

BOOK REVIEWS

EFFECTIVE APPELLATE ADVOCACY. By Frederick B. Wiener. Prentice Hall, New York, 1950. Pp. xv, 591. \$8.50.

In "Essentials of Appellate Advocacy" Mr. Wiener makes a noteworthy contribution to the working materials of active practitioners in appellate courts. He has not only utilized his vast experience in appellate argument, but has pointed up each of his chapters with illustrations from the broad reservoir of appeals in which he was personally involved or which were of such public interest as to constitute sound precedent for the point emphasized. This book is equally good reading for the seasoned practitioner and the youngster preparing to argue his first case on appeal.

The frequency with which lawyers appear in appellate courts woefully unprepared for the argument, fumbling on the facts, unfamiliar with the record, and totally lacking in sparkle or dramatic appeal has been the subject of caustic comment from appellate justices who properly believe that it is the duty of a lawyer by his knowledge of the case and by his method of presentation to assist the court in reaching a decision. Conversely, a keen interest manifested by an appellate court the moment an advocate arises to address the court is a subtle tribute to the lawyer's careful preparation and reflects an expectation of a lucid and forceful argument.

The frequent appearance of interesting readable books on cross-examination, trial tactics, psychology of the courtroom and successful advocacy before a jury suggests that the forum of the advocate is the court of first instance. The acceptance of this fallacy is probably attributable to the natural drama which attends the trial of cases and the traditional concept that appellate courts are immune to the arts of advocacy and are interested merely in the academic phases presented by an appeal. Any lawyer with experience in appellate work who has the good fortune of intimate knowledge of the thinking of appellate judges realizes that these courts, just as juries and trial judges, seek to find truth for their judgment with the aid of fine presentation and lucid argument. All this points up to the necessity for effective advocacy in appellate courts.

No case is won until a court of last resort has passed upon the facts and the law. The process of appeal is necessarily the client's last chance to sustain a victory or to overcome a defeat. The responsibility of the lawyer presenting a case on appeal is great and the lawyer who approaches an appellate tribunal on the assumption that a case will be won or lost on a brief written by some brilliant young associate without being implemented by force of judgment, experience and the persuasions of advocacy is untrue to his trust. Mr. Wiener demonstrates that the art of advocacy is not exhausted in the trial forum, that it is an "exercise in persuasion"

and not an "impartial discussion" and is of primary importance when the case reaches the appellate court. He emphasizes that advocacy is an art, not an exact science, but as with all arts the degree of perfection must depend upon the care and study which accompany the development of the art.

Mr. Wiener's book is a superb treatise on specific aids to the art of advocacy in appellate courts. A lawyer with extensive practice in appellate courts may utilize the material in the pages of this book with assurance that following the precepts of the author will increase his stature as an advocate.

The scope of Mr. Wiener's book is revealed by the following excerpt from the foreword inscribed by the Honorable John W. Davis:

"Of all the demands his calling makes upon an advocate, none is more weighty than the preparation and argument of an appeal. For one thing, it represents the last chance for a client who has lost below. Or, if he has been fortunate enough to win, it is the last effort necessary to save the advantage he has gained. The argument of the appeal is, therefore, a breathless moment for the lawyer and the client alike."

Mr. Wiener discusses appellate advocacy in four well conceived and documented chapters which comprehend the general principles of advocacy, effective brief writing for appellant or appellee, sound guides to effective oral argument, and models of briefs in a long range of typical appellate cases.

His chapter on the importance of advocacy and the essentials of effective oral argument possess greater appeal and conviction than his more lengthy consideration of the essentials of good appellate briefs. To the associate charged with the first draft of the brief, the sections on the content of the brief would be of great assistance, but to the seasoned practitioner or the recruit preparing for his first appearance in an appellate court the hints to effective advocacy and oral argument comprise the most important and interesting portions of the book. Mr. Wiener points up with dramatic effectiveness the cardinal principles of appellate argument such as: the frequency with which the appellate court is affected in its final judgments by first impressions of the oral argument; the confidence expressed by appellate courts in the opinions of the advocate who has earned a reputation for candor in argument and honesty in his relations to the court; dramatizing by thoughtful consideration in preparation the seemingly dull facts of a case; the importance of simplicity in illustration; concise statement of facts without burdensome detail; careful preparation of notes for oral argument to supplement the printed brief—these and many other hints for the successful presentation of an appellate argument must be of inestimable help to the recruit and will confirm the thinking of the seasoned appellate lawyer on the arts of advocacy which he may have employed in appellate courts over the years.

Of great human interest are Mr. Wiener's sections regarding the actual presentation of an appellate case in court. The character of Mr. Wiener's approach to this section is indicated by his listing of the essential features such as never reading the argument, the necessity for good public speaking, a well thought out and effective opening, a clear statement of the facts, a complete knowledge of the record, thorough preparation, an attitude of respect and, lastly, the so frequently absent element of flexibility in the argument. Each of these essentials is discussed in such a human and interesting manner as to lead the practitioner reading the book to the conviction that it would indeed be a pleasure to be a spectator in the courtroom during an argument by the author.

The last chapter on the finer points of oral argument contains hints which the author quite frankly admits point to perfection in oral argument. Many of these hints the author quite frankly would admit stem from the personality of the advocate, his position at the bar, his relationship to the community in which he lives, and personal mannerisms. When the author discusses with great conviction the necessity of "learning to think on your feet" and the necessity of never refusing to answer a question or in postponing an answer to questions, he is considering the finer points of oral argument which frequently are the result either of instinct or are acquired by long experience. Nevertheless, Mr. Wiener's analysis of these finer points leads effectively to the concluding paragraph of his book in which he suggests as a fitting goal for the advocate to so present a case that judges will say of him, as Justice Cardozo once said when he heard Mr. Charles Evans Hughes: "How can I possibly decide against this man?" When an argument evokes that reaction, says Mr. Wiener, you have attained effective appellate advocacy. Mr. Wiener's book is fine reading in the best tradition of one who believes that advocacy still stands high on the list of the finer attainments of the lawyer.

C. Brewster Rhoads.†

THE GROWTH OF AMERICAN LAW—THE LAW MAKERS. By James Willard Hurst. Little, Brown and Co., Boston, 1950. Pp. vi, 502. \$5.50.

In this day and age it is possible for a scholar to be a pioneer, but ordinarily only in the most esoteric of areas. One can write a study of *The Influence of the Norse Sagas on Minnesota Law*¹ and feel oneself to be a trail breaker, but the chances are that few will follow this trail or even happen on to it. Yet, amazingly, the material for really significant

† Member of the Philadelphia Bar.

1. Any resemblance between the title of this study and any books in print or in gestation is wholly coincidental.

pioneering often lies close at hand, overlooked in the mad dash for scholarly topics. *The Growth of American Law—The Law Makers* is evidence that Professor Hurst of the University of Wisconsin is a true pioneer. It is a magnificent contribution to legal history that combines new thinking about old subjects with a perceptive synthesis of the old thinking.

Professor Hurst is not afraid to proclaim himself a synthesist. In his preface he notes that he has relied heavily on secondary sources, and he is concerned throughout with systematizing existing knowledge and attempting to discover a pattern, or patterns, of legal development. There are some who feel that a synthesist cannot be a pioneer; that a true scholar must never leave any questions unanswered. I submit, with *The Growth of American Law—The Law Makers* as evidence, that pioneering scholarship is as concerned with asking questions as with answering them. Hurst has, in effect, established a framework for future legal scholars to utilize. In addition to its substantive merits, this analysis should serve as a handy guide to graduate students in government who are searching for thesis topics; there is hardly a page in the work that does not include one or more references to serious gaps in our knowledge.

Professor Hurst's basic outlook deserves brief discussion. In the same way that the late Charles A. Beard brought the Constitution down from Olympus, Hurst has humanized the development of American law. Others have tried to do this, but none on so large a canvas or in such a readable manner. While hundreds of studies of specific aspects of lawmaking have been written, Professor Hurst is the first to put them together in a coherent fashion. Our early ideal of a "government of laws and not of men" has long since been modified to a "government of lawyers . . .," but no one prior to Hurst has attempted on such a broad scale to trace the operations of the lawmakers and to assess the merits of the various types of lawmaking.

Professor Hurst holds that the development of law follows a path determined far more by practice than by *a priori* theories. Law is not born of theorizing, but of human action on the day to day problems that beset mankind. As the author points out in one context:

"The vote was not extended to broader classes of citizens as a result of any dispassionate pursuit of a political ideal. Party battles and class feeling went into the trend, with as much of opportunism as of principle. Those who fought for extended suffrage often wanted to write it into the constitution simply to put a political victory of the time and place into the form most difficult for their opponents to upset."²

Thus the law of any given period tends to be a reflection of the Zeitgeist, and those who bemoan the fact that the United States Constitution has been interpreted to authorize, among other things, the National Labor Relations Act should realize that this action by our permanent Constitu-

2. Page 237.

tional Convention, the Supreme Court, was fully in keeping with its past role as the reconciler of previous theory with present reality.

Viewed in this light, the problem of what is "unconstitutional" assumes its true shape as a *political question*. The Constitution—and any constitution—appears in its true guise as an instrument of social change and social progress rather than as an end in itself. And this is as it should be, for a democratic society is a dynamic society *par excellence*. The canonization of an institution such as took place with the Supreme Court in the Thirties is an attempt to stop the engine and, consequently, is a repudiation of the democratic premise that man only is the end, and all institutions are but his instruments. An outstanding characteristic of the totalitarian society is the domination of man by his instruments, the Party, the State, the Folk.

If Hurst's book is a healthy corrective to the *a priori* view of law, it is also a warning of the dangers latent in the pragmatic approach. The appalling slowness of legal reform, the shortsightedness inherent in the process of playing by ear, the ease of crime, and the delays in retribution, are all spelt out. The clock today runs faster than it did a hundred years ago, and the implications and effects of an inefficient legal system frequently call for faster remedies than those supplied by our traditional trial and error methods. The size of the United States, the differing sectional viewpoints, as well as the absence of any centralizing influence like the Inns of Court in Britain, have created enormous problems for the reformer.

One of the most valuable aspects of this analysis is Hurst's discussion of the position of the judges among the lawmakers. The author believes, correctly, I feel, that judges have generally been accorded credit as lawmakers far out of proportion to their actual contribution. This is part of the tendency to use individuals as symbols. As Hurst puts it:

"We like to bring things down to life size by tracing what happened to the doings of specific people. This not only makes us feel more sure that we understand what went on; it also adds drama to what seems, even if only superficially, to be otherwise a dull march of bloodless facts."³

But, while the courtroom scene may be dramatic, Hurst submits that the lawmaking contributions of the judges have never been as substantial as rumor would have it, and that with the decline of the common law in favor of statutes that has taken place with increasing rapidity in the last half century even this contribution has drastically decreased.

There is no point in attempting in a short review to pay justice to all the high points of this remarkable study. Hurst's analysis of the role that the Bar has played in the lawmaking process deserves a review in itself, and his synthesis of existing materials on constitution-making pro-

3. Page 17.

cedure is a valuable addition to our knowledge of that subject. His sections on the executive and administration as lawmakers suffer only, in my opinion, from undue brevity. I assume from the subtitle that Professor Hurst plans to look further into these problems.

A reviewer to demonstrate his competence ordinarily feels obliged to quarrel with the author of the book under review, or, at the very least, to correct his spelling. I must humbly admit that I am not sufficiently learned to dispute Professor Hurst's facts, and I agree wholeheartedly with his major premises. However, I was surprised to note his high regard for Jefferson the President, whom I have always considered to be a first rate thinker but a second rate executive. I was sorry to note that he apparently missed a most stimulating legal study describing the Bar in action, the late Benjamin Twiss' *Lawyers and The Constitution*. But these are minute quibbles that scarcely deserve mention in the face of the scope of the book as a whole.

In short, *The Growth of American Law—The Law Makers* appears to me to be a highly significant work. Future legal scholars may succeed in undermining some of Hurst's hypotheses, but his study will stand as a framework, and the very people who dig under his walls will simultaneously be paying tribute to his seminal synthesis.

John P. Roche.†

† Assistant Professor of Political Science, Haverford College.