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Book Reviews

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BOOK REVIEWS

THE ART OF ADVOCACY: A PLEA FOR THE RENAISSANCE OF THE TRIAL LAWYER. By Lloyd Paul Stryker. New York: Simon & Schuster, 1953. Pp. 306. \$5.00.

After Judge Arthur T. Vanderbilt's review of *The Art of Advocacy* in the New York Times, March 28, 1954, any other must seem, at best, an anti-climax. That review was complete and laudatory, and properly so. This book is a masterpiece in exposition and a gem in inspiration.

Your reviewer must admit to some partiality toward and admiration for the author. He has had the pleasure of participating in two trials against Mr. Stryker and has been his beneficiary of some self-sacrificing acts of friendship.

This book states its theme in the sub-title, *A Plea for the Renaissance of the Trial Lawyer*. Most of the arguments and illustrations are to prove: that we should develop well-trained trial lawyers or barristers who will try all cases in our American courts; that other lawyers not trained in court litigation should be precluded from trying court cases; and that trials would then be better and more expeditiously handled and justice more easily attained.

Your reviewer disagrees with Mr. Stryker's super-emphasis on English justice and methods. For one thing, England has not always pointed toward justice and freedom, especially for the non-English. Secondly, your reviewer is not enthusiastic, to put it mildly, about the English method of witness interview and preparation by the solicitor; and trial by the barrister, with witnesses practically unseen by him until the trial. I do agree with Mr. Stryker, however, that our system of witness interview and preparation by the trial lawyer as soon as possible is the better in gaining justice for the litigants.

Your reviewer also disagrees with the author's great admiration for English judges and the policy of choosing solely from the list of barristers. Mr. Stryker states, "Why are English judges so uniformly excellent?" Are they? He continues, "One reason must be that they are appointed from the roll of those who have devoted a lifetime to the conduct of litigation in court—that is, from the barristers." And then, "A law teacher or writer would have as much chance of mounting the bench as he would of becoming the chief surgeon of a great hospital." Now Mr. Stryker, is it not true that many of our incompetent and some of our unfair judges have come from the ranks of trial lawyers? Is it not also a fact that many of our greatest judges, trial and appellate, have come from the ranks of law teachers and writers? Your reviewer, for one, wishes there were more scholars on the bench.

Knowing the type, quality and names of many cases tried by Mr. Stryker in his long and illustrious career, your reviewer feels that the author could have chosen some greater trials of his own, not only as examples of his own masterpieces, but also in place of the English illustrations he used.

Despite some of these disagreements your reviewer does admire the book. It is inspirational to neophyte and veteran alike. The beautiful language and the zealous arguments tend to sway the reader into the field of advocacy and to electrify the veteran advocate to greater heights.

Now that your reviewer has gotten some of his mental operations concerning the book off his chest it is a good time to describe and discuss its general contents.

The first chapter, "A New Case Arrives," describes the tedious work of interviewing witnesses and clients,—and thus mastering the facts. Contrary to most

works on the subject this chapter reads as easily and as smoothly as a novel.

In the succeeding chapters, II-VI, Mr. Stryker takes us from entry into court through the closing speech. The reader can actually picture himself conducting that "Bulwark of Liberty," and performing that "Incomparable Art"—Cross Examination, and then making the swaying, persuasive closing speech to the jury.

In the second part of the book Mr. Stryker tells us of the present low estate of advocacy and of the great advocates of the past: Littleton, the Choates, Webster, Jackson and others. He spends a chapter extolling the virtues of Martin W. Littleton and the same space describing the ability of John W. Davis. Your reviewer never saw Mr. Littleton; he saw and heard Mr. Davis, 'The Advocate'. Your reviewer cannot think of greater praise than in James M. Cox's *Journey Through My Years*:

"If the Almighty ever created a finer man than John W. Davis, I never knew him. He possessed every quality of statesmanship. On one occasion, he, Newton D. Baker and I were speakers. In the midst of his admiration for Mr. Davis's speech, Mr. Baker said to me, 'If I knew I were to be born again, by some process of reincarnation, and I were permitted to write out specifications for my future being, I would ask to be given the legal mind of John W. Davis.'"

Part Three:—Good Advocacy—A Crying Need—develops the author's argument for trained advocates in the criminal and appellate courts, and a divided bar. He makes out an excellent case for his position that only trained advocates should be permitted to try and argue cases in the courts. The last chapter of Part Three, "The Ethics of Advocacy," is a dynamic reminder to lawyers and laymen alike that under our Anglo-American system each accused, regardless of person or crime, is entitled to a zealous, well-prepared, well-tried defense by competent trial lawyers; and that no advocate assigned to or retained by a disliked client, accused of an unpopular crime should, in protecting the constitutional and legal rights of the accused, be the subject of criticism or slander.

As the reader may have gathered, your reviewer feels that Mr. Stryker's *The Art of Advocacy* is a great book; it is dramatic reading for the layman; and it is instructional and inspirational to embryo and experienced trial lawyers alike. To the embryo the advice is: read it once for enjoyment; then read it slowly and carefully for instruction. At any rate, read it.

MARIO PITTONI*

INTRODUCTION TO CIVIL PROCEDURE: ACTIONS AND PLEADING AT COMMON LAW.
By Alison Reppy. Buffalo: Dennis & Co., Inc., 1954. Pp. xiv, 860. \$3.50.

Pollock and Maitland in their *History of English Law*¹ say that to tell a piece of history is to tear a seamless web. The same can be said of a study of the history of almost any field of the law. It is especially true of an exploration of the whole domain of common law procedure. In this field as in any other, continuity must be the guide to understanding. We cannot comprehend the purpose or the effect of statutory codes, even those compiled by master minds such as Bentham, Brougham

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1. Pollock and Maitland, *History of English Law* (2d ed. 1899) 1.

or Field, merely by studying them as independent systems; we cannot grasp them as newly-forged weapons any more than could Coke, as he was accused of attempting to do,² "rip uses up from their cradle." Our modern law of practice and procedure was born in the manorial courts, the hundred courts and the shire moots, long before the Conquest, quite as much as in the Court of Common Bench; and it traveled with the judges of Eyre on circuit in the reign of Henry I, before it came to rest in Westminster Hall.

The admonition implicit in the famous dictum of Pollock and Maitland³ has been faithfully observed by Dean Reppy in his *Introduction to Civil Procedure*, dealing with actions and pleadings at common law. Only a scholar with the broadest perspective and the most profound knowledge could essay the task of surveying the whole range of common law procedure in England and the United States and of integrating with the present the experience and learning of the past. In this volume Dean Reppy has measured up to the task to which he has addressed a lifetime of painstaking industry in this branch of the law.

The book commences with a concisely portrayed panorama of the history of the English judicial system, drawn against a rich background of deep historical knowledge. Although the information is eclectically available in various other places, its gathering into one place is of great value to the student. Underlying the historical treatment is the theme of the gradual evolution from the itinerant justices into the centralized system of the growing common law jurisdiction. The historical growth of this important phase is developed with a wealth of learning and illustration. There is a particularly illuminating exposition of the growth of the power of the Chancellor into the Court of Chancery. There is also a skilful description of the transition from customary law to common law and from common law to Chancery. The history of the system and growth of appellate courts is set forth simply and clearly. More dates in this part of the book would be helpful to the neophyte. There is more in this historical introduction than the student needs to know, but this is not an objectionable feature. There is adequate although not extended treatment of the effect of the Consolidation Acts of 1873 and 1875.

The emphasis on the influence of the writ system, through the writings of Coke and Blackstone, on the development of the Colonial Courts and the Courts of the Justices of the Peace, is an important contribution. The great influence of the Court of King's Bench on American judicial organization is adequately emphasized, as, for example, in its assumption of jurisdiction over possessory actions as the old real actions fell into disuse. The slowness with which the courts of some of the colonies and states recognized the Chancery jurisdiction is explained in a novel and illuminating light.

For a description of the Nature and Function of Pleading at Common Law, the author draws on the First Report of the Royal Commission for improving the system of pleading in the superior common law courts, issued in 1851, which states in clear outline the groundwork of the English system of pleading, and points out with admirable objectivity its merits and disadvantages. The discussion on Equity, Modern Code Pleading, Modern Practice Acts and the Federal Rules of Civil Pro-

2. Chudleigh's Case, 1 Co. 120 a (1594).

3. Maitland was understandably impressed with the feature of continuity. He expressed much the same thought earlier when, speaking of some of the great English statutes, he said that "to pull them away without providing some substitute would be to bring the whole fabric to confusion." *Constitutional History of England* 20 (1913).

cedure includes an admirable discussion of the distinction between actions at law and suits in equity, with emphasis on their different modes of relief and modes of trial. The doubtful usefulness of the New York Code of Civil Procedure in simplifying procedure is pointed out, and the skepticism substantiated by well-chosen materials. The effect of the New Federal Rules is briefly discussed. The author then proceeds to the vital problem of Fundamental Conceptions Common to all Procedural Systems. Here he surveys with the sure touch of the master the influence of the Roman law prior to the fourteenth century, of German procedural science and of canonical procedure. No doubt the compass of the book precluded a detailed discussion of the German Reform Procedure of 1900, which Maitland regarded as a hundred years ahead of the English procedural system.⁴

Chapter II deals with the Commencement of an Action. The notes to this chapter are copious and at the same time informative and carefully selected. Jurisdiction and venue are illustrated by cases of origin and of departure. The selectivity of illustration is characteristic of the selection of cases throughout the book. There is a particularly penetrating discussion comparing the problem of jurisdiction in England and in the United States, leading up to the problem of *Eric Railroad v. Tompkins*. At page eighty-five there is given a form of original writ in debt, which lightens considerably the strain on the student's imagination imposed by the cases dealing with the historical substantive sequence from debt to contract and the historical procedural sequence from writ to declaration. The problems confronting the pleader in stating a cause of action are then summarized.

The author has made an individual contribution to his subject by illustrating and discussing the relationship between the considerations underlying bills of particulars and the statement of facts required in declarations, first as required at common law and then under modern Codes and Practice Acts. Here as throughout the work the element of continuity and integration is stressed and demonstrated in a readily understandable manner. The problem of stating a cause of action is next caught up and illuminated by a comparison, by way of flash-back, in terms of the specific common law actions, which is the subject of the Third Chapter. The method of this chapter is to take up the traditional Tort Actions—trespass and case, trover, ejectment, detinue and replevin—treating each action chronologically, from the point of view of the history and form of the action, the plaintiff's right, title, interest or possession, the alleged wrongful act of the defendant, and finally the status of the action under Modern Codes and Practice Acts. Tort, with its predecessor form of action in trespass, with illustrative declarations from actions in the King's Bench, is followed by an historical note on actions on the case, and a comparison between the traditionalist, modernist and revolutionary views. Here again the cases of origin, such as the Innkeepers Case, are found rubbing shoulders, but not uncomfortably, with the modern cases. Trespass and Case actions are illustrated by cases on the history and form of the action of trespass and on the case; the plaintiff's right, title, interest or possession in trespass and case; on case as the great residual remedy of the common law, with particular applications, and on their status under Modern Codes and Practice Acts. Trover, ejectment, detinue and replevin are treated in order with similar discriminating evaluation, and as always with the beautifully articulated integration of ancient and modern procedure. An illustration is in the section on the plaintiff's right, title, interest or possession, starting at page 254,

4. Maitland, *The Making of the German Code*, 3 Coll. Papers 474, 483 (1911).

where the note material on the ancient real actions, comparing the defects in the Real Actions with the advantages of the Action of Ejectment, gives a rich body of source material for the study of the transition. The problem of Entry and Ouster, and the imperative requirement, often overlooked, of the latter element at common law, is illustrated with a wealth of discriminately selected English cases of the late eighteenth and early nineteenth centuries, and the significant cases under Modern Codes and Practice Acts.

The history and form of the Action of Detinue is introduced by a sufficiently comprehensive extract from Dean Ames' essay in his Lectures on Legal History, illustrated by cases from the Year Books. This material is followed by sample writs, declarations and judgments in detinue, and finally, marshalled in orderly sequence, by the modern cases, at common law and under Modern Codes and Practice Acts.

The second part of the chapter on Stating the Cause of Action deals with Contract Actions; Debt, Covenant, Account and Special and General Assumpsit. Here the method is to discuss under each action its history and form, its nature, and its status under Modern Codes and Practice Acts. This has been done with the same painstaking attention to early precedents, both common law and statutory, and a skillfully manipulated transition to modern cases and statutes. As in the treatment of the Tort Actions, copies of original writs and declarations are inserted to make more readily understandable the origin of the rules and therefore their modern offspring. There is, on page 489, a useful diagram of the Common Counts, with comments on their origin ranging from Ames to contemporaneous Law Review discussion.

Part IV, Defensive Pleadings, starts with a chapter on demurrers. From a treatment of general and special demurrers and a discussion of the effect of demurrer the author proceeds, with a characteristic wealth of illustrative cases, to demurrer and corresponding motions under the Codes and Practice Acts. Chapter V deals with Pleas, first from a general approach to pleas in abatement and in bar, through the Common or Specific Traverse and the Special Traverse to the General Issue and Pleas in Confession and Avoidance, with appropriately selected forms applicable to particular forms of action. The material in this part is especially rich and pertinent.

Chapter VI deals with Replications de Injuria and Departure; Chapter VII with motions on the pleadings; Chapter VIII with the Judgment and its Effect, including the problems of collateral attack and *res judicata*, and execution. Chapter IX deals with Appellate Review, from the writ of error through the Bill of Exceptions to Status under Modern Codes and Practice Acts. The Appendix, characteristic of the author's learning and antiquarian instincts, gives the record in Slade's Case and the Hilary Rules of 1833.

We have here a work which reflects no mere growing perception of the problems involved, but a superbly mature survey of common law actions and pleading. There is little in this field which the book leaves unexplored. It is necessarily left to special works to explore topics such as equity pleading, interpleader and the Federal Rules of Practice. This is perfectly consistent with the author's view that the subject of procedure cannot be compressed into one course, but must be approached with adequate emphasis on its background and history. The author has created a unified and integrated history of common law procedure, emphasizing the continuity and evolution of this branch of the law. Clearly the book has a twofold objective: to enable the student to obtain an understanding of the modern system of code pleading and practice, and to facilitate the accomplishment of this objective through

acquainting him with the philosophy of procedure. To understand the modern practice as craftsman rather than as mere artisan, one must understand its origins. This dual objective has been accomplished, it would seem to this reviewer, to the limit of one-volume capacity. The book should prove to be an admirable teaching tool and of great value to anyone who seeks to attain a thorough mastery of the tools of the craft of the practice of law. The book, the culmination of a lifetime of study, teaching and reflection in the field of common law pleading and procedure, is a definite contribution to our learning in this branch of the law, well worthy of standing cover to cover with Stephen, Chitty and other masters of the field.

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