ISRAEL LAW REVIEW

Vol. 9 April, 1974 No. 2

# BENJAMIN NATHAN CARDOZO (1870–1938) — IN MEMORIAM

*(On the 35th anniversary of his death)*

*By Shalom Kassan**

> By universal consent he [Cardozo] is a great lawyer, a master of the principles, ideals and technique of Anglo-American law . . . Moreover, his is an all round scholarship, and his culture, his wide general knowledge, and his command of English put him with [the] best of those who have sought to formulate judicial experience for the use of lawyers and litigants to come. Roscoe Pound[1]

> For our time Cardozo is second only to Holmes in having imparted to the judicial process a philosophic direction so as to blend continuity with creativeness. Felix Frankfurter[2]

Cardozo sat upon the bench of the New York Court of Appeals[3] for eighteen years—five of them as its Chief Judge. This was followed by six years of service on the United States Supreme Court. His career was cut short by his death at the age of sixty-eight, but already embraced enough great philosophy and legal learning to have gained world renown.

*Family Background*

The roots of the Cardozo family go back to Spain and Portugal. After the expulsion of the Jews, the family migrated to Holland; they later moved to England and thence to the English Colonies on the American Continent. Cardozo's grandfather was nominated Justice of the Supreme Court of New York State, but he died before the elections took place. His father,

* Ph.B.; M.A. (University of Chicago); formerly Relieving President in District Courts of Jerusalem, Haifa, Nazareth.

1 Foreword, Joseph P. Pollard, *Mr. Justice Cardozo: A Liberal Mind in Action* (Yorktown Press, New York, 1935) 4–5. Three years later, Dean Pound included Cardozo in his list of the ten judges who must be ranked "First in American judicial history". Pound, *The Formative Era of American Law* (Boston, Little, Brown and Co., 1938) 30.

2 (1938) 24 American Bar Association Journal 638.

3 The highest court in the State of New York, located in Albany.

Albert Cardozo, showed brilliant promise as a lawyer but died as a young man in 1885. Benjamin Nathan Cardozo, Albert's second son, was born on May 24, 1870 in New York City.

*Education*

As a child, Benjamin Nathan's tutor was an American author, Horatio Alger.[4] It is highly probable that his tutor's heroes played a part in moulding Cardozo's character. It was also Alger who helped to develop in him his love for English and Greek literature, which later found expression in his opinions and his other writings. "My preparation for college" wrote Cardozo in response to an inquiry, "was the work of Horatio Alger", and in his usual humble way, he added that "he did not do as successful a job for me as he did with the careers of his newsboy heroes".[5]

At the end of his fifteenth year, Cardozo became the youngest student of Columbia University. The shy, reserved little boy soon showed that he was a brilliant scholar; but the modesty, which distinguished him all his life, made him popular with his fellow students. He graduated with the highest honours at the age of nineteen, in 1889, and was elected life Vice-President by his class and chosen to be the class orator at the commencement exercises. His interest in government theory was displayed at this early date with an oration on The Altruist in Politics and with a B.A. thesis on Communism.[6]

In his presentation, Cardozo attacked the unrealistic altruists who were advocating an absolute community and equality of wealth.

> In almost every phase of life, this doctrine of political altruists is equally impracticable and pernicious. In its social results it involves the substitution of the community in the family's present position. In its political aspect it involves the absolute dominion of the State over the actions and the property of its subjects. Thus, though claiming to be an exaltation of the so-called natural rights of liberty and equality, it is in reality their emphatic debasement. It teaches that thoughtless docility is a recompense for stunted enterprise. It magnifies material good at the cost of every rational endowment.

[4] Horatio Alger (1834–1899) graduated from the Harvard Divinity School and became a minister of the Unitarian Church in 1864. He resigned two years later and moved to New York City to write. There, his association with poor boys in the streets gave him the background for his books. His heroes rose from tattered poverty to riches and respectability. This "rags-to-riches" theme became a symbol and a myth. The imagination of many of the American youth of that period was fired by his books: *Fame and Fortune; Ragged Dick; Luck and Pluck; Sink or Swim; From Canal Boy to President; Tattered Tom,* and many others. In all these books the hero triumphed over poverty and adversity by courage and hard work.

[5] Letter to Milton H. Thomas, curator of Columbiana, Columbia University, New York, March 26, 1936.

[6] Cardozo, *Communism* (unpublished thesis in the library of Columbia University, New York, 1889).

Thus, the deliberative and philosophic habit of mind and the concern for moral fundamentals, which became so highly developed in later life, can already be discerned in this thesis.

Two years after graduation, Cardozo aged twenty, concluded his regular education with the award of an M.A. degree in political science.

*Admission to the Bar*

In 1891 Cardozo was admitted to the New York Bar. He practised as a partner of his older brother, and together they joined the firm of Simpson and Werner, which was named Simpson, Werner and Cardozo.

His method of pleading won notice. His memory for cases was famed. He had not been a practicing advocate very long, when he was briefed to appear before the Court of Appeals.

Young Cardozo was both nervous and reserved. His diffidence was plain to the court; but so was his grasp of the law, and he gained high praise from the chief judge for the skill with which he argued his case. He spent two decades specializing in appellate practice, arguing complex points of law before the higher court of review. In his spare time, he was busy writing his first book, *The Jurisdiction of the Court of Appeals of the State of New York* (1904), which is still considered the authoritative work on the subject.

*Joining the Judiciary*

In January 1914 Benjamin Nathan Cardozo took his seat upon the bench of the Supreme Court of the State of New York (equivalent in scope to the District Court in Israel).

Three vacancies arose in the said Court to be filled by election in New York County. For one of these vacancies Cardozo was nominated. He was an independent member of the Democratic party, deeply interested in government, but he had never taken an active part in politics. His name was almost unknown to politicians and to the general public.

As an advocate he had never appeared in any sensational case; his name was seldom mentioned in the newspapers; he had not been the confidential adviser of known corporations or of powerful financiers. He had, however, gained a high reputation among the members of the bench and the bar as a conscientious student of the law, as a keen analyst of legal principles and judicial precedents, as an advocate with extraordinary powers of exposition and persuasion, who never presented a contention to court or jury which he could not support with logical argument and with profound learning. His nomination and election as a judge were hailed by both the members of the bench and the bar.

Within one month, and even though he had not served in the appellate division, he was appointed by the Governor of the State of New York to serve temporarily as associate judge in the highest court of the state, namely the Court of Appeal, where additional help was needed.

In the fall of 1917, Cardozo was duly elected for a 14 year term to the Court of Appeals, running with the joint endorsement of the Democratic and Republican parties.

In 1927 he was elected Chief Judge of the Court of Appeals. During his judgeship, the court exerted great influence on the development of the common law throughout the United States, and even in England, because of the brilliance of Cardozo's reasoning and the weight of the authorities upon which he based his decisions. An outstanding judicial stylist, he was recognized as the great interpreter of the common law.

*Elevation to the Supreme Court*

In 1927 Cardozo declined an appointment to the Permanent Court of Arbitration at The Hague. But in 1932 came a more urgent call. In that year Holmes who had reached the age of ninety, resigned from the United States Supreme Court, It fell, therefore, to President Hoover, a conservative republican, to nominate a successor to that great liberal.

There were already two justices (Chief Justice Hughes and Mr. Justice Stone) from New York on that Court, and it rarely happens that two judges from one state are appointed. But the legal profession in United States urged that Cardozo was the most qualified and competent man to succeed "the great dissenter".[7] President Hoover resisted this demand and insisted that the South and the West had legitimate claims to the appointment. Furthermore, there were political as well as geographical factors involved. Cardozo was a Democrat with an outspoken liberal philosophy; the President, on the other hand, was a Republican with a prominent conservative outlook.

But the nation did not acquiesce. There followed an upsurge of public support for Cardozo as the one man who had proved his capacity to fill the seat of the magnificent Olympian.

Robert F. Wagner, New York's humanitarian Senator pleaded for Cardozo's appointment on behalf of the people of the entire nation. He was seconded by Senator Borah of Idaho, who answered the President's doubts by stating: "Mr. President, the man you appoint to the Supreme Court represents every state in the union—Idaho as well as New York. If you appoint Judge Cardozo, you will be winning the applause of the whole country and not merely one state". Still the President tarried and hesitated. He then called into consultation his personal friend, Mr. Justice Harlan Stone, who had been appointed to the Supreme Court by President Coolidge in 1926. The President asked

[7] On January 23, 1932, the New York State Bar Association sent a telegram to President Hoover, which concluded with the following words: "In the conviction that the matter is too important to be affected by geographical considerations and that only the welfare of the nation should be considered, this association presents the name of the man recognized by the profession and the people alike as the most distinguished jurist of our age—Chief Judge Benjamin N. Cardozo of the Court of Appeals of the State of New York."

Stone what he thought of the chance of getting the Senate's approval of his proposed candidates: Senator Joe Robinson of Arkansas or Federal Judge Orie Phillips of New Mexico. Stone did not dwell on the superior qualifications of Judge Cardozo for the post, but stressed the fact that while it might be possible to secure enough votes to put one of the suggested nominees through, the naming of Cardozo would receive instant confirmation. The President was at last convinced and on February 15 he sent his nomination of Judge Cardozo to the Senate because "the whole country demanded the one man who could best carry on the great Holmes tradition of philosophic approach to modern American Jurisprudence".[8] The nomination was greeted with general acclaim by the people and the press. On February 24, 1932, the nomination was unanimously confirmed by the Senate.

On March 14, 1932 Mr. Justice Benjamin Nathan Cardozo ascended the Bench of the country's highest tribunal. The general reaction of public opinion was that this unanimous appointment "ignored geography and made history".

Three groups of justices were serving on the United States Supreme Court at that time: In the first group were four elder gentlemen as immutable as dried concrete—Justice Willis Van Devanter (appointed by President Taft in 1911); Justice James C. McReynolds[9] (Wilson—1914); Justice Pierce Butler (Harding—1922); and Justice George Sutherland (Harding—1922). This group of jurists stood firm against any experimental legislation. Opinions delivered by any of these four veterans were likely to be grasped in the waiting courtroom whether right or wrong.

Solidly against this rockwall stood three equally determined colleagues: the two great dissenters Oliver Wendell Holmes and Louis D. Brandeis, later joined by Harlan F. Stone.

Mr. Justice Holmes, the aged philosopher of the bench, was appointed to the Supreme Court in 1902. He consistently favoured a liberal inter-

[8] Judge Cuthbert W. Pound at the close of the last consultation of the Judges of the New York Court of Appeals, March 3, 1932 (258 N.Y. VI).

[9] Mr. Justice Felix Frankfurter in his *Reminiscence* (Recorded in Talks with Dr. Harlan B. Phillips, 1960, Reynal and Co., N.Y.) 101, introduces Mr. Justice McReynolds to his readers with the following description: ".. . Mr. Justice McReynolds was a strange creature, . . . was a hater. He had a very good head. He was also primitive. He had barbaric streaks in him. He was rude beyond words to that gentle, saintlike Cardozo. He had primitive anti-Semitism . . . Rude isn't the exact word. He was not rude really, but indifferent which is worse than being rude. He was handsome, able, and honest. I sort of respected him . . . I despise McReynolds, but respect him. I respected that he refused to sign a letter when Brandeis left the Court. There was the usual letter of farewell to a colleague, and he wouldn't sign it. I respected that, because he did not remotely feel what the letter expressed and I despise hypocrites even more than barbarians". Frankfurter was appointed by President Roosevelt to the Supreme Court in June 1939 being "the only person fit to succeed Holmes and Cardozo" (*ibid.*, p. 288).

pretation of the Constitution. Truly, Holmes had a low regard for most social legislation, but he knew how to subordinate his own personal feelings. In most of his judicial opinions and other writings, he had given varied and eloquent expression to his philosophy of life and of law, which earned him an international reputation.

Until 1916, when Louis D. Brandeis, the crusader for human rights, was elevated to the Supreme Court, the voice of Holmes was often the only voice in the wilderness. It was only then that the opinions of both of them, most of the time, reflected the liberal views of the bench.[10] At a time when a majority of the court was striking down new social legislation, Justices Holmes and Brandeis powerfully insisted that the United States constitution did not embody any single economic creed, and that to curtail experimentation was a fearful responsibility.

At the end of their career on the bench Justices Holmes and Brandeis saw the court well on its way to the adoption of the position they had for so long taken in dissent.

Mr. Justice Harlan Fiske Stone came to the Supreme Court as an associate Justice in March, 1926. Sixteen years later he was appointed to fill the post left vacant by the retirement of Chief Justice Hughes. He came from roughly the same background as the immutable conservatives. He had not been long at his post when he showed himself to be a liberal-minded jurist and began to reveal opinions akin to those of his colleagues Holmes and Brandeis, to the surprise of former foes and the chagrin of former clients.

The third category of the justices on the bench of the Supreme Court was composed of the "swing" men. They were Chief Justice Charles Evans Hughes and Owen J. Roberts. Hughes stood about midway between the first two groups, with Roberts somewhat right to the right of him but also in a central position. Justice Roberts usually, but not always voted with the conservatives, while Chief Justice Hughes sometimes also threw in his lot with the liberals.

As it was naturally predicted, the new appointee promptly allied himself with the liberal group, and at once occupied the seat vacated by Mr. Justice Holmes. The Holmes tradition of liberalism and philosophic approach were fully carried out by his successor in the same democratic and progressive spirit. His philosophic beliefs and directions Cardozo spelled out in his trilogy,[11] while his opinions generally struck close to the circumstances of the particular record.

> Judges like Brandeis, Cardozo, Stone brought to the bench a libertarian philosophy and used it to shape the law to the needs of an oncoming generation. In that sense they were "activists", criticized by many. But history will honour them for their creative work. They knew that all

[10] Kassan, "Louis Dembitz Brandeis—In Memoriam" (1971) 6 Is.L.R. 447 at 459.

[11] *The Nature of the Judicial Process* (1921); *The Growth of the Law* (1924); *The Paradoxes of Legal Science* (1928).

life is change and that law must be constantly renewed if the pressures of society are not to build up to violence and revolt.[12]

*Books*

The most important book written by Mr. Justice Cardozo is *The Nature of the Judicial Process*.[13] It was originally a series of four lectures delivered at the Yale University Law School in 1921. This book contains a careful analysis in a charming style of the various considerations, both conscious and unconscious, which influence a judge in reaching his conclusions.

In his illustrious essay, "The Judicial Process in Twentieth Century England"[14]—Lord Evershed, Master of the Rolls of Great Britain observed:

> ... anyone in my country, as in the United States, who wishes to reflect on the broad problems of the law's philosophy and the judicial function in its exposition will without doubt turn to the writings and recorded lectures and opinions of the great American judges and law teachers of recent times. To these authorities all English lawyers, and particularly English judges, acknowledge their indebtedness. I have in the course of this paper made reference to notable living American authorities. But the names of American judges of not long ago are constantly in mind, names like Oliver Wendell Holmes, Harlan Stone, Louis Brandeis and, especially in this context, Benjamin Cardozo, whose lectures, "The Nature of the Judicial Process", must always remain a classic—an assertion that is happily supported by the recent announcement of their publication in England. I have to confess that no English judge in modern times has provided any comparable work. But in the conditions under which we live and particularly in the presence of the flood of the enacted law that has inevitably affected and circumscribed the judicial function it is desirable to look to Cardozo's analysis and then try to discover how that analysis now operates.

Three years later, in 1924, Cardozo published *The Growth of the Law*,[15] based on a series of five lectures given at the Law School of Yale University in December, 1923. It is a sequel to his previous book. In these lectures, his thoughts are elaborated. Here he calls for fuller and more explicit emphasis that no single approach would give us the correct answer to our legal problems. He suggests a carefully phrased formula:

> You shall not for some slight profit of convenience or utility depart from standards set by history or logic; the loss will be greater than

[12] Douglas, *An Almanac of Liberty* (Doubleday, N.Y.) 104.

[13] New Haven, Yale University Press; Geoffrey Cumberlege, London, Oxford University Press.

[14] (1961) 61 Colum. L.R. 761 at 771–2.

[15] New Haven, Yale University Press; Geoffrey Cumberlege, London, Oxford University Press.

> the gain. You shall not drag in the dust the standards set by equity and justice to win some slight conformity to symmetry and order; the gain will be unequal to the loss[16] ... logic and history, the countless analogies suggested by the recorded wisdom of the past, will in turn inspire new expedients for the attainment of equity and justice.[17]

His next book, *The Paradoxes of Legal Science*,[18] based on a series of four lectures given at the Columbia University Law School in 1927 was published in 1928. In this book, he further discussed the relation between justice and law with more philosophic analysis. Again he emphasized that the legal process must be one of compromise and concordance. The many references in these lectures to Greek philosophy show how great a part his early classical training played in the formation of his ideas.

His last book, *Law and Literature*[19] is a collection of seven essays and addresses[20] given in the years 1921–1930. In the title essay, he described, in a passage which has frequently been quoted, the various types of judgments —

> As I search the archives of my memory, I seem to discern six types or methods which divide themselves from one another with measurable distinctness. There is the type magisterial or imperative; the type laconic or sententious; the type conversational or homely; the type refined or artificial, smelling of the lamp, verging at times upon preciosity or euphuism; the type demonstrative or persuasive; and finally the type tonsorial or agglutinative, so called from the shears and the pastepot which are its implements and emblem.[21]

In this essay most of his quotations are taken from English judgments ranging over many countries, and about them he says: "... for quotable good things, for pregnant aphorisms, for touchstones or ready application, the opinions of the English judges are a mine of instruction and a treasury of joy".[22]

*Judicial Opinions*

In his six years on the bench of the Supreme Court, Cardozo wrote approximately one hundred opinions, and during the prior period when he served for eighteen years on the bench of the New York Court of Appeals, he wrote approximately five hundred opinions.

16 *The Growth of the Law* 88.

17 *Ibid.*, p. 89.

18 Columbia University Press, N.Y., 1928.

19 Harcourt, Brace and Co., New York, 1931.

20 "Law and Literature", "A Ministry of Justice", "What Medicine Can Do For Law", "The American Law Institute", "The Home of the Law", "The Game of the Law and its Prizes", "The Comradeship of the Bar".

21 "Law and Literature", p. 10.

22 *Ibid.*, pp. 20–1.

He possessed a concise, vivid and convincing style. He had the singular felicity of presenting the most abstract legal proposition in clear, attractive, understandable form, of winning and holding the interest of the reader no matter what sphere of the law he was discussing.

His opinions are monuments of legal scholarship and bear the marks of careful preparation, of patient and laborious research, of a profound understanding of legal principles interpreted in the light of their past history and their present ethical, social and economic setting. Even the relatively unimportant cases gained distinction at his hands.

He made a conscientious effort to use few words and the best words to convey his thoughts: "The search is for the just word, the happy phrase, that will give expression to the thought, but somehow the thought itself is transfigured by the phrase when found. There is emancipation in our very bonds. The restraints of rhyme or metre, the exigencies of period or balance, liberate at times the thought which they confine, and in imprisoning release".[23] There is a poetic verse running through many of his opinions, a beauty, charm and grace of expression, a rhythm that is soothing to the senses. Often there are delightful historical and classical references. The reading of Cardozo's opinions is an intellectual adventure. Regretfully it would be beyond the scope of this article to review them in detail or to quote freely from them.

It is a sheer coincidence that both the first and the last opinions that he wrote in the Supreme Court arose out of the interaction of government and business. It is significant to note that in his first opinion, *Coombes* v. *Getz,* 285 U.S. 434, 448, (1932)) Cardozo spoke only for Mr. Justice Brandeis, Mr. Justice Stone and for himself, while his last opinion (*Smyth* v. *U.S.* 302 U.S. 329 (1937)) delivered in his absence by Chief Justice Hughes, was on behalf of a majority of the court.

### *The Law of Torts*

There is perhaps no branch of the law in which the creative element has a wider range than in the law of torts. This is one of the most human fields of legal relations. Cardozo was one of the most important single influential authorities in the development of the law of torts in the last half-century. He was at his best in this field, which touches most closely the everyday life of the community. Here, "a spirit of realism should bring about a harmony between present rules and present needs".[24]

Nowhere is the growth of enlightened concepts of justice better illustrated than in the cases under the law of torts where money claims are made for damage caused by negligence. Personal injury suits crowd the court calendars in increasing numbers. Novel situations are frequently presented and call for the application of novel principles. The need for creative energy and up-to-

[23] Cardozo, *The Growth of the Law* 89.

[24] Cardozo, *The Nature of the Judicial Process* 157–8.

date know-how on the part of judges becomes apparent in the tragic chaotic confusion of just demands and technical defences. Impatient of purely legalistic reasoning, interested primarily in people rather than in the involved problems of business, Cardozo found in torts perhaps the best field for the expression of his philosophy of life.

His greatest contribution to the law of torts was in the field of negligence. His opinions are models for courts and students alike. The following four opinions illustrate in the same degree the extent of his contribution to the law of torts.

*MacPherson* v. *Buick Motor Company*[25]

The judgment he rendered in this case became a landmark in the law of torts. There is hardly a law student, who does not make his acquaintance with Mr. Justice Cardozo through this great opinion which probably had more influence of the development of the law of torts than any other judicial opinion since *Rylands* v. *Fletcher*.[26]

The Buick Motor Company, the defendant in the case under review, was a manufacturer of automobiles. One of its cars sold to a retailer, was resold to the plaintiff, who was injured because one of the wheels of the car was made of defective wood causing its collapse. The defendant did not make the wheel but purchased it from another manufacturer. The evidence showed that the defect could have been discovered by reasonable inspection. The defendant, however, was negligent in failing to ascertain the defect. The plaintiff met with the argument that the company although it owed a duty of care to the retail dealer, with whom it did business, owed none to the plaintiff, and relied for this proposition on the traditional English leading case of *Winterbottom* v. *Wright*,[27] where the court of the Exchequer held that a person who had contracted to supply mail coaches for the Postmaster General and to keep them in repair was not liable to a driver hurt when one of them collapsed, because a breach of contract with one could not be made the basis of an action of tort against another.

Judge Cardozo was not satisfied to decide the case on the strength of this outworn precedent. He decided that the defendant company was liable to pay damages. In so doing, the rule of law was established that privity of contract is unnecessary to give the right to sue, where the article manufactured is of such a nature as to place life and limb in peril if negligently made, and where there is knowledge that the article will be used by persons other than the immediate purchaser.

Speaking for a court which granted recovery, Cardozo exposed the fallacy of the limitations which existed, pointing out that the results of the cases were both unjust and out of line with negligence principles:

[25] 217 N.Y. 382, 111 N.E. 1050 (1916).
[26] (1868) L.R. 3, House of Lords, 330.
[27] 10 M. & W. 109 (Ex. 1842).

"If the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger". Knowledge that the danger will be shared by others than the buyer "may often be inferred from the nature of the transaction . . . In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of the contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law".

"Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective . . . It was as much a thing of danger as a defective engine for a railroad. The defendant knew the danger. It knew also that the car would be used by persons other than the buyer. This was apparent from its size; there were seats for three persons. It was apparent also from the fact that the buyer was a dealer in cars, who bought to resell. The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect . . . The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be".

"Subtle distinctions are drawn by the defendant between things inherently dangerous and things imminently dangerous, but the case does not turn upon these verbal niceties. If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent".

Eight years later Judge Cardozo himself commented on this case and said: "Since the decision in *MacPherson* v. *Buick Mg. Co.,* decided in 1916, the law of New York must be said to be in accordance with the plaintiff's claim".[28]

Sixteen years later, in the English Case, *Donaghue* v. *Stevenson,*[29] the House of Lords held by a majority of three to two that a manufacturer of ginger-beer, who had sold a bottle of his beer with a dead snail in it to a retailer, was liable for his negligence to a third person, who had consumed the ginger-beer. The majority judgments cited Cardozo's opinion in the *MacPherson* case with approval, and in departing from previous English precedents, they adopted his reasoning.[30]

[28] Cardozo, *The Growth of the Law* 41.

[29] (1932) A.C. 562.

[30] The decision was affirmatively reviewed by the Right Hon. Sir Frederic Pollock in (1933) 49 Law Quarterly Review 22.

*The Wagner Case*

Second only in importance to the *Buick* case, was his opinion in *Wagner* v. *International Railway Company*.[31] It involved substantially the same principle as the *Buick* case but had its own difficulties. This case is a further illustration of the steady and continuous growth and development of the law in the field of human conduct.

The plaintiff, Arthur Wagner, and his cousin Herbert Wagner were on one of the defendant's inter-urban cars. The car was crowded and they both had to stand on the platform, the doors of which, the conductor had failed to close. When the car reached the curve of a certain point, it turned sharply without slowing speed and Herbert was thrown overboard into the darkness. The cry, "man overboard" was raised, but the car went on across the bridge, and stopped on the other side. In an attempt to rescue his cousin, Arthur jumped out and started to return through the darkness to search for his cousin, slipped and was badly injured.

That the defendant was negligent was clear; also that the negligence resulted in harm was also clear; but there was difficulty as to precedents. There was an additional problem of deciding whether the defendant could reasonably have anticipated harm to a rescuer. Previous decisions were far from conclusive. The defendant argued that it owed no duty of care to the plaintiff as he was a volunteer seeking to rescue his cousin.

Further, the defendant contended "that rescue is at the peril of the rescuer unless spontaneous and immediate. If there has been time to deliberate, if impulse has given way to judgment, one cause, it is said, has spent its force, and another has intervened".

> Cardozo replied:
> The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion . . .
> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim, it is a wrong also to his rescuer. The State that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid. The railroad company whose train approaches without signal is a wrongdoer also to the bystander who drags him from the path . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had . . .

[31] 232 N.Y. 176, 133 N.E. 437 (1921).

An elegantly written judgment is not only aesthetic but also gives effective and influential expression to the labours of the judge.

The importance of the *MacPherson—Buick* case and this case is that they focus attention upon the risk of harm and not upon the manner by which it is caused or the number of events intervening between the defendant's act and the catastrophe. The older phrases which were used to describe the situations and to determine fixed limits and definitions of liability are abandoned in favour of the realistic viewpoint by which anticipation of harm and not the proximity in point of space or time or the number of intervening events is of sole importance. The main question is whether there is sufficient risk.

In the English case of *Haynes* v. *Harwood*[32] fourteen years later, the English Court of Appeal had to determine whether a police constable who, to save a woman and some children, had stopped the defendant's horses which had run away owing to the driver's negligence, was entitled to recover damages for the serious injuries he had suffered. The Court of Appeal in reversing the judgment of the trial court, relying on Cardozo's opinion in the *Wagner* case held that the plaintiff was entitled to do so. Here again a narrow interpretation of the law was displaced by a more liberal doctrine which brought the law into consonance with the principles of humanity.

*Hynes* v. *New York Central Railroad Co.*[33]

In the hot days of the summer, young boys were enjoying themselves along the banks of the Harlem river in New York City and were jumping into the water for a swim from time to time to cool off. A sixteen-year old boy bathing in the river, climbed on to a springboard which had been fastened to a bulkhead on the defendant's land, and which projected from its property over the water. The boy proceeded to the end of the board. As he poised for his dive into the stream, he was struck by electric wires which fell from one of the defendant's poles and swept him to his death below. The wires were high tension wires by which the railroad operated its trains at that point. These wires fell because of the carelessness of the company's employees. The boy's parents sued the railroad, claiming the boy had been rightfully using the public waters when struck by the fault of the company. The railroad company defended the suit, on the ground that the boy was a trespasser on its land; consequently the company contended that it was not liable for any but an intentional injury. Actually, the boy was not standing on the land of the railroad when struck. The boy stood on the end of the springboard, extending some seven feet beyond the line of the railroad's property, and above the public waterway. The defendant's argument, however, was

[32] (1935) 1 K.B. 146.

[33] 231 N.Y. 229, 232, 236; 131 N.E. 898 (1921).

that because the board was annexed to its land at the rock end, it was a fixture and thus was constructively, if not actually, an extension of the land; hence the boy standing on it, was as much of a trespasser, as if he were standing on the company's ground. This contention met with success in the trial court and also in the appellate Division of the Supreme Court, where it was held that the boy's parents could not recover damages from the railroad. On second appeal to the New York Court of Appeals, the two judgments of the inferior courts were reversed. In a brilliant judgment showing deep human feeling Judge Cardozo declined to apply the severe common law rule protecting landowners from liability to trespassers harmed by static conditions of the land, even though the plank on which the boy was standing when struck was a fixture in the defendant's possession. This new decision, actually covering a virgin field, will leave an historic imprint on the law. The tricky perversities of logic were cast aside and abstract conceptions were subordinated to realities. Judge Cardozo wrote: "This case is a striking instance of the dangers of 'a jurisprudence of conceptions', the extension of a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme' ... The defendant was under a duty to use reasonable care that bathers swimming or standing in the water should not be electrocuted by wires falling from its right of way. But to bathers diving from the springboard, there was no duty, we are told, unless the injury was the product of mere willfulness or wantonness, no duty of active vigilance to safeguard the impending structure ... The conclusion is defended with much subtlety of reasoning, with much insistence upon its inevitableness as a merely logical deduction. A majority of the court are unable to accept it as the conclusion of the law ... jumping from a boat or a barrel, the boy would have been a bather in the river. Jumping from the end of a springboard, he was no longer, it is said, a bather, but a trespasser on a right of way. Rights and duties in systems of living law are not built upon such quicksands ... In one sense, and that a highly technical and artificial one, the diver at the end of the springboard is an intruder on the adjoining lands. In another sense, and one that realists will accept more readily, he is still on public waters in the exercise of public rights. The law must say whether it will subject him to the rule of the one field or of the other, of this sphere or of that. We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of the defendant's immunity and exemption, and place him in the field of liability and duty".

Judge Cardozo convinced the majority of the court that the social interest would best be served by taking the broad and realistic view of the situation, by refusing to push logic to an artificial extreme. It was a close question, bound to call for difference of opinion. It was decided, in favour of the boy's parents, by a vote of only four to three. Thus, the more humane philosophy, the one of social utility, adjusting liability to the ends which the law should serve, triumphed by a small margin.

Commenting on this case, a year later, in one of his lectures at Trinity College, Cambridge, Dean Pound said: "It is a welcome sign of the times, that when legal conceptions were pressed upon the New York Court of Appeals recently and it was asked to hold that where a springboard projected from a railroad right of way on a river where the public had a right to bathe, as the springboard was annexed to the right of way and hence was a fixture, a man on the end over the river was technically a trespasser and so was not protected from the negligence of the railroad company—When asked to apply logic to legal conceptions in this way, the court denounced the jurisprudence of conceptions and refused to carry out the conception of a fixture and the conception of trespass to such a result".[34]

*The Palsgraf Case*

The opinion in *Helen Palsgraf* v. *Long Island Railroad Company*[35] is another landmark in the law of negligence. It was a natural development of the theory underlying the three preceding cases. At the outset it is very important to emphasize the final results of the present case *vis-à-vis* the final results of the three preceding cases. The very fact that in this case judgment was given for the plaintiff accentuates rather than throws doubt upon the underlying theories of the four cases, which is that risk not merely creates the existence of liability, but defines its limits both with reference to the person injured and to the harm.

In this case, Mrs. Palsgraf was standing in a railroad station many feet away from the track. Two train guards, in assisting a passenger to reach the platform of the already moving train, clumsily knocked a small package from his arms. Although its appearance did not so indicate, it contained fireworks. The package fell and the fireworks exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck and injured the plaintiff. Thereupon, she sued the Long Island Railroad Company for damages. The jury returned a verdict in her favour, finding that the guards of the railroad were negligent. The railroad company promptly appealed and the appeal was dismissed. On further appeal to the New York Court of Appeals, both judgments of the lower courts were reversed by a four to three decision, Chief Judge Cardozo writing the prevailing opinion: "... The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another ... There must be a violation of a right owing to the person seeking redress ... The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it

[34] Pound, *Interpretations of Legal History* (Cambridge University Press, 1923) 123.
[35] 248 N.Y. 339, 341, 342, 343, 346; 162 N.E. 99 (1928).

the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right... [The plaintiff might] claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue, [but] if no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else... Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right... One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person... affront to personality is still the keynote of the wrong... The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another... He sues for breach of duty owing to himself. The law of causation, remote or proximate, is thus foreign to the case before us.... One who jostles one's neighbour in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behaviour must conform".

In conclusion, Chief Judge Cardozo admitted that "there is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforseeable invasion of an interest of another order, as e.g., one of bodily security. Perhaps other distinctions may be necessary—we do not go into the question now. The consequences to be followed must first be rooted in a wrong." This decision was not made without a sharp difference among the judges. Judge Willian S. Andrews, in a strong dissenting opinion led the minority of three judges. These two conflicting opinions make the issues clear, crystallizing the arguments which have surrounded the specific problems of the case.

*The Law of Contracts*

Cardozo wrote more than one hundred opinions in this field of the law while serving on the bench of the New York Court of Appeals, but it cannot be claimed that he made any extensive changes in the existing law of contracts. A review of these consecutive opinions will show the application of existing doctrines with sagacity, prudence and common sense, restricted

within fairly definite limits, determined by his own experience and study. His opinions demonstrate his instinct for a justice that is human and practical. Himself a master of expression, both graceful and exact, he knows also how to understand and interpret the language of contracts, graceless and inexact.

It was not often that he dissented in a contract case. It was others who frequently dissented, for Cardozo constantly attempted to mould the law to justice, not necessarily applying literal rules and definitions regardless of the consequences. Only rarely did he fail to induce the assent of at least four of his colleagues on the bench. Occasionally he wrote a concurring opinion; but the others concurred in that, too.

In one of his earliest opinions Cardozo wrote:[36]

> The law, in construing the common speech of men, is not so nice in its judgments as the defendant's argument assumes. It does not look for precise balance of phrase, promise matched against promise in perfect equilibrium. It does not seek such qualities even in written contracts, unless perhaps the most formal and deliberate, and least of all does it seek them where the words are chosen by the master under legal advice and accepted by the servant without the aid of like instruction. There are times when reciprocal engagements do not fit each other like the parts of an indented deed, and yet the whole contract... may be "instinct with an obligation" imperfectly expressed.

Just as promises that are not clearly defined can be made clear by a liberal process of interpretation, so also can entire promises be found by reading between the lines. Furthermore, where an agent expressly promised to serve for five years, the court was able to find an implied promise by the principal to employ him for five years.

Thus, if a promise by a principal can be implied for the purpose of enforcing it, so also can a promise by the agent be implied in order to serve as a consideration for an express promise by the principal.

*Otis F. Wood* v. *Lucy, Lady Duff-Gordon*[37]

In this case the principle was carried to its logical conclusion by a closely divided court. Lady Gordon, who styled herself "a creator of fashions", promised her agent in writing that he should have the exclusive privilege of marketing her fashion designs. When sued for breach, she argued that the agent had not made a return promise. Judge Cardozo thus replied:

> ... The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's endorsements

[36] *Moran* v. *Standard Oil Co.* 211 N.Y. 187, 197; 105 N.E. 217, 221 (1914).
[37] 222 N.Y. 88, 90; 118 N.E. 214 (1917).

and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be "instinct with an obligation" imperfectly expressed. If that is so, there is a contract.

*The Doctrine of Consideration*

Cardozo's opinion in the case of *De Cicco* v. *Schweizer*[38] indicates a tendency to liberate the courts from the ancient common law principles governing the doctrine of "consideration" in relation to binding contracts. And yet, he does not purport to abandon these ancient principles and elementary knowledge, or to make new laws. He recognizes growth and the necessity of changes in doctrine; but the statement of new doctrine he leaves to the competent authorities. His compass pointed to his guiding star of good faith in promises and justice in meeting expectations; and he held to his course, labouring resolutely with courage to make the shifting winds of doctrine and the waves of sentiment aid him toward his goal.

One such example of his characteristic craftsmanship is his opinion in the present case.

A written agreement was executed between the defendant Joseph Schweizer and his wife Ernestine and Count Oberto Gulinelli, who was affianced to their daughter. The wording was: "whereas, Miss Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer... is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli, now in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche, during his own life and to send her, during her life-time, the sum of two thousand five hundred dollars..."

The father paid the annuity for 12 years and later reneged. The plaintiff who held an assignment executed by the daughter in which her husband joined, was sued for an annual instalment. The court rendered judgment for the plaintiff. The issue was: was there any consideration for the promise of Joseph Schweizer? In the signed document, as cited above, none is stated other than the statement of fact that Blanche "is now affianced to and is to be married to" the Count. This statement was true. The happy pair were indeed engaged, and the wedding day was promptly set. They were actually married four days after the father made his promise. The plaintiff argued that the "marriage" was the consideration. The defendant argued its insufficiency on the grounds that the marriage was no more than the performance of an already existing legal duty, since the Count was already affianced to Miss Schweizer, and thus "consideration" was lacking.

[38] 221 N.Y. 431, 436, 438, 439; 117 N.E. 807 (1917).

Furthermore, from the words of the document alone, it would be reasonable to believe that in making his promise, Joseph was motivated and induced by his love for his daughter, his joy at her approaching marriage, and his desire to provide for her support. None of these inducements would be a sufficient "consideration" at common law. Nevertheless, Cardozo decided that the trial judge was justified in making the inference of a bargain, and said:

> . . . undoubtedly, the prospective marriage is not to be deemed a consideration for the promise unless the parties have dealt with it on that footing. Nothing is consideration that is not regarded as such by both parties. But here the very formality of the agreement suggests a purpose to affect the legal relations of the signers. . . we cannot say that the promise was not intended to control the conduct of those whom it was designed to benefit. Certainly we cannot draw that inference as one of law.

The next question is: was the purpose to enforce a promise that was reasonably relied on? Furthermore: did the marriage in fact take place in reliance on Joseph's promise? Cardozo recites the circumstances, and comes to the conclusion that:

> . . . we may infer that at the time of the marriage the promise was known to the bride as well as the husband, and that both acted upon the faith of it. . . that they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission and delay aside.
>
> With all due respect and humility, surely this is a sound and convincing conclusion. But finally, was the marriage anything more than the performance of an existing legal duty, both on the part of the Count who was promisee, and on the part of Blanche who was a donee beneficiary? Not a duty owed by them to father Joseph; they are not shown to have made any engagement with him to marry each other. It was a contractual duty of each to the other. The promisee, Count Gulinelli, was under a legal duty to Blanche, a third party, albeit one to whom the money was to be paid and who, equally with the count, acted in reliance on the promise.

Cardozo had to admit, "The courts of this state are committed to the view that a promise by A to B inducing him not to break his contract with C is void . . ." but showing his intellectual inspiration he added "We have never held, however, that a like infirmity attaches to a promise by A, not merely to B, but to B and C jointly, to induce them not to rescind or modify a contract, which they are free to abandon".

This promise, he maintained was intended to affect the conduct of both the daughter and her husband. Though it runs to the Count, it was for the benefit of the daughter. As a natural consequence of the defendant's

promise, they had put aside the thought of rescission or delay. "Consideration" had been provided.

There is no direct assault in Cardozo's opinion on the ancient doctrine of "consideration", which many jurists acknowledge to be often superfluous at the present time. There is no dismissal, in his opinion, of the recitals in the instrument and a direct acceptance of the marriage as consideration, if consideration be retained. There is not a direct disposition, to put promises affecting entrance into marriage into an exceptional category as far as consderation is concerned. But there is instead creative soundness in this decision. Cardozo's opinion demonstrates its justice, cites and weighs critically the literature on the topic involved, and lays a foundation for subsequent development.

*Jacobs and Youngs* v. *Kent*[39]

This is another noteworthy instance of legal formula yielding to demands of justice and fair dealing. In a contract for the construction of a building at a cost of more than $77,000, the specifications required certain iron pipe to be of "Reading" manufacture. A subcontractor used "Cohoes" pipe instead, identical in quality. After completion, the final instalment of the price was refused. The architect refused to issue his certificate and ordered the substitution of "Reading" pipe.

Refusal of the certificate was followed by this suit brought by the plaintiff, who built the residence for the defendant, to recover a balance of $3,483.46 remaining unpaid. The work of construction ceased in June 1914, and the defendant then began to occupy the dwelling. There was no complaint of defective performance until March 1915.

The evidence sustains a finding that the omission of the prescribed brand of pipe was neither fraudulent nor wilful. The trial court prevented the plaintiff from proving that the change of the pipes used was trivial and directed a verdict for the defendant. The plaintiff was also ordered to do the work anew. Obedience to the order meant more than the substitution of other pipes. It meant the demolition at great expense of substantial parts of the completed structure.

On appeal, the Appellate Division of the Supreme Court, granted a new trial. On further appeal, the New York Court of Appeals directed judgment absolute in favour of the plaintiff.

This is another opinion written by Cardozo, in which the question of dependency of promises and implied conditions of a contracting party's duty to pay, is discussed with so much enlightened intelligence and charm of expression accompanied by deep human sympathy. "The courts", declares Cardozo, "never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however,

[39] 230 N.Y. 239, 242, 244; 129 N.E. 889 (1921).

that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture... The distinction is akin to that between dependent and independent promises, or between promises and conditions... Considerations partly by justice and partly by presumable intention are to tell us whether this or that promise shall be placed in one class or in another... If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution... Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favour of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier... Where the line is to be drawn between the important and the trivial cannot be settled by a formula... The same omission may take on one aspect or another according to its setting. Substitution of equivalents may not have the same significance in fields of art on the one side and in those of mere utility on the other. Nowhere will change be tolerated, however, if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract. There is no general licence to install whatever, in the builder's judgment, may be regarded as 'just as good'. The question is one of degree, to be answered, if there is doubt, by the triers of the facts and, if the inferences are certain, by the judges of the law. We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfilment is to be implied by law as a condition... The wilful transgressor must accept the penalty of his transgression. For him there is no occasion to mitigate the rigour of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong."

On the measure of the damages for the contractor's minor breach, the opinion shows the same clear common sense.

Blessed with an understanding of human justice, its expression in judicial opinions, and its basis in the prevailing but sometimes changing *mores* and practices of men, the great jurist writes the following conclusion:

> In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing... The rule that gives a remedy in cases of substantial performance with compensation for defects of trivial or inappreciable importance, has been developed by the courts as an instrument of justice. The measure of the allowance must be shaped to the same end.

*The Law of Equity*

One of the well-known opinions written by Cardozo in this field of the law is in the case of *Globe Woollen Company* v. *Utica Gas and Electric Co.*[40]

The plaintiff sued to compel the specific performance of contracts to supply electric current to its mills. The defendant contended that the contracts were made under the dominating influence of a common director, that their terms were unfair, and their consequences oppressive; hence, the contracts could not stand.

A referee sustained the defence. The Appellate Division of the Supreme Court affirmed his decision with some modifications.

The plaintiff company was the owner of two mills in the city of Utica. The defendant company generated and sold electricity for light and power. For many years John F. Maynard was the plaintiff's chief stockholder, its president and a member of its board of directors. He also served as a director of the defendant company, and as the chairman of its executive committee.

The background of the case may be briefly stated: at the very beginning, the plaintiff's mills were run by steam. This kind of operation became antiquated and inadequate. After some years electric power was substituted. To this effect, contracts were executed between the two parties. It took the form of letters exchanged between the two companies, which were ratified by the executive committee at a meeting which was presided over by Mr. Maynard, who put the resolution to a vote, but he himself did not vote. It clearly appeared that the defendant had made losing contracts due to miscalculations; but only gradually did the extent of the loss, its permanence and its causes become clear. Both the referee and the Appellate Division annulled these contracts. It would appear that the evidence supported the conclusion that the contracts were voidable at the election of the defendant. The plaintiff did not deny that this would have been true if the dual director, namely Mr. Maynard, had voted at the executive committee meeting for their adoption. On this point, however, the plaintiff argued that since the common director refrained from voting on the transactions, the responsibility was shifted to his associates, and that he was entitled to reap a profit from their errors. To this argument, Judge Cardozo replied: "One does not divest oneself so readily of one's duties as trustee. The refusal to vote has, indeed, this importance: It gives to the transaction the form and presumption of propriety, and requires one who would invalidate it to probe beneath the surface. But 'the great rule of law', which holds a trustee to the duty of constant and unqualified fidelity, is not a thing of forms and phrases. A dominating influence may be exerted in other ways than by a vote. A beneficiary, about to plunge into a ruinous course of dealing may be betrayed by silence as well as by the spoken word. The trustee is free to stand aloof,

[40] 224 N.Y. 483, 489; 121 N.E. 378 (1918).

while others act, if all is equitable and fair. He cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface, or lurking beneath the surface, but visible to his practised eye . . . No label identified the request of Mr. Maynard, the plaintiff's president, as something separate from the advice of Mr. Maynard, the defendant's chairman . . ."

"A trustee may not cling to contracts thus won, unless their terms are fair and just. He takes the risk of an enforced surrender of his bargain if it turns out to be improvident. There must be candor and equity in the transaction, and some reasonable proportion between benefits and burdens . . ."

"The contracts before us do not survive these tests. The unfairness is startling, and the consequences have been disastrous. . . . These elements of unfairness, Mr. Maynard must have known, if indeed his knowledge be material."

"We hold, therefore, that the refusal to vote does not nullify as of course an influence and predominance exerted without a vote. . . .. We hold that the constant duty rests on a trustee to seek no harsh advantage to the detriment of his trust, but rather to protest and renounce if through the blindness of those who treat with him he gains what is unfair. And because there is evidence that in the making of these contracts, that duty was ignored, the power of equity was fittingly exercised to bring them to an end."

In conclusion, the judgment was affirmed and all the judges concurred, with the exception of Judge Andrews, who was absent.

*Caveat emptor*

*Caveat emptor* is a maxim that will often have to be followed when the morality which it expresses is not that of sensitive souls. Other relationships in life, as e.g., those of trustee and beneficiary, or principal and surety, impose a duty to act in accordance with the highest standards which a man of the most delicate conscience and the nicest sense of honour might impose upon himself. "In such cases, to enforce adherence to those standards becomes the duty of the judge. Whether novel situations are to be brought within one class of relations or within the other must be determined, as they arise, by considerations of analogy, of convenience, of fitness, and of justice."[41]

Cardozo's attitude of strong opposition toward selfish and unconscionable conduct among corporation directors succeeded in moulding the law in that larger form. And his decision, which was unanimous, served the useful social purpose of giving warning to businessmen, particularly to company directors, that only the highest standard of business action would be tolerated by the court.

"Who can doubt that courts of equity in enforcing the great principle

[41] Cardozo, *The Nature of the Judicial Process* 109–110.

that a trustee shall not profit by his trust nor even place himself in a position where his private interest may collide with his fiduciary duty, have raised the level of business honour and kept awake a conscience that might otherwise have slumbered?"[42]

> What does the Lord require of thee?
> But to do justice and to love mercy![43]

By all means, mercy is not to be contrasted with justice, as we commonly find that it is. Cardozo, however, always maintained that mercy is compounded into the very essence of justice. But his liberal views have not always prevailed. Sometimes the strict letter of a contract wins the adherence of a majority of the court, in spite of the apparent injustice of an equitable claim. When it did, Cardozo was outspoken in his opposition. Ever mindful of equity's purpose to relieve the hardship of an unconscionable law, he tried his best to avert a contrary holding.

A good example is the *Graf* v. *Hope Building Corporation* case.[44] This was an action to foreclose a mortgage because of a default in payment of an instalment of the interest. The undisputed facts are as follows:

The estate of Joseph Graf owned a mortgage on some valuable property located in New York City belonging to the defendant corporation. A clause in the mortgage deed provided that the entire amount of the principal debt, over $300,000 should become due after default for twenty days in the payment of any instalment of interest. On June 2, 1927, the president of the corporation left for Europe on a business trip. Prior to his departure he signed a check for $4,219.69 to cover the interest payment due on July 1. The amount was $401.87 short, owing to an error of the bookkeeper's secretary. When she discovered her error, she mailed the check to the plaintiff on June 24, explaining the error and telling him that a check for the balance would be forwarded when the president returned on or about July 5, since only the president of the corporation was authorized to sign checks on behalf of the corporation. The mortgagee did not reply to that letter, but he cashed the check and did not react in any other way. Meanwhile, the secretary forgot to call the matter to the attention of the president when he returned from his trip. The twenty day period of grace expired, and on the next day, on July 22, without notice or warning, the mortgagee brought suit for the foreclosure of the mortgage. This suit was the first notice that the responsible head of the corporation had of anything being wrong. The corporation tendered payment of the overdue instalment the same day. The payment was bluntly rejected.

The trial court decided in favour of the defendant. The New York Court of Appeals reversed the liberal holding of the lower court and decreed in

[42] Cardozo, *The Growth of the Law* 96.

[43] *Micah* 6:8.

[44] 254 N.Y. 1, 5; 171 N.E. 884 (1930).

favour of the plaintiff. Judge O'Brien led a bare majority of four in granting the plaintiff's claim, relying on his legal rights in accordance with the terms expressed in the mortgage. Regardless of circumstances, there had been default, and a default meant forfeiture. The majority of the court refused to be moved by sympathy for the inadvertence, the smallness of the amount involved, or the fact that the mortgagee was obviously seizing his advantage. "The secretary's forgetfulness during this time", wrote Judge O'Brien for an unyielding majority," is not sufficient excuse for a court of equity to refuse to lend its aid to the prosecution of an action based upon an incontestably plain agreement. Such a refusal would set at nought the rules announced and enforced for a century..."

It was one of the rare cases in which Cardozo could not win the court to his view. Thus he felt compelled to state his opposition in a long dissenting opinion, in which Judges Lehman and Kellogg concurred, calling his colleagues' attention to the fact that there was such a thing as equity.

Cardozo's vigorous dissent in this case has such organic unity that one can hardly avoid mutilation in brief excerpts. "There is no undeviating principle that equity shall enforce the covenants of a mortgage, unmoved by an appeal *ad misericordiam,* however urgent or affecting. The development of the jurisdiction of the chancery is lined with historic monuments that point another course... Equity follows the law, but not slavishly nor always... If it did, there could never be occasion for the enforcement of equitable doctrine..."

"When an advantage is unconscionable depends upon the circumstances. It is not unconscionable generally to insist that payment shall be made according to the letter of a contract. It may be unconscionable to insist upon adherence to the letter where the default is limited to a trifling balance, where the failure to pay the balance is the product of mistake and where the mortgagee indicates by his conduct that he appreciates the mistake and has attempted by silence and inaction to turn it to his own advantage. The holder of this mortgage must have understood that he could have his money for the asking. This silence followed as it was, by immediate suit at the first available opportunity, brings conviction to the mind that he was avoiding any act that would spur the mortgagor to payment. What he did was almost as suggestive of that purpose as if he had kept out of the way in order to avoid a tender..."

"In this case, the hardship is so flagrant, the misadventure so undoubted, the oppression so apparent, as to justify a holding that only through an acceptance of the tender will equity be done".

"The omission to pay in full had its origin in a clerical or arithmetical error that accompanied the act of payment, the very act to be performed. The error was not known to the debtor except in a constructive sense, for the secretary, a subordinate clerk, omitted to do her duty and report it to her principal. The deficiency, though not so small as to be negligible within

the doctrine of *de minimis*, was still slight and unimportant when compared with the payment duly made. The possibility of bad faith is overcome by many circumstances, of which not the least is the one that instantly upon the discovery of the error, the deficiency was paid, and this only a single day after the term of grace was at an end. Finally, there is no pretence of damage or even inconvenience ensuing to the lender. On the contrary, and this is the vital point, the inference is inevitable that the lender appreciated the blunder and was unwilling to avert it. From the conduct on the day immediately succeeding the default, we can infer his state of mind as it existed the day before. When all these circumstances are viewed in their cumulative significance, the enforcement of the covenant according to its letter is seen to approach in hardship the oppression of a penalty . . ."

"Equity declines to intervene at the instance of a suitor who after fostering the default would make the court his ally in an endeavour to turn it to his benefit."

". . . True, indeed, it is that accident and mistake will often be inadequate to supply a basis for the granting or withholding of equitable remedies where the consequences to be corrected might have been avoided if the victim of the misfortune had ordered his affairs with reasonable diligence. . . The restriction, however, is not obdurate, for always the gravity of the fault must be compared with the gravity of the hardship . . . Let the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path . . ."

Cardozo's beneficent attitude in this case was an echo of his moving indictment of judicial logic:

> Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, nonetheless, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity. . . I suspect that many of these sacrifices would have been discovered to be needless if a sounder analysis of the growth of law, a deeper and truer comprehension of its methods, had opened the priestly ears to the call of other voices. . . Hardly is the ink dry upon our formula before the call of an unsuspected equity—the urge of a new group of facts, a new combination of events—bids us blur and blot and qualify and even, it may be, erase.[45]

### *A Talmudic Legend*

There is an old Talmudic story, that on one occasion God wished to pray, and his prayer was "Be it my will that my justice be ruled by my mercy".[46]

When one encounters these words in Mr. Justice Cardozo's opinions and

[45] Cardozo, *The Growth of the Law* 66–67.

[46] *Berakhot* 1:7a.

in his other writings, one is tempted to seek in them the keynote of his entire personality. There is something about this legend of God's prayer that suggests the magnificent aloofness of the man, the sublime loftiness of his judicial position, his passion for justice, his dignified humility. If the fine concept of God's prayer for justice-tempered-with-mercy gives but the merest cue to his personality, there is another passage in his writings which perhaps throws more light on the subject:

> What we are seeking is not merely the justice that one receives when his rights and duties are determined by the law as it is; what we are seeking is the justice to which law in its making should conform. Justice in this sense is a concept by far more subtle and indefinite than any that is yielded by mere obedience to a rule. It remains to some extent, when all is said and done, the synonym of an aspiration, a mood of exaltation, a yearning for what is fine or high... Perhaps we shall even find at times that when talking about justice, the quality we have in mind is charity, and this though the one quality is often contrasted with the other.[47]

*Taxation*

Taxation is the most sensitive area of contemporary government, but the intellectual perspective in which Cardozo placed tax measures, induced by social rather than fiscal motives was expressive of his general attitude toward the diverse manifestations of the modern state. Modern industrial and economic conditions demand that the states of the Union should not be hampered in the exercise of their constitutional powers, that they should be allowed, within a flexible rather than rigid and strict constitution, to regulate and tax and control private property in the public interest.

In the Florida Chain Store Case,[48] decided in March 1933 by the Supreme Court, Cardozo had occasion to express his liberal views previously expressed in the New York Court of Appeals.

The rapid rise of the chain store method of doing business, successfully competing with the small local store, had called forth legislative action regulating such stores. Legislatures commonly taxed the chain stores at a higher rate for the privilege of conducting large-scale business than they taxed the one man business. Objections were at once raised by the big chain stores, that they were being discriminated against, in violation of their right, under the constitution, to the equal protection of the laws.

The Supreme Court was first confronted with this problem in 1931, when grocery chain stores in the State of Indiana objected to the levy of the Indiana legislature. The court then held the legislature of Indiana was entitled to assess chain stores at a higher rate than individual stores. The difference in the methods of doing business, the advantage which larger

[47] Cardozo, *The Growth of the Law* 87.

[48] *Liggett* v. *Lee,* 288 U.S. 517 (1933).

capital investment and unified corporate control gave to the chain stores, furnished a legitimate basis for imposing the higher tax on them. But when, two years later, chain stores in the State of Florida protested against the Florida tax, the protest was accepted and a majority of the judges, headed by Mr. Justice Roberts, declared the Florida tax to be unconstitutional. Justices Brandeis, Stone and Cardozo dissented. It is true that the Florida tax went further than the Indiana tax had gone in that it laid a heavier tax on chain stores which did business in several counties in the State than it laid on chain stores located in but a single county. This seemed to Mr. Justice Roberts and his colleagues to be an arbitrary distinction in violation of the store's right to the equal protection of the laws.

Facing the situation realistically, Cardozo pointed out: "Systems of taxation are not framed, nor is it possible to frame them, with perfect distribution of benefit and burden. Their authors must be satisfied with a rough and ready form of justice. This is true in special measure while the workings of a novel method are untested by a rich experience. There must be advance by trial and error... In discarding as arbitrary symbols the lines that it (the legislature) has chosen, there is danger of forgetting that in social and economic life the grooves of thought and action are not always those of logic, and that symbols may mean as much as conduct has put into them".

Thus, various forms of taxation have been devised in response to the problems presented by economic concentration. Whether to differentiate between big and smaller business, and how to do so—these are economic problems which divide expert as well as lay opinion. No one will deny that this is a field into which the state may enter. The wide range of discretion which is given to the legislative authorities must not generally be curtailed by judicial intrusion. Cardozo translated these generalities into living practice. For he viewed measures of social taxation with a judicious eye: "Statistics ... indicate that there is a definite line of cleavage between chains that serve consumers within a single territorial unit and those framed for larger ends. The business that keeps at home affects the social organism in ways that differ widely from those typical of a business that goes out into the world. It affects the social organism but also it affects itself. With the lengthening of the chain there are new fields to be exploited. The door is open to opportunities that have hitherto been closed. Where does the local have an end and the non-local a beginning? The legislature had to draw the line somewhere, and it drew it with the county. Within the range of reasonable discretion its judgment must prevail."

"In the south from the beginning the distinctive unit has been the county... The movement from one county to another becomes in a very definite sense the crossing of a frontier, a change as marked as the difference between wholesale trade and retail. So at least the legislature might not unreasonably believe, and act on that belief in the formulation of the

law . . . Lawmakers are not required to legislate with an eye to exceptional conditions. Their search is for probabilities and tendencies of general reality, and these being ascertained, they may frame their rule accordingly. They are not required to legislate with an eye to forms of growth beyond the limits of their own State. In laying a tax upon a Florida chain their concern is with those activities that have social and economic consequences for Florida and her people. The question for them, and so for us, is not how a business might be expected to develop if its forms and lines of growth were to be predicted to develop in the abstract without reference to experience. The question is how it does develop in normal or average conditions, and the answer to that question is to be found in life and history. . . . The legislature has found them [the differences] in those variations of degree that separate a chain within the territorial unit of the locality from chains that are reaching out for wider fields of power. There is no need to approve or disapprove the concept of utility or inutility reflected in such laws. . . The concept may be right or wrong. At least it corresponds to an intelligible belief, and one widely prevalent today among honest men and women. . . With that our function ends."

Mr. Justice Stone and Mr. Justice Brandeis concurred. The latter wrote a separate dissent, which is one of the most masterful opinions of his judicial career, analyzing the economics of chain store operation and displaying total disagreement with the argument that there was no valid basis for the tax.[49]

*Civil Rights*

When ethical precepts which are embodied in the Bill of Rights were invoked, Cardozo responded with all the talent and gift of one whose most constant companion was reason and whose life was rooted in the moral law and values. Regrettably, the brevity of his tenure in the Supreme Court gave him only limited opportunity to express his views on the claims of civilization justified by constitutional protection of civil liberties.

For him civil liberties were not empty slogans but cherished protections of the human spirit. They derived meaning from history and were given pertinence by contemporary society. He was, however, too steeped in the history of the law not to detect quickly dishonest uses of history. Here is a simple case with an interesting historical background.

L.A. Nixon, a black citizen of Texas, sought to cast a ballot at the primary; but he was denied permission because of his colour. Both the federal district court in Texas and the Circuit Court of Appeals approved the denial. He carried his case to the United States Supreme Court and there the tables were turned. Mr. Justice Cardozo, writing the majority

[49] See Kassan, "Louis Dembitz Brandeis—In Memoriam" (1971) 6 Is.L.R. 447, 453.

opinion of the court, annulled the denial and declared that the black citizen was entitled to vote.[50]

In the state of Texas there existed a statute which prohibited blacks from voting at Democratic primaries in that State. That statute was declared void by the Supreme Court of the United States and the state of Texas was rebuked for denying to a black his right to vote. About that statute, Mr. Justice Holmes had said: "It seems to us hard to imagine a more direct and obvious infringement of the Fourteenth Amendment".[51] This Amendment had been written into the American Constitution in 1868, at the close of the Civil War in the United States. Its primary purpose, while applying to all citizens, was to protect the new freedmen from hostile civil and political discrimination by state governments, "with a special intent to protect the blacks from discrimination against them",[52] and a statute which denied them the rights of other citizens, in the South or elsewhere, because of colour, was null and void. But there are ways of avoiding such an unsavoury constitutional provision as the Fourteenth Amendment, despite the protection of the United States Supreme Court. The lawmakers of the state of Texas wasted no time in devising an ingenious method of correcting the U.S. Supreme Court decision. They were resolved that blacks in Texas were not to vote, Supreme Court or no Supreme Court. Thus a new statute was created in 1927, which provided that the state executive committee of any political party should have the power to prescribe the qualifications of party members and should determine in its own way who should be entitled to vote. This, it was thought, would evade the restrictions of the Fourteenth Amendment by making the action of hostility to the coloured people the action of a private group—a political party, rather than official state action. The new law merely said: "No state shall deny to any person the equal protection of the law". Formerly, the state, through its legislature, had forbidden blacks to vote. Now, if blacks were to be forbidden, it was the political party alone which did it, and the state, in their eyes, could not be held responsible. Hence, the executive committee of the Democratic Party at once adopted the resolution that white men only could vote at the party primaries.

Nixon, having brought his earlier case all the way up to the United States Supreme Court, now had to start a second battle. He promptly sued the election judges for damages in a federal district court in Texas. The court ruled out his complaint on the ground that he had not been denied any right by the State. The discrimination against him was set up by a private political party. The federal constitution had nothing to do with such action. This ruling was affirmed on appeal by the Circuit Court of Appeals. The persistent

[50] *Nixon* v. *Condon,* 286 U.S. 72 (1932).
[51] *Nixon* v. *Hermdon,* 273 U.S. 536 (1926).
[52] *Ibid.*

black did not acquiesce and again carried his case to the United States Supreme Court. This time Mr. Justice Cardozo—the successor of Mr. Justice Holmes—wrote the opinion of the majority of five, over four heated protests led by Mr. Justice McReynolds of Tennessee.

Cardozo's view was that the hostile action of the state executive committee was in substance the action of the State itself, and as such, forbidden by the Fourteenth Amendment.

> ... Whatever power of exclusion has been exercised by the members of the committee has come to them, not as the delegates of the party, but as the delegates of the State... If heed is to be given to the realities of political life, they are agencies of the State, the instruments by which government becomes a living thing... The pith of the matter is simply this, that when those agencies are vested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power.

Surely the executive committee had not acted under the authority of the political party but under the authority of the statute, the official edict of the state lawgivers. How then could it be said that the denial of the right to vote was the work of a political party? In these circumstances, both the political party together with the executive committee acted as a fictitious and disguised camouflage of the state of Texas. Seen in that realistic light, the denial of the right to vote was the denial of the State, and henceforth, it became the duty of the Court to declare it inoperative.

Four justices dissented. Mr. Justice McReynolds was joined by the stalwarts of the Old Guard: Justices Van Devanter, Sutherland and Butler. They considered that the executive committee had a perfect right to bar black citizens from the polls, and the state of Texas could not be held responsible.

*Conscientious Objectors*

"One... does not prove by his martyrdom that he has kept within the law".[53] The American Congress donated public lands to the University of California for the purpose of supporting a college for the teaching of agriculture and other sciences including military tactics. Any resident of California with proper requirements may study at this university but it is required from the students to take a course in military science and tactics.

Albert W. Hamilton, together with other students, petitioned the university authorities for exemption from military training, upon the grounds of their religious and conscientious objections.

[53] *Hamilton* v. *Regents of the University of California,* 293 U.S. 245, 265, 266 (1934) Cardozo concurring.

The regents of the university rejected the petition. Thereupon the students refused to take the prescribed course. Shortly thereafter they received formal notification from the regents suspending them from the university with leave to apply for readmission at any time, conditional upon their ability and willingness to comply with all applicable regulations of the university governing the attendance of students.

The main opinion of the Supreme Court upholding the regents was written by Mr. Justice Butler. Concurring in the opinion, Mr. Justice Cardozo wrote "... the petitioners have not been required to bear arms for any hostile purpose, offensive or defensive, either now or in the future. They have not even been required in any absolute or peremptory way to join in courses of instruction that will fit them to bear arms. If they elect to resort to an institution for higher education maintained with the state's money, then, and only then, they are commanded to follow courses of instruction believed by the state to be vital to its welfare. This may be condemned by some as unwise or illiberal or unfair when there is violence to conscientious scruples, either religious or merely ethical. More must be shown to set the ordinance at naught... instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is the government establishing a state religion when it insists upon such training. Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion, when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war. The meaning of those liberties has striking illustration in statutes that were enacted in colonial times and later... From the beginnings of our history, Quakers and other conscientious objectors have been exempted as an act of grace from military service, but the exemption when granted, has been coupled with a condition, at least in many instances, that they supply the army with a substitute or with the money necessary to hire one... Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state. One who is a martyr to a principle which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law."

Brandeis and Stone concurred.

*Freedom of Speech*

Mr. Justice Cardozo regarded the human interests in Civil Liberties to be of such major significance that he would not allow himself to be confined by the subtle meshes of procedural technicality. He refused to be hobbled by the court's mechanical device for the orderly presentation of appeals, when a vital issue of freedom of speech appeared from the record as clearly

and as opportunely as the strange circumstances of the *Herndon* case[54] permitted.

The accused was convicted under a Georgia statute which made it a crime to attempt, by persuasion or otherwise to induce persons to join in any combined resistance to the State. The trial court charged the jury substantially in terms of a certain doctrine known as "the clear and present danger" test. The Supreme Court of Georgia construed the act as not requiring the limitation imposed by this test—the law may punish the accused if he intended an insurrection to follow at any time. The United States Supreme Court affirmed the conviction without passing on the constitutional question.

Mr. Justice Cardozo dissented (Mr. Justice Brandeis and Mr. Justice Stone joining), maintaining that while for the presentation of the case before the court it was not necessary to decide whether the clear and present danger test applied, he said that the doctrine "at least" had "colour of support in words uttered from this bench, and uttered with intense conviction". The accused, Angelo Herndon, a Negro Communist Party organizer in the south, was charged in substance with an attempt to enlarge the membership of the Communist Party in Atlanta, Georgia, and should, according to Cardozo, have been afforded an opportunity by the court to argue that under the *Schenk*[55] decision his conviction was unconstitutional, and then the court could pass on the constitutional test and questions.

"... I hold the view", proclaimed Mr. Justice Cardozo, "that the protection of the Constitution was seasonably invoked and that the court should proceed to an adjudication of the merits. Where the merits lie I do not now consider, for in the view of the majority the merits are irrelevant. My protest is confined to the disclaimer of jurisdiction... What was brought into the case on the motion of rehearing was a standard wholly novel, the expectancy of life to be ascribed to the persuasive power of an idea. The defendant had no opportunity in the State court to prepare his argument accordingly. He had no opportunity to argue from the record that guilt was not a reasonable inference or one permitted by the Constitution on the basis of that test anymore than on the basis of others discarded as unfitting... The argument thus shut out is submitted to us now... Will men 'judging in calmness' ... say of the defendant's conduct as shown forth in the pages of this record that it was an attempt to stir up revolution through the power of his persuasion and within the time when that persuasion might be ex-

[54] *Herndon* v. *Georgia,* 295 U.S. 441 (1935).

[55] The opinion delivered by Mr. Justice Holmes for the unanimous court in *Schenk* v. *United States* in 1918 (249 U.S. 47) is often quoted in Free Speech cases: "... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress (or the State) has a right to prevent. It is a question of proximity and degree".

pected to endure? If men so judging will say yes, will the Constitution of the United States uphold a reading of the statute that will lead to that response? Those are the questions that the defendant lays before us after conviction of a crime punishable by death in the discretion of the jury. I think he should receive an answer."

Brandeis and Stone concurred.

*Conclusion*

The fullest reading of Cardozo's judicial opinions and other writings can merely indicate his depth of thought and beauty of character.

His approach to the subject matter before him demonstrated his outstanding unusual ability in the analysis of complex problems and transactions. His greatest strength, however, lay in his understanding of human conduct and expression and the manner in which he led the court to administer justice, never allowing traditional dogma or commonly stated doctrine to block its attainment, thus he moulded doctrine without repudiating it.

In his judicial process, Cardozo drew from the very wellsprings and fountainheads and poured forth the living drought in a liquid style that sparkles with his own incomparable charm and personality.

Yet at the same time Cardozo was not building a new system of law. No one knew better than he, that such a thing is not possible. What he actually achieved was to make an existing system work well in new cases as they arose. He was taking the past, indeed well-known and well respected, and moulding it to serve the end that it has always served. It is true that he did not leave it unaffected and unchanged in the process. Such is indeed *The Nature of The Judicial Process.*

"I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found 'with the voyages in Browning's 'Paracelsus' that the real heaven was always beyond' (G. Lowes Dickinson, "Religion and Immortality", p. 70). As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth in which principles that have served their day expire, and new principles are born."[56]

[56] Cardozo, *The Nature of the Judicial Process,* 166–7.

Is this a voice from the twentieth, or perhaps from the nineteenth century? In truth, it is an ancestral voice coming from a far more distant period, where the wellsprings of western thought are found. In Cardozo there was the strain of Isaiah's stern reproach of want of wisdom and the search of wisdom:

> And I look, but there is no man,
> Even among them, but there is no counsellor,
> That when I ask of them, can give an answer.
> Behold, all of them,
> Their works are vanity and nought;
> Their molten images are winds and confusion.[57]

[57] *Isaiah* 41:28–9.