

SUPREME COURT OF THE UNITED STATES

Monday, December 19, 1938.

Present: The CHIEF JUSTICE, MR. JUSTICE BRANDEIS, MR. JUSTICE BUTLER, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, and MR. JUSTICE REED.

MR. ATTORNEY GENERAL CUMMINGS addressed the Court as follows:

May it please the Court: The members of the Bar of this Court on November 26, 1938, met in this room to express their sorrow at the death of Mr. Justice Cardozo. At that meeting moving tributes were paid to his memory; and the following resolutions were adopted:

[Mr. Cummings read the Resolutions, which are set forth *ante*, p. X *et seq.*, and proceeded:]

It is my privilege to present these resolutions and to ask that they be entered in the permanent records of this Court.

In discussing the judicial work of Mr. Justice Cardozo, I speak, however haltingly, for the Bar of the Nation; I feel that in a measure I speak also for the Nation itself. A great judge leaves his mark not only on the law which he serves but also on the life of the people. Not until future generations of scholars have traced the course of the law in its constant search for justice will the full scope of his great service be revealed. But we can today with all certainty say that he opened ways along which a free people may confidently tread.

For eighteen years Judge Cardozo sat on the Court of Appeals of New York State. It was an eminent court when he came to it; when he left, it was the greatest common law court in the land. Throughout this long

period, as its members have been quick to say, the court drew heavily upon the inexhaustible learning, the clarity of analysis, and the boldness of thought of their gentle brother. The peculiar influence of Cardozo, however, spread far beyond the conference room. To lawyers and to courts his opinions were more than a record of the judgment. They spoke with the majestic authority of an analysis which reached to the bedrock of the learning of the past and yet was attuned to the needs of the living. And always the opinions spoke in tones of rare beauty. They might deal with things prosaic, but the language, lambent and rich, was that of a poet.

Opinions in the New York court are assigned by rotation, yet during the years of his service there an exceptionally large number of its great opinions were those of Judge Cardozo. There were few branches of the law that were not quickened by his touch. Significantly, his most notable contributions to the common law are found in fields which had long before settled into fixed forms. No other judge of his time was so deft in weaving the precedents of centuries into a new shape to govern a new society. This is the heart of the common law process, but only a master can fashion a new rule and yet preserve the essential truth of the older decisions.

To Judge Cardozo the law was meant to serve and not to rule the institutions which it sheltered. No one saw more clearly than he that the imperfect rules of today may stir equities that become the law of tomorrow. In the law of torts, one need only mention on the one side *MacPherson v. Buick Motor Co.*,¹ where the law as to negligent manufacture was at last brought abreast of modern methods of distribution, and, on the other side, the *Palsgraf* case,² where the notion of "negligence in the air" received its classic castigation. The impact of Judge Cardozo on contract law is typified by the *Duff-Gordon*

¹ *MacPherson v. Buick Motor Co.*, 217 N. Y. 382.

² *Palsgraf v. Long Island Railroad Co.*, 248 N. Y. 339.

case,³ where a contract was enforced because the obligations although not express were fairly to be implied. "The law," he said, "has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal." Minor and unintentional defaults in a complicated construction contract, Judge Cardozo held in another case,⁴ are not to be subjected to a syllogistic rule whose premises are found in the far simpler contracts of another age. There must be no sacrifice of justice, the opinion reads, whatever may be the doubts of "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 . . ."

Throughout these opinions one traces their animating current, the one passion of this gentle and retiring man, that the courts should never fail to use the law to promote justice. While few judges have been so ready to adapt the law to the changing organization of the business world, he steadfastly refused to sanction any relaxation in the morals of the market place. It is likely that most real estate operators would not consider that their duty to their joint-venturers extended so far as to share the opportunity to start anew at the conclusion of the venture. But, in the case of *Meinhard*,⁵ Chief Judge Cardozo refused to sanction even so slight a deviation from "an honor the most sensitive." As he writes, the ease of the philosopher changes into the inner fire of the prophet. "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

³ *Wood v. Duff-Gordon*, 222 N. Y. 88, 91.

⁴ *Jacob & Youngs v. Kent*, 230 N. Y. 239, 242.

⁵ *Meinhard v. Salmon*, 249 N. Y. 458, 464.

In 1932 Chief Judge Cardozo was at the head of the foremost common law court of the land. His court was but rarely forced to plunge into the elusive statesmanship of constitutional law; it was a court of legal craftsmen. He was warmed by the deep friendship of his colleagues. Neither he nor any student of the common law could have wanted more than that he fill out his days in such a fruitful serenity.

But in that year Justice Holmes resigned. For thirty years, he had enriched the work of this great Court and, by the same token, the legal thought of the Nation. To succeed Justice Holmes there could be but one man. President Hoover spoke for the whole people when he offered the nomination to Chief Judge Cardozo. With reluctance, and through a selfless obedience to the higher duty, Judge Cardozo accepted the call and took his seat on this Court on March 14, 1932.

His first opinion for the Court appears in the 286th volume and his last opinion in the 302nd volume of the reports.⁶ The span is tragically short. But in these brief years Justice Cardozo has notably enriched the history of jurisprudence. To this Court he brought his deep learning in the law and to the solution of its vexing problems he lent a tolerance and a generous understanding which have rarely been equalled.

He made the transition from New York to this Court with an ease which seemed effortless. The large questions of constitutional law, the unexplored vistas of administrative law, and the complexities of federal taxation, were each beyond the ordinary range of litigation in the Court of Appeals. Yet, from the very beginning, his touch was as sure and his vision as far-ranging as it had been in the familiar rooms at Albany.

To the specialized fields which provide much of the work of this Court, Mr. Justice Cardozo brought rare

⁶ In these six years, Mr. Justice Cardozo wrote 128 majority opinions, 2 concurring opinions and 24 dissenting opinions; in addition, he collaborated in 7 concurring and 10 dissenting opinions.

skill with the technical tools of the lawyer and an insistent belief that the law failed when it offered reward to chicanery or greed. A complicated question of tax limitation⁷ was solved by "the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." He differed with the majority of this Court in the *Securities and Exchange Commission* case,⁸ perhaps less because of his analysis of the statute than for fear that it would "become the sport of clever knaves." If the registration procedure is not to "invite the cunning and unscrupulous to gamble with detection," he continued, "when wrongs such as these have been committed or attempted, they must be dragged to light and pilloried."

But it is in the larger reaches of public law that the broad vision of Mr. Justice Cardozo found full scope. The commentators may dispute as to whether the judge, who decides these questions must be more the statesman or the lawyer. But none has doubted that Mr. Justice Cardozo was rarely gifted with both qualities.

The novel problems presented by administrative law received from him a sympathetic and discerning treatment. He never forgot that administrative agencies were born of a need for developing a technique which differed from judicial litigation. He has written, for the Court, that "the structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. . . . It is not the province of a court to absorb this function to itself."⁹ He saw, too, that these agencies act in a field where substantial accuracy is immeasurably preferable to the complete frustration which would result were an absolute precision sought. The Interstate Commerce Commission, faced with the task of

⁷ *Stearns Co. v. United States*, 291 U. S. 54, 61-62.

⁸ *Jones v. Securities & Exchange Comm'n*, 298 U. S. 1, 32.

⁹ *Mississippi Valley Barge Co. v. United States*, 292 U. S. 282, 286.

valuing railroads, he said, may recognize that "in any work so vast and intricate, what is to be looked for is not absolute accuracy, but an accuracy that will mark an advance upon previous uncertainty."¹⁰ For him the respect to be paid the findings of the administrative tribunal was an imperative rule of decision, not to be satisfied by verbal recognition. He has placed a decision of the Court on the ground that the lower court, "though professing adherence to this mandate, honored it, we think, with lip service only."¹¹

The same quality appears when he considers the validity of state legislation. There could be no tolerance for state regulation which, as he said in the *Seelig* case,¹² by setting "a barrier to traffic between one state and another," "would neutralize the economic consequences of free trade among the states." But, so long as the state action contained no threat to national solidarity, it could not properly, Mr. Justice Cardozo felt, be nullified by this Court unless the Constitution spoke to the contrary with unmistakable clarity. When this Court held invalid a state sales tax, graduated according to volume, in the *Stewart Dry Goods* case,¹³ Mr. Justice Cardozo entered eloquent protest. The legislation, he said, was "a pursuit of legitimate ends by methods honestly conceived and rationally chosen. More will not be asked by those who have learned from experience and history that government is at best a makeshift, that the attainment of one good may involve the sacrifice of others, and that compromise will be inevitable until the coming of Utopia."

Few men have, with such wholehearted humility, practiced that tolerance for human experimentation which many feel must be the hallmark of a great constitutional jurist. But none knew better than Mr. Jus-

¹⁰ *I. C. C. v. New York, N. H. & H. R. Co.*, 287 U. S. 178, 205.

¹¹ *Federal Trade Comm'n v. Algoma Co.*, 291 U. S. 67, 73.

¹² *Baldwin v. G. A. F. Seelig*, 294 U. S. 511, 521, 526.

¹³ *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 577.

tice Cardozo that, when the question was one of personal liberty rather than the economic judgment of the legislature, vigilance rather than obeisance must be the order of decision. Of freedom of thought and speech, he wrote in one of his last opinions for the Court,¹⁴ "one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." He has elsewhere said:¹⁵ "Only in one field is compromise to be excluded, or kept within the narrowest limits. There shall be no compromise of the freedom to think one's thoughts and speak them, except at those extreme borders where thought merges into action." And then follow these majestic words: "We may not squander the thought that will be the inheritance of the ages."

Perhaps the most nearly ultimate field upon which a Justice of this Court must venture is that of measuring an Act of the Congress against the requirements of the Constitution. Mr. Justice Cardozo sat during six of the most momentous years in the history of this Court. Throughout these years the familiar rules which forbid the Court from passing judgment on the wisdom of the Congress were to him not aphorisms but burning truths. He found, in his own words,¹⁶ a "salutary rule of caution" in that "wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion." Mr. Justice Cardozo viewed the Constitution as directed to the great end of preserving a democratic government for a free people. This high purpose is defeated if the courts view the Constitution as dictating choice, as he has stated it, in "a situation where thoughtful and honest men might see their duty differently."¹⁷

¹⁴ *Palko v. Connecticut*, 302 U. S. 319, 327.

¹⁵ "Mr. Justice Holmes," 44 Harv. Law Rev. 682, 688.

¹⁶ Dissenting in *United States v. Constantine*, 296 U. S. 287, 299.

¹⁷ *Mayflower Farms v. Ten Eyck*, 297 U. S. 266, 276.

His consistent deference to the judgment of the legislature came not merely from the humility of his nature. It arose also from his profound conviction that, as he put it,¹⁸ "one kind of liberty may cancel and destroy another," and that "many an appeal to freedom is the masquerade of privilege or inequality seeking to entrench itself behind the catchword of a principle." Thus, where an industry was so glutted by ruthless overproduction that its survival was threatened, Mr. Justice Cardozo saw nothing in the Constitution which forbade the Congress to act, for, as he said in the *Carter* case,¹⁹ "The liberty protected by the Fifth Amendment does not include the right to persist in . . . anarchic riot."

Mr. Justice Cardozo found no constitutional barrier to prevent the enactment of legislation which was compelled by the urgent needs of an ever-changing society. "The Constitution of the United States," he wrote in his dissent in the *Panama Refining* case,²⁰ "is not a code of civil practice." The commerce power, he has said, "is as broad as the need that evokes it."²¹ The basic constitutional doctrine of separation of powers was for him not "a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety."²²

Thus far I have spoken of our friend as a lawyer and a judge. This imperfect tribute leaves untouched the far reaches of his mind and character. I have not trusted myself to speak of these things. They are so intimate and so beautiful that they quite transcend the limits of

¹⁸ "Mr. Justice Holmes," 44 Harv. Law Rev. 682, 687-688.

¹⁹ Dissenting in *Carter v. Carter Coal Co.*, 298 U. S. 238, 331.

²⁰ *Panama Refining Co. v. Ryan*, 293 U. S. 388, 447.

²¹ Dissenting in *Carter v. Carter Coal Co.*, 298 U. S. 238, 328.

²² *Panama Refining Co. v. Ryan*, 293 U. S. 388, 440.

our common speech. It is better, I think, to rest upon the words of Justice Holmes who, in tenderness and affection, said that Judge Cardozo was "a great and beautiful spirit."²³

It was eminently fitting that Mr. Justice Cardozo should have been chosen to deliver the opinion of the Court in the *Social Security* cases. The governmental process must have seemed noblest to him when it was directed to the relief of the aged, the infirm, and the destitute. His words seem to have sprung from the heart of one who felt with intensity that government succeeds only as it serves the needs of its people: "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times. . . . The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near."²⁴

Mr. Justice Cardozo has reached the end of his journey. It has been a journey of loving service to the law and to those who live under the law. I venture to predict that, so long as our common law and our Constitution persist, men will pay tribute to the memory of this shy and gentle scholar, whose heart was so pure and whose mind was so bold.

THE CHIEF JUSTICE responded:

Mr. Attorney General: The tribute in the resolutions you present comes most fittingly from the members of the Bar who find the ideals of their profession realized in a career of extraordinary worth. It is of special significance at this time that these sentiments of lawyers will find a warm response in the hearts of millions of our

²³ Letter to Dr. John C. H. Wu, printed in Holmes, *Book Notices, Uncollected Papers, Letters* (Shriver), p. 202.

²⁴ *Helvering v. Davis*, 301 U. S. 619, 641.

fellow countrymen who, without learning in the law, have a keen sense of the public benefit that has come from the quiet, unselfish and humane labors of a great jurist working in the public interest with a consuming zeal. We, his brethren of the Court—still awestruck by the fate which brought his career to such an untimely and tragic end—receive this tribute with hearts burdened by the sense of loss of that personal association which was to us a priceless privilege.

Benjamin Nathan Cardozo was city-born and bred. He was reared not in the wide open spaces but within the narrow confines of the great metropolis. But his horizon knew no urban bounds and his vision took in all the circumstances and needs of our country with complete understanding. His urban training made him familiar with some of the most serious problems of our democracy and gave him special alertness to detect every sort of wrong, however cunningly disguised by conventional or tolerated forms. The passion for justice which characterized his work had its roots in what he early perceived in his metropolitan environment and never forgot.

It would be difficult to find a life so completely and uninterruptedly devoted to pursuits congenial to talent. While enjoying the resources and interests of a cultivated taste, it was to the study of the law—its learning, its processes, and its adjustments—that he bent his energies and he reaped the hard-won rewards of the most distinguished scholarship. He was singularly immune from either the enticements or the demands of activities foreign to strictly professional labors. He did not seek public office. He stood aloof from politics. He did not engage in public controversies or aspire to leadership in organized social efforts. He did not crusade for social reforms. His zeal for human betterment took a direction better suited to his temperament and intellectual interests. He shrank from promiscuous contacts, finding a safe refuge in his books.

Even at the Bar, he was spared the stormy conflicts of jury trials and the contests which evoked passion and animosities. Early distinguished for his ability in analysis and his force and felicity of expression, his professional opportunities lay in briefs and arguments in cases in equity and in appellate courts,—in cases requiring particular skill in the illumination and solution of legal problems, where advocacy needed the resources of the industrious scholar. During his twenty or more years at the Bar he neither sought nor had public acclaim. But he deeply impressed his brethren of the profession and on that solid reputation his future was built.

It was evident to all who knew him that he would be an ideal judge; and in truth it was his friends of the Bar who procured his nomination and made sure his election as a judge of the Supreme Court of New York, the highest court of original jurisdiction in that State. It was equally plain that his best service would be in an appellate court, and almost immediately he was designated to serve in the highest court of the State, and there by subsequent choice of the electorate as Associate Judge and Chief Judge he remained for about eighteen years. His work in the Court of Appeals of New York made him renowned throughout the country. It was service of the highest judicial quality in learning, in skill in exposition, in outstanding contributions to the development of the law. In the field of the common law, his learning gave him the freedom which comes with mastery, as he utilized its processes to secure its intelligent adaptation to the needs of his time. Modest, sensitive and retiring, he was still a mighty warrior for his convictions and in his expert hands the pen became a sword wielded with devastating power.

When Mr. Justice Holmes retired in 1932, the country, led by the Bar, with one voice urged his appointment to this Court. And here he sat for over five eventful years. In the proceedings which led to the adoption of the resolutions you have presented, Mr. Attorney General, the opinions of Mr. Justice Cardozo—those which he wrote

and those in which he concurred—have largely been considered. This is not a fitting occasion for a critique. It is sufficient to say that no judge ever came to this Court more fully equipped by learning, acumen, dialectical skill, and disinterested purpose. He came to us in the full maturity of his extraordinary intellectual power, and no one on this bench has ever served with more untiring industry or more enlightened outlook. The memory of that service and its brilliant achievements will ever be one of the most prized traditions of this tribunal. Mr. Justice Cardozo in one of his penetrating discussions observed: "If I consult my own experience, and ask what judges do in building law from day to day, I find that for the average run of cases what our predecessors have *said* is a generative force quite as much as what they have done." He meant what had been said, not by way of mere *dictum*, but what had been said "as the professed and declared principle dictating the conclusion." With the same thought he emphasized the "exceptional cases" when "the creative function is at its highest." And I have no doubt it is not so much the specific rulings in the opinions of Mr. Justice Cardozo but what he said in arriving at the rulings that will be found to be a constantly active generative force in working out the decisions of the future. He has left a great arsenal of forensic weapons.

Mr. Justice Cardozo was devoted to our form of government and to him our constitutional guarantees of essential liberties constituted a heritage to be defended at all costs. With rare insight into our social problems and with vivid imagination, what he thought and sought to enforce was built upon the foundation of profound study. The idea that "sentiment or benevolence or some vague notion of social welfare becomes the only equipment needed" was an illusion. "Nothing," he said, "can take the place of rigorous and accurate and profound study of the law as already developed by the wisdom of the past." "This," he added, "is the raw material which we are to mould."

That process of "moulding" he not only brilliantly illustrated in his judicial opinions, but he subjected it to the most rigorous analysis. The function of the judge in the shaping of the law was for him a subject of perennial fascination, to which he ever returned with a clarity and comprehensiveness of exposition which placed him in the front rank of writers on the philosophy of law,—its nature and its growth. In his view the competing demands of stability and progress pointed to an essential compromise,—“a compromise between paradoxes, between certainty and uncertainty, between the literalism that is exaltation of the written word and the nihilism that is destructive of regularity and order.” “The victory,” he said, “is not for the partisans of an inflexible logic, nor yet for the levelers of all rule and all precedent, but the victory is for those who shall know how to fuse these two tendencies together in adaptation to an end as yet imperfectly discerned.” For Justice Cardozo, the distrust of a concept was the beginning of wisdom and he was constantly on guard against the “tyranny of labels.” With characteristic detachment, he was aware of the snares of “universals,” as well in his study of the “theory of juristic method” as in other matters. “The snares that are thus set may catch the heedless feet of thinkers who have been loud even as they stumbled in cries of danger unto others.” And thus he recognized that “Generalizations about the ways in which the judicial process works are quite as likely to be incomplete, and to stand in need of supplement or revision, as the generalizations yielded by the process when in action, the output of its workings.”

On the one hand, Justice Cardozo dissented from the “depreciation of order and certainty and rational coherence” as merely negligible goods, and, on the other, he was “wholly one” with the insistence “that the virtues of symmetry and coherence” can be purchased at too

high a price and that law is "a means to an end and not an end in itself." He summed up his teaching and his practice in his heed to the warning that principles and rules and concepts are in many instances but "glimpses of reality" and that there is the need, as he put it, of "reformulating them or at times abandoning them altogether when they stand condemned as mischievous in the social consciousness of the hour."

Success in such an effort at interpretation of the social consciousness manifestly would demand a rare equipment of learning, experience and wisdom,—a balance of judgment which imperfect knowledge or narrowness of understanding would at once upset. That necessary equipment Mr. Justice Cardozo possessed in a remarkable degree and with his keen awareness he was able to escape the pitfalls into which a lesser mind might easily have stumbled. Justice Cardozo fully recognized the disagreements among those who had studied the juristic method, whether they prosecuted their studies as detached philosophers or with the aid of experience in the exercise of the judicial function, and in summarizing the conflicting contentions he disclosed his own attitude in these words: "I do not know how it will all end. I know that it has been an interesting time to live in, an interesting time in which to do my little share in translating into law the social and economic forces that throb and clamor for expression. Like any other era of unrest, it has had its pangs of uncertainty, its doubts and hesitation." And referring to a saying of Bacon, he concluded: "The 'ways' we have to travel nowadays are not flat and plane, if indeed they ever were. They are uphill and downhill with many a signpost that is false and many another that has fallen. . . . If I have not lost the road altogether, if my feet have not sunk in a quagmire of uncoordinated precedents, I owe it not a little to the signposts and the warnings, the barriers and the bridges, which my study of

the judicial process has built along the way.”¹ It was under the sway of the convictions produced by that special study that he wrought out the judicial opinions which constitute his monument.

Judge Irving Lehman, of the Court of Appeals of New York, has spoken out of his intimate knowledge of the strong influence exerted by Cardozo as Chief Judge of that court. Judge Lehman referred to his vast store of learning, his unflagging industry and his command of the gentle art of persuasion, but far above those he placed the “integrity of his mind,” “his complete absorption in his work, his selflessness, his independence restrained by his respect for the opinion of others.” These qualities were also outstanding in his work in this Court. In conference, while generally reserved and reticent until it was his duty to speak, he then responded with an unsurpassed clearness and precision in statement. His gentleness and self-restraint, his ineffable charm, combined with his alertness and mental strength, made him a unique personality. With us who had the privilege of daily association there will ever abide the precious memory not only of the work of a great jurist but of companionship with a beautiful spirit, an extraordinary combination of grace and power.

¹ Address before New York State Bar Association, 1932. Association Report, Vol. 55.