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Book Review (reviewing Robert Wyness Millar, Civil Procedure of the Trial Court in Historical Perspective (1952))

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manifold procedural requirements appropriate in civilian tribunals. Thus the Supreme Court has held that the right to a trial by jury is not applicable to cases under military jurisdiction. *Ibid.* The essential requirements of a fair trial can be guaranteed if the conduct of military tribunals is judged by a concept of procedural due process similar to that required of state courts. Such a concept — oriented to notions of fundamental fairness — should not prohibit waiver of the right to confrontation of witnesses even in capital cases. Cf. *Frank v. Mangum, supra.*

BOOK REVIEWS

CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE. By Robert Wyness Millar.[1] New York: Law Center of New York University for the National Conference of Judicial Councils. 1952. Pp. xvi, 532. $7.50.

In a society which so often confuses quantity with quality — or at least tends to regard quantity as a necessary ingredient of quality — it is not surprising that American legal texts labelled "great" have generally been multi-volumed ones. While the number of volumes certainly does not detract from the worth of a *Williston on Contracts* or a *Wigmore on Evidence*, their sheer size has made them more easily recognizable, in our society, as classics. On the other hand, the single volume American law books receiving the label of greatness would make a sparse list indeed. To this elite list must now be added Professor Millar's *Civil Procedure of the Trial Court in Historical Perspective.*

Colonel Millar describes in his preface his objective in preparing this text:

> The case, therefore, is one that seems to call for a book that will briefly survey the major procedural rules employed in the courts of first instance of this country and England, viewed especially from the viewpoint of their historical progression. The usefulness of such a standpoint is obvious. To the law of procedure are particularly applicable the words of Holmes, spoken of law in general, that 'its form and machinery and the extent to which it is able to work out satisfactory results depend very much on its past.' In this manner of proceeding, too, we are enabled to follow, in its main lines, the course of contemporary reform and to see how far the most approved procedural ideas have come to acceptance. It is in the end of thus meeting what is an apparent desideratum that this book has been written (p. xi).

Testimonials to the success with which this objective has been met are already numerous. Almost uniformly, the reviewers have picked up this volume with the feeling that despite Professor Millar's undoubted capacities he was attempting the impossible to put in the compass of a single volume a history, description, and prognosis of Anglo-American

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procedural law. The consensus reveals a recognition by the experts that he has accomplished the impossible. A short quotation from a letter from Judge Clark to Dean Havighurst summarizes the general acclaim:

> The book is amazingly good. I use the adverb designedly and notwithstanding the fact that my knowledge of Professor Millar's scholarship would have led me to expect something quite good in any event. But this is such a dextrous use of the old to highlight the new and to enlighten as to wise reforms that it is unique. . . . Further, the title of the book was a wee bit frightening as an advance prophecy. But the content turns out to be just what either scholar, reformer or practical lawyer or judge can find most useful. Perhaps the highest praise I can tender the book is that when in certain few particulars it goes so far as to criticize the Federal Rules I am both impressed and substantially convinced.

To add to the praise already heaped on this volume would be to pile Pelion upon Ossa. But what are the elements that brought forth such praise?

First, perhaps, is the breadth of approach. One might expect that the author of a volume such as this would have a working familiarity with the current and historical aspects of English and Scottish as well as American law. Professor Millar brings no such limited knowledge to his task. For in addition to these he affords explicit comparison between the Anglo-American system and aspects of the Roman, French, German, Italian, Austrian, and Spanish law, past and present.

A second factor of importance is his exhaustive knowledge of the American and English law. On none of the important aspects of the procedural law has he failed to consider the law of all the American jurisdictions as well as England. Nothing seems to have escaped his consideration. A single page reveals a study of a Massachusetts Bay statute of 1692–93, a Pennsylvania statute of 1700, and Virginia legislation beginning with 1645.

Add to these the fact that Professor Millar is not content merely to collate and relate this vast information, but points out with acumen and skill where the rules past and present accomplished the purposes they were meant to achieve and where and why they failed to do so. He then goes on to anticipate the problems of the future and indicates ways of dealing with them. In addition to these impressive items, the entire book is written with a disarming simplicity of style that makes of a subject that most would find, and leave, dry as dust, an exciting and interesting commentary.

All these accomplishments, however — a panoramic view, an exhaustive treatment, a critical and forward-looking approach, an excellent prose style — do not explain what it is that requires this book to be placed with the major contributions to legal literature. The greatness of the book can be found in the fact that it is the culmination of a life of scholarship devoted to the purpose of making law approach justice by the creation of the machinery by which this end might be met. Here then is the magic potion that makes this book all that it is.

Those of you who come to know Professor Millar through his writ-

ings will learn something of this great scholarship. Mr. Justice Frankfurter in a recent address at the University of Chicago described another great law teacher in words which truly fit Professor Millar, as any who know him personally will testify. In speaking of Professor Ernst Freund, Mr. Justice Frankfurter stated: "I don't think I ever met anybody in the academic world who more justly merits the characterization of a scholar and a gentleman. . . . He was a courtly man of the old school, as it is said. But his courtliness was an exquisite expression of his great courtesy and his great kindliness. Unlike many scholars of courtesy and kindliness, he was a man of great convictions. But in his case, passion was behind his judgment and not in front of it. He was a scholar in the most comprehensive and relevant sense of that term. He was not a pedant." Unfortunately, Mr. Justice Frankfurter was talking of a scholar of the past. Fortunately, Professor Millar is very much of the present and future. We look forward to many further contributions from him of the magnificent nature of this book.

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SWORD AND SWASTIKA: GENERALS AND NAZIS IN THE THIRD REICH. By Telford Taylor.[1] New York: Simon and Schuster. 1952. Pp. xiii, 431. $5.00.

This brilliant analysis of the Nuremberg testimony by the lawyer who knows most about it focuses on two questions: (1) How did the spirit and mechanism of German aggressive militarism propagate itself in the fifteen years between Armistice Day and the accession of Hitler? (2) After Hitler came to power what interaction of militaristic spirit and structure, Nazi politics, German industry, and political folly on the part of the Western democracies produced the tragedy of 1939–45?

It is the first of these questions that puts this book on the "must" list for anyone who wants to think straight about NATO and its strategy *vis-à-vis* Russians and Germans. In vivid, muscular prose that has miraculously survived the combined disciplines of law and Army, Mr. Taylor recounts the facts as they came out in the evidence. He draws no conclusions. Only in the Preface does he suggest that his compelling narrative may have an impact on the present:

> Is the German volcano dead or even dormant? . . . Perhaps the terrible blows rained on the Ruhr have not splintered, but rather tempered, the steel. Will the German steel flash again and, if so, where and in what array? Of only one thing am I certain — that no question should be more anxiously weighed by the men who are striving to ride the whirlwind of these times.

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