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BOOK REVIEWS

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The Growth of the Law. By Benjamin N. Cardozo. New Haven, Yale University Press, 1924. pp. 145.

Judge Cardozo's lectures before the Law School of Yale University, delivered in the William L. Storrs lecture series, 1921, and published under the title of *The Nature of the Judicial Process,* have been supplemented by five additional lectures given at the same university in December, 1923, now published under the title of *The Growth of the Law.* The later work is necessary to the complete exposition of the author's thesis. In his introduction to it, Judge Cardozo says: "Some thoughts, imperfectly developed in the first series, seem to call for fuller and more explicit statement in the second, even at some risk of repetition." The two books should be read together. In the introduction to the first volume, the first inquiry stated is, "Where does the judge find the law which he embodies in his judgment?" If the rule which fits the case is supplied by Constitution or Statute, the task is relatively simple. But if there is none and "we reach the land of mystery, when constitution and statute are silent," the Judge must look to the common law; he must search the precedents, back of which "are the basic, judicial conceptions which are the postulates of judicial reasoning, and further back are the habits of life, the institutions of society, in which those conceptions had their origin and which by a process of interaction they have modified in turn."

Stare decisis is recognized as the every day working rule of the law. But the rules and principles of case law have never been treated as final truths but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Yet distinction must be made between precedents which are static and those which are dynamic.

"The problem of the judge is first to extract from the precedents the underlying principle; and then to determine the path or direction along which the principle is to move and develop if it is not to wither and die."[1] The impelling forces are philosophy, history and custom. Which shall determine the direction? How is the judicial mind to choose between them? Judge Cardozo finds the determining factor in the social needs of the time. "The final cause of law is the welfare of society."[2] The end which the law serves, not its origin, is the main thing; "the juristic philosophy of the common law is at bottom the philosophy of pragmatism."[3] Which of the forces: logic and history; custom and utility, "shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired."[4]

Finding the law of decision in this manner soon leads to making the law. Judge Cardozo faces this frankly. "I take judge-made law as one of the existing realities of life. * * Not a judge on the bench but has a hand in the making."

Coming to the second series the author recognizes that the law of our day faces a two-fold need—first, of some restatement that will bring certainty and order out of the wilderness of precedent. This is the task of legal science. The American Law Institute is addressing itself to that. "The second is the

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[1] *The Nature of the Judicial Process,* p. 28.
[2] *Ibid.* p. 68.
[3] *Ibid.* p. 102.
[4] *Ibid.* p. 112.

need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth."[5]

"Law must be stable, yet it cannot stand still," Judge Cardozo quotes from Dean Pound.[6] " . . . there is danger in perpetual motion"; "a compromise must be found in a principle of growth." What shall be that principle? "What are the directive forces to be obeyed, the methods to be applied, the ends to be sought? These are problems of philosophy."[7]

"A philosophy of law will tell us how law comes into being, how it grows and whither it tends. . . Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth, the final arbiter."[8]

This inquiry leads to the consideration of what is law, and how it is created; after it is created, how it is extended or developed.

"What are the principles that guide the choice of paths when the judge, without controlling precedent, finds himself standing uncertain at the parting of the ways? What are the directive forces to be obeyed, the methods to be applied, the ends to be sought? These are problems of philosophy."[9]

. If the judge must become a philosopher, the counsel must become a prophet. For he must predict the rule or principle which the court will apply in a case not expressly controlled by statute or precedent.

"A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, is then, for the purpose of our study, a principle or rule of law."[10] The judge may resort to philosophy as a guide to his decision. The counsel who has to advise a client in advance of legal action must be able to predict by what principle of philosophy the court will walk to its decision. Yet as it stands to-day, Judge Cardozo says: "the judge is often left to improvise such a theory, such a philosophy, when confronted overnight by the exigencies of the case before him." How a proposed rule will work as a practical matter, often is determinative. "By emphasizing standards of utility, by setting up the adaptation to an end as a test and evidence of verity, pragmatism is profoundly affecting the development of juristic thought." And again,

"The adaptation of rule or principle to changing combinations of events demands the creative action of the judge. You may praise our work, or criticize it. You may leave us with the name we have, or tag us with some other label, arbitrators or assessors. The process is here to stay."

With this candid analysis of the method of judicial law making, what wonder the author speaks of "The delusive hope of certainty!" Yet every man is conclusively presumed to know the law! Judge Cardozo ends as he began, with the text "Law must be stable, yet it cannot stand still." How this may be accomplished, he does not attempt to determine. "We are not yet in agreement about the answer, though in truth it is fundamental and at the basis of our work." A knowledge of the existence of the problem is the first step towards solution. What he says is challenging to legal thought. No judge has with greater frankness revealed the mysteries of the conference room. Nor has he been content to leave the matter there. In an interesting article called *A Ministry of Justice*,[11] Judge Cardozo has suggested a method of helping the

[5] *The Growth of the Law*, p. 1.
[6] *Ibid.* p. 2.
[7] *Ibid.* p. 27.
[8] *Ibid.* pp. 24, 25.
[9] *Ibid.* p. 27.
[10] *Fbid.* p. 52.
[11] (1921) 35 HARV. L. REV. 113.

courts as they are not now helped, but should be, in the adaptation of law to justice. He suggests a board or commission of representatives of the bench and bar and of faculties of law or political science to watch the operation of law, and through study and observation reach conclusions which it may recommend to the legislature for action.

The State of New York already has taken a step in the line of this suggestion by appointing a Commisson to examine the statutes and judicial decisions of the State, to investigate any defects it may find in the present law and in its administration, and to recommend such steps as are necessary to modify or eliminate inadequate and inequitable rules of law and methods of administration, to remove anachronisms in the law, and generally to bring the law of this State, civil and criminal, into harmony with modern conditions. (N. Y. Laws, 1923, ch. 575.) Judge Cardozo is a member of this Commission, and a report has been made by it to the Legislature at the present session, recommending the establishment of a body such as Judge Cardozo recommended in *A Ministry of Justice.* If the law is growing in the pragmatic fashion described in *The Growth of the Law,* it is high time the bar took a hand in the process in order to clear away some of the doubt as to what rule will be applied and how the bar may predict with reasonable accuracy and thus fulfil its function, not only as advocate, but as counsel.

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Le obbligazioni nel diritto inglese in rapporto al diritto italiano, by Sarfatti, Mario. Case Editrice Dottor Francesco Vallardi, Milano, 1924. pp. 352.

As a result of the comradeship in arms during the late war, there has arisen both in France and Italy a desire to become better acquainted with the Anglo-American system of jurisprudence. Before that time comparative studies had been carried on in these countries but they rarely dealt with the private law of England and the United States in a serious manner. Since the termination of the war special chairs have been created in France and in Italy for the purpose of bringing home to the students of those countries an appreciation of Anglo-American law. In France Professor Lévy-Ullmann was made Professor of Comparative English and French Private Law at the Paris Law School, whereas Professor Sarfatti was assigned to a corresponding chair of English and Italian Law at the University of Turin.

In view of the fact that England and the United States had impressed themselves upon the continental thought as the great commercial countries of the world, it was but natural that the commercial law of these countries should have been the first to attract the attention of the foreign scholars One of the first fruits of the establishment of the above chairs of comparative law is the present volume, a study of the law of Obligations in English law in its relation to the Italian law. In a letter to Professor Sarfatti, which is printed in the Preface, Sir Frederick Pollock, to whom the work is dedicated, says that Professor Sarfatti's work on English law is to his knowledge grounded on long study and is sound and well informed. The same conclusion must be reached by every reader of this volume. From the very outset one is struck by the fact that the work is not a superficial comparison between the English and the Italian law, but a profound study of the English law as such. The author has tried to absorb the spirit of the English law and to present it in the light of its peculiar history and development.

The first chapter, covering 65 pages, is devoted to an historical introduction. In the remaining part of the work Professor Sarfatti sets forth those branches of English law falling within the law of Obligations in the continental sense, whether

dealt with in the civil or commercial code. It covers, therefore, the subjects of Contracts, Quasi-Contracts, and Torts and the special contracts regulated in the Italian civil and commercial codes, such as Sales, Bailments, Suretyship, Partnership, Carriers, Bills and Notes, etc.

In the brief compass of 333 pages of text, the author does not attempt of course to give the technical rules of each subject in detail. What he seeks to do and has accomplished exceedingly well is to so characterize the English law that fundamental differences between the English and Italian systems stand out with great clearness. In doing this the firm grasp of the author on the history of the English law is everywhere apparent. One is impressed by the work as one of a thorough student who is interested both in the development of the law during the past and its tendencies in the present. Professor Sarfatti is acquainted not only with the latest English textbooks on the various subjects discussed, but also with the latest legislation. What is more surprising still, the author has found time and inclination to acquaint himself even with American writers, frequent references being made to standard treatises and casebooks.

The author is familiar not only with his own law but with that of other countries, particularly with the law of France, Germany, and Switzerland, and on many occasions this knowledge is drawn upon for interesting comparisons or comment.

In attempting to cover the entire field of Obligations Professor Sarfatti undertook a very arduous task. The amount of material which he had to study and to digest was vast and the difficulty of knowing what to include and what to exclude was great. The author has been very felicitous, however, in his process of selection and his method of treatment. He has presented the subject matter in a direct and simple way and has relegated the less important points to the notes, in which he gives ample references to the literature in the various countries for the benefit of those who care to investigate the subject further.

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BOOKS RECEIVED

The Professional Ideals of the Lawyer. By H. W. Jessup. New York, G. A. Jennings Co., Inc., 1925. pp. xlii, 292.

Federal Income Tax. By G. E. Holmes. Sixth Edition. Indianapolis, The Bobbs-Merrill Co., 1925. pp. xcvi, 2007.

Recent Developments In International Law. By J. W. Garner. Calcutta, Calcutta University Press, 1925. pp. xii, 840.

The Historical Foundations of the Law Relating to Trade Marks. By F. I. Schechter. New York, Columbia University Press, 1925. pp. xxviii, 211.

Economics of Our Patent System. By F. L. Vaughan. New York, Macmillan Co., 1925. pp. xv, 288.

The Consolidation of Railroads. By W. M. W. Splawn. New York, Macmillan Co., 1925. pp. vii, 290.

The Geneva Protocol. By D. H. Miller. New York, Macmillan Co., 1925. pp. viii, 280.

English Political Institutions. By J. A. Marriott. Third Edition. Oxford, Clarendon Press, 1925. pp. lii, 351.

The Old Yellow Book. By J. M. Gest. Boston, Chipman Law Publishing Co., 1925. pp. viii, 687.