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Book Reviews

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gineer sent to Israel. While en route to Jerusalem to go sight-seeing he was shot and killed by Arabs. Finding that sight-seeing was not an unreasonable activity for an employee assigned to a foreign country, the court awarded compensation to his widow.

The instant case might well be numbered among the "borderline" cases. Due to the multitude of subtle distinctions which have been called into play in deciding workmen's compensation cases, there exist sufficient precedents to support either side. Although the dissenting opinion in the case follows the current liberal trend usually applied in New York, the majority ruling is more in accord with common sense, the total weight of authority, and legislative intent. The workmen's compensation acts are not meant to be so liberally construed as to afford the worker general accident insurance.

Thomas J. Griffin.

BOOK REVIEWS

DEMOCRACY IN THE UNITED STATES. By William H. Riker.[1] New York: The Macmillan Company, 1953. Pp. xiv, 428. $3.50.—*Democracy,* Professor Riker states, is a word that has "far more popularity than meaning." [2] The popularity is universal. In Washington and in Moscow, in Cuidad Trujillo and in Teheran everybody — and especially every government — is all for democracy. Obviously, all these governments do not stand for the same thing. If democracy is to mean all things to all men, it will mean nothing. To rescue the word from this plight is Mr. Riker's first task. He undertakes the task on this basis: in spite of past and current abuses of the term *democracy,* history contains the record of movements and societies which all sensible men agree in recognizing as democracies — at least, they could be called nothing else. In the history of these democracies from time to time statements of the ideal of society appeared and were recognized as such by the members of society. Taking five classic statements which range from Pericles' *Funeral Oration* in 431 B.C. to Lincoln's *Gettysburg Address* in 1863, Mr. Riker finds that all acclaim the attributes of democracy as: Popularness, Liberty, Equality, Tolerance, and Obedience (to law). These are not ultimate values. Any of them may exist and have meaning outside the framework of democracy. They are means to ends, and the ends are those things which constitute the good life: human dignity, self-respect for everybody. Democrats value the means, because they see them promoting human dignity and self-respect. Similarly, democrats condemn whatever things oppose

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[2] Text at 4.

those ends — summed up as servility (or pride). This still does not define democracy, because other systems, including the non-political, have been and are dedicated to the same ideal. What must be added to the ideal, held in common with other systems, is the method, which Mr. Riker asserts, is unique. The method is government responsible to the people, and its essential institution is the ballot-box. The attributes, the ideal and the method, all examined and considered in the light of the five classic statements, blend then into a definition which states: "Democracy is a form of government in which the rulers are fully responsible to the ruled in order to realize self-respect for everybody." [3]

This is a definition of an ideal, however. In reality, the best of democracies fail to make the relationship between the rulers and the ruled distinctly one of full responsibility. The problem of democracy, then, arises out of the "difference between democratic promise and democratic performance." [4]

Having established the problem in the first chapter, Mr. Riker devotes the remaining eight chapters to analyzing the promise and performance of democracy in the United States. His analysis is excellent. In the course of it he covers ground familiar enough to most students of politics, but the view that the student gets of the ground is as refreshingly new and different as is the sight of a countryside viewed for the first time from a sky-dome railroad car after one has seen the same thing many times before from the narrow apertures of an old-fashioned coach.

Democracy rests on universal suffrage, and all democrats deplore restrictions on voting which result in effective disfranchisement. But there are subtler means of depriving a citizen of his voting rights than most democrats realize. Poll taxes are not subtle and their objective is racial disfranchisement. But residence requirements can also be made instruments to effectively deny voting power. So can registration laws, which in New York City operate to keep the vote low in all but presidential election years. Other devices which serve the same purpose are gerrymandering (which Mr. Riker illustrates with the congressional apportionment prevailing in Massachusetts) and "rotten" districts (with examples drawn from Ohio). The lesson is spelled out with compelling logic: from the North as well as from the South there are elected Republican and Democratic Congressmen who could not be elected if the suffrage of large numbers of voters was not made meaningless by one or another of the means of systematic disfranchisement.

In spite of the fact that they benefit by these defects, political parties are an "essential instrument of the democratic method of self-respect." [5] Through the strife between the two major parties the guarantees of

[3] *Id.* at 34.
[4] *Id.* at 37.
[5] *Id.* at 95.

personal freedom contained in the Bill of Rights are made a part of political reality. Parties create majorities. A true majority resting on agreement on a single issue is probably impossible, but artificial majorities can be constructed. The existence of a majority, however artificial, confronts the rulers with "some real, enumerable and observable people as their masters." [6] This promotes the cause of government responsible to the people. Mr. Riker believes that the majority can be most meaningful in a two-party system. One-party politics lacks "the rationalizing effect of majorities," [7] and a multi-factional condition leaves the rulers and the ruled in doubt about who are the masters.

Our parties function under a Constitution which is "characterized chiefly by the theory of separation of powers." [8] The theory, as Mr. Riker skillfully demonstrates, has carried different connotations in different circumstances. Power is separated to frustrate tyranny, whether in the form of a monarch, a powerful legislature, or the mass of the people. In the first two cases, the theory is directed against an established tyrant, in the third, against an anticipated oppressor. By showing that these are not at all the same things Mr. Riker performs a very useful service for all serious students of democracy. The good plain people who for so long have uncritically venerated the principle of separation of powers will be shocked by the blunt assertions that in times of national crisis the principle simply has not worked to protect minorities against the majority, but to this reviewer Mr. Riker's case, based mainly on the Civil War and its aftermath, is entirely convincing. Furthermore, it is hard not to agree with him when he says: "The real protection against majority tyranny is the next election. Regular elections mean shifting majorities. Shifting majorities mean that every minority has a chance to be on the winning side." [9]

Mr. Riker calmly but courageously calls for a gradual abandonment of the separation of powers doctrine to go hand in hand with a strengthening of democracy through making the suffrage more effective. Not everyone will accept his case. But let him who will not, if he claims to be a democrat, prepare then to explain how it will be possible to correct (or justify) the anti-democratic influence of the internal structure of the legislative branch, where power is linked to structure which in turn is linked not to accountability to the people as a whole, but rather is dependent upon the accident of longevity combined with one-party rule of "safe" congressional districts.

Much the same sort of challenge lies in Mr. Riker's thoughtful appraisal of the presidency and his exposition of the necessity for an expanded and unhampered leadership in that office, which would be

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6 *Id.* at 109.
7 *Id.* at 124.
8 *Id.* at 132.
9 *Id.* at 160.

strictly responsible to the electorate. It seemed to this reader that the case was considerably strengthened by the frank recognition of the President's *federative* power (in Locke's concept of the term) as distinct from his *executive* power. For this distinction removes the discussion from the narrow realm of "enumerated powers" and puts the question squarely in the light of 20th century reality.

In discussing the judicial review function of the Supreme Court Mr. Riker also makes some useful distinctions. The evaluation of the Court's review of state legislation in distinction from its review of national laws is not original, having been voiced by Mr. Justice Holmes, among others, as the author points out. However, his historical summary of the changing attitudes of the Court in the face of congressional enactments gives emphasis to his case for government by the people. Seventy-seven cases have been the occasion for Supreme Court rulings that acts of Congress are unconstitutional. The vast bulk of these fall in the period between 1862 and 1937, with the heyday of judicial review really getting into full swing after 1890. Commenting upon the basis for the holdings Mr. Riker observes: [10]

> In all but five of the seventy-seven cases in which acts of Congress have been held unconstitutional, they have conflicted more with judicial embroidery than with the exact words of the Constitution itself. (The five cases of direct verbal conflict all involved the procedural guarantees of the Bill of Rights, which are the most specific parts of the Constitution.)

Undoubtedly certain constitutional lawyers will find grounds for disagreement over this treatment of the seventy-two cases, but it will be hard to deny that the Court itself has held varying views of the function of judicial review at various times in the nation's history. It seemed to this reader, however, that one element was left out of account in the analysis: namely, that the ever-present possibility of judicial review may condition congressional action in such a way that the legislature strives to stay within the constitutional limits. And in the light of the imperfections in the democratic functioning of the legislature, which Mr. Riker clearly recognizes, this is potentially at least a protection against violation of minority or personal rights. In the appropriation act involved in the *Lovett* case,[11] for example, would the Senate and President have bowed to the intransigent attitude of the House, if they had not felt with certainty that the Supreme Court would rule the House rider unconstitutional? And the Court *did* live up to the expectations of the Senate and President.

This, however, is a minor flaw in a very good book, and in treating a work of such substantial merit as this one, flaws should not be overemphasized. Now that the subject has come up, however, it struck this reader that there were a few inaccuracies scattered through the volume.

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10 *Id.* at 264.

11 United States v. Lovett, 328 U.S. 303 (1946).

For example, in an otherwise good chapter on suffrage, Mr. Riker somehow equates the rising divorce rate with the extension of the suffrage to women in the past generation. It seems to this reader that the fair sex deserves more and better credit from a political scientist. The great improvements in legislation regarding public health, education and social welfare that have come about in the past thirty years have coincided with the advent of universal female suffrage, and it ought to be possible to give the women's vote some credit for these advances, to say nothing of the very able lady administrators and civic leaders who have played so invaluable a role in translating the laws into action.

This does not change the fact that Mr. Riker has produced an excellent book. It will delight progressives and exasperate conservatives, but it will instruct both. Moreover, it is the kind of book which the former cannot dismiss with the words, "I've read it all before." Nor can the latter reject it as a mere rehashing of a "liberalism" against which they are already committed. It is good enough to commend the respect and attention of all.

*John J. Kennedy**

LORD ACTON, A Study in Conscience and Politics. By Gertrude Himmelfarb.[1] Chicago: The University of Chicago Press, 1952. Pp. x, 260. $3.75. — Acton and Maitland are conjoined by Judge Learned Hand at the head of a list of illustrious authors with whom, he ventured to believe, "it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance . . . as with the books which have been specifically written on the subject." [2] For those members of the legal profession, as well as aspirants thereto, who are desirous of acquiring a bowing acquaintance with Acton this reviewer recommends Gertrude Himmelfarb's recent study, which is not a conventional biography, but what the author characterizes as a "biography of a mind" or "an intellectual biography." [3] Significant events in Acton's life are duly noted, but the principal theme of the book is the development of Acton's thought on questions of politics, morals, and religion.

It is the story of the growth of a powerful intellect, unsystematic but profound,[4] amassing prodigious learning, engaged in high controversy,

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1 Writer and Scholar.

2 Hand, *Sources of Tolerance,* 79 U. of PA. L. REV. 1, 12 (1930). The complete list includes in addition to Acton and Maitland, Thucydides, Gibbon, Carlyle, Homer, Dante, Shakespeare, Milton, Machiavelli, Montaigne, Rabelais, Plato, Bacon, Hume and Kant.

3 Text at viii.

4 *Id.* at ix.

revealing but a fraction of its wisdom in published writings, largely fugitive and ephemeral in nature. It is, like the story of Dante or the story of Milton, both of whom are also on Judge Learned Hand's list, a story of failure. The great poets, however, achieved immortal success in their poems. Acton remains the author of "the greatest book that never was written." [5] Nevertheless, from the mass of materials, both published and unpublished, which have been left by Acton, industrious persons have culled many passages, some of which have been quoted so often as to become familiar to the general reading public. Acton's relevance to lawyers and students of law, however, is not confined to his authorship of a number of aphoristic utterances that might be used in an argument on a point of constitutional law. His political views and the changes in such views, grounded in his ever-expanding knowledge of history, challenge the wit of all concerned with the functioning of our constitutional system.

The exposition of Acton's political views is to be found in three of the chapters. These three chapters and the conclusion of the book are particularly recommended for American lawyers. The first of the three is Chapter IV, entitled Political Conservatism and Liberal Politics. Here we are told that in Acton's younger years Edmund Burke, in Burke's most conservative aspects, was considered the great political guide. Acton then held anti-democratic views, which he seems never to have completely cast aside, but which were greatly modified in his later years. The young Acton had little sympathy for the French Revolution or, indeed, for the American Revolution. He revered the English constitution. As the author states: [6]

> What Acton particularly admired in the later Burke was his empirical philosophy of politics, his refusal to give way to the metaphysical abstractions, the *a priori* speculations, that had been insinuated into public life by the rationalists of the French Revolution. Facts, Burke had admonished, are a severe taskmaster. . . . It was the genius of the English political system to adhere to the facts of English history. "The English constitution," Acton noted in 1858, "was excellent until removed by foreign writers into the domain of theory, when in direct contradiction with its nature and origin it came to be admired as a common representative government." . . . It was by the intensity of their Conservatism, not by the fanaticism of revolution, that the English purchased their freedom.
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> The principle of Conservatism was history, the principle of revolution was sovereignty; the Conservative found law in history, the revolutionist found it in the will of the sovereign power. . . . Macaulay and Burke were separated by the same chasm that separted legitimate authority and popular sovereignty, for while a government in which the people were unrepresented was "defective," one in which the law was not supreme was "criminal."
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> Against what he described as the "violent Liberalism" of Macaulay, Acton urged not a programme of reaction, of opposition to all progress, but a

[5] *Id.* at 2.
[6] *Id.* at 70-2.

> slow evolution of institutions with changes arising from special historical situations rather than from the minds of presumptuous men. There was nothing admirable, he wrote, in the attempt to apply mechanically "the dead letter of a written code to the great complications of politics." Law should, and normally did, follow the course of history, and the good jurist was he who knew how to distinguish between what was temporary and dispensable in it and what was essential. . . . The English were wise in refusing to be lured into the false dilemma of choosing between a sterile legalism and a series of arbitrary, violent innovations. They were wise to cherish the ancient principles of the constitution while contriving new forms by which to implement those principles.
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> The most revered principles of social organization and the most compatible with true liberty were aristocracy and monarchy, Acton argued, turning on its head the modern democratic theory that aristocracy and monarchy are the epitome of the arbitrary and illiberal.

It is also in this chapter on Acton's early views that we read: "No amount of constitutional pretences could alter the fact that the modern State was essentially arbitrary and absolute." [7]

For the young Acton, "the United States was the ominous wave of the future," and, says the author, "The Southern States, desperately intent upon preventing the threatened deluge, commanded all of his respect." [8] Acton in those days referred to the Civil War as the American Revolution. As late as 1866 he could write in a letter to General Lee that he deemed that Lee was "fighting the battles of our liberty, our progress, and our civilization." [9]

The second chapter of the book which is of special interest to lawyers is Chapter VI, entitled The History of Liberty. Here we find Acton in his mature years much more sympathetic to America. Indeed, one of his projects in 1863, when he was presumably inclined towards the South, was a history of the origin of the American Constitution. Here also we find Acton apparently approving of "the idea of popular election, 'the idea that a man ought to have a voice in selecting those to whose rectitude and wisdom he is compelled to trust his fortune, his family and his life.' " [10] Acton is quoted as having written: [11]

> "The vice of the classic State was that it was both Church and State in one. Morality was undistinguished from religion and politics from morals; and in religion, morality, and politics there was only one legislator and one authority."

Later on, the author restates Acton's thought: [12]

> But when Christ said, "Render unto Caesar the things that are Caesar's, and unto God the things that are God's", he [sic] gave to the State a legitimacy it had never before enjoyed, and set bounds to it that it had

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7 *Id.* at 74.
8 *Id.* at 77.
9 *Id.* at 83.
10 *Id.* at 133.
11 *Id.* at 135.
12 *Id.* at 136-7.

> never yet acknowledged. And he not only delivered the precept but he also forged the instrument to execute it. To limit the power of the State ceased to be the hope of patient, ineffectual philosophers and became the perpetual charge of a universal Church.

Acton's own words with respect to the bitter struggle throughout the Middle Ages between the Church and the temporal powers are quoted: [13]

> "To that conflict of 400 years we owe the rise of civil liberty. If the Church had continued to buttress the thrones of the kings whom it annointed, or if the struggle had terminated speedily in an undivided victory, all Europe would have sunk under a Byzantine or Muscovite despotism. For the aim of both contending parties was absolute authority. But although liberty was not the end for which they strove, it was the means by which the temporal and the spiritual power called the nations to their aid. The towns of Italy and Germany won their franchises, France got her States-General, and England her parliament out of the alternate phases of the contest; and as long as it lasted it prevented the rise of divine right."

After a brief description of the nature of medieval conflicts, Gertrude Himmelfarb states: [14]

> From these cross-currents of interests there emerged a fund of constitutional principles: representative government, no taxation without representation, the moral right of insurrection, the extinction of slavery, trial by jury, local self-government, ecclesiastical independence, even the ideas of the Habeas Corpus Act and the income tax.

The revival of the theory of Natural Law and the rise of various religious sects are noted. With respect to the latter there is a statement which is pertinent to American experience: [15]

> Yet it was the revolutionary sects which, after Grotius, gave the impetus to the movement for liberty. The principle of religious liberty, which was their unique contribution, was second only to that of natural law in the history of freedom.

The most striking development in Acton's thought for the American lawyer is his mature view of the American Revolution: [16]

> It took the American Revolution to emancipate liberty from property and expediency by striking out boldly for right and justice. At this point of history, the typically modern despotism of the Renaissance and Reformation gave way to a typically modern Liberalism. America made all previous attempts to capture the secret of liberty look like the futile grapplings of shadows. In the strictest sense the history of liberty dated from 1776, for "never till then had men sought liberty knowing what they sought." The Revolution pursued liberty as an end in itself, and the Constitutional Convention created a democracy that was unique in also being Liberal. "It established a pure democracy; but it was democracy in its highest perfection, armed and vigilant, less against aristocracy and monarchy than against its own weakness and excess."

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13 *Id.* at 138.

14 *Ibid.*

15 Text at 140.

16 *Id.* at 141.

The great change in Acton's thinking with regard to America is gratifying to the American reader. It should also be noted that he changed his mind with respect to written constitutions.

The third chapter of the book that requires particular notice for the lawyer is Chapter VII, entitled Politics and Politicians. Acton's reversal of position on the question of the never-ending conflict between liberal and conservative is especially interesting. His mature view is stated as follows: [17]

> The great vice of the Conservative Party was its identification with a special economic interest; the virtue — and the meaning — of Liberalism lay in its disinterested pursuit of principles, its superiority to sectarian motives. Therefore Acton judged that "the best [i. e. the most complete] Conservative is an American Republican, the best Liberal is a divine." A Liberal Party might sometimes derive momentum from an interest, but it always received its original motion from an idea, and only as long as it continued to be moved by that idea was the party justified.

Another passage of great interest is the following: [18]

> Of the two propositions established by Adam Smith — that contracts ought to be free between capital and labour, and that labour is the source of wealth — the Liberals had adopted the first and the Socialists the second. Socialists reasoned that if labour is the source of national wealth, it should also be the source of national power. Liberals learned another lesson, that if labour and capital were to meet freely in the open market, it could not be right for one of the contracting parties to have exclusive control over the making of laws, the keeping of peace, the administration of justice, the levying of taxes and the expenditure of income. That all these securities should be on one side, and on the side that had least need of them, was monstrous. "Before this argument, the ancient dogma, that power attends on property, broke down. Justice required that property should — not abdicate, but — share its political supremacy. Without this partition, free contract was as illusory as a fair duel in which one man supplies seconds, arms and ammunition."

Finally, in one of Acton's unpublished manuscripts occurs the following: [19]

> "Property is not the sacred right. When a rich man becomes poor it is a misfortune, it is not a moral evil. When a poor man becomes destitute, it is a moral evil, teeming with consequences injurious to society and morality. Therefore, in last resort, the poor have a claim on the wealth of the rich, so far that they may be relieved from the immoral, demoralizing effects of poverty."

Other matters which were of great concern to Acton and of great general interest, such as his views and activities regarding the Vatican Council, are treated at length in Gertrude Himmelfarb's book. Since

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17 *Id.* at 171.

18 *Id.* at 173-4.

19 *Id.* at 178.

these matters are not particularly relevant to lawyers they are not discussed here. This reviewer trusts that enough has been set forth above to show that the book in question will readily serve as an introduction to Acton. Of course, the book is more than that, for the author imparts to those who will read all of the book the fruits of years of scholarship and presents a portrait of a great intellect.

*Roger Paul Peters**

MODERN PROCEDURE AND JUDICIAL ADMINISTRATION, CASES AND MATERIALS. By Arthur T. Vanderbilt.[1] New York: Washington Square Publishing Corp., 1952. Pp. xx, 1390. $8.50. — Judge Vanderbilt has made another valuable contribution to the literature on judicial administration in his latest book. This is a fitting companion volume and logical sequence to his *Minimum Standards of Judicial Administration* published in 1949.[2]

In his preface, the author states an axiom of proper judicial administration by saying that there is no place and should be no place for the study of any but the best system of procedure. Every progressive lawyer will agree with this statement. He says that the simplest system of procedure thus far developed is in the Federal Rules of Civil and Criminal Procedure. It is true that numerous states have adopted the federal rules practically intact or with such modifications as are required by local conditions, but in many jurisdictions the conservative still has his way and anything which tends to minimize the opportunities to waylay or entrap one's opponent is frowned upon. Too many lawyers hold tenaciously to the theory that a lawsuit is a sporting event, in which the object is not to do justice but to defeat one's opponent. It is overlooked or denied that it is the duty of a trial court to do justice and the duty of a reviewing court to determine whether justice has been done.

Nearly twenty years ago Attorney General Homer Cummings said: [3]

> Courts exist to vindicate and enforce substantive rights. Procedure is merely the machinery designed to secure an orderly presentation of legal controversies. If that machinery is so complicated that it serves to delay justice or to entrap the unwary, it is not functioning properly and should be overhauled.

It is encouraging to note that in the author's opinion, notwithstanding the obstacles that have been and are still encountered, there has been

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1 Chief Justice, Supreme Court of New Jersey: Formerly Dean of the Law School, New York University.

2 Reviewed in 25 NOTRE DAME LAW. 789 (1950).

3 Cummings, *Immediate Problems for the Bar*, 20 A.B.A.J. 212-13 (1934).

more progress in this country in the law of procedure, and especially in the spirit in which it has been administered, in the last fifteen years than in the whole preceding century.

Judge Vanderbilt puts it this way: [4]

> No substantive rights, not even the rights guaranteed by the federal and state constitutions, are really assured to one until he is vouchsafed the most fundamental right of all — the right to a fair trial in both civil and criminal cases.

He urges lawyers to consider not merely what the law of procedure is in their states but also what it should be.

In further comment on the federal rules he says: [5]

> . . . and most important, the fundamental premise of the federal rules is that a trial is an orderly search for the truth in the interest of justice rather than a contest between two legal gladiators with surprise and technicalities as their chief weapons, an outmoded point of view that unfortunately still lingers on in all too many states.

It might be appropriate here to remark that despite the progress made in improving procedure in many jurisdictions, there are still those who cling to the traditional theory.

The author sets out in full an address by Dean Roscoe Pound delivered in 1906 before the American Bar Association on "The Causes of Popular Dissatisfaction with the Administration of Justice." [6] He also quotes what he designates as the dramatic story of the reception of Pound's address in an article by Dean Wigmore entitled, "The Spark That Kindled the White Flame of Progress." [7]

It is interesting to note the reception which Dean Pound's address received from the American Bar Association. Wigmore says but one voice was raised in support of the proposition. Wigmore, then a young man, heard the debate, and observes that among others who defended "Things-As-They-Are" was William Ketcham of Indiana, who "riled me most of all." Those of us who had the privilege of knowing General Ketcham and hearing his terrific oratory can well imagine that Dean Wigmore found the General to be a most worthy foe. Wigmore says that notwithstanding the rejection of Pound's theories and recommendations,[8]

> . . . the great result was that the soul of the profession had been touched. For many ensuing years the St. Paul speech was the catechism for all progressive-minded lawyers and judges. Slowly the doctrines spread. Many other forces — most notably the American Judicature Society — organized their efforts. And so the white flame of Progress was kindled.

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4 Text at 2.

5 *Ibid.*

6 The text of this address may be found in 20 J. Am. Jud. Soc'y 178 (1936-37).

7 20 J. Am. Jud. Soc'y 176 (1936-37).

8 *Id.* at 178.

Judge Vanderbilt calls attention to what is not widely known among lawyers, that is, the astonishing practice of government prosecuting attorneys furnishing the trial judge a so-called "confidential brief" without giving the defense attorney a copy. The Conference of Senior Circuit Judges in October 1946 disapproved the practice,[9] and doubtless it is not now indulged in in any federal jurisdiction.

The author states the major problems of procedure as follows: [10]

1. In what court shall the plaintiff bring his action?

2. Who should or may bring the suit and who should be made defendants?

3. Where shall the action be brought? — venue.

4. How shall the defendant be brought before the court? — process.

5. What remedies may be available?

6. How shall the matter of pleadings be handled?

7. What preparation shall be made for trial, including pretrial procedure?

8. What judgment properly follows the trial?

9. How may judgments be reviewed?

10. How is the prevailing party to have satisfaction of his judgment?

He reminds us that justice is administered by men, and its administration depends upon the kind of men doing it. He divides the problems of manpower of the courts into four parts. The first concerns the judiciary, their tenure of office and what standards govern their conduct. Second is the problem of jurors and their selection. The third concerns the function of the lawyers who take part in the trial. All of this leads up to the fourth problem, the judicial system itself and its administration.

Chapter 3 of the book deals with the primary question of where to bring a lawsuit. The author points out that the complexity of the organization of American courts arises largely out of the fact that they go back to English origins. Chapter 5 on standards of court organization is a good catechism for the bench and bar of every state. Among the tests he offers is whether rule making power is vested wholly in the supreme courts.

Another question is whether the chief justice has power to act as administrative head of all the state courts, including the power to assign judges where most needed. Also presented is the question whether procedure is available so that the supreme court on its own motion or

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9 Minutes of the 1946 Annual Conference of Senior Circuit Judges, p. 21.

10 Text at xviii.

on petition may review important proceedings on appeal from a trial court directly without the intervention of an intermediate court of appeal.[11]

A further question is with reference to the gathering of statistics in regard to the courts of the state. It is no secret that when the Judicial Council of Indiana, for example, sought certain statistical information, although it received the cooperation of many clerks of the courts, others flatly refused to do anything in this respect and there was no way to compel them.

As another part of his test, the author would inquire whether all judges, clerks and personnel of the courts are prohibited from engaging in political activities. That is a sensitive subject in most jurisdictions where judges are popularly elected, because back until the memory of man runneth not to the contrary, political parties and their leaders have depended upon judges to subscribe to their tickets and win votes, a procedure which has frequently elected incompetent men running on the same ticket for other offices. Most judges apparently do not hesitate to take a hand in political battles. A candidate for judge of any court finds himself under pressure from political leaders to make public allegiance to his ticket and approve the candidates thereon.

Judge Vanderbilt goes to great length in discussing judicial selection. The quotation from James Bryce's *American Commonwealth* is worth noting. Bryce says: [12]

> . . . popular elections, short terms, and small salaries — would be sufficient to lower the character of the judiciary. Popular elections throw the choice into the hands of political parties. . . . [Short terms sap the conscience of the judge, for they] oblige him to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence.

As stated in another form by a state supreme court judge: "There is no harm in turning a politician into a judge. He may become a good judge. The curse of the elective system is that it turns almost every elective judge into a politician." [13]

The author has gathered some interesting statistical information on judicial selection. He points out that in the eleven jurisdictions where trial judges are chiefly selected by some mode other than popular election, at least two thirds of the trial bench is satisfactory. In seven states the entire appellate bench is considered satisfactory and in four, eighty percent of the appellate bench are so rated. In none of these is a change to direct popular election of judges favored. On the other hand, in thirty-

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11 Even in states where such a procedure is provided, as for example, Indiana, the great majority of appealed cases go to the appellate court first.

12 BRYCE, AMERICAN COMMONWEALTH 351 (Abridged Ed. 1933).

13 Hartshorne, *Progress in Judicial Administration*, 21 ROCKY MT. L. REV. 235, 248 (1949).

nine states where judges are chiefly elected by popular election only one half are rated satisfactory.[14]

His chapter on Questions to Test the Standing of the Judiciary in Any Jurisdiction makes three inquiries. First, does the appointing authority appreciate the importance of having competent judges; second, are judicial appointments considered outside the realm of political patronage; [15] and third, is adequate notice given prior to appointment or confirmation for the Bar and public to make known any facts adverse to the prospective appointee?

Another question posed is whether the judges in a given state are interested in and active promoters of judicial reform. It is the opinion of this reviewer that a majority of the occupants of the bench in most jurisdictions are not interested. The supreme courts, to a limited extent, can be excepted from this observation, in light of their sporadic promulgation of procedural rules.

Reform is needed. This is especially true in regard to the manner of selecting judges and making the chief justice of the supreme court the actual head of the judicial branch of the government with supervisory power over all inferior courts. Every business of any magnitude has a head with some authority over everybody in the organization. The principle is applied in the military organizations. The authority and jurisdiction of the commander-in-chief of an army goes down to the humblest private in the ranks. Why should the administration of justice be farmed out to one hundred or more judges, independent individuals operating without coordination or supervision?

By improvement is not meant the writing of better opinions, but the consolidation of the judicial branch into a coherent and articulated body, with a responsible head. It would be entirely out of order to condemn all trial judges as a group, for many of them are conscientious, hard-working and pains-taking. But occasionally there comes to the surface the conduct of a judge which is little short of reprehensible; for example, keeping a motion for a new trial under advisement for several years. This is clearly a denial of justice. The supreme courts should have not only supervisory power lodged in the chief justices, but should be equipped with the authority and funds to call for a progress report from the various lower courts.

Judge Vanderbilt has made a rather unique and helpful contribution to the work of judges and lawyers as well as students of law. He sets out significant cases by including the opinion of the court in full. Thus,

14 Text at 1178.

15 In one instance, known to this reviewer, following the death of an elected judge in a county predominately under the control of one political party, the state governor, a member of the other party, unconditionally ordered that the replacement appointee be a member of his party.

his efforts have not only produced a scholarly treatise, but render it unnecessary to go beyond the covers of his book to find a complete compilation of cases in the field of procedure and judicial administration. He has furnished an excellent and unusual working tool for those whose goal is better administration of the law.

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*LORD ACTON: A Study in Conscience and Politics. By Gertrude Himmelfarb. Chicago: The University of Chicago Press, 1952. Pp. x, 260. $3.75.

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*Reviewed in this issue.