

BOOK REVIEWS

A Kaleidoscope of Justice. By John H. Wigmore.* Washington: Washington Law Book Co., 1941. Pp. xxx, 751. \$5.00.

The title given above may be called "the short title." More fully the title is "A Kaleidoscope of Justice Containing Authentic Accounts of Trial Scenes from All Times and Places." There are, it is announced, one hundred and forty-two of these accounts—there are really a great many more—and they describe the methods used all over the world since the dawn of history to perform a special function called "justice." But, as Dean Wigmore warns us, it is not the social and moral concept of justice. This social and moral concept is a complex of ideas and institutions, and within it there is one particular element concerned with public order. That is the element which furnishes the background of most of the scenes so vividly described here. It is "justice" on a fairly simple level, the level of persons who are in fear of men that disturb the social harmony and who wish to see them punished—which, in many cases, means "removed altogether." It is the justice which gets itself frequently symbolized by the sword, the fasces, or the gallows.

Justice in this sense has two goals. The first is to find out the disturber of the social harmony—often subsumed under the term "peace," as in medieval Europe—and next to get rid of him and, in addition, to frighten off others from similar attempts. We have here more than one hundred and forty-two different illustrations of how different communities have endeavored to perform this task.

Dean Wigmore goes through the five continents and concludes with eighteen examples from ancient times. His final chapter, or "Epilogue," analyzes what he finds to be the basic elements in this justice. He finds a basic pattern—entertainingly illustrated in bright colors on the frontispiece—which shifts as we go from place to place, without destroying the fundamental relationship. There is always a "power-holder," an accuser, a seizure of the accused, and some form of "proof," to which must be added formal announcement of a judgment. Widely as these elements differ in detail, they can be distinguished in every instance.

And what certainly can be learned from all these manifold and diverse efforts is the fact that they are dreadfully ineffective. How often was the offender discovered? We are prone to accept the common statement that, given the psychological conditions of early times, ordeals, oaths, compurgators, and such things worked better than they might on rational grounds be supposed to have worked, and that at the present time witnesses and juries, or the shrewd intuitions of experienced judges, manage to be right in most instances.

We can, however, scarcely conceal from ourselves that this is a pious hope rather than a demonstrated fact, even in a system which, like ours, seeks some semblance of a scientific investigation. Perhaps the laws of chance help out, but the numerous examples of obvious failure which these trials exhibit must give us pause.

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Then there is the fact that they all—the modern scientific ones as well as the unscientific ones, whether the latter are primitive or ancient or frontier—quickly degenerate into machinery, and, being machinery, can be diverted to the oppression of the weak as well as the enforcement of order. It is a matter about which we apparently can do nothing, since safeguards against such diversion merely stimulate the ingenuity of those who have control of the machinery to evade the safeguards. Our only recourse is to make sure that we know who are given control of the machinery.

If we really had to depend wholly on these methods to secure even the special element of justice involved in public order—not the highest justice though it has often called itself so—it would be a sorry kind of world in which to live. But the fact is that we do not depend on them. Trials and procedures arise only when the great mass of the community have already developed a social pattern and when divergences from it are rare. Whenever these devices have to be used often, their tragic inefficacy becomes so quickly apparent that a demand for revision and reform is inevitable. That so many of these trial procedures have a marked association with wizardry and magic is intelligible enough. They seek what is in effect an impossible thing to know, something done, as Bracton said, *nullo praesente, nullo sciente, nullo audiente, nullo vidente*.¹ The Danish and Norman conquerors of England made no attempt, as we know, to do this impossible thing when a man of their own was found dead, but the method they used in place of a trial of fact was no more effective to prevent secret killings than any other would have been.

And because procedure is associated with a ritual that inclines to magic, these accounts—most of them by eye-witnesses—make just the kind of highly entertaining reading that Dean Wigmore promises us.² Only a person with the varied and wide reading of the editor could have found all these cases for us. Only a person like Dean Wigmore would have thought of collecting them or of presenting them in this penetrating fashion. We are never allowed to forget the common elements of the human task performed by this shifting kaleidoscope of beheadings and floggings, strange adjurations and incantations, searching interrogations and ingenious traps. Kafir and Fiji, Teuton and Roman and Indian—all have the same thing in view and all are quite sure they know how to reach it.

Numerous as these cases are, they are a selection, since the editor's source is as long as recorded history and as wide as the habitable globe. Inevitably, some will miss cases with which they are familiar and situations which they find more significant. I doubt whether any other selection would have served so well to epitomize the episode in social history which is involved here. The book is unique and of permanent value.

My single serious criticism would be directed to the inclusion of Number 17³ and Number 146.⁴ Dean Wigmore explains the use of these imaginative reconstructions in place of authentic accounts. I am afraid I am not quite convinced. There exist manorial records of the Middle Ages and historical sources of the later Roman Empire, which, while less complete, would have given us accounts more suitable for inclusion in a collection like this.

¹ De Legibus f. 134a (Woodbine ed. 1922).

² P. v.

³ France: A Baronial Court of High, Middle, and Low Justice, A.D. 1220.

⁴ Rome: A Trial for Murder at Rome, A.D. 200.

The editor disclaims any effort at precision of scholarly references. It will therefore not be amiss to note that the Lateran Council of 1215 did not merely abolish the use of the ordeals in Church courts⁵ but forbade priests to take part in ordeals anywhere. As the priest's blessing was essential, this would of itself have ended the practice if the orders had been rigorously carried out. They were not, as a matter of fact, and Dean Wigmore notes that the ordeals lingered on in various parts of Christian Europe in spite of the Council.

Dean Wigmore, besides the enormous debt which the common law owes him for his epoch-making work in Evidence, has a special claim on the gratitude of American lawyers for his services in the field of Comparative Law, of which the present work is a special and monumental illustration. He has domesticated among us the tradition of Kohler and Vinogradoff rather than the severely practical type of research in which Edouard Lambert's Institute at Lyons has done such notable work. It is in keeping with his general attitude that he has cultivated this field for its value in promoting a more profound understanding of law, by making its base as broad as possible. "Law is not so dull a subject as some men would have it," said Mr. Henry Parker of Lincoln's Inn in 1647, answering the royalist contentions of Judge Jenkins. Certainly, as Wigmore conceives the law and presents it in this book, it is not dull from any point of view.

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The Rights of Margin Customers against Wrongdoing Stockbrokers and Some Other Problems in the Modern Law of Pledge. By Edward H. Warren.* Norwood, Mass.: The Plimpton Press, 1941. Pp. xiv, 464. \$4.00.

Professor Warren's stated purpose in writing this book is to build a modern law of pledge based upon ". . . a juristic structure with foundations as solid, and with lines as simple and stately and with vistas as spacious as those befitting a colonial mansion." If these remarks are meant to be read somewhat literally and are not afforded the immunity of poetic license, one is inclined to question both the attainability of the author's objective in the workings of the judicial process and the underlying assumptions of the legal scholar who believes changing and conflicting needs and interests in a work-a-day world can be satisfactorily accommodated in a logical structure designed to fit all situations in which lawyers invoke the collection of legal rules sometimes assembled under the caption, "The Modern Law of Pledge."

The execution of the author's objective has given us a repository of much valuable legal information, as well as such miscellany as seven rules for careful writing and the fact that the preparation of the book consumed 450 hours, at 15 hours a week for 30 weeks. The subject of the book purports to have been selected as best illustrating the delinquency of judges in not developing and changing the law, in not making it more consonant with the conceptions of businessmen, and in not writing clearer, better reasoned opinions. The foundation for the criticism of judicial decision is laid scholar-like by tracing the law of pledge from the time of the first treatise on common law that has come down to us, Ranulf de Glanville's *Laws and Customs of the Kingdom of England*, in the year 1181.

⁵ P. 6.

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