

Law and Literature (Book Review)

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BOOK REVIEWS

Editor—DONALD J. REDMOND

LAW AND LITERATURE. By Benjamin N. Cardozo. New York: Harcourt, Brace & Co., Inc., 1931, pp. 190.

The translucent sanity of Judge Cardozo makes us welcome everything from his pen. All but one of the papers in this volume were prepared for spoken delivery and that, for the most part, on special occasions. They contain, therefore, less which is of permanent importance than do the author's other books. The title essay, embellished with many examples, both horrible and noted, is a delightful analysis of the various kinds of judicial opinions. One paper is a dedicatory address; another, a commencement speech; a third, a talk given at a luncheon. Two of the articles manifest clearly the abiding interest of the author in the growth of the law and his conviction that under the complex conditions of modern life the judge in his great task must call others to his assistance.

In the essay, "A Ministry of Justice," Judge Cardozo points out the lack of continuity and expertness in the changes made from time to time in the body of the law and advocates an agency to mediate between the courts and the legislature, living as they do in "proud and silent isolation." Ever mindful of the value of precedent, he refers to the settled practice in continental Europe, and to the growing demand here and in England, for some such system to restore the confidence of the mercantile community in the common law.

He calls attention to the speed with which changes in the law are accomplished when some department of government is affected. Of this a striking instance has occurred since his paper was written—the passage through Congress and signing by the President, all in a single day late in the congested session of this year, of an amendment to the Estate Tax Law designed to overcome a decision of the Supreme Court rendered only the day before. Judge Cardozo points out that faults in the law which affect only the ordinary private interest often remain without correction, everybody's business being nobody's business.

While in many cases the desired change might be made by the courts themselves, often the judges feel they have carried the process of making distinctions beyond any possible point; often this process, lacking as it does directness and simplicity, subjects the judicial process "to a strain as needless as it is wearing." A permanent body is required which will consider such cases and propose to the Legislature appropriate changes in the law. The writer cites instances which should occupy the attention of a ministry or council such as he suggests; cases which have outgrown the reason for the original rule, such as the distinction between a release under seal and a covenant not to sue; cases in which the law fails to correspond with reality, such as the doctrine that a guest in an automobile is charged with the duty to watch for trains at crossings. Judge Cardozo reminds the bar that laymen are often

shocked at rules accepted by the profession from mere uncritical habituation. He praises the efforts of the Chamber of Commerce for having procured for New York an enlightened Arbitration Law. But he does not take the step logically called for by these observations and advocate the inclusion of laymen in the committee or ministry he desires. He suggests that there be on this committee representatives of law faculties, of the bench and of the bar. And surely there should be some laymen also, chosen from the mercantile community and perhaps, too, by organized labor.

It is the great strength of Judge Cardozo's thought that he is always receptive to the new, while valuing highly the traditional. He is mindful of the constant need for change. In his address to the American Law Institute upon the occasion of the first submission to that body of a partial restatement of the common law, he points out the danger in attempting to formulate too precisely, the necessity for leaving the solution of many problems "to the agency of time." He has expressed the same thought in the address delivered before the Academy of Medicine:

"We must not sacrifice this quality of resilient adaptability which persists while there is softness and suppleness in the bones of legal doctrine."

In the same address he holds out a hand of greeting to the new, going, this time, beyond the limits of the bench and bar to the fellow profession of medicine for scientific facts upon which to base juristic doctrines and for leadership away from old conceptions which have been destroyed by modern psychology. He characterizes the departure as but part of a wider endeavor on the part of the courts to understand the facts in their fullest significance. He suggests, perhaps with more confidence than can be accepted by the humble practitioner, that if the facts of any situation be but known, "the law will sprout from the seed and turn its branches to the light." So he attributes to an imperfect presentation, and therefore an inadequate understanding of the facts, some of the unfortunate decisions of the Court of Appeals made in the first decade of this century. No one would wish to minimize the importance in modern constitutional jurisprudence of the method of presentation of the social background of a case associated with the name of Justice Brandeis. Unquestionably judges must be educated in the real meaning of social experiments. However, they have not, even when so educated, invariably seen the light of a progressive day. At least not in Washington.

But in this address Judge Cardozo is chiefly concerned with the criminal law, and within that field, with the questions of insanity and intent in murder cases. He dwells with a degree of sympathy upon the suggestion recently made by Governor Smith that the sentencing of criminals be taken from the judiciary, and points to a considerable body of opinion in favor of such a step. He reminds us that our treatment of the criminal may not seem to the future any more enlightened than the punitive measures of the early nineteenth century seem to us. But he warns against a complete abandonment of the conception of vengeance in punishment, "till humanity has been raised to greater heights than any that have yet been scaled in all the long ages of struggle and ascent." For he is fearful that the passionate elements of

mankind may take the law into their own hands. And he recognizes that whatever change takes place can come about only through co-operation between law and medicine.

That there has long been dissatisfaction with the definition of insanity in the law is frankly conceded. Judge Cardozo brushes aside the technically valid argument that the law attempts not to define insanity but merely to describe that degree of mental aberration which shall be accepted as an excuse for crime. He considers the present standard too rigid because it excludes crimes committed under compulsion of disease. While advocating a change, he recognizes both the difficulty of framing a definition which will not facilitate imposture and the probability that this task cannot be completely accomplished. He notes, however, that other states have at least started in the right direction and hopes that we may improve the science and the candor of our own statute.

The unsatisfactory nature of the definition of murder Judge Cardozo attributes to the distinction between the two degrees of that crime, the conception of an intent necessary for murder in the second degree which is yet not the premeditation essential to first degree murder. He believes that intent implies conscious choice, that all conscious choice is premeditated, and that therefore, in effect, the statute gives to the jury the power to find the lesser degree of guilt when the circumstances seem to call for the exercise of mercy. He describes the existing distinction as dependent upon "an emotion or passion so swift and overmastering as to sweep the mind from its moorings," and doubts the desirability of letting questions of life and death depend on "the shifting test" of a metaphor. With his characteristic desire to reduce law to the realities of life Judge Cardozo suggests that no distinction so difficult to comprehend as this one, which he himself is not sure he understands, should be left in the law, unless the medical profession should conclude that it has basis in the life of the mind.

Throughout these papers there is voiced a great love for the profession of law, an enthusiastic belief in the nobility of the judicial process:

"It is in truth a fascinating process, baffling, elusive, infinite in the variety of its aspects, and yet infinite also in its appeal to the heart and mind and spirit of generous and ambitious youth."

The same grace of manner, aptness of illustration and felicity of expression as are found in Judge Cardozo's earlier works pervade this one. The temptation to quote cannot altogether be resisted.

"The rule that is to emancipate is not to imprison in particulars. It is to speak the language of general principles, which, once declared, will be developed and expanded as analogy and custom and utility, and justice, when weighed by judges in the balance, may prescribe the mode of application and the limits of extension."

"In case of doubt, I have a leaning, which is not always shared by others toward the impressionism that suggests and illumines without defining and imprisoning."

"One of the flood seasons is upon us. Men are insisting, as perhaps never before, that law shall be made true to its ideal of justice. Let us gather up the driftwood, and leave the waters pure."
"those provisional and tentative formulas, those reservations and conditions, those shadings and softenings, by which judges, made wary by many an ambush, have saved for hours of extremity an avenue of retreat."

No modern writing so thoroughly combines traditional reverence with an openminded questioning of existing rules and dogmas. In one thing this great sceptic has abiding faith: in the power of man by character and will, by courage and devoted work, to overcome the forces of inertia and indifference. Eloquent is his word to the becoming lawyer of the need for eternal vigilance:

"The heroic hours of life do not announce their presence by drum and trumpet, challenging us to be true to ourselves by appeals to the martial spirit that keeps the blood at heat. Some little, unassuming, unobtrusive choice presents itself before us slyly and craftily, glib and insinuating, in the modest garb of innocence. To yield to its blandishments is so easy. The wrong, it seems, is venial. Only hyper-sensitiveness, we assure ourselves, would call it a wrong at all. These are the moments when you will need to remember the game that you are playing. Then it is that you will be summoned to show the courage of adventurous youth."

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New York, N. Y.

CASES ON THE LAW OF INSURANCE. By William Reynolds Vance. St. Paul: West Publishing Co., 1930, pp. 1020.

More than sixteen years have elapsed since Professor Vance compiled the first edition of "Cases on Insurance." The intervening years have witnessed a tremendous growth in the business of insurance not only in volume but in the variety of risks covered. For years a close ally of "big business," and now, more than ever, it has become intimately associated with all commercial enterprise however small. It occupies a prominent and important position in the economic structure of the nation.

This rapid expansion has, quite naturally, been accompanied or closely followed by increased litigation in which courts have been called upon to decide many novel legal problems and we find that numerous significant changes have been effected in the law not only by juristic expressions but by legislative enactments.