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## Book Reviews

James M. Landis

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## BOOKS REVIEWED

**Landmarks of Law.** Edited by Ray D. Henson. New York: Harper & Brothers. 1960. Pp. xiv, 461. \$3.50.

*Landmarks of Law* is an anthology of articles that have appeared in the last century in various legal periodicals. It is by no means what its title purports it to be. The true landmarks of the law are rarely found in the essays that find their way into the pages of the hundreds of legal periodicals published yearly in this country. They are generally to be found in the decisions of our courts, decisions which are great because of their wisdom or because of their courage. True, there are books that have in their time become landmarks of the law—Coke on *Littleton*, Blackstone's *Commentaries*, Williston on *Contracts*, Wigmore on *Evidence*—to cite a few examples. There are, however, essays or studies whose effect upon the development of the law has been profound.

But there are too few of them in this volume. The roster of missing scholars whose impact upon the law has not been negligible is most significant. Of Ames, with his emphasis on the historic origins of our law; of Thayer, who formulated the basis for judicial review under the fourteenth amendment; of Mr. Justice Cardozo, who gave to private law a majesty far beyond the philatelic collection of authorities; of Stone, whose sympathies for the problems of administrative justice bred a new humility in judges confronted with these issues; of Learned Hand, whose use of the philosophic approach inspired lawyers to look beyond precedents to the quality of moral justice; there is no mention. Instead, the mass of the volume consists of pages of essays and talks by Goble, Harno, Patterson, Probert, Million, Havighurst, Loewinger, and Lord Buckmaster, which, however worthy of initial publication, certainly cannot lay claim to the rank of legal landmarks.

There are, of course, some excellent selections. Roscoe Pound's paper before the American Bar Association in 1906, on *The Causes of Popular Dissatisfaction with the Administration of Justice*, signified the turn of an epoch. His essay in 1903 on *Mechanical Jurisprudence* forecasts again his emphasis on the sociological bases for law that was to mark his later works on jurisprudence. The selections from Mr. Justice Holmes are three in number, two of which—*The Path of the Law* and *Law in Science and Science in Law*—foreshadow the appreciation that later judges had to give to the rising new sciences. His *Ideals and Doubts*, though beautiful reading, leaves little in the way of a deposit. One selection from Mr. Justice Frankfurter is not too happy, considering what other contributions could have been chosen. His facility for phrasing is splendidly illustrated in his *Some Reflections on the Re-reading of the Statutes*, but it adds little to the esoteric science of interpreting statutes. Similarly, a happier selection could have been made from Maitland than his *The Deacon and the Jewess*.

To continue criticism of this type is, perhaps, merely to prefer one's own predilections to those of the editor. This collection, however, suffers from another serious fault. Mr. Henson divides his selections into those dealing with "The Theory of the Law" and those pertinent to "The Substance of the Law." No sense of historical growth characterizes those essays concerned with the theory of the law. They pertain mainly to the relationship of logic to law. But that relationship has been altered over the centuries, particularly as recently allied sciences have developed their own disciplines for the discovery of truth on the basis of experimentation rather than mere rationalization. The impact of these sciences in such fields as criminology,

segregation and civil rights, public utility regulation, even evidence, finds no echo in this volume.

The portion of this volume dealing with the substance of the law contains Warren and Brandeis' memorable essay on the right to privacy, and a recent sequel to it by Melville B. Nimmer on the right to publicity. But despite some excellent articles such as William R. Vance's *Early History of Insurance Law*, it represents something of a hodgepodge of "substances" ranging from perpetuities and associational personality to the interesting but unsolved problem of the rights of the United States Government to the private notes of Captain Clark of the Lewis-Clark Expedition.

Unfortunate, also, is the format chosen by the editor, which relegates all footnotes to the end of each essay. Footnotes are integral to the reading of legal essays, either to give a clue to the basis of a statement made in the text or to pursue some variant thought that need not, unless one wishes it to do so, divert the main thread of the argument. Relegating them to the end of an essay means that their impact is lost, and footnotes, as every reader of a legal periodical knows, are often the bones upon which the flesh of the text, succulent or dried, is built.

During the past three decades a number of volumes have been produced reprinting a series of articles culled from various legal periodicals. They usually have centered on some legal theme such as contracts or torts or constitutional law. They have been of great advantage to the legal profession, and probably also to members of other allied professions. But neither their authors nor editors have suggested that the articles so chosen were landmarks of the law. Rather, their belief seems to have been that these essays were cairns, some moss-covered, some newly built, which could lead judges through the fog of litigation to a decision which might in time deserve iteration and reiteration as a landmark of the law.

JAMES M. LANDIS\*

**Ehrlich's Blackstone.** J. W. Ehrlich. San Carlos, California: Nourse Publishing Co. 1959. Pp. 987. \$15.00.

In this age in which the practitioner of the legal art finds himself deluged annually with scores of volumes, all to be added to his rapidly vanishing shelf space, there must be an ever present subconscious desire to scrap the entire system or to reduce it to a single volume.

For many years in the literary field the public has been asked in a hypothetical way to select the one book best calculated to give intellectual stimulation and enjoyment to the equally hypothetical castaway on a deserted island. Were this castaway a lawyer and were he hopeful that other castaways would arrive so that he could resume the practice of resolving their disputes, he might be fortunate indeed in having been able to salvage J. W. Ehrlich's recent revision of Blackstone's *Commentaries* as his one book. From this treatise alone he could obtain all the necessary principles for the resolution of practically all his legal problems. Why not, therefore, one may ask, discard all law books in favor of this one? The thought is tempting. Temptation,

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however, must yield to reality and reality discloses that one searches in vain for briefs and opinions in Blackstone.

What is wrong with Blackstone? Of course, no lawyer today, would write a brief or make an oral argument based upon the *Commentaries*—but why? Probably first, they are regarded as antiquated. Second, much of the law deals with subjects, particularly in the field of realty, which are no longer applicable. Finally, four volumes with the old English spelling are formidable.

The present reviser has made a distinct contribution in creating his one volume edition, which should be a valuable addition to any law library. Obviously, it is not possible to review Blackstone and commend him for an exciting chapter on Adwosons, Freewarren, and Incorporeal Hereditaments or criticize him for an uninteresting exposition of Free Socage, Gavelkind, and Villeinage. A review is better limited to the purposes to which this edition may best be adapted. It will not replace the myriad of citations of cases supposedly in point which deal with other controversies between other persons in other times and in other places. These cases will still form the foundation for those who delight in the so-called foursquare authoritarian case in point approach. But for those who, before plunging into the legal maze, wish to obtain a broader vista for better orientation this volume will serve a useful purpose.

The chapter on "The Absolute Right of Individuals" declares fundamental concepts of civil liberties which have changed little over two hundred years. So, also, do the brief paragraphs dealing with various phases of substantive law. Although encyclopedic tomes have been written on all such subjects, the philosophy underlying the rules of conduct giving rise to these laws and their interpretation is basically the same.

The value of any work which attempts to encompass all law—civil, criminal, private, and public—as it existed in 1765, must be found largely in providing the historical background of our present laws. However, for a profession which is so wedded to the past, the *Commentaries* of Blackstone, now made most readable by Mr. Ehrlich, should be a part of the cultural equipment of the legal profession.

LEONARD P. MOORE\*

**The Anatomy of Freedom.** Judge Harold R. Medina. New York: Henry Holt and Co. 1959. Pp. x, 178. \$3.50.

*The Anatomy of Freedom*, a collection of addresses by Judge Harold R. Medina, is good reading for the layman and professionally enlightening for lawyers and judges. For young lawyers considering public service, whether as teachers or as practitioners, it will be especially stimulating.

Judge Medina has accomplished what most professional men desire to do. He has practiced his profession to the hilt, successfully and on the center stage, and in addition he has rendered public service of lasting benefit to his fellow citizens. Long before he had become nationally known as the Federal Judge who presided with dignity and skill at the 1949 trial of the eleven communists, he enjoyed recognition as a vigorous trial attorney, as a great teacher at Columbia Law School, and as a

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lecturer to thousands of young lawyers at "cram sessions" preparatory to taking the New York State bar examinations.

To those who have studied under his direction or appeared in the courtroom with him, it will be no surprise that even in the printed work, in this compilation of his speeches, his dynamic personality is evident.

The speeches are not stereotype. They obviously were made because the speaker wanted to say something that was on his mind. There is an evangelical strain in them. Moreover, since the subject matter is largely an account of one or another significant experience in Judge Medina's strenuous career, they are entertaining. Mr. C. Walter Barrett is credited with having edited them, and he has succeeded in retaining the salty flavor of the almost impromptu style that characterizes Judge Medina's "after dinner remarks."

Part of the value of this book comes from the fact that Judge Medina has brought his "nonconformist" nature, as he describes it, to bear at times on the problem of how to defend an individual against threatened government tyranny and at times on the problem of how to protect a democratic government against subversive efforts to destroy its foundations. He did this by the "case" method. He was an active participant in historic courtroom struggles which tested the meaning of American freedom. At one time he was a court-appointed lawyer defending a German-American accused of sabotage. At another period in his judicial life he presided at the communist trial and withstood the assaults against our federal processes of justice. In both incidents his character was attacked and his motives publicly impugned. This volume describes dramatically the physical and mental wear and tear which public service usually entails.

Something of the philosophy of life emerging from the book can be gleaned from Judge Medina's mention that the three persons who contributed most to his firmly held views of the anatomy of freedom were Professor Christian Gauss of Princeton University, Woodrow Wilson, President of Princeton University during Judge Medina's undergraduate days there, and Chief Justice Harlan Fiske Stone, Judge Medina's teacher and later fellow faculty member at Columbia Law School. Each of these three mentors has been studied by experts who have tried to reach a conclusion as to whether their subject was a "liberal" or a "conservative." To my mind the experts never made a convincing case for either conclusion. Furthermore, I doubt if they could be any more dogmatic about Judge Medina himself, for the very good reason that his horizons are broad and his contacts have reached into all spheres of life. His practical mind seeks always to help those around him who need help today as well as to furnish some intellectual guideposts for those who follow him. During his professional career he accomplished both objectives and this volume describes how he did it.

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**An Outline of United States Patent Law.** Richard E. Brink, Donald C. Gipple, and Harold Hughesdon. New York: Interscience Publishers, Inc. 1959. Pp. 280. \$7.50.

Any effort "to combine in one logical sequence much of the material contained in Title 35 of United States Code, the Rules of Practice of the United States Patent Office in Patent Cases, and the Manual of Patent Examining Procedure" is to be commended.

As an aid in preparing to take the examination for registration to practice before the United States Patent Office, the outline form utilized by the authors provides a useful tool for the posing of questions to be answered. The outline itself occupies 103 pages, with each page almost half filled with text. Such a condensation of patent law is bound to suffer from omissions which any reader of the book might readily point out.

The outline treatment gives rise to dogmatic statements which, as statements of the law, are not quite as clearly established as would appear. The omission of important qualifying phrases likewise may be misleading. Thus, for example, it is stated that "mere disclosure of the invention in a foreign patent without claiming it does not raise a statutory bar." This statement can scarcely be sustained if the foreign patent is also a printed publication. Another example exists under the heading of the contents of the oath. The oath is quite explicit in stating that the applicant must aver that he does not know and does not believe that his improvement was ever known or used before his invention thereof. The language of the oath makes it possible for inventions to be known and used in countries outside the United States, providing they are without the inventor's knowledge at the time he made his invention. Nevertheless, in the outline, the foregoing is capsulated to say, "the invention was neither known nor used before presently invented." There is a world of difference!

In a number of instances, it would have been helpful if the authors had referred to the authorities for some of the statements made. For example, it is stated that "a patentee who sells an unpatented article to a customer, knowing the customer will use it to build the patented device, cannot enforce the patent against the customer." (p. 95) The assertion will be news to many patent lawyers who have clients selling motors, knowing that the motors may be used in patented combinations, and, likewise, to manufacturers of transistors and vacuum tubes, where the manufacturers know they are to be used in patented circuits.

The book's bibliography was prepared from Library of Congress catalogue cards from 1949 to date. For that reason, the book by Emerson Stringham, *Outline of Patent Law and Guide to Digests* of 1937, was omitted. This book is interesting because Emerson Stringham gives a different approach to the whole problem. In addition, the card for McCrady's *Patent Office Practice* shows publication by Pacot Publications instead of Margit Publications, of Pasadena, California.

Thirty-nine pages of the book are devoted to the reproduction of Title 35 of the United States Code, while 108 pages are required for the reproduction of the Rules of Practice of the United States Patent Office in Patent Cases, as amended to August 19, 1957. It is questionable whether such a disproportionate number of pages should be devoted to material conveniently available in pamphlet form from the Superintendent of Documents.

The book contains an appendix devoted to "Foreign Practice," which would appear to be helpful as a quick check list. Though not intended to detract from the usefulness of the book as a basis for preparation for examinations or a quick review of

many points of patent law and practice considered by the authors to be of importance, nevertheless, the serious student must necessarily rely on the original text and not upon the capsulated version of the "outline." One further example will suffice to make the point clear. It is said that "if the statutorily fixed day falls on Saturday, Sunday or a District of Columbia holiday, the date the communication is due is postponed to the next working day." (p. 19) This sentence might lead the casual reader to feel that in the event the anniversary of a public use or sale falls on a Saturday or Sunday, the application may properly be filed on the following Monday. Such does not appear to be the case. The statute used as a basis for the quotation does not apply to the filing of applications. Thus, section 21 of Title 35 is limited in its application to the requirement "for taking any action or paying any fee in the United States Patent Office," and does not affect in any way the requirements of section 102(b).

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