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### Book Reviews

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## BOOK REVIEWS

**New Paths of the Law.** By Roscoe Pound. Lincoln: The University of Nebraska Press. 1950. Pp. 69. \$2.00.

Now, in mid twentieth century, multitudes of people shout for the attention of one another, and the shouts are as loud for matters of small moment as for matters of large importance. The cries of Communists, the propaganda for the United Nations, and the calling of religious leaders mingle with the noise of those who extol suds, cures, and candies. This book, consisting of but sixty-nine pages, with two of those left blank, by its very thinness may succeed in luring attention away from competing attractions, since here one may, with the expenditure of only a little time, obtain the reaction of one of the giants of jurisprudence to our confused, complex, and turbulent modern legal scene. Roscoe Pound, a man who, in his courses at Harvard Law School, made generations of law students acquainted with the world's great juristic thought, who himself added one of the most outstanding contributions to that thought made by any American jurist, and whose particular genius has been his ability to draw panoramic pictures of the large scale movements in human thought during the course of centuries, is qualified, as few men of our time are qualified, to comment on the large scale significance of what is happening in the disturbed legal order of our age. If this reads a little like a eulogy, it is to be noted that when the literal truth about a man reads like a eulogy, that man's mature comments on the life of his time are worth a brief pause to read, especially when his comments are so terse that the required pause can be brief.

The book consists of three lectures delivered by Pound at the University of Nebraska in 1950. In the first lecture, called "The Path of Liberty," he expounds the idea that law in the nineteenth century sought to realize a maximum of free individual self assertion, and he sets forth many influences which caused the law to move along such a path. First, the period from the sixteenth to the nineteenth century was an era of discovery, colonization, and development. A time of opportunity calls for liberty so that individuals may be free to seize their opportunities. Also there was the influence of Magna Carta and the Declaration of Independence; of the doctrine of the common law rights of Englishmen and the theory of the natural rights of man; of Kant's theory of allowing the maximum amount of free assertion of the will of each person compatible with a like assertion of the wills of others; of Maine's view

that legal history is the history of progress from status to contract; of Bentham's view that happiness is to be found in individual freedom. These and other influences all contributed to the movement of law in the path of liberty. But toward the end of the century a new movement set in. The "era of opportunity was felt to be over," Pound writes. Individual freedom began to be limited on behalf of the interests of society. Since then the movement has accelerated, and Pound points to numerous restrictions on freedom of contract, on the right of the individual to the free use of his property, and the like. The first lecture is background. In it Pound summarizes much that he had written many years before. It contains his strengths and weaknesses, already much commented on, so that there is no need of rehearsing them here.

In the next two lectures Pound discusses two new paths which are beginning to be discernible in the legal trends of our time, but to neither of which we are yet irrevocably committed. One of these Pound calls the humanitarian path, and his second lecture is a discussion of it. "In the English-speaking world, until the present generation, security has meant security from aggression or fault or wrong-doing of others. Today the term security is being used to mean much more—how much more it is not easy to say. But certainly it is made to include security against one's own fault, improvidence, or ill luck or even defects of character." Whereas tort liability had been a consequence of fault, "a developing humanitarian idea seems to think of repairing at someone's expense all loss to everyone, no matter how caused." Two new theories of liability have appeared; one Pound calls the insurance theory, and the other he calls the involuntary Good Samaritan theory. Under the insurance theory, liability is imposed upon someone more able to bear the loss—such as the employer if an employee be injured, or the manufacturer if a consumer is injured in the use of a defective manufactured article—and the loss is then passed on to the public by regarding it as part of the cost of production to be included in prices. Pound is skeptical about the operation of this theory in practice, because it is usual that one agency of the government fixes prices, whereas a jury or another administrative agency assesses damages, and there is no coordination between them. Those who control prices are zealous to keep them low, but those who impose liability are zealous to afford the maximum relief to the injured. In practice Pound thinks law is called upon to play the involuntary Good Samaritan, to pull the injured out of the ditch, bind his wounds, and pay his hotel bill. The law then drafts someone else to foot the expense. This comes down, says Pound, to the Marxian aphorism, "To everyone according to his wants; from everyone according to his means." Pound concludes the

lecture by pointing out that much of the humanitarian program, if not beyond attainment, is beyond attainment by means of law.

The other of the two new paths of the law Pound calls the authoritarian path, and it is plain that he does not like it. This path is one in which a service state controls all individual activities and all productive effort, provides full services to everybody, and solves all ills. For freedom of individual action is substituted a different kind of freedom, namely freedom from want and freedom from fear. Pound uses the term "service state" instead of the more common "welfare state" because the latter term seems to him to be a boast. Whether such a state produces welfare is at least debatable. Pound repeatedly says that he has no objection to a state rendering services; he does object to the state taking over the whole field. Already the state has become jealous of service performed by anybody else. "The service state easily becomes an omniscient state, with bureaus of *ex officio* experts and propaganda activities carried on at public expense." Pound also elaborates on the idea that, "It is characteristic of the service state to make lavish promises of satisfying desires which it calls rights." On the specific matter of what the service state may mean to lawyers, Pound contrasts a profession, in which the members render public service by the exercise of their own individual initiative and talents, with a regime under which what were formerly professional men become employees, members of an employee group, represented by employee unions, and interested primarily in their pay. It is obvious that Pound is no advocate of socialized medicine, nor socialized law, in the direction of which we have been inconspicuously moving as more and more lawyers fail to hang up their shingles and instead become employees on staffs of government agencies.

Pound concludes with a declaration of faith that "what was found for civilization while law was treading the path of liberty will not be lost." We will not take the authoritarian path. There will be a broadening of objectives but not a sacrifice of values already attained.

By many who have identified liberalism with belief in the welfare state this book may be regarded as the product of a great man of yesterday who has failed to keep pace with the times. Pound, the sociological jurist who did much to set in motion a change in the law from individualism to an emphasis on social interests, is in danger of suffering the fate of reformers who launch reforms that get out of hand, become revolutions, and in the end lop off the heads of the reformers who launched them. Pound's head is probably in no immediate danger, but Pound himself is in danger of being labeled a hidebound reactionary during these days when men are more impetuous than wise. But it seems

to be characteristic of the human race that in times of change it goes too far, and then falls back, thus reaching in two movements the place where wiser leaders would have stopped. Pound's present position may be the one we reach in the end.

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**Primer of Procedure.** By Delmar Karlen.<sup>1</sup> Madison, Wisconsin: Campus Publishing Company. 1950. Pp. 525. \$6.50.

I remember reading a review of a child's book (of the kind read nightly *ad nauseum* by parents to tiny tots) in which the reviewer suggested his incompetence since only an infant could give an adequate judgment on such a book. Since this "primer" is exactly that, designed, as the author tells us, to give entering law students a basis understanding of civil procedure and to help orient them in the legal world, it should perhaps be reviewed by a student just entering law school. It could be objected that such a student could not properly evaluate the book until he had studied sufficient law to tell how good the book was, and by that time he would have become disqualified because he would have forgotten how ignorant he was to start with. Still, new devices for breaking in the student are commonly being tried by we who have that job, and if one of us may write such a book, another may be excused for reviewing it.

The tenor of the book is shown in the introductory quotation from Mr. Justice Holmes: "We need education in the obvious more than investigation of the obscure." In 113 pages the author gives a broad outline of procedure from summons to appeal, keeping his eye always on the normal course of things and giving only a preliminary warning that practically every sentence in the book is subject to some exception or qualification. He then devotes fifty pages to the common law writs and a summary of equity, ending with a glance at the steps taken toward reform and unification. At each procedural step the text is keyed into an actual record comprising 280 pages of pleadings, transcript, appellate papers, briefs, and opinion. The book concludes with a reprint of approximately half of the Federal Rules, as an example of a modern procedural system.

This material, according to Professor Karlen, can be used either as supplementary reading for the student or as the sole foundation for a two-hour introductory course. As supplementary reading the adequacy

<sup>1</sup> Associate Professor of Law, University of Wisconsin.

of the book depends upon that which is being supplemented. If the students are simply given a few lectures on law school and legal procedures the book should be excellent for the purpose of aiding them in the preparation and understanding of their other courses. If a short course on procedure, with a longer one to follow in a later year, is taught from a casebook such as Atkinson & Chadbourn, *Introduction to Civil Procedure*; or if the freshman orientation takes the form of a course in legal method from texts such as Fryer & Benson or Dowling, Patterson, & Powell, Professor Karlen's primer will materially expand and clarify some of the procedural concepts taught. If, however, in the freshman year a complete course is given from Atkinson & Chadbourn, or Scott & Simpson, *Cases on Civil Procedure*, this book would do little except to give the student a broad preliminary outline of the material he is about to cover in detail.

As the foundation of a course for the beginning student I can only say that I am wholly convinced that the materials are entirely adequate for Professor Karlen's course and quite inadequate for the introductory procedure course which I teach.<sup>2</sup> My feeling is that great virtue lies in the process pounding into the students the essential requirements of the various judicial remedies and in forcing the students to dig for them in the cases. For these reasons the short textual treatment of the forms of action would not do for my course.

Whether or not any particular law professor will like this book will first depend upon whether or not he will agree that Professor Karlen's purpose is a desirable one, and secondly whether or not he feels that the purpose has been accomplished. Karlen justifies his simplified approach on the grounds that more sophisticated approaches have proved unsatisfactory. The lack of detail in the main body of the primer, the failure to note exceptions and qualifications, may cause some to shudder, but much similar material is found in all our freshman lectures when we use some half-truth to ease a student over a procedural stumbling block. After all, 113 pages contains considerably more detail than does Atkinson & Chadbourn's six pages or Scott & Simpson's nine.

In one respect Karlen has limited the usefulness of the book. As an educator of Wisconsin lawyers he has in some instances stuck closely to Wisconsin procedure in order to get a firm footing and avoid the shifting sands of attempting to describe all systems of procedure at once. For this reason a few parts of the book will need some external explanation when used in any other state. For example, the Wisconsin "order to show cause" is explained without any attempt to indicate that in many other jurisdictions such a procedure is called a motion for a temporary restraining order, or that other states have other pro-

<sup>2</sup> See Mueller, *There Is Madness in Our Methods*, 3 J. LEGAL EDUC. 93 (1950).

cedures bearing that name. Similarly, Karlen speaks of the summary judgment as being of prime importance without indicating that it is not available in most state courts. It would not have been too difficult or too confusing to have footnoted alternative names and procedures as they occur in other jurisdictions. One other fault is that occasionally the author in attempting to avoid "exceptions and qualifications" shows only one side of a genuine controversy. For instance, he gives the Blackstonian view of the derivation of the action of case from trespass by virtue of the Statute of Westminster II, without the faintest hint that Plucknett or Dix have had anything to say on the matter. A single page<sup>3</sup> could have adequately presented the whole picture for the student's judgment.

On the whole I think Karlen's purpose and accomplishment an excellent one. From what I think I know of what the entering student does not know I would conclude that this book should be very helpful and I would wholeheartedly recommend its use to him. For the professor assigned to teach introductory procedure or to give the aforementioned few lectures the book should be a valuable source of notes explaining some rather complex concepts in simple terms understandable to the beginner. It certainly should sit in fair numbers upon every law school's library shelves.

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**The Papers of Walter Clark.\*** Edited by Aubrey Lee Brooks and Hugh Talmage Lefler. Volume II, 1902-1924. Chapel Hill: The University of North Carolina Press. 1950. Pp. 608. \$6.00.

The presentation of Judge Clark by Mr. Brooks in his two volumes, "The Fighting Judge" and "The Letters and Papers," addressed to the layreader as well as the lawyer, very properly by-passed the citations and discussions of the cases and opinions which a Law Review, addressed more especially to the lawyer, can more properly present—cases that made the landmarks of his career and which flowed into the whirlpool of both legal and political controversy. A review of these

\* *E.g.*, MORGAN, *THE STUDY OF LAW* 106 (2d ed. 1948); ATKINSON & CHADBOURN, *CASES ON CIVIL PROCEDURE* 18 (1948).

\* A review of *The Papers of Walter Clark* by Mr. H. S. Ward recently appeared in a leading North Carolina newspaper. Since Mr. Ward is a contemporary of Judge Clark, he is especially well qualified to give an insight into the character and times of that great North Carolinian. For this reason, the LAW REVIEW requested Mr. Ward to follow up his review with a comment on the book directed particularly to the members of the North Carolina Bar.

cases would have given the layreader too much of a law brief, not wholesome to his taste. The omission, therefore, leaves interesting law history which reflects the character of his subject and speaks for itself without extensive narrative. These cases, that so vividly reflect his official life, are presented for that purpose. They offended the type of lawyer that represented the larger interest, then just springing to its feet in this state and pluming its wings for a higher and stronger flight. But for these opinions and discussions of them, the general public would have seen nothing in him but a faithful, public servant, active in magazine and newspaper writing, showing his interest in the backward in life's race and his fearlessness of the larger selfish activities which by superior ingenuity and bigness imposed on the masses, as he thought. The general public approved these writings, but with no polemic spirit. And by these writings alone he would not have become the storm petrel he was. The lawyers of his day were better known, more revered and admired than were law books and the opinions they contained.

In the distinguished group which graced the big lobby of the old Yarborough Hotel in Raleigh fifty years ago, the four major railroad companies with their general and division counsels, together with the shorter intrastate lines predominated. In 1833 and '35, the Legislature granted a charter to the Wilmington and Raleigh Railroad Company to build a road connecting the two cities and put in exemption from taxation for unlimited time. In a suit in our court, Pearson writing, our court held the exemption did not include the franchise. *Reid vs. Railroad*, 64 N. C. 144. A corporate franchise, independently of tangible property for taxation had theretofore received little, if any, judicial consideration. On appeal to the United States Supreme Court, the decision was reversed. 80 U. S. 568. (What does the lawyer of today say to the proposition of a legislature exempting from taxation beyond the limit of its own life and binding subsequent legislatures by it? The "Sun do move." Appellate courts are slow and hesitant at innovation, but civilization has what takes the place of a modern implement which man calls the bulldozer, by which he moves the mountain to the valley.) This railroad company afterwards acquired lines connecting Weldon with Kinston and insisted on continuing its exemption. In 1891 Sheriff Allsbrook of Halifax demanded tax on both franchise and tangible property. The railroad enjoined. The case was heard by Judge H. G. Connor. He split his judgment, seeing the franchise and certain tangible property in a different light. Both sides appealed. 110 N. C. 137. The court was Merrimon, C. J., Shepherd, Avey, Davis, Clark. Clark had been on the bench about three years and had displeased the Yarborough lobby sufficiently to align him with Avery. Merrimon and Shepherd, safely conservative; Avery and Clark, surely and displeasingly radical.

Where was Davis? No finer spirit ever sat on that or any other bench. This was February, 1892. He had been sick through the winter and died the following August. Several conferences, of course, were held by the court on this case which he attended, but on the day set for the vote he was quite sick. With him absent, it was expected there would be a dog-fall and Judge Connor affirmed in both appeals. They were right about Avery. He was as liberal as Clark, but without Clark's dynamic energy, impatient, resentful of criticism and in fact irritable of controversy. Clark, patient, undiscourageable, insensible to insult, "His soul was satisfied as with marrow and fatness" as he faced a contest. He fought the policy and for the principle and not the person. At two o'clock, the hour for the conference and the vote, Clark's carriage drove up to Judge Davis' house and Clark went in and soon came out with Judge Davis leaning on his arm. They drove to the court building and the hope of the dog-fall vanished.

Ten years passed. The Machinery Act of 1901 put the Corporation Commission in perplexity with respect to the taxation of the intangible property of railroads. Gov. Jarvis and F. M. Simmons in the campaign of 1900 had promised Col. Andrews, the star performer in the railroad drama and a powerful man, that the railroads would not be taxed on their franchises separately from their tangible property. It was contended from official reports that it amounted to around nine million dollars. The sheriff of Washington County, J. W. Jackson, brought an action for mandamus against the Corporation Commission to require it to assess the franchises. Judge Robinson, at chambers, dismissed; and the appeal was argued, first week of February Term, 1902. 130 N. C. 385.

The ten years that had passed since the Allsbrook case had shown Clark's handiwork sufficiently to keep alive the resentment to his "injustice to the interest," but he had run the steamroller over them at the Greensboro Convention of 1902 before the opinions were handed down. Notwithstanding this lessening of the furor, when the suit was brought he was accused of himself having it brought. There was some excuse for this charge. I do not doubt that his writings in the *Arena* and newspaper interviews brought it to Jackson's attention. The *News & Observer* exposed the matter at different times and it was asserted that the editorials showed the touch of a skilled legal hand and it was charged that Judge Clark inspired them. The editor of that paper was himself a lawyer but it was asserted that Clark's hand was undisguisable. I note with admiration that the lawyers who were resentful to Judge Clark's liberalism could have easily been mistaken, but they were not McCarthys. Far indeed from it. They were the great men of this state in all the qualities of Christian personality. There were other skilled

hands in Raleigh then than Clark's. Anyhow and however, Jackson got the information and he was cocked and primed as much as Allsbrook. He contended that the franchise was as clearly property as the rolling stock and was included by implication in the word "property." The court held the case five months. It voted three to two to reverse and to order the Superior Court to issue the Writ, Montgomery, Douglas and Clark, Faircloth and Furches dissenting. After both opinions were written, as will be seen by Douglas' opinion, there was a shift of the wind. It was in this opinion that Furches said "The case is big enough to fall of its own weight." Plaintiff showed by official report of the railroads that nine million dollars worth of property was escaping taxation. In the last week of May, with both opinions on the conference table but not filed, Judge Montgomery asked for further consideration. I believe the proper name "Shiras" since the decision of the famous income tax case in the United States Supreme Court, which caused the Constitutional Amendment known as "The Income Tax Amendment," has reached the dictionary, and the books on English and been participialised; so that we say that at this eleventh hour, Judge Montgomery shirased the plaintiff. The judgment below was therefore affirmed.

Other citations that could easily be selected from the Reports during Judge Clark's career on the bench would be easily available, but we haven't the space, and a clear, correct and sufficient insight into the "inward parts" of Judge Clark are reflected by these two sufficiently for any thoughtful person to see what he was and all that he was. He was not a socialist, nor a believer in any form of collectivism in government, but a believer in a capitalistic democracy. His liberalism consisted in a conviction that a laissez faire or non-interference doctrine of government would leave the masses and unprivileged classes of mankind the suffering victim of superior ingenuity, and the combinations of capital (what Judge Brandeis called "bigness") would result in commercial chaos and general poverty. One of the top celebrities of the lobby of classical learning quoting Brankenbury in Richard the Third, said of him: "G—D—him, he's a perturbed spirit." The difference of opinion between the conservative and the liberal is with us yet and has no promise of disappearing. Fortunately, however, the North Carolina court has overcome it and no longer suffers its imputations, but in the political arena like Tennyson's brook, "Men may come and men may go, but I go on forever."

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