

PROCEEDINGS IN MEMORY OF MR. JUSTICE
CARDOZO.

SUPREME COURT OF THE UNITED STATES.

Monday, October 3, 1938.

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

The CHIEF JUSTICE said:

“Since our last session, we have suffered an irreparable loss in the death of our brother, Justice Cardozo. At a time when he should have enjoyed the full exercise of his remarkable powers he was fatally stricken and we are inexpressibly saddened by this tragic termination of his judicial service and the breaking of our cherished ties of personal association. Admitted to the Bar of New York at the age of twenty-one, Benjamin Nathan Cardozo rapidly won the esteem of lawyers and judges and his special qualifications for judicial work were early recognized. He was elected a Justice of the Supreme Court of New York in 1913 and was almost at once designated for service on the Court of Appeals of that State. This was followed in a few years by his election as Associate Judge of that Court and in 1926 he was made Chief Judge. On the retirement of Mr. Justice Holmes, and in response to a widespread appreciation of the fitness of the succession, Judge Cardozo was appointed Associate Justice of this Court in February, 1932. His service on the Bench thus spanned nearly twenty-five years, and his contributions to the development of our jurisprudence made his judicial career one of the most illustrious in American annals. His erudition, acumen, and technical skill, combined with a philosophic outlook and a passion for justice, made him

an ideal Judge, and the wide range of his cultural interests, his modesty and personal charm, made fellowship with him a most precious privilege. With deep sorrow at our loss, we turn to our work with a fresh inspiration as we contemplate his devotion to the highest standards of the Bench. At an appropriate time, the Court will receive the resolutions of the Bar in tribute to his memory.”

Members of the Bar and Officers of the Court met in the Court Room on Saturday, November 26, 1938, at 11 o'clock a. m.¹

The meeting was called to order by Mr. Solicitor General JACKSON.

Mr. JACKSON said:

A custom of this Bar bids us to meet in commemoration of a Justice of the Supreme Court who quits his life and his service together.

Even in the absence of such a custom, the death of Mr. Justice Cardozo would result in this outward and visible sign of our affection and respect.

He answered the Nation-wide call to the Bench of this great Court with characteristic humility. As he left the New York Court of Appeals to accept promotion, he wrote these words to me:

“Whether the new field of usefulness is greater, I don't know. Perhaps the larger opportunity was where I have been. But there was an inevitableness about the matter in the end that left little room for choice.”

These words revealed the man underneath the Judge. This Court, to Cardozo, was just that—a “field for usefulness” where his lot had been cast by a fate that had asked no sign from him.

¹ The members of the Committee on Arrangements for this meeting were: Mr. Solicitor General Jackson, *Chairman*, and Messrs. Henry L. Stimson, of New York; and J. Harry Covington, Charles Warren, and John Spalding Flannery, of Washington, D. C.

He was passionately devoted to the law and to the Court's function of giving judicial answers to our groping for order and peace and justice. But he was too humble to regard his own solutions as final ones, however useful in their own day. Constant growth and renewal of life was a basic article of his legal faith.

Even if he thought the answer tentative, he spared no pains to clothe it in living and vigorous words. None has matched him in the beauty and perfection of his craftsmanship.

He had laid all sources of knowledge under tribute, and mastered the subtleties of all schools of thought without becoming the vassal of any. He stood apart from the passions of our time and the pettiness of our lives, yet no one better knew our problems and our aspirations. Few men ever so dwelt in the clear spiritual atmosphere of another world, without losing touch with the realities of this one. The range of his wisdom and the sweep of his sympathy partook of timelessness and universality, like those of the Prophets.

Our generation is contributing many a statute and decision to the mosaic which we call "Jurisprudence." Some of its most delicate and deftly executed patterns are concepts of the mind and work of the hand of this master craftsman.

So I have called the members of this Bar to meet and, in the name of our profession, confess and record the debt of our times to Mr. Justice Cardozo.

On motion of Mr. Solicitor General JACKSON, Mr. JOHN LORD O'BRIAN was elected Chairman and Mr. CHARLES ELMORE CROPLEY, Secretary.

On taking the Chair, Mr. O'BRIAN said:

As the Solicitor General has said, we, members of the Bar of this great Court, are met here, pursuant to ancient custom, to commemorate briefly and all too inadequately the life and achievement of Justice Cardozo, whose whole life service was devoted to the law. In the interest of

orderly procedure the Solicitor General and the Committee on Arrangements have requested some half dozen of your members to speak of his life and his achievement. Speaking with discrimination, and appreciation, they will deal with the characteristics of his mental powers, his purposes and the far reaching influence of his achievements. Before calling upon these members of the Bar may your Chairman comment briefly upon one broader aspect implicit in this occasion?

We are met here in a time of grave anxieties—a time in which all men who love liberty find themselves confronted by world events and intangible forces of unmistakably evil portent. At this time when a great part of the world called civilized seems surely passing into eclipse—under the shadow of the increasing power of brute force—and multitudes of men are suffering from new and unheard of horrors—it is significant that we should be meeting here in the quiet of these surroundings to commemorate the service of the one man of all of our profession who has been in our time the truest exemplar of faith in the power of persuasion in the never ending conflict of rule by compulsion with rule of persuasion. To him the one element of certainty in human affairs was the paramount supremacy of reason. To that conception and to his abiding confidence in the power of ideas his efforts throughout his whole life were consciously dedicated. He saw the age-long struggle for individual freedom in Lord Acton's description of it as the ceaseless effort to deliver man from the power of man. As we now see more clearly in retrospect, the chastening effect of that concept was ever present in his unceasing labors to convince men by persuasion and to demonstrate that the ways of the law were reasonable ways. Disillusionment, disappointment and grief have always beset those who placed their confidence in the reasonableness of men. To Justice Cardozo these experiences brought no handicap. His infinite patience seems always to have served as a protection for his faith.

If there is, as the philosophers say, a quality of beauty in clearness of thinking, in clearness of expression, these qualities with this man were merely the outward symptoms of a kind of immanent grace—the expression of a disciplined mind; the expression of a spirit habitually imbued with the idea that his own life was in a sense a ministry to be spent in making truth in the law conform to the truths that animated men's lives in changing generations.

Many have written of the meaning of his work. In times now distant, many others will reinterpret his work with meaning ever fresh for new generations of lawyers and philosophers. But nearly all of the present day commentators miss, and perforce all who come hereafter will miss, one element of which all of us who knew him were deeply aware—the strangely compelling power of that reticent, sensitive and almost mystical personality. There are in this gathering some of those men who knew him in intimacy and with whom he shared his inmost beliefs. They will best understand what I mean. His unflinching courtesy and kindness toward those who stood but upon the threshold of his friendship, or in the outer range of his acquaintance, were symbols of the depth of his feeling and constant solicitude for those who were his nearest friends. All men, strangers and friends alike, could see that his all-pervasive toleration and even sympathy for points of view other than his own were not born of doctrine or formula, but were the result of an extraordinary breadth of understanding of mankind and patience with their weaknesses and their prejudices.

It was these qualities, sometimes only dimly perceived by strangers, that brought to him something more than respect—a rare quality of regard akin to affection—in the hearts of many who never saw him. Even they, upon analysis of his writings, would, I feel sure, realize that over and beyond the extraordinary intellectual powers of this man there was another element equally important which made his influence unique—the appealing and

utterly sincere human personality which above all other qualities endeared him to his friends and gave to his utterances as Judge a power of influence and persuasiveness quite beyond ordinary human experience. It was for this that we who were privileged to know him, even in casual intercourse, loved the man.

Innate dignity, intellectual genius are not enough to explain his power. But the word majesty—which he avoided—belonged to him, because the ennobling power of his personal character gave that quality to all that he did.

Mr. WILLIAM D. MITCHELL, acting on behalf of a Committee,² presented the following

RESOLUTIONS

The members of the Bar assembled in the Supreme Court Building on Saturday, the 26th day of November, 1938, speak for the legal profession of the country in expressing their sorrow at the untimely death of Mr. Justice Cardozo, and resolve to keep in vivid memory the pre-eminent judicial labors of the Justice as well as the rare

² The gentlemen composing the Committee were: Mr. John Lord O'Brian, of New York, Chairman; Messrs. Henry F. Ashurst, of Arizona; Warren Olney, Jr., Alfred Sutro, and Golden W. Bell, of California; Morrison Shafroth, of Colorado; Charles E. Clark, of Connecticut; Frank J. Wideman, Donald Richberg, Frank J. Hogan, and Mrs. Mabel Walker Willebrandt, of the District of Columbia; William A. Sutherland, of Georgia; Luther M. Walter and Barnet Hodes, of Illinois; John G. Gamble, of Iowa; William Marshall Bullitt, of Kentucky; Isaac Lobe Straus, of Maryland; Felix Frankfurter and Edward F. McClennen, of Massachusetts; John B. Gage, of Missouri; C. C. Burlingham, George H. Engelhard, William D. Mitchell, Benjamin V. Cohen, Thomas D. Thacher, and Charles Evans Hughes, Jr., of New York; J. Crawford Biggs, of North Carolina; Arthur C. Denison, of Ohio; Henry W. Bikle, Francis Biddle, and David A. Reed, of Pennsylvania; William L. Frierson, of Tennessee; Hatton W. Sumners, of Texas; William W. Ray, of Utah; B. H. Kizer, of Washington; and Harold A. Ritz, of West Virginia.

qualities of mind and character of which his achievements were the fruit. A formal memorial cannot convey the depth and elevation of his mind, nor catch adequate glimpses of his spiritual qualities. Only the barest outline of his career and of its significance can be attempted.

Benjamin Nathan Cardozo was born in New York City on May 24, 1870, and died at the house of his intimate friend, Judge Irving Lehman, in Port Chester, New York, on July 9, 1938. He was the younger son of Albert and Rebecca Nathan Cardozo, both of whom were descended from Sephardic Jews who had been connected with the Spanish and Portuguese Synagogue in New York from before the Revolution. His precocity was revealed early, but his was the precocity of accelerated maturity. He graduated from Columbia College at the age of nineteen, taking his master's degree at the same college in the following year. He then attended the Law School of Columbia University for two years, and was admitted to the New York Bar in 1891. For twenty-two years he pursued what was essentially the calling of a barrister, unknown to the general public but quickly attaining the universal esteem of the Bar and Bench of New York. He paid the debt which every lawyer owes to his profession, not merely by proving in daily practice that law is a learned profession but also by his illuminating book, "The Jurisdiction of the New York Court of Appeals."

His election, in 1913, to the Supreme Court of New York was a striking manifestation of the democratic process. He was not destined to enjoy experience at *nisi prius* for which he was eager. Just as he was a lawyers' lawyer, so at once he became a judges' judge.

At the request of the Court of Appeals, Governor Glynn promptly designated him to serve as a temporary member of that Court; and in 1917, Governor Whitman appointed Judge Cardozo to a vacancy in one of the permanent places on the Court. In the autumn of that year he was selected by both parties for the full term of four-

teen years, and in the autumn of 1927 became with universal acclaim, the Chief Judge of that great Court. For eighteen years his learning, conveyed with great felicity, gave unusual distinction to the New York Reports, and exerted a dominant influence in making his court the second most distinguished tribunal in the land. In addition, his philosophic temper expressed itself, more systematically than legal opinions permit, in four volumes, slender in size but full of imaginative insight, upon the relations of law to life. These are: *The Nature of the Judicial Process*, *The Growth of the Law*, *The Paradoxes of Legal Science*, and *Law and Literature*.

The New York Court of Appeals, with its wide range of predominantly common law litigation, was most congenial for Judge Cardozo. No judge in our time was more deeply versed in the history of the common law, nor more resourceful in applying the living principles by which it has unfolded. His mastery of the common law was matched by his love for it. It was, therefore, a severe wrench for him to be taken from Albany to Washington. Probably no man ever ascended the Supreme Bench so reluctantly. But, when Mr. Justice Holmes resigned in 1932, President Hoover's nomination of Chief Judge Cardozo was in the nature of a national call. In selecting him, President Hoover reflected the informed sentiment of the country that, of all judges and lawyers, Chief Judge Cardozo was most worthy to succeed Mr. Justice Holmes.

It was a grievous loss to the Court and the Nation that fate should have granted him less than six full terms on the Supreme Bench. That in so short a time he was able to leave so enduring an impress on the constitutional history of the United States is a measure of his greatness. To say that Mr. Justice Cardozo has joined the Court's roll of great men is to anticipate the assured verdict of history. His juridical immortality is not due to the great causes that came before the Court during his membership; it is attributable to his own genius. With astonish-

ing rapidity he made the adjustment from preoccupation with the restricted, however novel, problems of private litigation to the most exacting demands of judicial statesmanship. Massive learning, wide culture, critical detachment, intellectual courage, and exquisite disinterestedness combined to reinforce native humility and imagination, and gave him in rare measure, those qualities which are the special requisites for the work of the Court in whose keeping lies the destiny of a great nation.

It is accordingly *Resolved* that we express our profound sorrow at the untimely passing of Mr. Justice Cardozo, and our gratitude for the contributions of his life and labors, the significance of which will endure so long as the record of a consecrated spirit has power to move the lives of men, and Law will continue to be the ruling authority of our Nation.

It is further *Resolved* that the Attorney General be asked to present these resolutions to the Court, and to request that they be inscribed upon its permanent records.

Addresses were delivered by Messrs. Irving Lehman, Associate Judge of the Court of Appeals of New York; George Wharton Pepper, of Philadelphia; Monte M. Lemann, of New Orleans; and Dean G. Acheson, of Washington, D. C.

The Chairman read a letter from Mr. John W. Davis, of New York.

The Resolutions were then adopted and the meeting adjourned.³

³ The proceedings at this meeting were fully reported in a pamphlet entitled "Benjamin Nathan Cardozo," which was edited by the Committee and printed and distributed by the Clerk of the Court, acting as the Committee's Secretary. This publication gives all of the addresses *in extenso*; includes a eulogy by Frederick E. Crane, Chief Judge of the Court of Appeals of New York, delivered at the opening of that court on October 3, 1938; and also the eulogies attending the presentation of the Resolutions to the Court. (See *post*, p. XIV.) It is adorned by a striking likeness of the departed Justice.