

BOOK REVIEWS

THE PARADOXES OF LEGAL SCIENCE. By Benjamin N. Cardozo. New York: Columbia University Press. 1926. Pp. 136.

Here is a companion volume for the two preceding books written by Judge Cardozo within the past half-dozen years, *THE GROWTH OF THE LAW* and *THE NATURE OF THE JUDICIAL PROCESS*. It is in much the same tone and, like the others, consists of a series of lectures, this time on the Carpentier foundation, Columbia University. The book develops further the point of view which this eminent jurist has emphasized before. Like its predecessors, it is in some respects a penetrating intellectual autobiography, describing, in places approaching the tragic, the mental and spiritual travail of an extremely sensitive intellect. Many will regard this as the best of the series.

The first paradox with which the author is concerned is the eternal one, "rest and motion." He suspects that the motion of the law is not the smooth and gradual process that it has been thought to be, but rather a progression of leaps and jumps. The law is now static, now in sudden motion. Surveyed over a period of years through the eyes of the historical jurist, it gives the illusion of continuous motion. In any event, there must necessarily be both rest and motion. There can be, it is discerned, no change without conservation. Otherwise there is mere passage from nothing to nothing. In regulating conduct, the problem for law is one of continued adjustment, the adjustment of rules of conduct to the phantasmagora of human experience. "When changes of manners or business," for example, "have brought it about that a rule of law which corresponded to previously existing norms or standards of behavior, corresponds no longer to the present norms or standards, but on the contrary departs from them, then those same forces or tendencies of development that brought the law into adaptation to the old norms and standards are effective . . . to restore the equilibrium." And so it is that the forces of life, expressing themselves in society, will determine law. On the one hand will be the inertia of custom; on the other the teleological faith of one shaping material to effectuate desired ends. Between the two extremes will be found every gradation of criteria for judgment, all determined by the social pressure behind. The author's experience on one of the highest courts in the world is not wanting in rich illustration.

In the chapter on "Social Justice—The Science of Values"—which some will have it is the best in the book—Judge Cardozo relies heavily upon the pragmatist view. We are to be wary of ambitious conceptions of justice and absolute notions of right. "It comes down to this," he assures us, "There are certain forms of conduct which at any given place and epoch are commonly accepted under the combined influence of reason, practice and tradition, as moral or immoral. . . . Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate." Thus it is that justice is fundamentally an ethical conception, although, like ethics, it will sometimes divulge a content frequently regarded as something to contrast with justice, e. g., "grace," "compassion," perhaps, at times, "pity." So when beneficence and generosity acquire such social pressure that the sanction

will become determinate, it becomes incorporated into law, i. e., it becomes a part of the jural norm of justice.

The law, it is pointed out, does not create a scale of values. It adopts that found in the "social mind." But this social mind is a scientific conception, and is to be regarded as producing critically thought out social judgments which are not to be confused with mere passing popular opinion or, perhaps still more important, with the frenzied desire of the mob. Law accordingly does not slow up civilization nor does it accelerate it. It but regulates it lest it defeat itself.

But Judge Cardozo distrusts somewhat the science of axiology. We may well fear that in moments of trial he will abandon it in desperation and look to some magic power to direct him to the "lucky find" necessary to a happy solution of the problem. Are we, then, to identify the vague promptings of intuition or instinct or whatnot with those "luminous hypotheses" which, as everyone knows, are the landmarks of scientific progress? Surely it cannot be. These "luminous hypotheses" are the direct products of the creative imagination, indeed, but they are born of an imagination thoroughly grounded and rooted in the facts of empirical knowledge. In the last analysis, then, it must be this empirical knowledge that is to furnish our only divining wand for truth.

In the constant balancing of interests, it must be remembered that in some phases of the law fixity and certainty must be evaluated higher than in others. The law of Bills and Notes, of Real Property and of Conflict of Laws are suggested as examples. Numerous citations to New York decisions again furnish repeated illustrations demonstrating how back of the determination of the legality or non-legality of acts and situations the value of these acts or situations for society is constantly pressing for recognition. Thus again every judgment is more properly to be regarded as an adjustment.

Nor is any question entirely free from doubt as these interests are continually being re-evaluated. Even basic questions—those regarded as fundamental in our law—are often shrouded in uncertainty, e. g., the privilege to employ force when threatened with assault by one with a deadly weapon; the privilege to employ force to recapture a chattel; to effect an entry to land. But by a return to pragmatism, there is peace to be found. Now we shall only aspire to an adaptation to experience, content with a temporary adjustment. In one of the most chaotic field of the law, that of legal or "proximate" cause, the author will find the orthodox "tests" as no more than guides or clues to assist and direct the judgment. After all, "there is something in the minds of men . . . which solves . . . this problem of causation." "The truth which the law seeks in tracing events to causes is truth pragmatically envisaged, truth relative to jural ends."

But in the final lecture Judge Cardozo falters again. Liberty this time is the paradox. He recognizes the conception of liberty, not as a datum, but as a standard developed by the social sciences. This conception, however, he will bend somewhat or modify to fit constitutional dogmas of "property" and perhaps even of "liberty." Is this another intrusion of the "higher law"? Are we to offer up a living conception of liberty which social science is constructing out of the very experience of human beings, a sacrifice to a static and uncompromising dogma? Judge Cardozo himself has seldom done so, although

his brothers have frequently so sinned. Are we to mistake the means for the end, and thus misuse the pragmatist test, as William James himself has done? Are we to confuse, after all, those "critically thought out" social judgments as to balancing of interests with prejudiced and biggotted dogmas as to means or instruments, which are eternally obstructing the progress of science and the scientific solution of human problems? If this is what we are to understand by the higher law, it is permissible to submit that there is more than a mere resemblance in name between it and that "higher law" which for centuries obstructed the very adjustments which Judge Cardozo so confidently and justly commends.

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THE BUSINESS OF THE SUPREME COURT. By Felix Frankfurter and James M. Landis. New York: The MacMillan Co. 1928. Pp. viii, 318.

This book is avowedly an attempt to reveal the story of political and economic strife which lies hidden beneath the technicalities which govern the jurisdiction of the federal courts. It first appeared in the *Harvard Law Review* in serial form. The method is historical and the plan chronological. The scholarship is of the highest order and the text is illuminated with extensive notes. Infinite pains have been expended in going to original documentary sources, with a corresponding presumption of accuracy.

We are introduced first to the considerations underlying the First Judiciary Act. Elaboration is made upon the parts played by state jealousy and the fiscal necessities of the Union to enforce its own claims. It is pointed out how the act was, in fact, a compromise between conflicting economic and political interests. Incidentally, innumerable incidents of the history of the judiciary, of independent interest for lawyers, are woven into the general story—incidents interesting in themselves, but unknown to the average lawyer. For example, who knows how many judges there were under the First Judiciary Act? When did Congress first start its tiresome and endless series of "investigations"? What were the arguments for and against the system of circuit riding? Why has reform of the federal judiciary occurred only after the need therefor has become unbearable? Who and what were the "midnight judges"? Has the supreme court ever consisted of more than nine members? How many miles would a justice travel in a year doing circuit court work? And so on.

From the Civil War to the Circuit Court of Appeals Act, more and more is it shown how "the history of the federal courts is woven into the history of the times." The economics of the period immediately following the war were reflected in the litigation of the supreme court. It foreseeably appears that the history of the federal courts is a living part of our national life. Great commercial activity and development, panics, land booms, railroad building, cannot but produce vast litigation. Again, the political and economic implications of the Fourteenth Amendment gave complexion to supreme court business. The movement toward nationalization was significant. We were now a nation, with a nation's litigation. Not the least significant phase of this period of supreme court history was the impossibility of relief for the congestion of judicial business by reason of the inability of Congress and the executive to cooperate regarding relief measures, due, of course, to the burning