

BOOK REVIEWS

The Common Law Tradition: Deciding Appeals. By KARL N. LLEWELLYN.
Boston-Toronto: Little Brown and Company, 1960. Pp. xii, 565. \$8.50.

A JUDGE'S VIEW

This is a book about legal craftsmanship by a wise and kindly master-craftsman. It states a modest purpose—to investigate the charge that *stare decisis* is dead, and that there is today no predictability of result in the work of our appellate courts. The resulting investigation produces not just an answer to the charge, but a broad and penetrating study of the common law in operation.

The materials are unusual. The focus here is not upon the great constitutional cases in the Supreme Court of the United States, or even upon the leading cases in the state courts. The stuff that this book deals with is the day-to-day output of the state reviewing courts, and many of the samples that have been intensively studied are clusters of cases taken just as they appear in sequence in the reports, often the product of a single opinion day.

Until now the most significant descriptions of the way appellate courts handle common law problems have been Cardozo's. But Cardozo dealt with the great cases, perhaps because the great judge makes great cases. This book, because it bears down upon the mine-run judicial product, more accurately pictures the way of the ordinary judge with the ordinary case.

The data used in pursuing the investigation are entirely objective. The conclusions are drawn from an examination of the opinions of the courts, supplemented only by the keen insights of the author. And this, it is clear, is a matter of regret to him. Professor Llewellyn's appeal for help from the judges as to their subjective processes of decision is couched in narrative terms. It is muted, but unmistakable.

He tells how, during the early days of the Roosevelt administration when law teachers were being named to the bench with considerable regularity, he requested seven close friends who became judges to record for a year their actual experiences in the process of judging. Regretfully he announces that none of them complied with his request, and regretfully he concludes that none made the effort. The assignment was a difficult one because it is hard to couple participation in the normal work of deciding cases with simultaneous description of the mental processes involved. Moreover, the self-conscious process may not be the natural one. But although there are difficulties, Llewellyn refuses to concede even this degree of intellectual bankruptcy on the part of the judges. His persistence may yet produce results.

While the book relies upon objective materials, it carries the smell of the conference room. Indeed, to a reviewing court judge, its diagnosis of the way those judges go about their work, their problems, and the causes of their successes and failures in solving them is uncannily accurate. Llewellyn sees these judges for what they are, "specialists in the varied"—the remaining echelon of generalists upon whom, in so many cases, the specialists press their claims.

He sees them dealing with "disputes self-selected for their toughness." He is sensitive to the volume that confronts them, and he points out the need for winnowing out of the mass, for special attention, the vital cases. At the same time he recognizes the hazard of "the recurrent case where the outcome is too clear to bother about; where, therefore, precisely because no worry is involved, the temptation is strong to hang that judicial hat on any convenient peg." The fact that a reviewing court is a team and its product is a team product is not overlooked. Llewellyn's charming suggestion as to the value that Cardozo attached to intrateam relations, and the way that value was manifested in an opinion (p. 358), is hypothetical of course, but it will ring true to judges who have faced similar problems.

In pursuing the stated inquiry, the dominant concern is with the ways of courts in handling precedent. Here is a documented analysis of acceptable (and unacceptable) techniques ranging from Mansfield through American courts in the 1840's and 1850's, and on down to yesterday. The list of techniques is long, but the illustrations have a familiar sound. Not even the losing lawyer has tested the accuracy of citations with greater care than is shown here. The high frequency of the "simple citation"—a statement of the proposition followed by a case citation—is gratifying, even though a strict analysis of the technical holding in the cited case shows the simple citations refer to statements rather than to holdings in 29% of the instances. The explanation, or justification, is found in a recognition that the "considered ruling," as distinguished from the technical holding, has been lifted "out of second class citizenship." And with this recognition goes the warning that such a ruling must be treated by an advocate as seriously as "the flattest holding; you had better rest your distinction solidly on reason and the facts."

The fundamental assumption upon which the book is based will hardly be controverted today. It is that the law moves, and that in common law matters it is the judges of the reviewing courts who select the direction and control the rate of movement. Indeed, without that capacity for growth and adaptation, a legal system which depends as largely as ours does upon judge made law could not survive. Throughout there is an insistence upon the reason for the rule rather than its words. Some years ago Chief Justice Stone suggested that legal doctrines are themselves on trial in every common law case quite as much as the cause to be decided. Llewellyn expresses a similar thought in this way: "The question was not, fifty, sixty or seventy years ago: 'Will the

cases, or the principle, stand this extension?" or "Is a new or reframed principle a necessity?" The question was "Does not this novel case fall within the principle?" "

It is good to know that pursuit of the main inquiry results in the conclusion that there is a comfortable degree of "reckonability"—a reasonable regularity about the work of the common law courts. But that conclusion is really not too important, for the value of the book does not depend upon either the inquiry or its answer. Indeed, a simple comparison of the number of trial court dispositions with the number of reviewing court dispositions would itself go far toward proving that lawyers generally feel that the end result is predictable in the great bulk of cases.

What makes the book a great one is its realistic grasp of the day-to-day operation of the judicial process. No one else has captured so accurately the process by which reviewing courts decide cases and the factors that move them to the results that they reach. As he reads this book, the working judge feels that here is no outsider—that this is a man who sat at his shoulder as he fought that last batch of cases through to decision. He senses, too, a stirring call for improved craftsmanship. The techniques of analysis, illustration and example all add up to an insistent exhortation. The criticism is kindly. But this too may be only the technique of the critic. For in the large this book is a subtle and masterful piece of advocacy—for better advocacy and for higher and more self-conscious standards of judging.

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A PRACTITIONER'S VIEW

One who reviews this book from the point of view of the practitioner speaks with a special accent—for it is for him and his fellows at the Bar that the book is avowedly written. There is much in it that must assuredly be useful to conscientious appellate judges seeking to understand the nature of their tasks; and much valuable instruction—and admonition—for those whose work in the law is to communicate its mysteries to successive generations of students. But Professor Llewellyn explicitly disclaims at the outset any primary purpose to write for judge or teacher. His concern is for the legal craftsmanship of the practicing lawyer. His goal is to recreate confidence in the lawyer that the process of appellate decision is responsive to craftsmanship. His method is to build solid foundations for that confidence upon a close scrutiny of what our state appellate courts are doing in selected, but complete, series of decisions handed down by a representative number of those courts.

Any book written for the working profession as a whole must be judged by the impact it will have on the ordinary lawyer. The author of this book