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# Judge and Jury

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# BOOK REVIEWS

JUDGE AND JURY. By Leon Green. Kansas City: Vernon Law Book Co. 1930. Pp. vi, 417.

This little volume is a collection of essays and addresses, most of which have already appeared separately in various legal publications within the last few years. Following are the chapter titles: Structure of Tort Classification; Analysis of Tort Cases; The Duty Problem; The Negligence Issue; Rules of Causation; Mahoney v. Beatman: A Study in Proximate Cause; The Palsgraf Case; Law and Fact; Deceit; Assault and Battery; Malicious Prosecution; A New Development in Jury Trial; Jury Trial and the Appellate Courts; Why Trial by Jury?

The title of the volume, which might seem rather foreign to the purport of the specific topics, derives significance from the fact that all the topics focus more or less upon a general theme which threads the entire discourse. This theme may perhaps adequately be described by the borrowed phrase, "the law in action", or dynamics of the judicial process; for if there is anything which the author undertakes to demonstrate, it is that there is nothing static about the law, that there is no law without action, and that the judicial process is inevitably dynamic. In the judicial process, the major problems are concerned with the respective functions of judge and jury. Hence the title. As the chapter titles will indicate, the author has largely confined his inquiries to the field of tort, as the one most prolific for purposes of demonstration. A more pretentious title might have been, "The Judicial Process as Exemplified in Tort Actions".

The necessary lack of homogeneity in the volume as a whole makes it impracticable to attempt a review that would do justice to the many interesting and enlightening phases of thought in the specific topics. Comment will be confined mainly to the general theme.

The author's attitude toward the judicial process may be described briefly as "modern". The "law" of the case is settled by the *judgment* of the court. The judge and the jury each perform functions prerequisite to the judgment. The task of the judge is to employ a technique for the purpose, in the first instance, of determining whether, or to what extent, the jury shall participate in deciding the case; and in the second instance, for passing the case to the jury for its decision. This function of the

judge, in traditional and conventional terms, is usually defined as "deciding the law of the case". For such purpose, the judge has been supposed to have recourse to what are variously described as legal rules, principles, precepts or theories. But the author undertakes to demonstrate that the judicial process cannot be adequately explained or justified on any theory of *a priori* application of rigid rules or principles. Legal precepts are useful aids as methods of approach, thought vehicles and stimulants and mediums of articulation. As such, they help to carry forward the judicial process and to articulate the judgment, but they cannot dictate the judgment. The judicial process is larger and more complicated than these mere mechanisms which serve it. But obviously the judicial consciousness must have some background other than the bare facts on which to function. If not rules, principles or precepts, then what?

It will be necessary to seek for something broader and more flexible than formal rules, principles and precepts, and for a term which will adequately include that breadth and flexibility. The term selected is "factor". The "factors which control judgment" are the following: "(1) The administrative factor, (2) the moral factor, (3) the economic factor, (4) the preventive factor, (5) the justice or 'capacity to bear loss' factor." In order to clear the tort field of the overwhelming complexity of inadequate and perplexing conventional legal rules and give these "factors" an opportunity to operate intelligently, the following formula is prescribed for the analysis of tort cases: (1) The right-duty problem; (2) the violation of duty problem; (3) the causal relation problem; (4) the damage problem. The bulk of the volume is concerned with a subjection of these analyses to the test of concrete cases, coupled with a demonstration of the futility of relying upon the orthodox historical methods of approach.

It might be mistakenly surmised that the author is urging abandonment of the use of legal rules in the judicial process. Such is not so. He merely calls attention to the limitations of their use. In fact, he demonstrates that he can make rather neat use of them himself (and this seemingly in the orthodox, conventional manner), when he is keen on the scent of a false decision. What we should escape from is any canonizing or apotheosis of words and principles which leads to what is described as a "legal theology". In truth, the very salvation of the judicial process is secured by the fact that these rules and principles are so numerous, varied, indefinite, contradictory and alternative in application

that they leave the field open for operation of the judicial factors enumerated above. He comes very near to injecting a fourth dimension into the judicial process. "The 'law' of to-day is not the same as it was yesterday nor what it will be to-morrow." The whole doctrine of *stare decisis* is thrown overboard. No case decided can be the absolute law for any future case, because each case has its own setup, its peculiar personal equations, and these are a part of the law. Yet if there is a fourth dimension, the judiciary are nevertheless permitted to go their Euclidian way. Such is the variety of judicial measuring rods of the conventional sort that an astute judge is rarely in danger of having his technique unduly cramped.

The three concluding chapters rather stand off by themselves. The first of the three is an enlightening review and comparison of legislation designed for the purpose of substituting a modified form of the special verdict for general verdicts, as a device for dispensing with instructions to the jury and thus obviating the most fruitful source of trial error. The second traces the recent ascendency of appellate courts, calling attention to the inadequacy and cumbersomeness of their methods of review, and explaining their inevitable tendency to add to the emphasis of formal legal theories and principles as controls of the judicial process. The last chapter, first published in THE AMERICAN MERCURY, is a merciless and unqualified condemnation of the trial jury. All that is said in this respect may be conceded as true. But some things that might be said in mitigation are left unsaid. This the author admits in a footnote reference to the prior chapter, where it is admitted that the jury may serve some useful functions in the judicial process, particularly as a "shock absorber" to shield the judiciary from an accumulation of animosity, and to dispose of problems which are not amenable to the artistry of the more refined end of the judicial process. One cannot help wondering whether this last chapter received a tinge from consciousness of the fact that it was to be published in THE AMERICAN MERCURY.

One may be tempted to inquire, conceding that all that the author undertakes to demonstrate as to the proper workings of the judicial process is true, what is to be done about it. The author would perhaps say, "Nothing". Whether there is a "law" which is made dynamic through the application of principles, "factors", personalities, or what not; whether there is actually a "law" which grows, or whether there is merely a judicial technique which varies with social fluctuation; it will perhaps, in any event,

be conceded that the whole thing, whatever it is, is too large and has too much momentum to be swerved very much from its course by any process of retrospective analysis. Yet it is believed that, differ with the author as we may as to some of his generalizations, no one can read this volume without conceding the force of many of his conclusions. Particularly, his methods of analysis help to disclose the inadequacy of many of the orthodox methods of approach to legal problems, and, to this exent, at the least, should help to clarify the application of accepted, conventional standards of solution.

The author's style is entertaining. The repetition is a little tiresome, but we are warned in the foreword to expect this, owing to the fact that the book is what may be described as an "assembled" volume.

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THE REVIVAL OF NATURAL LAW CONCEPTS. By Charles Grove Haines. Cambridge: Harvard University Press. 1930. Pp. xiii, 388.

The subtitle of this volume indicates its most significant content, "A Study of Limits on Legislature With Special Reference to the Development of Certain Phases of American Constitutional Law", to the thoughtful student of the Constitution of the United States this work is particularly welcome. Over a period of little more than a century there has been erected an elaborate structure of fundamental law for the protection of private rights against legislative action. Many students have turned their attention to the application of this body of law by the courts of the nation, but few have sought either to examine the sources of judicial doctrine from which the law emanates, or to define the nature of the guaranties thus accomplished. Dean Pound, more perhaps than any other scholar, has indicated the presence and influence of higher law doctrines in American law, particularly the force of Puritan thought, but it has remained for Professor Haines to subject to painstaking study and thorough analysis the process by which the presence of this ingredient came about. A considerable share of the material in the volume has previously appeared in a series of law review articles by the author, particularly those in the *Texas Law Review* on judicial review and implied limitations on legislative action. The concentration of this material,