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Book Review: My Life in Court

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MY LIFE IN COURT. By Louis Nizer. Garden City, N. Y.: Doubleday & Co., Inc., 1961. Pp. 524. \$5.95.

I undertook to review this book about a year ago, and I have regretted it, and put the job off, ever since. It is not that it makes difficult or tedious reading; far from it. *My Life in Court* deserves its place at the top of the nonfiction best sellers, for Mr. Nizer really has played a major rôle in some of the most diverting litigation of our times; he seems to have almost total recall (and, no doubt, excellent files); and the good stories lose nothing in his telling of them. As bedside reading for lawyers and laymen, he is hard to beat.

Part of the inordinate delay is attributable to the mere length of the book; no legal career below the level of Marshall's or Holmes' really deserves what must be well over a quarter million words. But most of my procrastination was because I found it prudent, even essential, to take Mr. Nizer's memoirs in small, well-spaced doses. Hero-worship tends to cloy, and hero-worship, amounting to uncritical adulation, is what Mr. Nizer plainly feels for the subject of his autobiography. Some such weakness was probably unavoidable; had he suffered from modesty or shyness, his career would never have furnished the raw material for a book like this one. A first-rate trial lawyer who hated himself would be a *lusus naturae* as astounding and improbable as a diffident, shrinking actor. But the art of self-praise is one whose extreme difficulty is insufficiently appreciated by most of its numerous practitioners. It is true, as Samuel Butler astutely remarked, that "the advantage of doing one's praising for oneself is that one can lay it on so thick, and exactly in the right places." Great as is this advantage, however, the compensating risk is even greater. To avoid overdoing it, or to achieve the coup de maître of letting one's light shine freely while seeming modestly to place it under a bushel, requires skill of a superlatively high order—a skill denied even to such consummate masters of self-laudation as Marcus Cicero and Bernard Shaw. Indeed, the only example which comes readily to mind of self-glorification which does not fatigue the reader, because it is done with a masterly appearance of objectivity and impartiality, is Julius Caesar. Mr. Nizer is not among the select company of subtle masters of the art and mystery of the higher egotism. The tone of the work is set by the dust jacket and end papers, which feature no less than six different pictures of the author in various forensic poses, every one of them dignified, intellectual, and impressive. The "I" count is also very high: on a couple of pages selected by opening the book at random,¹ I find no less than twenty-four first person pronouns. I assume that Mr. Nizer *must* have lost a case at some time since he took to the law; it is even possible that he has been outfoxed by an opponent. But no hint of any such contretemps appears in these pages. By the same token, I assume that he did not fight every battle alone; but I cannot recall any place in which he mentions the name of a partner or associate.

Nevertheless, Mr. Nizer's chapters are highly enjoyable and in places instructive, for he is one of those uncommon fellows who is in cold fact, and as

1. Pp. 182-83.

the record shows, almost as good as he thinks he is. As an office lawyer—by which I mean one whose practice consists largely of divining the law and applying it to his clients' problems—he appears to be reasonably competent. But his talents in this end of the business are by no means as spectacular as a lay reader might suppose after perusing, for example, his stream-of-consciousness account of his own legal reasoning on matters of corporation law in the course of the great battle for control of Loew's.² It is notorious that great advocates are not necessarily, and perhaps not even usually, great lawyers—Lord Erskine is one demonstration of that proposition, and Sir Edward Marshall Hall another.³ It is safe to say that there are at least a thousand lawyers on Manhattan Island, and not a few students in this and other law schools, who could have done as well or better on these not very difficult questions of corporation law.⁴ But there are not a dozen who could have matched Nizer's performance, chronicled in the first chapter, in persuading a jury to award Quentin Reynolds punitive damages of monstrous size in his libel suit against Westbrook Pegler and the Hearst Corporations.⁵ That chapter makes superb reading, in part, of course, because it is always pleasant to see the likes of Pegler get their comeuppance, but largely because of the virtuosity of Mr. Nizer's handling of the witnesses and jury. That virtuosity is demonstrated again and again and in many contexts in the succeeding chapters, for Mr. Nizer is a specialist only in the sense that he specializes in litigation. As a litigator, he comes about as close as a lawyer can to being a general practitioner, save that he seems to have avoided criminal cases, or at any rate includes none in these chronicles. Otherwise, as the present volume shows, all is grist that comes to his mill—copyright, personal injury, malpractice, domestic relations, savage corporate infighting, in and out of court.

Here, then, are a series of accounts of what are often termed, especially by Mr. Nizer, courtroom dramas which are fascinating in their details and which constitute, moreover, excellent clinical studies in trial practice, step-by-step demonstrations by an undoubted master of the conception and execution of some of his principal masterpieces. It is generally interesting, and even exciting, to watch at work a master of any art, craft, or skill, however humble, even

2. See, e.g., pp. 466-69, 490-92.

3. See Lord Birkett's article on Erskine in *The Listener*, June 29, 1961, p. 1128; MARJORIBANKS, *LIFE OF SIR EDWARD MARSHALL HALL*, K. C. (1929).

4. Mr. Nizer seems to lack that precision and attention to detail which usually are regarded as helpful, if not essential, in the practice of corporation law. For example, he states that "The By-laws of the corporation provided for cumulative voting." Actually the provision was located in Loew's certificate of incorporation, as, under Delaware law, it had to be. DEL. CODE, Tit. 8, § 214 (1953); see *Campell v. Loew's, Inc.*, 134 A.2d 852 (Del. Ch. 1957).

5. The difference between Louis Nizer as a courtroom lawyer and Louis Nizer as an office lawyer is further exemplified by a statement on page 151. "What Reynolds had not known was that compensatory damages are substitution for lost income and are taxable. Punitive damages are not." We may hope and assume that Mr. Reynolds' tax returns are prepared by somebody else, for Mr. Nizer's proposition is not known to tax lawyers either. See C. A. Hawkins, 6 B.T.A. 1023 (1927); Rev. Rul. 54-418, 1958-2 *CUM. BULL.* 18.

yo-yo twirling or golf. I well remember, for instance, spending a long and blissful afternoon watching billiard balls, under the command of the late Willy Hoppe, move through fantastically intricate evolutions with the snap and precision of Kaiser Wilhelm's Prussian Guard. And yet Mr. Nizer's exhibition of his skill, though dazzling, somehow failed to afford me that simple and strong pleasure. After some cogitation, I have concluded that the trouble is that a very great part of Mr. Nizer's art or craft is essentially meretricious. This is not his fault, for he must work, and do the best he can for his clients, within the system which exists. Nor can he reasonably be expected to subject that system to critical examination, any more than Mr. Vholes was likely to deplore (even in his own mind) the Chancery practice of the time of *Bleak House*, for he gets his bread and butter by it, with a heavy coat of jam. Moreover, very few of us are objective enough to ask if what we do with great dexterity is really worth doing at all. Mr. Nizer, of course, is no Vholes, for every page of his book shows that he is one of those lawyers who wholeheartedly (and warmheartedly) make their client's cause their own; his jubilation in victory plainly reflects more than mere gratification at personal triumph. Nevertheless, the total impression with which I am left is that Mr. Nizer is a good man in a bad trade, or at least a trade which ought to be a great deal better than it is.

The depressing fact is that *My Life in Court* seems to me to raise anew, however unintentionally and even against interest, a suspicion that has been gnawing at my vitals for years: to wit, that our ancient system of trial by jury is in some contexts not merely ancient but antiquated, and that it stands in need of some fundamental re-examination and maybe revision. I do not suggest, of course, that the jury be abolished. Indeed, I think that in some types of litigation—for instance, the ordinary personal injury action and many or most criminal cases—the jury, though far from perfect, is still in all probability the best available device for securing substantial justice. Moreover, I am well aware that to a very numerous class of judges, lawyers, professors, politicians, and plain citizens the jury is still a totem figure comparable to Mother or Dwight D. Eisenhower. The orthodox appraisal of the jury system is still probably represented by the famous dictum of Blackstone, recently endorsed by Mr. Justice Black,⁶ that “the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases! . . . [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.”⁷ In our

6. See *Reid v. Covert*, 354 U.S. 1, 26-31 (1957). Mr. Justice Black's opinion, in which the Chief Justice and Justices Douglas and Brennan concurred, quotes or cites a number of other tributes to the jury system by eminent authorities, none of which (except his own opinion in *Toth v. Quarles*, 350 U.S. 11 (1955)) is very recent.

7. 3 BLACKSTONE, COMMENTARIES 379 (1829).

time and place, this majestic rhetoric requires qualification in certain important areas. Try reading Blackstone to a Negro charged with raping a white woman in Yahoo County, Mississippi, and see if he breaks into cheers. Blackstone, of course, wrote in the light of the history he knew, and that history gave some ground for the assumption, implicit in his encomium, that brave, honest, and intelligent jurors might well interpose themselves between a subject and a tyrannical sovereign—at least where the tyrant's prejudices ran counter to those of the mass of his subjects. He had in mind, no doubt, such instances as the acquittal of the seven bishops whom James II had caused to be tried for publishing a seditious libel.⁸ But Blackstone and Black might have recalled some defendants in the long and not always glorious history of the common law up to Blackstone's own day who perhaps would not have thought so very transcendent the privilege of entrusting their lives to twelve of their neighbors and equals—for an obvious instance, the Roman Catholics whom juries sent to the gallows on the evidence of Titus Oates and his coadjutors in the invention of the Popish Plot.⁹

But whatever the truth of Blackstone's statement in the eighteenth century, there are not many immutables in the common law, and it does not by any means follow that because it was then true, or mainly true, that it ought to be accepted unquestioningly and in all circumstances today. In fact, of course, it is not unanimously accepted; perceptive judges and lawyers have long been afflicted with a cankerous suspicion that the jury system, as presently constituted, may not be particularly well calculated to produce justice in *every* case between man and man or man and sovereign—that it is sometimes, in short, a sort of vermiform appendix in the body politic, like segregation or the Congressional seniority system, whose malfunctioning may be the cause of appalling bellyaches. Probably the most acute and reasoned criticism is that of Jerome Frank,¹⁰ but the most quotable is Mr. Dooley's: "Whin the case is all over, the jury'll pitch th' tistimony out iv the window, an' consider three questions: 'Did Lootgert look as though he'd kill his wife? Did his wife look as though she ought to be kilt? Isn't it time we wint to supper?'"¹¹ Without attempting to recapitulate Judge Frank's detailed analysis, it is obvious that there are some cases (antitrust litigation, for instance) in which it is virtually impossible to find twelve laymen who, with the best will in the world, can

8. See II MACAULAY, HISTORY OF ENGLAND ch. VIII, pp. 289-99 (1856). But the currents of prejudice ran somewhat crooked even in that case, for one of the panel was Michael Arnold, brewer to the court, who is supposed to have said, "Whatever I do, I am sure to be half ruined. If I say Not Guilty, I shall brew no more for the King; and if I say Guilty, I shall brew no more for anybody else." He very nearly succeeded in hanging the jury. *Id.* at 292, 298.

9. See I MACAULAY, HISTORY OF ENGLAND ch. II, pp. 181-85. "The juries partook of the feelings then common throughout the nation, and were encouraged by the bench to indulge those feelings without restraint."

10. See, e.g., FRANK, COURTS ON TRIAL *passim* and especially ch. VIII (1949).

11. Dunne, *Mr. Dooley on Expert Testimony*, in MR. DOOLEY IN WAR AND PEACE (1898).

understand what the incredibly complicated and voluminous evidence is all about, and others (civil rights cases, for example, in some of the states of the late Confederacy) in which it is virtually impossible to find twelve jurors who will let their verdict be influenced either by the evidence or the law. And there are still other cases in which there is only too much reason to suspect em-bracery.¹² Even in run-of-the-mill cases, it is common knowledge that jurors often find it easier to follow their prejudices than the evidence. It is instructive to listen to an experienced trial lawyer dispense his ripe wisdom on the subject of picking a jury. I once heard a very eminent criminal lawyer, since turned hanging judge, discourse on his technique. What he wanted in a juror, of course, was warmheartedness and sympathy, and so, since he happened to be a Jew, he recommended Jewish jurors, though he also had a good word for Italians. An equally eminent Irish lawyer spoke warmly in favor of Irishmen. If he had been a Turk or a Cambodian he would have counselled the selection of Turks or Cambodians.¹³ The point is that few or none of them are interested in picking a juror who will do even-handed justice, and all of them assume that it is possible and desirable to pick jurors who will be suitably prejudiced. It is nearly axiomatic that a lawyer who is sure his client is right on the facts will do his best to get a trial before a judge, while a lawyer who knows his client's evidence is weak will demand a jury. In the criminal area, it is hard to say whether more harm is done by unjust convictions or unjust acquittals. Perhaps the latter, for an appellate court can weed out the unjust convictions, and there is a fair to good chance that it actually will do so. There is not much in the argument that juries stand between the public and undue enforcement of harsh or unpopular laws. Aside from the orthodox rejoinder (which, it must be admitted, has more theoretical than practical force) that the best way to get rid of such a statute is to enforce it strictly, there is the highly practical consideration that most District Attorneys are hopeful politicians, and few of them see much advantage in zealous enforcement of a statute which runs counter to the mores of any considerable section of the electorate.

The principal alternative to trial by jury is trial by a judge, and it must, of course, be conceded that judges are but men and not invariably very good men. Since 1688, in the English speaking countries at least, we have seen no such monstrous and terrible judge as Baron Jeffreys, but in very recent times there have certainly been a few who in their small way were no roses. The late junior Senator from Wisconsin, Joseph R. McCarthy, got his political start as a trial judge, and a marvellously bad one at that.¹⁴ The successful Ku Klux

12. For an entertaining, if unedifying, account of the jury trial and acquittal of a defendant with almost unlimited wealth, see the account of the trial of Harry Sinclair in WEINER AND STARR, *TEAPOT DOME*, chs. 9 and 11 (1959).

13. It is a fact that I have yet to hear any criminal lawyer, even a Yankee criminal lawyer, recommend that the jury be loaded with Yankees. Personally, I regard Yankees as a very soft-hearted lot.

14. See *State ex rel. Dep't of Agriculture v. McCarthy*, 238 Wis. 258, 299 N.W. 258 (1941); *The Judge on Trial*, *The Progressive*, April, 1954, pp. 6-8.

Kandidate for governor of Alabama, the honorable George C. Wallace, is another example of a trial judge who seems a trifle lacking in what is usually regarded as the judicial temperament.¹⁵ I could probably think of other such specimens, but not very many. Such judges are sufficiently rare so that their antics attract attention, most of it unfavorable, which they would attract in no other trade. Taking one day with another, the average judge has the intelligence, experience, and ability needed to weigh the evidence in any case which is likely to come before him, and almost always, however cantankerous he may be, he can be counted on to make a sincere and generally successful effort to put aside his own prejudices. Moreover, his decision can almost never be bought for money, and usually (particularly in the case of federal judges) it cannot be influenced by political pressure. In short, while the superiority of judges to juries is far from clear-cut, and is probably nonexistent in many kinds of trial, my own belief is that, in some situations, it might be useful to reconsider the appropriateness of the popular assumption that jury trial should always be available.

These skeptical (but not cynical) reflections are reinforced by perusing Mr. Nizer's account of how to win cases and ingratiate oneself with juries. I hasten to say that he does nothing in the least improper, nothing that his duty to his client does not—under the present system—require him to do. According to the law books, Mr. Nizer's job in the *Reynolds* case was to persuade the jury by a preponderance of the evidence that the defendants had falsely, and without a privilege to do so, published matter defamatory to the plaintiff.¹⁶ In reality, what Mr. Nizer had to do was persuade the jurors that Reynolds was one of nature's noblemen and Pegler a five-star stinker. The latter hardly required a legal Hercules; it might have been done by a lawyer of quite ordinary talents, although Mr. Nizer's pulverization of Pegler was certainly extraordinarily thorough and satisfactory. But a great part of the strategy of counsel was devoted to problems which should not have mattered at all, and probably would not have mattered if the case had been tried to a judge. For example—and it is only one example—some of the jurors were Catholics, and it is obvious that Mr. Nizer assumed that they might well vote for the side which most gratified their religious sensibilities and against the side so unlucky or inept as to offend those sensibilities.¹⁷ Pegler was a Catholic, but so was Reynolds, and if "no one would have compared [Reynolds'] worldliness with the holy dedication of priesthood,"¹⁸ Pegler was also lacking in some of the attributes of saintliness. So far, a draw, although apparently Mr. Nizer would have despaired of justice had Reynolds been, say, a Seventh Day Adventist. But Pegler's counsel calls a priest, one Father Braun, as a witness; Mr. Nizer is "disturbed by such a display of clerical garb in front of the jury box." He agonizes over the question whether to trump Pegler's priest with Bishop Sheen

15. He recently denounced the entire federal judiciary, en masse and without exception, as "lousy and irresponsible." See *Time*, June 8, 1962, p. 25.

16. See RESTATEMENT, TORTS §§ 558, 569 (1939).

17. Pp. 123-25.

18. P. 123.

—then only a Monsignor but already pretty well known—and finally decides not to; neither does he cross-examine Father Braun, for that might mean “attacking him and perhaps offending the sensitivity of some jurors.”¹⁹ In fact, neither Father Braun nor Monsignor Sheen had any evidence of importance, and if the trier of the fact had been a judge, of whatever religious persuasion, it is very unlikely that either side would have gone through any such charade. There are other similar examples.²⁰

Not surprisingly, Mr. Nizer greatly prefers juries to judges. I probably would too, if I were he. Not only does his trade, which is persuading juries that his clients ought to win, keep him in considerable style, but it is obvious that he hugely enjoys playing a succession of starring roles in courtroom dramas. He says:

Although jurors are extraordinarily right in their conclusion, it is usually based on common sense “instincts” about right and wrong, and not on sophisticated evaluations of complicated testimony . . . Because judges, sometimes, consciously reject this layman’s approach of who is right or wrong and restrict themselves to the precise legal weights, they come out wrong more often than juries.²¹

This is a polite way to put it, and appealing too; but *mutatis mutandis*, it comes to pretty much the same thing as the dicta of Mr. Dooley and Jerome Frank.²² It certainly does not justify every jury trial. I suggest that the reader try applying Mr. Nizer’s reference to the jury’s “common sense ‘instincts’ about right and wrong” to the Mississippi Negro charged with rape of a white woman or the Mississippi Ku Kluxer charged with lynching that Negro, and see how it sounds.

You can’t blame a bartender, however, for not joining the Anti-Saloon League, and the foregoing querulous comments are not just criticisms of Mr. Nizer’s book. Our jury system is with us, and probably will be for some time to come—and one virtue it certainly has. It often produces wonderful reading matter. When lawyers are arguing to a court, the record, as the learned readers of this *Journal* well know, usually makes dry and indigestible reading. And that is a charge which neither judge nor jury would ever sustain against *My Life in Court*.

JOSEPH W. BISHOP, JR.†

19. P. 125.

20. *E.g.*, pp. 393-95. This one involved Lutheran pastors, testifying to the value of an advertising man negligently killed by the Long Island Railroad.

21. P. 313.

22. The jury are more brutally direct. They determine that they want Jones to collect \$5,000 from the railroad company, or that they don’t want pretty Nellie Brown to go to jail for killing her husband; and they bring in their general verdict accordingly. Often, to all practical intents and purposes, the judge’s statement of the legal rules might just as well never have been expressed.

FRANK, *op. cit.* *supra* note 10, at 111.

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