordering on adoration. The stature of Brandeis as a lawyer and a judge is so universally conceded today that it is hardly necessary to labor the point that he could do no wrong. In particular, the emphasis given by Professor Mason to discussing and refuting the charge of inconsistency sometimes levelled against Brandeis during his crusading years, scarcely seems warranted. For the same reason, too much attention has perhaps been given to the loose charges of unprofessional conduct made by his opponents. The fact is that Brandeis, in living "The Free Man's Life," developed his own standards of conduct entirely apart from the prevailing mores of the bar. The author has not focused upon this basic factor in Brandeis' professional life, but has provided ample information for evaluation by the reader.

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Evidence: Common Sense and Common Law. By John MacArthur Maguire. Chicago: The Foundation Press, Inc. 1947. Pp. xi, 251. $3.00.

This book represents the effort of an experienced and respected teacher to make the law of evidence more easily understood by students. It is neither a reference text nor a "treatise." It disclaims all pretense of being citable as authority. It has no footnotes, and the complete Table of Cases contains exactly seventy-nine items. It is written in an informal style, with a liberal supply of illustrations drawn from actual

[8] P. 301.

cases or from the authors' imagination. It does not purport to be complete. A few points, carefully chosen with a view to pedagogical effectiveness, are examined in detail while others of equal importance are given only passing mention and many are ignored. It is a "preface," a "primary introduction" to the study of the law of evidence.

The arrangement of topics is unconventional. Most books on evidence (and on other legal subjects for that matter) resemble a room-by-room description of a finished structure. This one is more like a set of builder's instructions. After an introductory chapter, of which a word will be said later, the author acquaints the student with three of his principal "working implements"—hearsay, opinion, and best evidence. These tools, and others which are picked up and examined as the book progresses, are put to work first on witnesses, separate chapters being devoted to Testimony and Examination, Impeachment and Rehabilitation, and Incompetency and Privilege. The privilege against self-crimination is grouped with confessions and illegally obtained evidence in a chapter on Protection Against Official Misconduct.

Chapter VII is entitled Hearsay Exceptions, Professoinal Pertinacity, and Administrative Challenge. In it is a sampling of the common-law hearsay exceptions classified according to "the three principal motives or reasons which appear to have led to their fabrication," followed by subchapters on Inadequacy of the Common Law Exceptions, Remedial Proposals and Experiments, and Administrative Challenge. Then comes a chapter on Judicial Control and Administration in which attention is paid to judicial notice, burden of proof and presumptions, and remote and prejudicial evidence, and a final chapter on Preliminary Findings of Fact.

Even the Index is unusual. Considerations of mere utility as a place-finder could scarcely have prompted such catch-lines as "David Declarant," "Heresiarch," "Slow-Motion Picture of Mental Operations" and "Totem Pole Hearsay."

The book must be judged in the light of its purpose, and this calls for a degree of mental self-discipline which another teacher may find it difficult to exert. He is not disposed to be generous in his appraisal of what must appear to him as a manual on How Evidence Should Be Taught, especially when it is one which his students are publicly invited to acquire and read. Where the author's methods coincide with his own he will feel that his thunder has been stolen. Where he has been doing things differently he will prefer to keep on thinking that his own way is the better, notwithstanding the accumulation of documentary evidence to the contrary within the covers of his students' examination books.

Perhaps one who, like this reviewer, has taught Evidence in the

recent past but has now moved into other fields can more easily push aside these psychological obstacles. He no longer has a face to save in the classroom, and his reactions as he reads may safely alternate between pleasure at finding himself in good company where he agrees, and a mild tut-tutting where he does not. At any rate I have been able, with only moderate exertion, to maneuver myself into an honest and ungrudging belief that the book is an excellent one for its purpose. It is easy reading, and the student who reads it—and backs up and rereads where he feels himself getting beyond his depth—ought to stand up better under classroom questioning, write a better examination book, and become a more efficient trial lawyer than one who does not.

There is just one query of a general nature that still sticks with me after all the mental housecleaning of which I am capable. A student who knows no evidence except as he has learned it from this book will, I think, get the impression that the law of evidence is on the whole a fairly rational body of principle; and I doubt the wisdom of leading him into this frame of mind. Of course there are classroom hours which the teacher may, with sadistic enjoyment, devote to dispelling the illusion. And there are other books to be read. But this one is designed, as I understand, to set the pattern of the student's thinking about evidence. Ought not such a book be a "primer for crusaders"—which, the author tells us, this is not?

Now I do not mean that the author is uncritical. He uses harsh words about a good many points; he comments vigorously and at some length on the dangers of professional conservatism with respect to the hearsay exceptions; and in his concluding paragraphs he reminds us that the title of the book "suggests failure of complete coincidence between the two intellectual commodities," Common Sense and Common Law. But the emphasis throughout is on principle and policy. The topics selected for detailed examination are chiefly those which show the interplay of wholesome policies, while parts of the field that are noted for their irrationality tend to be slighted, and the whole is fitted into an impressively logical outline.

It is just possible that this is the consequence of the author's expressed aim—to the justification of which his introductory chapter is devoted—of presenting the law of evidence as it is administered by trial judges rather than as it appears in appellate opinions. Suppose we accept this as a laudable objective; still, to concede its accomplishment in the present work one must share the author's conception of "the thinking of the *nisi prius* judge," and this I am not sure that I do—partly, no doubt, because I am not altogether sure what that conception is. "This judge," the author tells us, ". . . desires quick, clean-running contention upon recognizable general principle, unblocked by clots of

citations. If at all human—which he usually is—he does not enjoy too frequent occasion to exercise a difficult discretion, preferring to impose a rule of thumb."

But "general principle" and "rule of thumb" to my mind are different creatures. They abide in the same formula only when the general principle has given birth to the rule of thumb, and this has happened less often in the law of evidence than one might wish. Does the *nisi prius* judge do most of his thinking in terms of general principle or of rule of thumb? The structure of this book suggests that the author has accepted the former alternative, while my own recollections are predominantly of a great many rules of thumb applied without bothering much to look for principle. This was not because the judges were ignorant of the law of evidence, or because they were too lazy or in too much of a hurry or too independent of appellate restraint to enlighten themselves. It was because the law of evidence is like that: too much rule and too little principle; and so, I think, ought future lawyers be made to see it. Then, seeing it as it is, they ought to do something about it. For the reason, read the last paragraph of Chapter VII of this book.

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The Nürnberg Case as Presented by Robert H. Jackson, Chief of Counsel for the United States, Together with Other Documents. New York: Alfred A. Knopf. Pp. xxi, 269. $3.00.

Before 1944 Nürnberg was famous as a city-wide exhibit of mediaeval and Renaissance structures, a modern community still living in buildings erected five hundred to one thousand years ago; to us now the name of the city means first of all the scene of "history's greatest criminal trial," as the words read on the dust-jacket of this volume. The writer, Mr. Justice Jackson of the United States Supreme Court, has had a long association with the trial of the Nazi war criminals. He represented the United States in the negotiation of the agreement of August 8, 1945, setting up the International Military Tribunal and creating its charter, as well as in the role of prosecuting attorney. He has said: "This is the first case I have ever tried where I had first to persuade others that a court should be established, help negotiate its establishment, and when that was done not only prepare my case but find myself a court room in which to try it."[1] So far as direct contact with events is concerned, he is qualified to tell the whole story of the

[1] This statement is quoted by Gordon Dean in his preface to Mr. Jackson's "The Case Against the Nazi War Criminals," 1946, p. xiii.

case. But this volume does not purport to be an "authoritative and comprehensive picture of the Nürnberg trials," except in a phrase on the cover jacket, which not even the publisher expects to be taken literally.

This volume, like another from the same pen and press last year, reprints portions of the documentary history of the case.[2] There is some duplication of material in the two books; the agreement establishing the International Military Tribunal, including the Charter of the Tribunal, and Mr. Jackson's opening statement in the case for the prosecution, appear in both. The indictment text is printed in the earlier book only. The present volume includes the report of Mr. Jackson to President Truman on June 7, 1945, stating the progress made in the month which had passed since Mr. Jackson's appointment as Chief of Counsel for the United States in the prosecution. This report was dated, and preparation of the American case had started, two months before the four powers had set up a court to try the charges. Several of the provisions of the eventual Charter of the Tribunal are foreshadowed in the report.

Most of the book is taken up with three addresses which Mr. Jackson made to the Tribunal in the course of the trial. Of these the most interesting, from the point of view of criminal procedure, is his argument in support of the indictment of certain Nazi organizations. The court was asked to place the judicial brand of criminality upon the Leadership Corps of the Nazi party, the Gestapo, and several other groups. This procedure is explained as intended to settle finally in the one action the single issue of the criminal character of the group rather than allow it to be re-tried in each prosecution of a member of the group. In theory, at least, no individual was foreclosed without a right to be heard on this issue, since any member could apply for permission to intervene under Article 9 of the Charter of the Tribunal. Article 10 of the Charter provides that, after an organization has been declared criminal, individuals may be tried "for membership therein before national, military or occupation courts." In such subsequent trials the individual cannot make a issue of the criminality of the group; nor insist that proof be offered of his individual participation in the crimes of the group. Mr. Jackson argues that the individual could defend on the ground that his membership in the organization was induced by duress or fraud; the language of the Charter does not require this conclusion, but Anglo-American courts would certainly agree with the argument, subject to proper definition of duress and fraud.

Mr. Jackson makes a strong defense of this novel procedural device. He refers to a similar procedure approved by our Supreme Court in

[2] The earlier volume is the book cited in note 1, *supra*.

Yakus v. United States, 321 U. S. 414 (1944), where the decision of the Emergency Court of Appeals upon the validity of OPA regulations, was treated as final, pursuant to statute, and therefore not subject to question in a subsequent criminal proceeding against individual violators. The analogy is not entirely satisfactory. The validity of OPA regulations could be contested in the Emergency Court of Appeals by an interested party before any violation had occurred, but it was only members of the indicted organizations who were permitted to seek intervention. Probably most members of the indicted organizations would hesitate to exercise their right to apply for an opportunity to be heard, feeling naturally that to do so would initiate a conflict with the prosecuting authorities which might not otherwise develop. However, where an organization has engaged primarily in criminal activity, to require proof of actual participation in a specific crime against each member prosecuted would be to place too heavy a burden on the proceedings against individual members; and to leave to repeated trials in many courts the single issue whether membership of itself was a crime would not only greatly burden the individual trials but would also probably lead to such varying results as to lower seriously the prestige of the courts. The device adopted seems to be the best solution; and it can certainly work no substantial injustice if the courts make proper use of their discretion in sentencing individual members of the condemned organizations.

In its judgment the Tribunal held the Leadership Corps, the Gestapo, and the groups known as the SD and the SS were all criminal organizations. But this declaration in each case was expressly limited to those persons who became or remained members of the organization "with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter."[3] The Tribunal refused to declare either the Reich Cabinet or the General Staff and High Command criminal organizations, partly, in each case, because the number of individuals involved was so small that the members could be conveniently tried without resort to such a declaration. The Tribunal also refused to hold the SA a criminal organization.

Mr. Jackson's opening and closing statements to the Tribunal survey the "Lawless Road to Power," the steps by which the Nazi party took over control of the German state and of every human force in it, and bent these powers to the party program. Each step was taken with the definite intent in the minds of the leaders to start a war of conquest. This purpose, often declared openly in general terms in the early years, went underground later and was avowed in secret meetings, meetings, however, of which damning records were kept. These records were the

[3] Judgment of the International Military Tribunal, reprinted in "Nazi Conspiracy and Aggression: Opinion and Judgment," U. S. Government Printing Office (1947), pp. 91, 97, 102.

principal reliance of the prosecution. The testimony of nineteen defendants who voluntarily took the stand in their own defense also proved to be a considerable help to the prosecution. Mr. Jackson has included in this book brief excerpts from the cross examination of Göring, Schacht, and two other witnesses, portions of the testimony which are referred to in his closing address.

These are eloquent and convincing arguments, especially the final statement to the Tribunal. It must be remembered, however, that we do not have the speeches of opposing counsel before us. And it is too much to expect a dispassionate analysis of the evidence and the trial in the address of a prosecuting attorney, however conscientious he may be. An appraisal of the whole record of this trial by an expert in criminal law, preferably a disinterested neutral jurist, would be of such value that it would well repay even the appalling research in many volumes of transcript which would be necessary in its preparation. This generation needs such a survey. In the meantime, informative books about the trial serve the purpose declared in Mr. Jackson's preface, to give the reader some acquaintance with the Nazi philosophy, as stated by its leaders. When that philosophy is dead, such books as this will have an academic value only; until we can be sure of that demise, such books should not be studied as history, but as practical present day political and social science.

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