BOOK REVIEWS


The most important recent developments as to the profession of law have been directed to providing a lawyer when needed. For thirty years past, emphasis has been given to the provision of counsel for indigents accused of crime, with the case of *Gideon v. Wainwright*¹ as the climax, though not the end, of the struggle. This emphasis, needed though it is, has somewhat obscured the facts that most persons needing legal services are not indigents and that most legal matters are not criminal cases or even court cases at all. There is no less need for attention to the provision of counsel for these other persons and matters. Consideration is made urgent by the recent decisions in the *Button*² and *Brotherhood of Railroad Trainmen*³ cases which upset traditional standards of the bar.

The method of financing legal services is a major aspect of any form of providing them. The possible sources of financing are two, each with subdivisions and possible combinations. One source is outside the parties and the case, as private groups or public monies. The second is the parties themselves, whether from their independent means or the case. The contingent fee is a method by which a claimant may finance the provision of legal services from the proceeds of the case itself. It is an application of quantum meruit to the lawyer, as Dean Griswold explained to an English audience.⁴

The contingent fee system may be this country's most distinctive contribution to the methods of providing legal services. It is "a uniquely American development which has evolved in the face of an historical position (still held by most countries) that its use is contrary to the public interest, unprofessional, and even criminal."⁵ It has been denounced as the source of gross abuses. It has been lauded as essential to the enforcement of just claims. It has been upheld, too, as affording the financial support necessary to the maintenance of an independent segment of the

⁵ P. 209.
bar who are free of the trammels of the establishment, whether economic or governmental or institutional, and who can furnish unhhampered public criticism in changing times. If this last justification, especially, is valid, it is of great social importance that the system be freed of abuses which, unless corrected, would threaten the existence of the system itself. There was need for a thorough and dispassionate study of the subject, which Mr. MacKinnon has given in this excellent report of the American Bar Foundation.

The subtitle of the volume indicates the purpose and direction of the volume, "A Study of Professional Economics and Responsibilities." The first of its four parts sets the discussion in the context of the development of fees in England and the United States. As the Supreme Court of the United States did in a case last year, the book contrasts the English policy on discouraging litigation through imposing the costs of litigation on the losing party, with the American policy of encouraging litigation through the imposition of only minor court charges on a defeated litigant and of making litigation feasible for claimants through the use of contingent fees. The second and third parts treat two contemporary matters, the law of contingent fees and their importance in financing legal services. The last part is the author's evaluation of contingent fees as measured by their fairness and their effect on professional responsibilities. To aid the reader in forming his own judgment there are appended sample forms of contingent fee contracts, the detailed regulations in two of the Judicial Departments of New York, and a bibliography. A helpful foreword by Dean E. Blythe Stason, the former Administrator of the American Bar Foundation, describes Mr. MacKinnon's book as a part of the Foundation's program for continuing the Survey of the Legal Profession. Written with insight and judgment and clarity, the book is indispensable to any thoughtful consideration of the subject whether by the bar or the courts or the legislature.

A few of the author's conclusions will be indicated. For the bulk of litigation in trial courts of general jurisdiction the contingent fee is the principal method of remuneration for the plaintiff's counsel. In some administrative proceedings the method has an even more dominant position. Yet for a substantial proportion of the members of the legal profession who are at or near the top in terms of income and prestige the contingent fee system is of slight importance, which may explain why so little careful consideration has been given to it.

Dangers inherent in the system may call for controls, which are now more usual with administrative tribunals than with the courts. An important control is self-limitation by lawyers.

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This professional self-limitation is a safety factor or governor on the machinery of fee-setting which is overlooked by many observers, who view with understandable alarm the prospect of routine application of rates providing for 1/3 or 1/2 of the recovery to attorneys, when the recovery is large (above $50,000).\footnote{P. 188.}

The evidence provided in two studies, by the Philadelphia Bar Association and by the Columbia Law School, shows that the average fee charged was lower than the allowed maximum.

If the contingent fee were abolished or severely limited, other methods of financing the plaintiff's litigation would have to be found, and some alternative methods are discussed. Among them are "institutionalized legal services," the development of which was opened by the \textit{Button} and \textit{Brotherhood} cases.\footnote{See notes 2-3 \textit{supra}.}

Mr. MacKinnon's book sets a high standard in the work of the profession of law.

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\footnotesize{\textsuperscript{7} P. 188.  
\textsuperscript{8} See notes 2-3 \textit{supra}.  
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Justice Peter V. Daniel served on the United States Supreme Court from 1841 to 1859. He was in many respects a nineteenth century James C. McReynolds, though McReynolds, unlike Daniel, could be a charming person when it suited his whims. As a man Daniel was a boor. Deep down he was a human being of decent emotions, but he was also compulsively honest, devoid of humor, verbose, endlessly contentious, a carper at the faults of others who was hypersensitive to criticism of himself. Even his friends apparently lacked any real warmth or affection for him, complaining of his "frozen deportment." In the bosom of his family, Daniel played the role of a fussbudgetty, overly paternalistic, lovingly tyrannical patriarch. Frank sums up the Justice's character as "sadly subject to the vices of pettiness and arrogance and to an insufferable self-righteousness."\footnote{P. 234.}

As a politician, Daniel's main attribute was a tenacious ability to cling to state office. In the early 1800's he had a brief and "utterly undistinguished career"\footnote{P. 11.} in the Virginia legislature; then from 1812 to