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Book Reviews

BOOK REVIEWS

MARBLE PALACE. THE SUPREME COURT IN AMERICAN LIFE. By John P. Frank. Alfred A. Knopf, New York: 1958. Pp. 302. $5.00.

It is rather late in the day to examine the virtues and vices of *Marble Palace.*[1] Professor Frank's "lively and informal book about the Supreme Court"[2] has already been variously reviewed by various reviewers. Mr. Paul C. Bartholomew, commenting in the pages of *America,*[3] found it informative as well as informal; and *America's* annual survey of literature[4] counted it in the top "five worthy of note" in the non-fiction field. The *New York Times*[5] was not so kind to Professor Frank and certainly not so generous. There Mr. Anthony Lewis pumped a steady, critical fire. He enjoyed a Sunday trapshoot of Frank's comments, critiques, and anecdotes. He found the book without "any real insight into the Supreme Court" and left it damned as one which makes no "significant contribution to the sparse literature" on the affairs of the Supreme Court.

Oddly enough there is merit in both reviews. Professor Frank's stories and essays are pellucid if not penetrating. He is most informal. While his informality often falls across the superficial he is seldom dull. His informality does, however, sacrifice the studied analysis which accuracy demands. Accuracy demands completeness too. It requires the whole rather than a casual summary of the parts. Professor Frank does not probe. He does not sift the complex circumstances, the more profound policies, the sometimes amorphous philosophies which influenced the more significant decisions of the Court. He is content to paint with softer strokes. His lighter touch produces a pastel of things not as they are but as they seem to be.

This much Professor Frank just about confesses in his preface. "Some of what I say," he forewarns us, "will be based on gossip or hearsay—but I would not put it

1. Professor Frank's "Marble Palace" is the home of the Supreme Court of the United States. He writes of the Court itself. The jacket of the book spells out its content and its purpose. We are told that this is "the story of the Court and how it works from the inside." The jacket cover continues, "it shows what work the 'nine old men' do, how they do it, and what political, personal, or other motives come into play. . . . In its broadest sense, Marble Palace deals with the practicalities of power, not with legal theory. It shows the impact of the Court's power on American life through the decisions it makes and the way it enforces them. Mr. Frank tells us how the Justices are chosen, how lawyers persuade the Court to their view, how the Justices confer among themselves, negotiate to consolidate their views, write opinions, concurring opinions and dissents. We are shown the idiosyncrasies of many famous Justices . . . how their personalities were accommodated by their brothers . . . their relations with one another (including some famous quarrels), and about their tendency to form cliques and blocs. . . . [We are told] the kinds of work the Court does: as an umpire in the fights among the other parts of the government; in respect to freedom of speech, press, religion, fair trials, and race relations; in regard to business and prosperity; in regard to foreign relations and the jurisdiction over the military."

John P. Frank served as law clerk to Mr. Justice Black in 1942. For eight years he taught constitutional law and Supreme Court studies at Indiana University and at the Yale Law School.

2. Also taken from the jacket eulogy of the book.
3. America, October 25, 1958, p. 111.
4. America, November 29, 1958, p. 290.
5. New York Times, Book Review Section for Sunday, October 16, 1958.

down if I did not believe it—and some on personal observation." The gossip or hearsay is what seems to disturb the *Times'* Mr. Lewis. The gossip, he suggests, contaminates the whole. Because the book is not pervasive it is poor.

But is there any reason why Professor Frank *must* write a profound treatise? Why may he not be casual with those who sit in the high-backed chairs of the marble palace? Must hearsay comments on the law be left to Mr. Pickwick, to W. S. Gilbert and "Trial by Jury" or to the *New Yorker* and "Talk of the Town"? Professor Frank is not a Dickens, a Gilbert or an E. B. White. But it is intellectual snobbery to conclude that he must, therefore, be profound or fail. He has chosen to give us some passing knowledge of the Supreme Court and its processes. He has not prepared a full course feast but rather some pastry sugared more often, as a matter of fact, by his personal observations than by the gossip which Mr. Lewis dislikes. The product is tasty enough and for that reason satisfying.

It should be noted that Professor Frank generates interest as he proceeds. He is off to a shallow start in his first chapter. There he seeks to sketch the importance of Supreme Court decisions on our day to day affairs; he seeks to find some earthliness and earthiness in the deliberations of the Justices who write the decisions. Frank seems to be writing his first chapter for Rudolph Flesch's "Johnnny." It is simplification reduced to simplicity.

Interest gains momentum when he writes of the Chief Justices, of the law as literature and he is at his best when he considers the "special functions" of the Court with respect to civil liberties, economic developments, and international relations. It is unfortunate that at times you sense an inconsistency in his treatment of the Justices and their decisions. At times Frank himself emerges as a freshly scrubbed altar boy standing in awe before the cardinals of the marble palace. You sometimes wish he played more often the part of a renegade priest ready to castigate, criticize, and argue with those whom he has served.

Mr. Justice Black is his high priest. As a former secretary to the Justice he is a loyal acolyte. He says of Black that "he is never intimidated by the new ideas of anyone else simply because they are new. . . . He is highly capable of creating new ideas himself. Black mingles a deep respect for history with an absence of fear of it. He draws liberally on seventeenth-century English experience, and his Livy is marked from one end to the other with his own notes, but his view is still forward. To the public utility field, state regulations of business, the patent system, the right to counsel, the obligations of states generally to honor all of the civil rights established in the Constitution, freedom of speech, and, most recently, to the right to practice the professions, Black has brought more new ideas than anyone else who was ever a member of the Court." He testifies that Black, unlike his colleagues, has an instinct to put his finger on *the* vital point in the case being argued; that Black will labor long hours to read all there is to be read concerning the case before him. Black's style is "precise." He uses "a simple and strong vocabulary, wrings out the water and deletes the superfluous word or citation or paragraph." Black he puts as one of the four (with Rutledge, Douglas and Murphy) "stoutest exponents of individual liberty ever to sit on the bench." And, "among the great creative minds in the twentieth century have been Holmes, Brandeis, Hughes, and Black." Frank's loyalty is as commendable as its constancy is incautious.

With others he is not always the altar boy. He has no reverence for Willis Van Devanter ("whose most peculiar achievement is that for perhaps his last ten years on the Supreme Court he averaged some three opinions a year"); for Joseph R. Lamar ("who is remembered, if at all, only by his grandchildren"); for Edward T. Sanford ("who was known at the time of his appointment as 'a little slow' in getting

out his work, and who disabused no one thereafter"); for McReynolds ("the most fanatic and hard-bitten conservative extremist ever to grace the Court . . . who got over the hard spots by drawing a line across the center of the page and going on to another topic"); or for Pierce Butler ("presenting an argument to Mr. Justice Butler was like shooting darts at a brick wall").

Professor Frank is also concerned with the literary merits of the Justices. He has added an appendix containing a brief critique of the styles of several Justices—skipping from the "legal lumpy" of Shiras to the "legal massive" of Stone to the "legal lucid" of Holmes. And in one or two earlier chapters he finds a somewhat wasted effort the inevitable concurring and dissenting opinions which have become the vogue in recent years. To that I would add a grand amen. And I would also add that it would be comforting, too, were the opinions of the Justices directed less at Bartlett and more at the case before the Court. Too often the Court's opinions submerge the particular facts of the particular case under consideration in a grandiloquence which leaves the principle of law distinctly unclear. They too often have the ring of something written solely for the literary edification of posterity. Even so gifted a stylist as Mr. Justice Douglas sounds maudlin in *Carroll v. Lanza* when he tells us that he writes "not only for this case and this day alone, but for this type of case."[6] If written opinions reflect the case before the Court and do so intelligently, clearly and concisely, the future will not have to be told where to find the patterns by which to shape itself.

LEONARD F. MANNING†

SUMMARY JUDGMENT IN NEW YORK. By David George Paston. Central Book Company, Inc., New York: 1958. Pp. 450. $10.00.

Summary Judgment in New York is a delightful, stimulating work on the subject of summary judgment. It is written in a fluent, lucid style which quickly gains the reader's interest and lends itself to perceptive, easy reading. It is devoid of cumbersome overtones which, unhappily, often accompany legal writing, yet, it carries a sound, scholarly approach and treatment of the subject matter amply supported by authority.

Mr. Paston begins his book by stating the scope of his work and defining summary judgment. Then rapidly, he takes us back to the days before we had summary judgment when obviously false pleadings prevented judgment; to the enactment of Rule 113, Rules of Civil Practice, in 1921, with its subsequent amendments; to the manner in which summary judgment and partial summary judgment work; to the actions in which plaintiff and defendant may move for summary judgment; to the proof required to grant or deny the motion; to the effect of summary judgment, and to summary judgment in the federal courts and other jurisdictions.

Of particular interest are chapters IV and XVI, the former dealing with needed reforms and reforms recommended by the author, and the latter with summary judgment in particular actions. To accomplish the desired reform a new Rule 113 is proposed. The proposed Rule would delete the nine classes of action in which a plaintiff may presently move for summary judgment and would make summary judgment available to both plaintiff and defendant in any action. To the busy lawyer, Chapter XVI should prove an invaluable reference. Here summary judgment in particular actions is deftly arranged alphabetically according to the substantive or

6. 349 U.S. 408, 413 (1955).

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adjective law involved. Two hundred pages are devoted to a clear and concise examination of applicable law indexed on a topical basis ranging from accord and satisfaction to zoning resolutions.

The practical considerations involved in the motion for summary judgment are ably treated in Chapter XVII. Here, one hundred and twenty-four pages are devoted to suggested forms, affidavits and notice of motion for use by both plaintiff and defendant. The streamlining of affidavits and briefs for use in connection with the motion for summary judgment is recommended and a complete case on appeal with attendant forms and papers is profitably set forth. Five pages (pp. 393-98) carry the summary judgment statutes in New York and in the federal courts and thirty-eight pages (pp. 400-38) are devoted to summary judgment law in jurisdictions other than New York.

Briefly, the contents of *Summary Judgment in New York* are so ably arranged that busy practitioners may now have a quick, ready reference of case law, forms, procedures, and suggested procedures in preparing to move or oppose a motion for summary judgment or to appeal an adverse decision. It is a sound, useful, and well documented book and should prove a valuable addition to the legal library.

JOSEPH N. FOURNIER†

THE IDEA OF FREEDOM. By Mortimer J. Adler. Doubleday & Co., Garden City: 1958. Pp. xxvii, 689. $7.50.

This monumental volume is the result of five years' work by more than twenty scholars at the Institute for Philosophical Research. Their labors were directed by Dr. Adler who undertook the task of incorporating the results of their studies in a book. There is a general introduction which describes the aims of the Institute. It was founded to take stock of Western thought on those subjects which have been of continuing philosophical interest from, roughly, the days of Thales to the present. The reason for the need of such an inventory is the fact that twenty-five centuries of inquiry on these subjects have not produced a body of universally accepted ideas. The members of the Institute do not approach their work in an historical or relativistic fashion. While, like the historian, they take the existing diversity of opinion as their point of departure, they proceed on the assumption that the recorded agreements and disagreements give rise to controversies about matters on which objective truth is ascertainable. They are concerned with discovering these agreements and disagreements in order to clarify issues that call for further resolution.

Then the method which was used to study two thousand, five hundred years of thought about freedom is explained. Dr. Adler is of the opinion that the same method will be at least generally applicable to other basic ideas. This method is non-historical. The materials are abstracted from their historical contexts. The proponents of the various opinions are treated as if they were contemporaries participating in actual discussion. The method is also non-philosophical. No attempt is made by the members of the Institute to develop a theory of their own on the subject under discussion nor are any of the opinions advanced proposed as true. Their aim is to develop an hypothesis about the controversies, explicit and implicit, contained in the literature of an idea. Their approach is non-partisan; while they describe controversies they take no part in them. By these means Dr. Adler and his colleagues hope to make some contribution to the solution of the problem of

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cultural pluralism which they regard as bound to exist in a free society. In the opinion of Dr. Adler at least, where a whole society agrees on fundamental subjects it can safely be inferred that such uniformity is enforced. But, he remarks, as tyranny is not the only alternative to anarchy in politics, so, in the intellectual life, there is a middle ground between an anarchic diversity which obliterates intellectual community and a regimented conformity which would crush intellectual diversity. By using the method developed at the Institute, Dr. Adler and his colleagues hope to help in the formation of a condition of "diversity within the framework of an intellectual community." The aim is to discover the extent and kinds of agreement that exist among men about what is true. When that is accomplished men may profitably engage in controversy, which is distinguished from polemics, on the points about which they differ. At least it is hoped they will know what they are talking about.

The task of rendering an objective, impartial, neutrally formulated report of the centuries-old discussion of freedom is then undertaken. From a survey of the evidence it becomes clear that men have used the word 'freedom' in senses so diverse that they are referring to different things. Epictetus was a slave and many writers would regard him as an excellent example of a person who was not free. But he was also a Stoic philosopher and regarded himself as a free man, at least as free as the Emperor Marcus Aurelius who was striving for the same kind of freedom as Epictetus. According to Hobbes, Boethius in prison would be another excellent example of a man who was not free. But Boethius, consoling himself with philosophy, did not regard Theodoric's jail as totally confining. From this survey it appears that there is a general controversy on freedom. There are writers who, in discussing freedom, look only to the circumstances that affect a man's ability to carry out his wishes, to do as he likes. There are others who do not regard this as freedom at all. For them freedom consists in doing as one ought and they look to the state of mind or character which enables a man willingly to act in this fashion. Father Zossima in the *Brothers Karamazov* speaks for the latter; Jeremy Bentham, for the former. Among those who look to circumstances as crucial in the matter of freedom, there are those who look only to external circumstances, freedom from coercion. There are others who think this is only the negative side of freedom. Positive power is also necessary and R. H. Tawney gives the example of a man who wishes to dine at the Ritz. He is not prevented by external circumstances, but he is not free to go there unless he can afford to pay for his dinner. Among those who think that freedom consists in doing as one ought, there are those, like Spinoza, who think the ability so to act lies fully within the powers of human nature. There are others, like Augustine, who regard this ability as beyond man's unaided strength.

So the 'dialectic' proceeds. As a result, three kinds of freedom are distinguished. There is circumstantial freedom, freedom depending on circumstances; there is acquired freedom, freedom consisting in an attitude of mind; and there is natural freedom, freedom inherent in all men regardless of circumstances or states of mind. The various writers whose ideas on freedom fall under these *genera* are listed and strange bedfellows appear. Aquinas precedes Spinoza in one list and follows Maimonides in two others. Dewey follows Hegel in one, Freud in another and Bergson in a third. Freedom, having been distinguished by reference to its mode of possession, is further distinguished by reference to the mode of self that carries with it the ability in which freedom is thought to consist. To circumstantial, acquired and natural freedom it is found that several ideas correspond in whole or part. Self-realization corresponds to the ability of an individual to act as he wishes, self-perfection to his acquired ability to live as he ought, self-determination to his natural

ability to decide for himself what he wishes to do or become. The authors are grouped again. Consequently three main subjects of controversy are identified: the circumstantial freedom of self-realization, the acquired freedom of self-perfection and the natural freedom of self-determination. Two other subjects, special variants of one or the other main subjects, are indicated, political freedom and collective freedom. Issues can now be joined.

The question of the necessity of such exhaustive and exhausting analysis naturally arises. Unfortunately it seems necessary in the present state of intellectual confusion, and this book is one of undoubted value. However, the painstaking application of the method employed becomes painful. In the interests of clarity there is too much repetition. The author's style is redolent of chalk dust. If the average man is to have a clear idea of freedom, a condensed version of this work is desirable.

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WORMSER'S GUIDE TO ESTATE PLANNING. By Rene A. Wormser. Prentice-Hall, Inc., Englewood Cliffs: 1958. Pp. 175. $4.95.

It is not uncommon in today's age of tax emphasis for the layman to become increasingly confused as to the proper method of planning and disposing of his estate. He is listening to advice from his insurance broker, banker, accountant, and lawyer on the various benefits of the new tax laws as they are promulgated—why he should make this gift, sell that asset or change his present form of business. As he reads and listens to his advisors, the average individual either decides that this whole tax and estate planning business is too complicated and refrains from doing anything or he makes a hasty move which he usually regrets at a later date. Where does the fault lie? It stems from the fact that most of the writing and advice on estate planning is directed at the means of achieving various ends instead of pointing out the *objectives* that first should be sought.

Mr. Wormser's book is noteworthy in that it is concerned principally with the objectives of estate planning. He has written an excellent book on this subject, primarily intended for the layman, but one that will also stimulate thought in the mind of the lawyer and the technician. The family's and the individual's welfare should be kept principally in mind, rather than placing emphasis on tax savings. However, the author points out that the individual would be foolish were he not "alert to possible tax savings."

The family's welfare is stressed mainly in the chapters on planning for the wife and children. Questions are raised in the mind of the reader. What type of a wife do you have? How much will you give your wife? How mature will your children be when they reach majority? Whom will they marry? Should all children be treated alike? The author tries to stimulate the reader's thinking on the qualities of their wives and children through a general list of their characteristics, so that the husband-father will be better able to make plans for their future security. In making these plans, the head of the family is advised to give his wife and children investment training. The children should be instructed at an early age.

Most of the suggestions given on the disposition of assets to the wife and children have greater significance for persons of substantial wealth, but they have unquestioned value to those of less means. At the same time, the objectives sought to be

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attained should be considered by everyone who may later be faced with an estate planning problem for which he has made no earlier preparation.

Though Mr. Wormser regards continuing inflation as inevitable, nevertheless it is his advice that the first money available to the young father should be invested by him in life and health insurance, the sole purpose of this investment being immediate protection. As time goes on and savings increase, his insurance program should be enlarged and some money invested in assets other than insurance. The advantages and disadvantages of mutual funds, variable annuities, real estate, tax exempt securities and investments in one's own business are briefly but well covered.

It is important to know how to invest your money, but it is equally important to know what occupation is best suited for the young father and what he should do when this occupation ceases to exist. The author gives the reader some new thoughts, in an estate planning treatise, on the subjects of occupation and retirement. He treats not only the father's occupation, but also the steps that a father should take to assist his children in the proper selection of their field of endeavor.

With more and more companies adopting a compulsory retirement age of sixty-five, and with the increase of the average life expectancy, the problem of what to do upon retirement assumes greater prominence. There have been discussions by many writers on this subject with a good deal of stress on monetary protection; Mr. Wormser's book is no exception. He does, however, point out that wealth will not necessarily make a man happy upon retirement if his time is not properly occupied. Expressing, perhaps, a bit of his personal philosophy, he suggests that the worker, prior to his retirement, embark upon some charitable, educational or other form of work which he might pursue in his later years.

There are other topics covered by the author which pertain to a relatively small group of people. In his treatment of the family enterprise, Mr. Wormser discusses the continuance and discontinuance of the business, its financing and reorganization, and the mechanisms for its succession. For those readers who now face heavy tax burdens and who are also charitably inclined, they would do well to consider the chapter on charities because of the many tax savings to be achieved through charitable gifts in one form or another.

It should not be forgotten that, although this book is principally directed at the layman, it would be wise for the lawyer, accountant, insurance advisor, broker, and investment counsel to read this book. They are the people who should be in a position best to assist him in formulating his objectives.

Too many individuals, regardless of their financial position, avoid the subject of estate planning mainly through ignorance. The subject is best handled, in their opinion, by the experts. While the execution of estate planning ideas is still a matter for the experts, the objectives of estate planning are the layman's own personal problem, and Mr. Wormser has succeeded in stimulating interest in these objectives. So that this book can reach the wide audience it deserves, it would be well for those in the estate planning field to recommend it to their clients' careful reading.

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