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## Book Reviews

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## Book Reviews

### Cover Page Footnote

Regent, Fordham University, School of Law. Author, *The Mind* (1925).

## BOOK REVIEWS

LAW AND THE MODERN MIND. By Jerome Frank. New York: Brentano's Inc. 1930. pp. xix, 368.

THE popular price for which this book is now offered to the public should attract buyers who are interested in the subject-matter of the book. It has been many times reviewed. But now that its price puts it within reach of the proletariat and the law student, perhaps another review of it will not be amiss.

It is a thought-stimulating book. As the "Devil's Advocate," raising objections to the canonization of the traditional theories concerning the essence of law and the nature of the judicial process, Frank is superb. He states facts admirably. He sets forth his concept of what the law is in the simplest possible language:

"It is sometimes asserted that to deny that law consists of rules is to deny the existence of legal rules. This is specious reasoning. To deny that a cow consists of grass is not to deny the reality of the grass or that the cow eats it. So while rules are not the only factor in the making of law, *i.e.*, decisions, that is not to say there are no rules." (p. 132) Law, therefore, according to Frank, consists of decisions. Again: "The business of judges is to dispose of litigation, not to formulate rules, that is, not to state accurate generalizations of the result of their decisions, or accurate forecasts of future decisions." (p. 277)

While these passages are admirably clear, it does not follow that they express the truth. Frank here appears to identify law with adjudication. And he claims that the business of the judge is only to adjudicate, that is, to determine *in concreto* the rights and liabilities of the parties before the court. It is obvious that the judge must adjudicate. But can he adjudicate without the aid of some norm? Men generally call the norm by which the judgment is directed, law. To Frank, not the norm, but the judgment itself is law. Words are arbitrary symbols of thought. And Frank may, if he chooses, use the word "law" in the sense of decision. But it is important for the reader to understand that he is doing so; else, the entire book will be unintelligible.

There was adjudication before Mansfield's time. But, according to Lord Campbell,<sup>1</sup> "no general rule was laid down which could afterwards be referred to for the purpose of settling similar disputes," in relation to commercial matters. If "decisions" means law, there was plenty of law before Mansfield's time. Lord Campbell evidently did not understand the word law to mean "decisions," when he wrote: "He (Mansfield) formed a very low, and I am afraid a very just estimate of the Common Law of England which he was to administer."<sup>2</sup> What was the defect in the law as Mansfield found it? Lack of suitable rules! Mansfield adjudicated, and formulated rules: ". . . not only in doing justice to the parties litigating before him, but in settling with precision and upon sound principles a general rule, afterwards to be quoted and recognized as governing all similar cases."<sup>3</sup>

As to the predictability of the decision (which Frank scouts), Lord Campbell has this to say: "When the facts were ascertained, the decision might be with confidence anticipated; and the experienced advocate knew when to sit down, his cause being either secure or hopeless. The consequence was that business was done

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1. III Lives of the Chief Justices 300 (1873).

2. *Id.* at 299.

3. *Id.* at 301.

not only with certainty but celerity."<sup>4</sup> Is it any wonder, then, that the legal profession of that day considered the body of rules administered in Mansfield's court, as the law of that court? Or, that law, in so far as it exists at all, consists of the body of rules by which the rights and liabilities of the litigants will be decided?

If Frank seriously believes that law consists of "decisions," and not of rules, he should give an interpretation of such phrases as "Due Process of Law," and "The Law of the Land," which will harmonize with his identification of law with decisions. Certainly in the mind of the common man, the word "law" stands not for the decision, but for the norm according to which the decision is made. The generic similarity which is expressed by the word law, as applied to the operations of nature and state regulations, rests upon the fact of regularity of recurrence. It is said, in popular language, that it is a law of nature that the sun should rise every day. It is also said that a conviction for first degree murder in New York State carries with it a sentence of capital punishment. In each case it can be said that law is operating, because there is regularity in the recurrence of the stated event. Frank's identification of law with "decisions" makes no provision for regularity of recurrence, and so omits an essential element of the notion of law.

Frank quotes with approval Judge Hutcheson's account of the judicial process:

"In feeling or hunching out his decisions the judge acts not differently from, but precisely as lawyers do in working on their cases, with only this exception, that the lawyer in having a predetermined destination in view—to win the law suit for his client—looks for and regards only those hunches which keep him in the path that he has chosen, while the judge, being merely on his way with a roving commission to find the just solution, will follow his hunch wherever it leads him."<sup>5</sup>

Frank adds: "We may accept this as an approximately correct description of how all judges do their thinking."<sup>6</sup> (p. 104)

Frank here indulges in a reckless generalization. Judge Hutcheson was explaining the judicial process as he conceived it to be exercised by a judge of a trial court, sitting without a jury. Under the Anglo-American system of law, the functions of the judge sitting without a jury are different from the functions of the judge conducting a jury trial; and the functions of both are different from those of the judge on the highest appellate court. Sitting without a jury, the judge answers questions both of fact and of law. Sitting with a jury the judge's answers are confined to what are called questions of law. Sitting on the highest appellate court, the judge reviews the answers to questions of law made by the trial judge to determine whether each of the litigants has had the full benefit of due process of law. In the highest appellate court, the judge may vote to affirm, reverse or modify the judgment of the trial court. He may not substitute a judgment of his own for the judgment of the trial court. It is his function to declare whether the law has been properly applied in the trial court. It is in this sense that the highest appellate court is sometimes said to be not a court of justice, but a court of law. It is assumed that the law ordinarily works justice. It is the function of the highest appellate court to see to it that law does its work, that the litigants receive the full benefit of its provisions.

Notwithstanding the fact that the functions of the judge vary with his position,

4. *Id.* at 473.

5. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions* (1929) 14 CORN. L. Q. 274, 278.

6. Italics the writer's.

Frank maintains that the mind of the judges in all these various positions operates in the same way. It is obvious that the highest appellate court is not required to "hunch out" a decision. It does not produce a judgment. It tests out the value of a judgment produced by another court. Its function is one of inference. It infers the agreement or disagreement of the judgment which comes up to it for review with the established rules of law.

Frank has offered no evidence for the truth of the statement that: "We may accept this as an approximately correct description of how *all* judges do their thinking." Yet he allowed his impulse to establish the "hunch" theory as the adequate explanation of the entire judicial process to control his pen—(or his typewriter)—in setting down this unwarranted generalization.

What does Judge Hutcheson mean by "hunching out his decisions?" Let us take the case of Solomon, sitting as a judge, and trying to determine which of the two women before him was really the mother of the child which each claimed as her own.<sup>7</sup> Judge Solomon, apparently sitting without a jury, like Judge Hutcheson, has "a roving commission to find a just solution." Solomon is judge both of fact and of law. The law to be applied here is clearly established: the child must be awarded to its true mother. The question of fact is not so easy of solution. The testimony before the court is contradictory. How is the judge to determine which of the witnesses is telling the truth? Solomon calls for a sword, and pretends a willingness to slit the child into two parts, and give one part to each woman. Did Solomon really intend to go through with the homicide, in case both women agreed to it? It is not likely. It was undisputed that one of the two women was the true mother. But which? Solomon worked a "third degree" on the pretending one. She fell into the trap. Her willingness to have the child cut into two parts was evidence that the child was not hers. His judgment was quickly formed. Was Solomon "hunching his way to a decision?" Yes, if you mean by hunching, reasoning. We reason when we trace causes to their effects, or effects to their causes. By his trick Solomon brought to light what the schoolmen called the *ratio essendi* (reason for the existence of the fact), and thereupon became possessed of the *ratio cognoscendi* (ground for certainty in relation to the fact).

Solomon was testing out for a manifestation of mother-love. The threat of death to her child would cause the true mother to reject the proposal to cut the child into two parts. Mother-love was the *ratio essendi* for the true mother's refusal of the offer of the judge. Solomon now had the *ratio cognoscendi*—ground for certain knowledge as to which is the true mother. It was a spectacular exercise of reasoning power. Could it be said that Solomon here "hunched his way to a decision?" Perhaps Judge Hutcheson might have a doubt about the propriety of using the expression in this case. Judge Hutcheson seems to suggest that when he is "hunching" for a decision, he is not certain at the outset what the decision will be. We may presume that in the present case the outcome was exactly what Solomon had anticipated it would be. Is it of the essence of the hunch that the outcome should not be foreseen with certainty? If so, then, perhaps, it might not be safe to say that in this case Solomon "hunched his way to a decision." We shall have to await the judgment of the "hunchers" on this point.

Frank is constantly inveighing against the use of logic by the judges, attributing to their love of logic their defects of judgment. (See Part I, Chapter VII) As well might he attribute the present depression to the rules of mathematics. Mathematics will tell you how much you are making or how much you are losing. But it will not make anything or lose anything for you. You must do the making or

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7. III Kings, III 16 Douay; I Kings, III 16, King James (Revised).

losing yourself. So a proposition is not necessarily true or necessarily false because it is correctly derived from other propositions. Logic guarantees merely correctness of inference, not truth—unless the inferred proposition is correctly derived from other propositions whose truth is established. Frank might as reasonably blame the scales for his over-weight—if he is over-weight—as blame logic for the errors of the judge. The logic of the lower court is as good as the logic of the appellate court which reverses its judgment. The difference consists not in the quality of the logic, but in the quality of the legal principle upon which each relies.

Frank maintains that it is a survival of childishness in the grown man to expect certainty in law. (Part I, Chapter II) He claims that law is uncertain because the decisions of the courts are unpredictable, and because he identifies law with the decision. As for the predictability of decisions, a man may be able to forecast, if he is deeply versed in the law, in nine cases out of ten, how the highest appellate court will decide a hotly contested point. But on the tenth occasion—?

I remember very well the day the United States Supreme Court published its decision in the Minnesota Mortgage Moratorium Case.<sup>8</sup> A professor who had come into my office had inquired of me whether the decision had yet been published. I did not know. "Well," he said, "I will tell you what it will be. The decision will be against the statute, and the vote will be unanimous." While he was speaking, another professor entered my office, just in time to hear this prophecy. "You are wrong," said the other professor, "it will be a five to four decision." And he named the five judges who would vote for affirmance. His forecast was absolutely accurate. Both these professors knew the rules of law. One of them, apparently, knew more about the judges than the other.

To be able to predict with accuracy the outcoming decision, I agree with Frank that one should know, not only rules of law, but also the bent of the judge. Frank holds that the decision is unpredictable, and that the decision is law. But he does not tell us what decision is law. The decision of the jury? Of the judge sitting without a jury? Of the intermediate appellate court? Of the highest court of appeal? In each case a decision is made. And, if the decision is law, they are all making law. And the decision is unpredictable, with anything approaching certainty, because these law-making agencies often make contradictory laws, *i.e.*, decisions. What men mean when they assert that the decision is predictable is the decision as issuing from the highest court of appeal. They do not hold that this decision is predictable in every case. There is a twilight zone of uncertainty, as is evident from the dissenting opinions.

One of the essential elements of the decision of the court (as distinguished from the decision of the jury), is that it should be a judicial declaration of the rights and liabilities of the litigants before the court. Law is the norm, by which rights and liabilities are measured. Law is the scales, not the object weighed, nor the weight. Law is a measure, not a measurement. Frank holds law to be a measurement, *i.e.*, a decision.

There are several sources of uncertainty with regard to the decision. One is the fact that it cannot be known with certainty, in advance, which of several available standards—rules—the court will employ to do the measuring. Another source of uncertainty is the measure of consideration the court will give to the circumstances of the case. A statute whose operation will bring about certain consequences in one set of circumstances may be declared unconstitutional, while a similar statute in other circumstances may be declared constitutional. Common sense requires the

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8. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398 (1934).

judge to consider the consequences in relation to the circumstances. The judgment of the judge is a mental act. His judgment must be made to appear to harmonize with the recognized rules of law. His written opinion is, as Frank says, his apology for his judgment. His choice of rule points the way to his decision. His judgment—decision—will be, not the measure, but measurement. The measurement, as issuing from the highest appellate court, is generally, though not always, predictable by the lawyer who is thoroughly acquainted with the rules of law, knows the bent of the judge, and gives due consideration to the consequences in the circumstances, and when the case involves issues upon which the court has ruled in the past. For the judicial interpretation of a new *corpus juris* such as the NIRA, no sane man would claim predictability.

JOHN X. PYNE, S. J.†

THE FAMILY IN COURT. By Jonah J. Goldstein. New York: Clark Boardman Co., Ltd. 1934. pp. xiii, 284.

Judge Jonah J. Goldstein, City Magistrate in New York City, has written this book "in the hope of arousing greater interest in the subject of the Law's Mis-handling of Domestic Relations." He expresses the sentiment that an aroused public interest and the use of common sense will tend to bring about necessary changes in the Family Court, for the sake of the families of today and tomorrow.

The book touches upon every phase of family relations, youthful crime, parents' quarrels, and all the myriad problems of everyday life which come up in the inferior criminal courts. Anyone who reads the book must come to the conclusion that our courts have lagged behind in the administration of justice, as applied to the varied and complex social problems encountered in these courts daily.

The discussion is interesting, full of human appeal, and I think it proves its case convincingly. There is no doubt that courts which deal with family questions should handle them in a keenly sympathetic and social-minded manner, free from the formalities and technicalities of ordinary legal proceedings. Furthermore, such courts should use such agencies as psychiatrists, social workers and the like in order to achieve maximum results, as Judge Goldstein points out so aptly.

In this connection the author comments favorably upon the valuable work performed by the Fordham University School of Sociology.

Judge Goldstein's writings are based not alone upon his legal experience as a lawyer and as a City Magistrate, but upon his long acquaintance with social problems. He says, page 111: "When I was a boy our family consisted of ten. Eight children and father and mother: three boys and five girls. We lived on Madison Street in three rooms. To the three rooms I must not forget to add the fire-escape, which served as a sleeping porch in the summer and an iceless icebox in the winter. Then, too, the roof of the tenement was an open air dormitory during the summer nights and clothes-drying emporium during the day."

After going through law school he became interested in social work and spent many years in attempting to reinstate and salvage juvenile delinquents and wrongdoers. Many of the instances furnished as illustrations come from his long personal acquaintance with social problems. This experience has led him to the conclusion that it would be advisable to do away in the Family Court with all technical formalities and to establish rather the atmosphere of a conference room with legal technicalities

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† Regent, Fordham University, School of Law. Author, *THE MIND* (1925).

left in the background. He feels also that in these courts the expense should be lessened as far as possible. "The size of one's bankroll should not be the admission ticket," he declares, "to a court of justice."

This is a distinctly worthwhile treatise and should be of much value to everyone who is interested in social and family problems. In particular it should be helpful to the lawyer and law student, so much of whose work is taken up with the troubles of "The Family in Court."

I. MAURICE WORMSER.†

CASES ON MUNICIPAL CORPORATIONS. By Murray Seasongood. Chicago: Callahan and Company. 1934. pp. xviii, 713.

This case book, compiled by Professor Murray Seasongood of the College of Law of the University of Cincinnati, is one of the National Case Book Series. The typography, proof-reading and binding of the book make it one from which the student should be loath to part.

The book was composed for a course of thirty hours. This, as the author states, because the authorities of so many law schools are unwilling to allot a greater time in their curricula to this hitherto neglected subject, of such really great importance.

Directly or indirectly, the book takes up very many of the topics with regard to which the legal adviser of a city, town or village would be likely to find himself concerned. It does, however, omit cases on the important subjects of conditions precedent to the maintenance of actions at law for damages against municipalities and the limitations of the times within which such actions must be commenced. While it is true that the statutes, and decisions under them, on these subjects, are almost as numerous as the municipalities they affect, no case book on the law of municipal corporations should leave the student unconscious of their existence. Too many litigants and private practitioners have seen their otherwise just demands against municipalities defeated because notices of claim were not filed within the times prescribed by statutes, sometimes buried in the welter of legislation, or because their suits were not commenced within times, usually shorter than the general periods of limitation, for the specific classes of actions.

Professor Seasongood may be forgiven for his, sometimes irritating, preference for cases decided in the courts of Ohio. It is only natural that he should have been tempted to impress the importance of his subject upon his classes by bringing before them the decisions of the courts of the state in which they live and will practice.

For a student intending to practice in Ohio, or for a lawyer engaged in practice in that state, the book is eminently practical. It is also highly valuable to students or practitioners in other states.

To the practitioner who has actually participated in the forensic battles of a municipality, the book adds to the conviction that the subdivision of the law designated as "Municipal Corporations," is in such a state of flux that ancient precedents are of little value, and familiarity with the latest decision of the highest tribunal of the jurisdiction in which a controversy is litigated, is more to be desired than devotion to any general theory, however sound. Professor Seasongood recognizes this fact by using cases which are, in the main, not more than five years old.

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† Professor of Law, Fordham University, School of Law. Author, *DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS* (1927), *FRANKENSTEIN INCORPORATED* (1931), *CASES ON THE LAW OF MORTGAGE* (1925).



An excellence of the book, perhaps covertly designed, is its gradual exposition of the superiority of the condition of the people who live in communities governed by freeholders' charters, such as exist under the constitution of California, over that of the citizens in other states who have relied upon such disappointments as the so-called Home Rule provisions of the constitution of the state of New York, to bring them freedom from legislative domination in their purely local affairs.

Professor Seasongood argues no thesis in this regard, but, without express language, encourages the thought that it would be wise for the states, especially those whose large cities were important before the states themselves attained their prominence, to be not so insistent on their sovereign dignity, and more willing to permit the cities, out of which they grew, to conduct their interior affairs without interference or compulsion by legislatures, never too friendly to cities, and sometimes too assertive of their own mightiness.

All in all, Professor Seasongood's case book may be regarded as the effort of an able and well-informed instructor to bring into the minds of students and practitioners, with the least effort on their part, the principles and peculiarities of the law affecting municipal corporations. As such it merits high commendation.

J. JOSEPH LILLY.†

REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE. Albany: J. B. Lyon Company. 1934. pp. 1016.

The Commission on the Administration of Justice in New York State created by the legislature in 1931, "to investigate and collect facts, relating to the present administration of justice in the state" and "to present recommendations for its improvements" has submitted its final report in a bound volume of slightly more than a thousand pages. The record consists of a "Main Report," summarizing the result of its labors, supplemented by a series of "Supporting Studies." It is these Supporting Studies, replete with tables of statistics, charts and graphs, that occupy most of the printed page.

In reading this report one must bear in mind the fact that in 1919 a joint legislative committee was appointed to revise our system of civil procedure in this state. As a result of its deliberations, what was then thought to be a system approximating as nearly as possible the ideal, was adopted and became operative in 1921 under the name of the "Civil Practice Act" and allied statutes. Like every other human institution, this system far from being perfect, has displayed signs of weakness in keeping abreast of the problems of civil litigation in the state. To use the words of the Commission. "So far as civil litigation is concerned, criticisms of our judicial system fall under three heads. First, the uncertainty, Second, the cost, and Third, the delay." Of these three heads the Commission considers "delay" the major point of criticism, and the elimination of this delay has been the "central object" of its labors.

In an effort to solve the problem of delay the Commission has given its attention to the functioning of the higher courts, the inferior courts and the rural justices courts.

"It has found that the principal solution of the problem of delay does not lie in changes in the trial procedure, but on the administrative side." The Commission finds that only one case out of four, which is placed on the calendar of the court is ever

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† Former Assistant Corporation Counsel, Head of the Appeals Division of New York City.

tried. The calendars are cluttered with "never-to-be-tried-in-any-event cases." Among the important recommendations which the Commission suggests to remedy the situation in the Supreme Court, is the appointment of an "administrative judge" in each district or county who shall supervise the administrative work of the court and supervise the holding of the terms of the court and assignment of justices to hold such terms. He shall also make recommendations to the Appellate Division with respect to changes and alterations of the rules, as he believes will promote the efficient transaction of business. The Commission finds that the "administrative judge" system has worked efficiently in Cleveland, Detroit and Chicago. The Commission likewise recommends that there should be put into effect a state-wide system for the assignment of Supreme Court justices, not depending on obtaining the personal consent of the justices to serve outside the districts in which they are elected, as is the case at present; that there should be a constitutional amendment enabling county judges and surrogates to sit in the Supreme Court; that civil jurisdiction should be restored to the county courts in Greater New York; that legislation should be enacted permitting temporary referees to preside over jury trials on consent; that similar legislation permit the use of temporary referees in the trial of non-jury and equity cases; that the Cleveland Calendar System should be installed in the counties of New York, Bronx, Kings, Queens, Nassau, Westchester, Albany, Onondaga, Monroe and Erie Counties; that the vacation of the judges should be limited and the court year lengthened. Recommendations designed to promote the work of the inferior courts, notably the City Court and the Municipal Court of the City of New York and the rural Justices of the Peace Courts, are likewise made by the Commission.

That the pressing problem of delay cannot be solved merely by improving the administrative work of the courts, but that the litigants themselves must be prevented from using obstructive tactics which delay a prompt determination of the merits of their respective claims, is also the conclusion of the Commission. To this end, the Commission recommends that the use of discovery and examination of parties and witnesses before trial be broadened and liberalized. This would be accomplished by amending the present Civil Practice Sections, so as to make uniform the practice in all four judicial departments in the state, and permit the unrestricted examination of both witnesses as well as parties; extending the examination into matters of defense as well as offense, and requiring the production of books and records for use on the examination, and their discovery and inspection by the service of the single notice used to obtain the examination. This recommendation of the Commission raises a controversial question, for many members of the Bar feel that such a "wide open" remedy of examination and discovery might lead to great abuse, sufficient in itself to offset any advantages derived. To quiet fears in this respect the Commission would limit the use of the examination of an ordinary witness at the trial to cases where he is unavailable for personal appearance at the trial, and as an additional safeguard it would be provided that the courts could direct that the examinations be taken secretly and be deposited sealed with the clerk of the court. Those who doubt the advisability of the full disclosure urged by the Commission are sought to be reassured by the statement that in many jurisdictions in which it is allowed, it is found to be seldom abused and has had a salutary effect in simplifying the issues, in shortening trials, and promoting settlements out of court.

One of the most potent weapons heretofore, against dilatory tactics on the part of an adversary has been the motion for summary judgment under Civil Practice Rules 113 and 114. The Commission has done "yeoman's service" in assisting the Appellate Division in putting into effect the amendments of 1932 and 1933 to Rule 113, which

have increased the efficacy of the remedy. The Commission in its report now recommends that summary judgment be extended so as to be available in mandamus proceedings under Civil Practice Act Section 1331 and to summary proceedings to recover real property. A further extension is also urged, so as to enable the court on the motion, to summarily dispose of purely formal issues raised by the pleadings and to order the trial forthwith of the specified issue which remains.

Not all of the delay which impedes the administration of justice takes place in connection with the trial of the case. The Commission finds that appellate practice, as it now exists, lends itself to obstructive tactics. It recommends that the taking of appeals from interlocutory orders be abolished and that such orders be reviewed only "when and if" the final judgment is itself appealed. The Commission likewise proposes a constitutional amendment permitting a direct appeal to the Court of Appeals upon questions of law, from the court of first instance. The purpose of this proposal, is to reduce the number of cases in which there is a double review of the questions of law, first by the Appellate Division, and then by the Court of Appeals.

From the comments made so far on the Commission's report, it would seem that the underlying theme running through it all is the elimination of the delay, which in some of the civil courts has caused the wheels of justice to grind so slowly as to amount to a positive denial of justice. It would be erroneous to assume however that the Commission has limited itself to the consideration of this problem to the exclusion of all others. The Commission has studied in a general way means of improving the practice, procedure and the rules governing the admission of evidence in the civil courts of the State. It recommends changes in the method of serving domestic corporations with the summons and also in the method of substituted service and service by publication. Many other recommendations affecting the pleadings, the noticing of the case for trial, the motion for the bill of particulars, the waiver of a jury trial, the non-unanimous verdict, the taking of exceptions to the decision of the court, and others of equal importance affecting different phases of civil litigation have been made by the Commission.

If the methods of administering civil justice in the state are open to criticism, the same may be said, the Commission finds, not only of our Code of Criminal Procedure but of the substantive Criminal Law. The Commission finds that there is need for a thorough revision of our Penal Law. It is not complete. Many of the acts prohibited by law with penal sanction are not found in the Penal Law at all. Nearly one-third of the New York statutory provisions on crimes are found distributed throughout other statutes. Some provisions of the Penal Law belong in the Code of Criminal Procedure. There are many inconsistencies and ambiguities in the definition of crimes, caused by careless amendment and there are many repetitions and duplications resulting from the same cause. Many of the provisions of the Penal Law are antiquated. These are some of the defects which render revision imperative.

The Commission takes cognizance of the conviction of many, that perjury is widespread. It leads not only to congestion of the calendars but to a miscarriage of justice. What is the answer? The Commission recommends that "material" be stricken from the definition of perjury contained in Section 1620 of the Penal Law. "The element of materiality is a stumbling block particularly as the appellate courts have not made its meaning clear." The Commission further recommends the establishment of two degrees of perjury: "first degree perjury" to consist of false swearing in a prosecution for felony and to be punishable itself as a felony; "second degree perjury" to consist of any other false swearing where an oath is administered and to be punishable as a misdemeanor. Amendments to Section 750 and 753 of the

Judiciary Law are recommended so as to make false swearing punishable as a criminal contempt.

The Commission calls attention to the fact that the Code of Criminal Procedure has not been subjected to general revision by the legislature since 1881. During the intervening fifty-three years it has been the victim of hasty and piecemeal amendment. "The impressive fact stands out," states the Commission, "that it has in some respects lost touch with current requirements in criminal law enforcement." The Commission is awaiting the recommendations of its advisory committee as to changes in the Criminal Code before presenting the matter to the legislature in a separate report.

After all has been said and done, the work of the Commission which has resulted in the greatest single practical achievement, is its recommendation that a "Judicial Council" and a "Law Revision Commission" be created in the state of New York. There is a sharp distinction between the two bodies. Judicial Councils have been created in many states of the Union. The function of the Judicial Council is to collect information, and to make recommendations to the legislature on matters chiefly concerned with the administrative work of the courts and methods of practice and procedure. The Law Revision Commission performs a work of a different character. It is based on the idea of a "Ministry of Justice" advocated by Mr. Justice Cardozo in articles written by him in 1921.<sup>1</sup> The function of the Law Revision Commission or Ministry of Justice would be to continuously consider the substantive statutory law of the state as distinguished from the administrative law with a view to "scientific revision in the light of modern conditions." It is a permanent agency to study "amendment and correction of the law." No state of the Union has adopted the idea of such a Commission but in the countries of continental Europe according to Justice Cardozo, the idea "has passed into the realm of settled practice."

The Commission in its report recommends the establishment of a Judicial Council and a Law Revision Commission in this state, and the legislature, adopting these recommendations, has during the year 1934 enacted legislation creating a Judicial Council and a Law Revision Commission for the state of New York. This is no small tribute to the members of the Commission and their work.

The report of the Commission is a record of real achievement in the realm of law reform. While it is a temporary body, its existence being limited by legislative fiat, the work which it has initiated and performed so satisfactorily will be carried on permanently by its offspring, the Judicial Council and the Law Revision Commission. That its labors have been appreciated, is evidenced by the prompt recognition which its recommendations have received from the legislature. In addition to establishing a Judicial Council and a Law Revision Commission, legislation among other things, has already been enacted, creating a "small claims division" of the Municipal Court of the City of New York, the service of process on domestic corporations has been facilitated by amendments and additions to the Stock Corporation Law; the procedure in noticing a civil case for trial has been simplified by eliminating the notice of trial, the necessity of excepting to the court's rulings during the trial has been eliminated, as has likewise been the requirement as to the filing of exceptions to the decision after trial by the court or referee, without a jury. Many other reforms recommended by the Commission will undoubtedly come in the course of time. As a work of reference the Commission's report is of prime importance to the Bench

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1. Cardozo, *Ministry of Justice* (1921) 35 HARV. L. REV. 113.

and Bar. The reading of it, particularly the "Supporting Studies," clarifies and explains the nature of the judicial process as it exists in the state today.

EDWARD Q. CARR.†

LORD READING AND HIS CASES: THE STUDY OF A GREAT CAREER. By Derek Walker-Smith. New York: The MacMillan Company. 1934. pp. xi, 400.

Four leaders of the English bar since the turn of the century were Sir Edward Clarke, Sir Edward Carson, Rufus Isaacs, (now Lord Reading), and Edward Marshall Hall. To the two excellent biographies of Marshall Hall and Carson which have appeared in recent years has been added what we may call the "legal biography" of a third member of that great quartette. The life of Lord Reading has been a many-sided one but Walker-Smith has chosen the legal side for this book, in which we catch only occasional glimpses of his subject's activities in the fields of politics and statesmanship. Of Reading's work in Parliament we have some description; of his work as the British representative in the United States and of his work as Viceroy of India there is almost nothing. Limited as it is to the legal career of a great man, the book is of especial interest to lawyers, but it will be read with hardly less interest and appreciation by laymen as well.

The biography of Marshall Hall is more dramatic and sensational than this book due to the fact that Hall was engaged almost exclusively in defending dramatic and sensational criminal cases. Carson's legal career takes on an added interest because of his position in the Irish controversy. Isaacs had but few criminal cases. He stood a little apart from the bitter controversies of his time; perhaps, as his biographer suggests, because as a member of a race which has been without a national home for centuries, he could "not feel the burning passion on the question of Irish Home Rule, which had consumed generations of Englishmen and Irishmen." Again, as one of that people which "had preserved their religion for centuries amid fierce persecution, [he] might be forgiven for thinking that in the eye of History, Welsh Disestablishment would loom considerably less large than it did to excited partisans in 1912."

One of his first important cases was *Allen v. Flood*,<sup>1</sup> which concerned a refinement of the principle of the hallowed *Lumley v. Gye*.<sup>2</sup> Many other important commercial cases engaged his talents which are more than ordinarily interesting, especially his labor cases and his exposure of the financial genius, Whittaker Wright. He was counsel in several libel cases, two of the most interesting being the prosecution of Sir Edward Russell for criminal libel, in which Isaacs was for the defense, and the civil action of *Cadbury v. The Evening Standard*, in which he was for the plaintiff. The frequency of libel cases in the English courts is rather surprising to an American reader of biographies of English lawyers. If our greatest court sport is negligence actions, theirs appears to be libel cases.

Seekers for sensation, however, will find that Issacs was concerned in a few widely publicized cases, such as the Hartopp Divorce and the "Gaiety Girl Divorce Case," the Gordon Custody Case and the defense of "Bob" Sievier for blackmail, "The Honor of the King" and the famous Seddons' murder trial.

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1. [1898] A. C. I.  
2. 2 E. & B. 216 (Q. B. 1853).

The most dramatic case of all those that concerned Lord Reading was one over which he sat as Lord Chief Justice of England, to which exalted office he was appointed just before the outbreak of the Great War. This was the trial of Sir Roger Casement for high treason. The author devotes a long and interesting chapter to the background and to the trial of this case. He deals with the defendant with great fairness and great sympathy. One who reads the account of this case and of other war-time trials over which Lord Reading presided cannot but be impressed by the fact that in the midst of the violence of popular prejudice and passion the English courts serenely administered fair and impartial justice according to law.

Rufus Isaacs' style of advocacy was not bombastic. He appealed to the mind rather than to the heart. He had the great art of selecting the salient features of the case and sticking to them through thick and thin, then, at the end, "driving them home with great force of argument." His talents were admirably suited to argument before the Bench of points of law no less than to convincing the mind of the jury. He was not an orator and did not, therefore, make a great success in the House of Commons. "The atmosphere [of the House]," says the author, "is widely different from that of the Law Courts, and members expect, in the ordinary default of original thought, either a certain warmth and passion to be introduced, or that a dry theme be adorned with eloquence." How often, nevertheless, one wonders, does the advocate in the law court endeavor to cover default of original thought by a certain warmth and passion.

The author's style is lucid and lively. He interlards the recital of facts and events with philosophic dissertation and sly asides of humor. The delicate task of writing a biography of a still-living countryman who is at the flood of a great career, he has accomplished with tact. He has not rendered fawning praise nor has he refrained from criticism when it was due. A whole chapter, for example, is devoted to the so-called "Marconi Scandals" and he does not hesitate to criticize his subject's conduct in that connection.

It is to be hoped that more of these accounts of great English lawyers will be forthcoming. Besides their general interest, we have something to learn from them. As one reads these accounts, he gets the impression that our friends across the Atlantic administer justice in a little better way than we do—that a trial there is, indeed, a solemn inquiry into the truth of the matter rather than a contest of wits between two attorneys for the delectation of the public, or of such audience as happens to be on hand.

GEORGE W. BACON†

A TREATISE ON RESIDENCE AND DOMICILE. By Kossuth Kent Kennan. Rochester: The Lawyers' Co-operative Publishing Company. 1934. pp. lxxiii, 981.

The object having been to make this work "as useful as possible to the working lawyer," too much space is devoted to an attempted definition of the term "domicile." Having, at the very outset, posited the truism that the concept is indefinable, the author proceeds to prove the undebatable by presenting a symposium of "definitions that do not define," gleaned from the Roman, continental, English and American statutes, judicial opinions, treatises and even dictionaries. Dissatisfaction with all of these is expressed, including the most recent "definition" proposed by the American Law Institute in its first Restatement of the Law of Conflict of Laws. The

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author then proposes a definition of his own: "Domicile is a word used to express the legal relation existing between a person and a particular place or territory. Such relation arises by residence in the place or territory accompanied by an intention to remain for an unlimited time, or it is created by operation of law as in case of birth, minority or marriage." (p. 60) Many there are who will find this definition at least as unsatisfactory as its inadequate predecessors. It is conceded to be "not ideal."

The truth is that the "working lawyer" is not interested in christening legal concepts. He is concerned not so much with how "domicile" may be best defined, as with proving the fact of domicile when it becomes necessary to do so. It is when the author presents the wealth of judicially recognized criteria of domicile that he performs a real service to the busy practitioner. These criteria are treated in five golden chapters, which present with scholarly thoroughness a digest of decisions from wideflung jurisdictions. The sum of these criteria gives to the litigating lawyer a complete plan of attack or defense in any case of disputed domicile.

Of equal practical value are the chapters considering residence and domicile in instances of attachment, divorce jurisdiction, limitations and voting and suffrage rights. Appended to each of these chapters is a useful compendium of the relative statutory provisions as to residence and domicile obtaining in all the American states. The chapter on divorce contains an interesting note regarding the questionable validity of Mexican and Reno decrees.

The subject of "Domicile and Taxation" is especially well treated. Here again, not only are the domiciliary requirements in various states compared and contrasted, but French, English and Canadian laws controlling the subject are compiled and discussed.

The chief service performed by the author is that he has brought to one accessible spot far-off sources of valuable information on an important subject, otherwise not ready at hand to the average lawyer.

WILLIAM R. MEAGHER.†

PRINCIPLES OF THE LAW OF EVIDENCE WITH CASES FOR DISCUSSION. By Henry Wilbur Humble. Chicago: Callaghan & Company. 1934. pp. vi, 424.

The teacher reviewing a textbook very naturally considers it from the viewpoint of its value to the law student. We cannot avoid the conclusion that this book, though it possesses certain highly meritorious features to which we shall gladly pay tribute, is unfortunate in its topical arrangement. This, it seems to us, is due to a faulty analysis of the subject matter of the law of evidence generally. Our study and our experience in the classroom have convinced us that Professor Thayer's analysis, which is disclosed by the arrangement of topics in his *Cases on Evidence*, is the correct one. This arrangement was followed by the compilers of the case-book now and for a number of years in use at the Fordham University School of Law. This particular analytical arrangement is based upon the perception that its excluding function is the chief characteristic of our law of evidence. This being true, it seems to us that it is highly desirable, first, to apprise the student of that fact at the earliest possible moment, and, second, to place all matters which a correct analysis will disclose as falling within one or the other of the rules of exclusion under that general category. Mr. Humble's first error, it seems to us, is to postpone the "Leading Rules of Evidence" until he has considered the matter of "Witnesses." After pre-

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sending the necessary "Preliminary Topics," then it would, as under Professor Thayer's arrangement, facilitate the labor of the student to have presented to him the rules of exclusion so that as soon as practicable he may be brought to an understanding that the main purpose of his study is to acquire a knowledge of these rules. In the second place, we think that the title "Leading Rules of Exclusion" would be more illuminating to the student than that of "Leading Rules of Evidence," for the very simple reason that the leading rules of evidence are rules of exclusion. Furthermore, an immediate projection of the five great rules of exclusion in a brief statement under the title head would be of material assistance. Mr. Humble would also, we think, have done better if he had labeled all matters from "Dying Declarations" to "Former Testimony," inclusive, as "Exceptions to the Hearsay Rule;" "Public Documents" and "Ancient Documents" should be similarly classified. The remaining matters only, which Mr. Humble places under "Rules Relating to Writings," properly belong there. On the other hand, though there is ample authority for so doing, we think that the classifications of "Admissions" under "Hearsay" is less desirable than treating them as belonging under "Preliminary Topics," on the theory that they are not "Evidence" but are "Substitutes for Evidence." "Character," though it is quite true that evidence relating thereto may be regarded as "Circumstantial Evidence," would stand out in higher relief if it were treated as a separate rule of exclusion. So also is the case with those collateral matters which Mr. Humble classifies under "Circumstantial Evidence." They, too, should be classified as falling under a separate and distinct rule of exclusion. All of the foregoing has reference to Mr. Humble's analytical arrangement. Except for what we cannot but consider serious defects in that respect, we regard the book as an excellent piece of work. The English is particularly clear and simple. This of course adds much to the pleasure experienced in reading it. The book though short, which it was obviously intended to be, is nevertheless comprehensive in its scope. Its only omission, it seems to us, appears in its comparative paucity of New York citations. This, of course, is not intended to suggest a serious defect, but we do think that a court of the high repute of the New York Court of Appeals is deserving of a more abundant reference to its decisions.

LLOYD M. HOWELL.†

COURTS AND JUDGES IN FRANCE, GERMANY AND ENGLAND. By R. C. K. ENSOR.  
London and New York: Oxford University Press. 1933. pp. vi, 144.

This short book fills a gap in Anglo-American legal literature. The continental lawyer (such as the author of these lines) often has occasion to notice how self-sufficient and how untouched by legal ideas and institutions of the non-English speaking world the Anglo-American law is developing; how unfamiliar and strange European procedure, courts and judges are to Americans and Englishmen.

Mr. Ensor's book is a praiseworthy attempt to utilize the methods of comparative jurisprudence in imparting knowledge concerning the constitution and the working of the German and French courts. That the book is brief, will make it so much more useful to the English speaking observer for whom detailed knowledge is of doubtful value. And to the American reader, more than to the English lawyer who need not learn the fundamentals of English judicature any longer, it must be of essential benefit that Mr. Ensor draws his picture of French and German courts and judges

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on the background of a description of the English court system. For, in spite of the common origin of American and English law, they are growing more and more different in the course of time.

Mr. Ensor commences his story by a description of the English judicature, stressing as its distinguishing features the absence of a judicial profession and of promotion to higher posts among the English judges; a judge in England generally keeps his rank and place from the day of appointment to the day of his death or resignation. Furthermore, the English judges sit singly in the courts of first instance. They receive very large salaries, while in France and Germany the principle of "collegiality" prevails and the judiciary is poorly paid. In England juries decide the facts even in the civil courts. The lower criminal courts outside the metropolitan area of London are presided over and staffed exclusively by laymen without previous legal training. There is no ministry of justice in England. In France and Germany, on the contrary, the administration of justice is organized by a ministry; in criminal and civil courts alike learned professional judges play the leading roles. No juries collaborate in civil cases, the judge deciding at once on the facts and on the law; and even in criminal jurisdiction, juries play a negligible part.

In France and Germany we find a professional judiciary. A boy finishing his legal education and passing his law examinations will have to decide, right at the outset of his career, whether he wishes to become a judge or a lawyer. If he enters the judicial career, he must be prepared to live in narrow economic circumstances and to accept a good social standing as a substitute for earthly means. The sole chance he has to improve his financial situation, outside of gaining wealth through marriage (venality of judges is practically unknown and unheard of in France and Germany) is the promotion from step to step on the long ladder of judicial hierarchy. The thorough professional and academic training of French and German judges, the comparatively low costs of litigation in both countries, the lack of technicalities in procedure that promotes speed in decisions, and the greater simplicity, clearness, handiness of French and German code law make litigation much more popular on the continent than in England. French and German courts are deciding an infinitely larger amount of cases day by day than English courts, in spite of the high quality of their judges. On the other hand, while England is getting along with approximately two hundred paid judges, the about equally populated states of France and Prussia boast of more than three thousand judges each.

Mr. Ensor's representation of French and German conditions is remarkably fair and well informed. As the approach to foreign institutions is extremely difficult, the writer of these lines does not intend to express any deprecation of the book by pointing out a few minor errors in Mr. Ensor's story. The author errs when he ascribes to the German office courts jurisdiction of matters up to eight hundred Reichsmarks instead of one thousand (p. 59); when he denies the jurisdiction of these courts in actions on bills of exchange and checks (p. 60, n.); when he denies the existence of a German tribunal of conflicts to demarcate between the jurisdiction of civil and administrative courts and attributes to the *Oberverwaltungsgericht*<sup>1</sup> the power of demarcation as it pleases. (p. 79) The *Bayerische Oberste Landesgericht* is not, as the author says, a court comparable to the Supreme Regional Courts. (p. 61) The minimum jurisdictional amount for appeals to the *Reichsgericht* has been six thousand Reichsmarks since 1929, and not four thousand, as the author states. There are no juries in Germany at all. The "Jury Courts" that try the most serious felonies as murder, arson, perjury, *etc.*, mentioned by the author on page 61, are such only in name, the "jurors" sitting with the professional judges to decide

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1. Highest Prussian court for the adjudication of questions of administrative law.

the facts and the law together and deliberating on the case under the leadership of the presiding judge.

There is one remark in the book that is very startling, but on account of the brevity of the book it is not explained fully enough to leave a full understanding of its factual background with the English or American reader. This is Mr. Ensor's contention that the German judicial system, for the high quality of the German codes, of the German universities, and of their products, the German judges, has a serious claim to be regarded as the best in Europe. I think this contention is true in so far as civil jurisdiction is concerned, but how then, the reader may ask, is this possible if the German judicial machinery employs so many thousands of judges in a territory that in England—and I may add in the United States—is judicially supervised by only a small fraction of this number? Allow me to offer a bit of constructive criticism by answering this question.

The German system rests upon the fundamental idea that justice must be available for poor or rich alike; that by furnishing proper institutions for the vigilant surveillance of all transactions between citizens, the state must do its utmost to prevent unclear legal situations making for quarrel and litigation; that where disputes arise, if large or small, the judicial officers of the state must be near at hand; that justice must be meted out with almost lightning speed, if the commonweal is to thrive.

Vigilance over important transactions is exercised by the introduction of the land registry in transactions concerning real estate and rights as to land. No vendee, no mortgagee need worry about his vendor's or mortgagor's title. The land records are open to him. And only by entry in a land record are property or rights to land transferred or created. The land records enjoy public faith. A vendee or mortgagee, once entered in the book as such in reliance on previous book entries, can never be done out of his rights by third parties claiming prior or better rights not on record. Other records are kept concerning property relations between husband and wife, ships and rights relative thereto, concerning commercial firms, associations, and corporations. The public may to a large extent rely on the correctness of such records.

Every contract leading to an entry in a public record must be made before a judge or a notary (a high official of judicial standing and training) who is bound to enlighten the parties as to the legality and the implications of their declarations. Thousands of judges, notaries, and lawyers are necessary to transact this work, which spells a high degree of certainty and assurance in all legal dealings.

If a law suit is necessary, the poor man has to pay no court fees, and a lawyer of his choice is assigned to him and paid for by the state. And the wronged party winning in an action at law can recover his full costs from the opponent, including all lawyer's fees and other expenses.

The utmost is done to speed up the procedure. I think no other courts can compete in rapidity of procedure with the German labor courts, where four days after filing of the complaint the first hearing is held, and, including trial and arguments, an ordinary case generally is decided within the fraction of a month.

The courts' business for all these reasons is overwhelming; and only due to the clarity of the German laws and to the high training of judges and lawyers (seven years of study after junior college and two severe examinations, oral and in writing, are necessary to qualify), is it possible to handle this amount of work. The large staff of judges, therefore, finds its reason for existing in the extensive juridical protection the country provides for its citizens.

So tremendous a machinery must have its shortcomings too, and the reformer still has a large field in the German system as well as in any other system in the world. But what has been said may suffice to show what stimulation for testing the soundness of our own institutions, what an enlargement of views every jurist can

derive from making himself acquainted with the ways and means of legislation and administration of justice in other civilized countries. For such endeavors Mr. Ensor, by his book, will provide an excellent beginning because of his sound judgment, his genuine knowledge of the topic, and his charming style.

GÜNTHER JACOBSON, PH.D.†

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