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THE LAWYER FROM ANTIQUITY TO MODERN TIMES. By Roscoe Pound. St.Paul: West Publishing Co., 1953. Pp. xxx, 404. $5.00.

"The Lawyer from Antiquity to Modern Times" is the chief item in "The Survey of the Legal Profession" conducted by the American Bar Association. The Survey itself is the most impressive score-board ever to be contrived for the appraisement of the people employed and assessment of the value of an entire profession. Dean Roscoe Pound was the logical choice of the Survey Council to write the central book. This amazing man is believed by many to be the most learned person alive in the fields of history and law. His memory is prodigious. His choices are bull's eyes, and his feeling for the jugular is intuitive. In this instance the subject matter is particularly challenging. The history of the development of the law is always fascinating, but when coupled to the evolution of lawyers, it is doubly so. The book itself is beautiful, in format, cover, material and printing. The style is that of an endless chain. There never seems to be a stopping point, nor a climactic build-up. The story just flows; every part of it is important, none less so than another. In the simplicity and directness of his accustomed style, he wishes to start with a common understanding of an elementary fact, and so he says: "Law is experience developed by reason and reason tested by experience." Again a basic truth of history is needed, and he explains: "Law, and hence lawyers, are the enemies of autocracy." From this satisfying truism he progresses to a comment upon conditions in the periods following the two great historic convulsions, the French and the American Revolutions: "Every Utopia that has been pictured has been designed to dispense with lawyers. This has been manifest particularly in the ideal schemes imagined after Revolutions." This fact has much to do with the theme of his book.

In the new found equality among men of patriotic purpose in America there was a strong prevalent theory that "one man is as good as another" (maybe even a little better), and in that view there was no reason, no reason at all, why an illiterate man drawn from the people would not be qualified for the highest and most responsible public office, or for practicing a profession such as the law, where mistakes would not be fatal to life or health. The impact of this concept tended to degrade a profession pursuing a learned art into an untrained trade, debasing it to a business calculated to yield a living without manual labor. These basic conditions and some hint of the reasons for their existence comprise Dean Pound's explanatory preface.

With this introduction the author lays open the heart of his entire subject with the guileless question, "What is a Bar Association?" In launching upon his answer he deftly turns the page to antiquity for a foundation. Historically there are three ideas involved in the profession: organization, learning, and a spirit of public service as the essential motive (making of a livelihood is incidental). The history, purposes, functions and spirit of Bar organizations as they are known in

America is the primary theme and the ultimate achievement of the book. "It is the bar association, not the individual lawyer that can maintain high education standards insuring a learned profession, that can maintain high standards of character as a prerequisite to the admission to practice, that can formulate and maintain high standards of ethical conduct in relations both with clients and with the courts." It would be hard to formulate a more competent statement than that. It should suffice even for the business executive, or for the labor leader, who sometimes find it hard to understand the lawyers' need for organization except for social purposes.

But Bar Associations are composed of lawyers. And so the author has a look at the lawyer himself, as a person, a unit of society, an efficient agent in the formulation and evolution of the concepts and principles of justice, which have satisfied the soul of man; in the development and preservation of the machinery of order; in the interpretation of justice and order in terms of the conduct of people in their unremitting search for a better and a nobler life. In readability and in the charm of this pursuit the book is a surpassing contribution. Dean Pound points out that at a very early period learning of the liberal arts and history was exclusively in the possession of the clergy. The church, having jurisdiction over the clergy, soon acquired a large jurisdiction over lay Christians. Hence, lawyers of the time were drawn into the Ecclesiastical Courts, and presently into the Tribunals of the Civil Law.

After the Revolution the French solicitors (avoues) were permitted to represent others in regard to their legal rights, although the litigant might appear for himself. In the 14th century they formed a brotherhood, with meetings and marches. The chief of the brotherhood carried a *baton*, from which is derived *batonier*, the name by which the head of the French Bar is known to this day.

But the author is even more at home in the organization of the bar in Medieval England. The Inns of Court have never been formally incorporated but are deemed to be Corporations by prescription. In contrast to the training of law students in the schools of the Continent and of America, the teachers are practicing lawyers teaching the law in action. It thus was and is the law of the courts, as the judges make it, and has the color of decision-made law. To this, Dean Pound exclaims, we owe the system of common law which was able to withstand the triumphal march of the Roman law, in the period when the three R's, Renaissance, Reformation, and Reception, were sweeping over western Europe. The Solicitor and the rise of the Court of Chancery came in the middle of the 15th century. During the Commonwealth the downfall of the whole system provided by the Inns of Court had been so complete that the Restoration could not set it upon its feet again. The fines imposed by the old orders for non-attendance at lectures, or cutting the moots, had turned into systems of graft. By the end of the 17th century students could compound their remissnesses by paying money to the Inns, and be called to the bar by eating the stated number of dinners, supposed to show residence, but pursuing their own way with their books. One of the distinguishing characteristics of the English system, achieved in the second half of the 17th century, was the division of the attorney (solicitor) and barrister. It was the solicitor who secured

the client and consulted the barrister, the solicitor who prepared the briefs of fact for use of the barrister in court. Thus the "briefless barrister" was the one who had the misfortune never to be chosen by a solicitor.

The British Bar forms a fraternity even stronger in many ways than Bar Associations as we know them, with their common meeting and eating places, and their offices in the Inns. The author points out that the English lawyer, although suffering many disadvantages as a student before being called, nevertheless has the advantages of continuing his legal education through these professional contacts, throughout life.

The Bar of Colonial America

In legal theory the American colonists brought the common law of England with them, and the charters of the colonies were drawn either with that provision or upon that assumption. The author divides the story of the colonial bar into four categories: (1) the attempt to get on without lawyers; (2) the stage of irresponsible filling out of writs by court officials and pettifoggers; (3) the era of admitted practitioners in permanent judicial organizations; and (4) the era of trained lawyers—the bar on the eve of the Revolution.

The phenomenon of attempting to administer justice without lawyers, which the author calls "a feature of all Utopias," came to America together with the high hopes of the adventurers that they could throw off the galling restraints of the civilization in which they had suffered and live the simple life, free and just. William Penn had planned that the laws would be so plain and orderly in his "City of Brotherly Love" that any one of the brethren could state his simple case and no special qualifications for its presentation would be necessary. There were but three lawyers in Philadelphia, as the author states "we are told," in 1706 (the estimated population of the time was 4500), and but eight in New York City as late as 1743. The growth of the population and expansion of business and commerce necessarily added to the volume of controversies, and, in the absence of legal talent the work of justice and order fell into the hands of petty court officers, sharpers and pettifoggers. The abuses which grew to be excessive created their own demand for change and, two decades before the Revolution, many trained lawyers had come over from the British Isles, and some native Americans educated at the Inns of Court also had come to the Bar. These men were equipped with such general culture and legal learning as to build up and eventually form a distinguished professional company. So many men well trained and learned at the law came to the Bar of Philadelphia in that period that the term "Philadelphia Lawyer" came to signify one who was competent to solve the most intricate legal problem. Of the 41 men at the bar of New York City at the time of the Revolution, 15 are said to have been notable and to have contributed conspicuously to history. But the Revolution itself made a huge gap in this body of preeminent lawyers. In the new-found freedom and confusion a devastating reaction in public attitude toward the legal profession set in. Lawyers were the most mistrusted group of citizens in the entire country. Charged with representing wealthy tories and with profiteering, they were despised by the people and reviled by a perfervid

press as a band of heartless bill collectors, imposing their ingenuity upon a nation of insolvent debtors. The author comments that for a generation after the Revolution, law and lawyers labored under the ill effects of this period of depression. Aversion to things English, pioneer distrust of specialists, and certain false and exaggerated ideas of democracy, led to the general rejection of the common law idea of an organized, responsible, self-governing profession.

But there is another side, to which the author turns now. Whereas war demands the talents of fighting men, doctors, and engineers, when reconstruction time arrives and it is necessary to build a new order out of the ruins of the old, a new life, a new government, the trained minds and habits of organization of the men of the legal profession are called into service. Soon there was the hey-day of the most distinguished and able men of the bar of the entire history of America.[1]

The Bar Organization had not at this time appeared. "Looking back over the period from Independence to the Civil War" says Dean Pound, "we see in the end the disappearance of the organized local bar and the small beginnings of what were to become the Bar Associations of a later generation." But again there was a low, possibly the lowest point in the stature and influence of the bar of America. It came just before and immediately following the Civil War. In state after state the constitutional conventions qualified "every person of good moral character, and over the age of 21 years," to practice law in all the courts. Even as the war clouds were gathering, in the era high-lighted by the Dred Scot case and the Kansas border skirmishes, the decline of the influence of the profession, in the stature of the men at the Bar, was evident. In the year 1860, the author points out, preparation for admission to the practice had come to be required in only nine of the 39 jurisdictions. Parenthetically it is noted that Indiana still retains in its Constitution the "equal rights" provision, though largely shorn of its effects by court interpretations. It was no accident, the Dean thinks, that by 1860, North Carolina was the only southern state, and Ohio the only state west of the Alleghenies to require a definite period of training before admission to the bar, and he remarks with modest irony that "the prime characteristic of the pioneer is versatility." An uneducated, untrained Bar and a short term elected Bench fastened some of their worst features upon us to last for a long time to come. That there were no Bar Associations worthy of the name which could claim continuity of existence through the period from this era of decadence down to the year 1887, is strong testimony to the deprofessionalizing influences of the period. There had come to be, not a Bar, but so many hundreds, or so many thousands of lawyers, each a law unto himself, accountable only to God and to his conscience—if any.

1. In visiting America in the year 1831, De Tocqueville saw and talked with Daniel Webster, John Marshall, John C. Calhoun, Henry Clay, Albert Gallatin, and many others among the brilliant men of the bar of the time. In returning to France this discerning commentator wrote: "I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people."

Transition to True Bar Associations

The author holds the era of modern Bar Associations to have begun with the organization of the Association of the Bar of the City of New York, in the year 1870. There were then about 4000 lawyers in New York City. Of these there were 235 who signed an agreement to form an Association in which there was recited their belief that "the organized action and influence of the legal profession, properly exerted, would lead to the creating of more intimate relations between its members than now exist and would at the same time sustain the profession in its proper position in the community, and thereby enable it in many ways to promote the interests of the public."

With this illustrious and honorable example the author is content. The pattern is satisfying and suitable for adoption generally.

A list of those states which have formed their legal professions into organizations of this general pattern follows, from Alabama to Wyoming, with dates and special features. It probably is the most authoritative reference material on this subject now existing. Many progressive groups are integrated in one form or another, which gives to them greater legal sanction for the disciplinary work which is expected of them.

The Epilogue

Here Dean Pound is at his best. He has returned to the class room, and is again pouring into the absorbent minds of young men and women who are at the threshold of a great adventure, the profound philosophy of a thoughtful life. He is once more facing an audience from the lecture platform, with a message of wisdom, encouragement and challenge. The entire theme of the book is epitomized and presented again in an essay of enduring quality. The Bar organization as it has been developed uniquely in America is a device of singular success in undoing the mischief wrought in "deprofessionalizing" both the calling and the practice of the law, by the impact of two wars and the crudities of pioneer life. It has done and is doing more than this. What has been achieved is more than an undoing. It is a restoration of the lawyer to his high estate, and of the practice of the law as a profession.

With fine discrimination between professions which combine the service objective with the incidental profit incentive, and purely business organizations which are primarily materialistic in purpose, the author reaches a climax in a happy phrase taken from Wigmore: "The most important thing about the practice of the law is that it is, and in the inherent nature of things demands that it shall be, a profession." But a profession pre-supposes individuals free to pursue a learned art with such initiative and independence as to promote the highest development of their human powers, and certain dangers must be understood by those who are at the beginnings of their careers. The very bigness of things in modern America has a tendency to promote mass action and to diminish the individual as a unit of activity to a point of impotence except in concert with others and under their direction. Thus the vitally responsible relation of attorney and client may be diluted, or relinquished as an incident to employment within a body of workers

which would have the effect of shifting masters. The author extends a warning to those who are confronted with choices such as these conditions present, that economic pressures may in some circumstances tend to advance money-making to the primary position of importance, or even to the place of sole interest. Again, the efforts of business groups to elevate the standards of practice among themselves although commendable, carry a threat which must be reckoned with. The business calling can never become a profession in the sense considered here for the evident reason that no learned art, in any true meaning of the term, is involved. In elevating the standards of the trade arts or merchandising skills vigilance is required that it be not accomplished by pulling down the standards of the old recognized professions to a common level. But the most impressive menace which the author makes out as threatening the continued existence and vigor of the highest professional standards in the learned arts lies in what the author rather sweepingly calls the "Service State," or "Welfare State." In an economic order in which the great majority of people in a community are on the payroll of the government, or of public or private corporations, individuals may come to think of themselves as employees and so become liable to be caught up in a regime of employee's organizations, collective bargaining over wages, and strikes. It is only here that the venerable and learned Dean reveals a certain surrender to fear which otherwise is alien to the constructive tone of this classic treatise. It is of course intended as a matter of emphasis. In the case of doctors, lawyers or other members of the professions embracing the learned arts, this practical obstacle in maintaining their professional independence and dignity while serving as salaried employees of corporations has not been overlooked. It is a favorite topic of legal journalists. The problem is neither new, nor easily solved. It is likely that most of those whose services are monopolized by a single client have given the closest study and most anxious consideration to the hazards of their position. Even so the warning is not untimely, as bigness continues to be an ever increasing characteristic of the business community of America. It is here that the mission of the Bar Association is clear. There is unremitting watchfulness and work to be done for the impartial enforcement of professional discipline upon the one hand, and measures for diplomatic educational work of enlightenment upon the part of employers, upon the other. The author concedes that there may be those (especially those who are advocating the Welfare State who may not share the fears expressed by him that eventually the Bar as a profession may be engulfed by such a creature, but no thinking person would disagree with his final injunction that, "before we go far with them on the path in which they have been going, lawyers should pause to see whither it leads."

Having delivered himself of this ground of fear, which to a degree has excited his emotions, Dean Pound is himself again, confident, reverent, optimistic.

In a passage of great beauty he reveals these qualities, every one, as a fitting finale to the essay (shall we not say lecture?), with which his great book is brought to a close. "In the great creative era of later Middle Ages men had ideas of doing things for the glory of God and the advancement of justice and not solely toward

competitive individual acquisition. We are learning to invoke some of these ideas once more. Not the least of these is the idea of a profession."

Every lawyer having a pride in his profession would be stimulated and refreshed by reading this book; it ought to be recommended by every law teacher as a cultural *must* for law students.

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