

1940

Book Reviews

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Book Reviews, 9 Fordham L. Rev. 299 (1940).

Available at: <https://ir.lawnet.fordham.edu/flr/vol9/iss2/10>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

BOOK REVIEWS

BENJAMIN N. CARDOZO, AMERICAN JUDGE. By George S. Hellman. (Illustrated). New York: Whittlesley House-McGraw-Hill Book Co., Inc. 1940. \$3.50.

We now have the eagerly awaited biography of Justice Benjamin N. Cardozo. It is written by one who is not a lawyer. Mr. George S. Hellman, the author, is a man of letters, a biographer who wrote "Washington Irving, Esquire", "The True Stevenson" and a number of other books. This is not a great biography like Harvey Cushing's "Life of Sir William Osler"; the vitalizing spark is not there. But, within the limits set by the biographer himself, it is an interesting portrayal of the human side of a great judge, a fine spirit, to whom our love and our veneration went out.

"The primary purpose of this biography", the author says, "has been to portray a personality. The philosopher and the judge have, of course, been kept in mind but it was the lovable man who, foremost, has invited attention." Himself a friend of Justice Cardozo and of his family, the author has drawn on his personal recollections as well as the recollections and estimates of the Justice's family, his friends and acquaintances. He has spoken to many who knew Justice Cardozo and has "gathered together hundreds of the Justice's letters". He gathered his material industriously and, on the whole, has employed a balanced sense of proportion in its use. The book is full of anecdotes revealing vividly the human side of the great man that Cardozo was. The biography, while not in the "Grand Style", is written entertainingly and is a clear and orderly presentation. It is a good work of biographical illumination. It will give to lawyer and layman alike an unforgettable picture of a gentle, lovable, charming man, a graceful scholar, a great judge, whose heart was ever his mind's Bible, who had an abiding faith in spiritual values, and the radiance of whose ideas will always be a beacon to those who put their trust in the law as the instrument of right and of justice.

The book gives a delightful account of Benjamin N. Cardozo's boyhood. He was born on May 24, 1870, at 12 West Forty-seventh Street, New York, the son of Albert and Rebecca. With him was born a twin sister, Emily. He had an older brother and three older sisters. His mother died when he was nine years old; he was fifteen when his father died. For the greater part of his life he lived with his sister, Ellen. She kept house for him; she looked after him, and her death in November, 1929, was his great sorrow.

The author relates that a few weeks after Benjamin's birth, an uncle for whom he had been named was murdered. The mystery was never solved. The shock to the family was great. The author tells of Benjamin N. Cardozo's kin, "The Clan", he calls them, "a great family, proud and reserved". Among his ancestors were noted soldiers who served on both sides in the Revolutionary War. We are told of the family's contributions to the cultural life of New York. Benjamin N. Cardozo's grandfather, Michael Hart Cardozo, was nominated for Justice of the Supreme Court of the State of New York but died before the election. The author describes how, when Cardozo was three years old, his father, under pressure, resigned as Justice of the New York Supreme Court. One of the main themes running through this biography is that Benjamin N. Cardozo dedicated his entire life to restore the lustre of the family name. In narrow souls such a hurt breeds hate, but there was an alchemy in Cardozo's soul that took the bitterness out of life, that made him more understanding of the trials, the sorrows and the miseries of others.

We are taken through the period of Cardozo's childhood, his college days and his entry into the practice of law. His tutor was Horatio Alger, who wrote "Ragged Dick", "Tom the Bootblack", "Phil the Fiddler", and many other books, all dealing

with one central theme—the poor boy who, as the result of earnest striving, triumphed over adversity. These books, our author says, “indubitably helped to mold the early life of Benjamin Cardozo”. At the age of ten he wrote an imaginative poem, “The Dream”, for his aunt’s album. He was so talented that “his piano teacher suggested that he make music his career”. He was one of the early devotees of the Wagnerian operas. His intense love of music was to be a solace to him through life. At an early age he became a great reader of books. Brought up in a strictly orthodox Jewish household and deeply sensitive to the misfortunes that came to his family, he did not seek social activities.

As a boy, we are told, he was shy and reserved. He entered Columbia when he was about fifteen years old and became the “foremost member of his class in almost every study”. He was intensely devoted to the study of Greek. The culture of Greek life, “the high plane on which moved its protagonists in philosophy, in law, in literature and in art, made permanent appeal to Cardozo”. “To the very end of his years”, his biographer writes, “he had recourse to the atmosphere of Plato and Aristotle”. For him the object of classical study was not merely to acquire grammatical erudition but the deepest and broadest education, a love of spiritual greatness increasing through life.

He was an active member of the Barnard Literary Association, a debating society named in honor of Columbia’s president. A classmate writes that “he was one of our most logical debaters and eloquent speakers”, but he would never take part in one of the joint debates with other societies or in any way force himself into the limelight. Reading books on philosophy was his chief recreation. The account of his college days is replete with most interesting and delightful anecdotes. A college paper of 1888 makes reference to what was said to be Cardozo’s “placidity and calmness and poise”. The Class Book of 1889 records that Cardozo was voted the cleverest man and the second most modest, and mentions his scholarly fervor and zeal. He was chosen first Orator at Commencement.

The subject of his oration was “The Altruist in Politics”. The author quotes at length from this address which followed the lines of Cardozo’s thesis for his degree of Bachelor of Arts. The author tells us that Cardozo “began with a sentence prophetic of that attitude toward law as a living thing which was to guide many of his discussions as Chief Judge of the Court of Appeals of New York State and as Associate Justice of the Supreme Court of the United States: ‘There comes not seldom a crisis in the life of men, of nations, and of worlds when the old forms seem ready to decay and the old rules of action have lost their binding force’. Then, as the young fellow went on, he showed, with his lasting sympathy for the oppressed, the danger of Communism as a solution for social ills.” The author continues that “Young Cardozo, however much he was, in his closing years, to feel sympathy with many of the objectives of Franklin D. Roosevelt, had already taken his stand with John Stuart Mill in relation to the liberty of the individual”.

Cardozo led his class in honors and was elected to Phi Beta Kappa. A year later he received his Master’s Degree. He entered the Law School of Columbia but did not finish the course. He left in the second year. The trustees had added a third year and he did not come back. He was “anxious to get out into the world and make his living”. The maintenance of the family home depended to a considerable extent upon his earnings. He was a law clerk for his brother, Albert, and then his partner. A few years later the firm of Simpson, Werner and Cardozo was formed. In 1912, George H. Engelhard became a partner, and later the firm name was changed to Cardozo and Engelhard. The author gives an account of Cardozo’s years at the Bar. A few of his cases are referred to, mainly for their human interest, the author

suggesting that some qualified person might well make an intensive study of Cardozo's "Cases and Points" which he presented to the St. John's Law School. Cardozo threw all his energy into the practice of the law. It was his one absorbing interest; he had no time for social functions. He became known as a lawyer's lawyer. His memory was amazing; he was called a walking encyclopedia of the law. In 1913, he was elected a Justice of the Supreme Court of the State of New York, First Judicial District, on a fusion ticket. He was the lawyers' candidate and was warmly endorsed by leaders of the Bar, regardless of party. The election was close; a swing of 1400 votes, we are told, would have defeated him. Regardless of the outcome of that particular election, he was destined to be a judge.

So high was his standing as a lawyer, so great his legal scholarship, so fine his character, that he hardly had time to don his robes at *nisi prius* before he was accorded the unusual distinction, a month after his election to the Supreme Court, of being designated by the Governor to sit on the Court of Appeals. This great honor was the result of the unanimous recommendation of the Judges of the Court of Appeals. From then on the story is well known to lawyers, yet it is told in this book with a wealth of anecdote that will bring joy to the Justice's many friends and admirers. His life in Albany, his experiences on the Bench, how he wrote his opinions, his lectures and addresses, his work with the American Law Institute, some of his opinions while Associate and Chief Judge of the Court of Appeals,—all these are depicted.

As has been stated, the author makes no pretense of any critical analysis of the opinions or the legal essays of Justice Cardozo. "The primary purpose of this biography has been to portray a personality." That has been done and done well, in a manner that will interest lawyers, to be sure, but also in such a way that the book will have a wide appeal to those unversed in the law or in legal methods and traditions.

We may pause to consider a striking circumstance in connection with Benjamin N. Cardozo's personality. The pattern of his life was cut early and remained in essence the same with advancing years and advancing position. We have not in his case the bewildering mass of contradictions so often encountered in the lives of famous men. The author of his biography appreciated this fact. "Essentially Cardozo remained the same through boyhood and after life. His character and personality did not alter in any fundamental way. Life impinges on many characters, contracts or expands them. Not so in this case. True, he rose from achievement as a matter of family honor to achievement as a matter of public service. True, the man of solitary inclinations became the center of a circle of friends. But basically he remained the same throughout his life."

His favorite refuge was in books; in the humanities he found permanent inspiration. Among the modern authors he preferred the philosophers and the historians. "It was to books that he turned more readily than to people." Yet he delighted in many friendships; he enjoyed a wide correspondence, interesting examples of which are given by the author. There is set forth in full in this biography an inspiring commencement address, delivered by Justice Cardozo, entitled "Values". The author calls it the noblest of all of Cardozo's speeches. Perhaps it is.

We go on to 1922 when Cardozo's name was first suggested for the United States Supreme Court. At that time he would have been delighted to receive the appointment. When the high honor came to him in 1932, he was sincerely reluctant to accept. The first few years in Washington were hard ones for him, years, it would seem, of judicial discord of the kind from which his sensitive nature shrank. He gloried in the friendship of Holmes to whom he looked as the great Master in the law. In his

bedroom he kept a framed letter from Holmes. In it Holmes wrote to him: "I always have thought that not place or power or popularity makes the success that one desires but a trembling hope that one has come near to an ideal." The warm friendship between Justice Cardozo and Justice Stone is recounted. It is a joy to read some of the correspondence between them. Cardozo's letter to Stone about the public response to the first Minimum Wage decision is a gem. In another letter he writes to his friend, Justice Stone, on July 2, 1936: "We did indeed have a hard year in the court. Next year may be bad, but certainly can't be worse. I don't need to tell you how much I leaned upon you through all the contests of the term. It would have been almost intolerable without you."

Justice Cardozo, the author says, "was among those friends of the President who felt satisfaction at the defeat of the Court bill." This is indicated in a letter written by Justice Cardozo to Justice Stone on the subject on July 2, 1937. In a subsequent letter to another friend, Justice Cardozo wrote: "It was a famous victory. Have you any notion of my meaning?" "One observes," the author remarks, "how guardedly Cardozo refers to the outcome of the President's plan in connection with the Supreme Court."

While he continually referred to himself as an "exile" in Washington, after a few years he was becoming adjusted to his new surroundings. He began to lead more of a social life than before and to enjoy the company of many friends who came to see him. In 1935, he suffered his first serious illness. He seemed to have made a fair recovery but refused to limit his judicial labors as his doctor advised. As a result he paid the penalty in January, 1938, when he was stricken with paralysis. He never really rallied. On July 9, 1938, he died. With him at the end was Miss Kate Tracy, for forty-six years a devoted member of the Cardozo household. At his funeral there was no word of eulogy. He was buried in accordance with the ancient orthodox rites of his fathers.

In his will, after specific bequests prompted by affection and gratitude, he left his residuary estate to Columbia University, with the expressed wish and hope that the gift should be applied to "the foundation and maintenance of a chair of jurisprudence in the Law School of the University, to be associated with my name and to perpetuate the scientific study of a subject which has been one of my chief interests in life."

What was the secret of Benjamin N. Cardozo's greatness? He was a distinguished scholar, with a profound knowledge of the whole ambit and content of the law. He had a deep understanding of the history of the law, of its philosophy, of the sources of the rules he was called upon to apply and the background of the precedents with which he dealt. He was not a great innovator in the law, nor was he a crusader or a legal engineer, but he was our great Chancellor. He was the very embodiment of the conscience of the law. He saw through falsehood or chicanery, no matter how attractive the cloak in which it was garbed. No wrong ever left him indifferent. When his moral sense was outraged, he invariably found a way to a just and honorable result. No judge in our time placed greater emphasis on the ethical factor in the development and growth of the law. No judge did more to help the law progress, in accordance with changing needs, along the lines of social and economic welfare.

No judge in our time exercised a greater intellectual and spiritual influence over his contemporaries. No judge did more to inspire public confidence in the law. He had the amazing power of the ancient Greeks of seeing straight to the heart of things and describing them in language to which time only lends fuller justification. With all his great learning, there was no air of lofty superiority about him. He was closer to us than any other judge of our time; he was so human; he was so simple; he was so filled with the spirit of genuine humility. He wrote with a sort of romantic grace

a prose that had in it the rhythm and the fervor of poetry. He had the "Grand Style". In his opinions he strove to attain perfection in thought, in feeling and in form.

We loved him for the rich treasures of his spirit. He endeared himself to us by his kindliness, his gentle shyness, his characteristic self-deprecating expressions, his confessions of doubt, and his craving for friendship and for approval. His soul will ever live in the hearts of men; his contributions to the law will radiate far down the years. Where there is love of truth, where there is love of humanity, where there is love of justice—a finer justice that is akin to mercy—there Benjamin N. Cardozo will always find a home.

BERNARD L. SHIENTAG†

EXAMINATIONS BEFORE TRIAL. (with forms). By Edward J. McCullen.¹ New York: Baker, Voorhis & Co. pp. xxxix, 1110. \$15.00.

"You will need to know much more than the piffle paffle of procedure."—
Cardozo.

In view of the extensive use of "wide open" examinations before trial in the Federal courts since 1938, lawyers throughout the nation have come to realize that the scope of related state statutes and rules will inevitably be extended in the near future. But in states like New York, ever jealous of the particular body of law which they have developed about their depositions statutes, extension is likely to be comparatively slow. It is thus apparent that New York practitioners must be kept abreast of their own distinctive *corpus juris* on the subject and that they may not content themselves with broad principles applicable to the use of the "wide open" device available elsewhere.

Distinctive though it is, however, New York's procedure is founded upon the firm foundation of principle and not upon the shifting sands of "piffle paffle". Mr. McCullen has unerringly traced the footings of the structure to bedrock.

1. AUTHOR'S ATTITUDE

The author is a lawyer who has for many years been one of the chief technicians in what is perhaps the world's greatest procedural laboratory—the Supreme Court of New York County. His work is judicially poised throughout, replete with apt citations and practical wisdom and frequently constructively suggestive. His pen is animated by the fundamental viewpoint expressed by Mr. Adams in 31 N. Y. S. B. A. R., 61, 64 as follows: ". . . The sooner the litigants are brought face to face and compelled to disclose to each other the strength or weakness of their respective lines of attack or defense, the more expeditiously and thoroughly will justice be done between them."

2. FORMAT, MECHANICAL FEATURES AND FORMS

In *Law and Literature* Cardozo observed that philosophers have been trying for some hundreds of years to draw the distinction between substance and mere appearance in the world of matter. He doubted their success in that world or indeed in

† Justice of the Supreme Court of the State of New York, First Judicial District.

1. Librarian of the New York Supreme Court, New York County.

the world of thought. He concluded "Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity."²

The union is a happy one in Mr. McCullen's text, which is studded with forms, invariably appropriate, adequate and properly placed.

The format of the book is in the attractive style of the revised edition of Williston on *Contracts*. The cover is red with gold lettering. The volume is large, but not heavy. The type is clear and kind upon the eyes. A table of cases is provided. And there is a general index with separate indices to "forms" and to "questions and interrogatories." We trust that the work will be kept up to date by a pocket supplement.

3. TEXT

A: *The Right to Examine*

The first third of the book is devoted to a discussion of the nature and development of the device of examination before trial and the basic principles governing one's right to examine. Who, for instance, will not be startled by at least one of the following precepts? (In each case the number following a statement represents the pertinent page of the work under review):

There can ordinarily be no examination before trial of a party who has defaulted (67). An intermediate assignor cannot be examined before trial because he is not an "original owner" of a claim (70). A party can be examined before trial through his corporate managing agent, but a corporation cannot be examined before trial as a witness (179). Municipal corporations may not be examined, despite the fact that the Administrative Code,³ permits the City of New York to examine any claimant against it in any case (76). A party may not be examined before trial through a former employee (83). Examinations before trial are freely granted in death actions (120), in certain mechanic's lien actions (124), in a variety of malpractice actions (317), in conspiracy actions (300), in certain annulment actions (297), in certain libel actions (316) and in certain actions involving patents (331). The term "other special circumstances" has been judicially interpreted (180). No expenses will be allowed a party who is required to come from Tennessee to be examined before trial (184). *Woernley v. Electromatic*⁴ prevents section 296-a of the Civil Practice Act from indirectly repealing section 392 (194). Trade secrets can be protected upon examination before trial (111, 134, 232). Depositions may be taken for use on a motion (241). An examination before trial may be had as to matter inadmissible at the trial under section 347 of the Civil Practice Act (282).

B: *How to Procure or Prevent Examination Before Trial*

Here, again, the expert's super-microscope will reveal thought-provoking stimuli:

It is not proper to frame a notice of examination by repeating verbatim the allegations of the complaint (349). A notice of examination before trial which contains 270 items, many of which are clearly without merit, is evidence of bad faith which justifies a denial of the examination *in toto* (350). A defendant's answer may be stricken out if he fails to appear for examination, provided he has been subpoenaed (415). In the absence of a subpoena the answer may not be stricken for failure to appear unless an order for examination was served upon the party's attorney and the failure

2. P. 5.

3. ADMINISTRATIVE CODE OF THE CITY OF NEW YORK (1937) § 93d-1.0.

4. *Woernley v. Electromatic Typewriters, Inc.*, 271 N. Y. 228, 2 N. E. (2d) 638 (1936).

to appear was willful (414). A person subpoenaed to attend as a witness at an examination before trial is entitled to subpoena fees. But a party under examination is not so entitled (416). An attorney has authority to sign a subpoena because of his status as an officer of the court (417). A Surrogate's Court subpoena need no longer be signed by the clerk of the court (417). In the Second Department of the Appellate Division a witness may only correct his testimony by adding a correcting statement at the foot thereof. In the First Department, however, a different rule prevails (445). An examination before trial may be used by a defendant against his co-defendant (458). To offer a deposition in evidence is to vouch for the credibility of the witness whose deposition was taken, but if the witness is a hostile one his testimony may be impeached⁵ (460). A notice of examination operates as a stay only if made "for the first term or sitting of the court at which the motion can be heard" (471-474). Once a motion to vacate a notice of examination before trial has been made, the burden is upon the party seeking the examination to justify it (474). The characterization "fishing excursion" is not necessarily fatal to an application for examination before trial because the statute grants what Surrogate Wingate has called "certain piscatorial rights"⁶ (481). When books are used at an examination before trial they should be marked for identification, since, strictly speaking, they will not be "in evidence" until they are produced at the trial itself (515). "Open" commissions are not favored by the courts (550). The testimony of physicians, surgeons, and nurses in negligence cases may be taken before referees provided the privilege of physician and patient is waived (682-687). The only important case which appears to have been omitted is *Matter of Meyers*,⁷ in which Surrogate Foley held that the normal sequence of "bill of particulars first and examination before trial second" is reversed in will contests.

C: *How to Conduct an Examination Before Trial*

The last third of the book is principally devoted to a consideration of examinations before trial upon oral questions. Numerous practical hints are given and specific questions are suggested for forty-six different forms of action, commencing alphabetically with "Abuse of Process" and continuing through "Work, Labor, and Services". Rules of evidence are discussed and practical notes accompany each proposed series of questions.

It has been stated that an examination before trial is "for the benefit of the applicant only" and therefore cross-examination of the witness examined is not permitted⁸ (782). A strong argument is made by the author, however, that cross-examinations should be allowed (778-790).

His argument may be fortified with such decisions as *Frcisinger v. Reibach*,⁹ *Matter of Merritt*,¹⁰ *Fitzpatrick v. Homell*,¹¹ *Van Ingen v. Marx*,¹² *Allen v. Van Allen*,¹³ and *Galbraith v. Galbraith*.¹⁴ These citations are of special interest in view of the

5. Cf. N. Y. CIV. PRAC. ACT. § 343.

6. *Matter of Zaiss*, 147 Misc. 616, 264 N. Y. Supp. 347 (Surr. Ct. 1933).

7. 158 Misc. 942, 287 N. Y. Supp. 81 (Surr. Ct. 1936).

8. *Zeldman v. Electrolux, Inc.*, 161 Misc. 849, 292 N. Y. Supp. 116 (Mun. Ct. 1936).

9. 254 App. Div. 575, 2 N. Y. S. (2d) 817 (2d Dep't 1933).

10. N. Y. L. J., Sept. 25, 1937, p. 837, col. 7 (Surr. Ct.).

11. 142 Misc. 101, 253 N. Y. Supp. 37 (Sup. Ct. 1931).

12. 154 N. Y. Supp. 112 (App. Term 1915).

13. 225 App. Div. 873, 232 N. Y. Supp. 658 (2d Dep't 1929).

14. 248 App. Div. 914, 290 N. Y. Supp. 739 (2d Dep't 1936).

decision in *Berdell v. Berdell*,¹⁵ to the effect that the party examined may read in evidence at the trial *his own* deposition, taken at the instance of the adverse party. The reviewer has seen this happen even in cases where the party examined was physically in court at the trial and declined to take the stand, with resultant avoidance of the broader cross-examination which a trial permits.¹⁶

CONCLUSION

This book is a most useful working tool. Specialized though it is in but one important branch of the adjective law, we perceive as we lay it down, that at least in a procedural sense "our little parish has its vistas that lie open to the infinite."

JOHN F. X. FINN†

RESTATEMENT OF THE LAW OF TORTS. By the American Law Institute. Volume IV. St. Paul: American Law Institute Publishers. 1939. pp. xxiv, 830. \$5.00.

"This, the fourth and concluding volume of the Restatement of the Law of Torts, contains the official draft of the final sections in Division Nine and Divisions Ten to Thirteen of the subject. The matters treated are interference with business relations by trade practices, by refusal to deal or inducing others to refuse to deal with another generally and in the course of labor disputes, invasions of interests in the private use of land, and tortious conduct not previously fully dealt with; also defenses applicable to all tort claims. The Thirteenth and last division deals with damages and injunctions."

The foregoing quotation from its introduction sets forth the scope of the present volume in language formulated by the Director of the Institute, William Draper Lewis. This introduction goes on to explain among other matters, that due to illness Professor Francis H. Bohlen, the Reporter for the subject, had not since June 1937 been able actively to participate in the work, and that other Reporters for different unfinished branches of the work had been put in charge. The present volume, completing these unfinished portions of the subject, is therefore primarily the work of these substituting Reporters, namely Harry Shulman, of Yale University, Everett Fraser, of the University of Minnesota, Warren A. Seavey, of Harvard University, Edgar N. Durfee, of the University of Michigan, and Maurice T. Van Hecke, of the University of North Carolina. Each of these Reporters, in working on the branch of the subject assigned to him has had the usual assistance of a group of advisers selected from among the law teachers, the active practitioners, and the judges of the courts.

The familiar form of the Restatement is observed in this fourth volume as it is in the other volumes of the series. The shortcomings of that general form of presentation has been frequently remarked, in that dogmatic statements of rules of law without adequate explanation of what is regarded as their underlying, supporting reasons afford but slight assistance in the practical workaday task of applying the law to the ever new and changing and developing facts. Without the light of available reasons to guide the determination of what rule in the instance is to be regarded as applicable to the facts in question in the novel situations that currently arise, the practical useful-

15. 86 N. Y. 519, 521 (1881).

16. Cf. *Soiefer Farms, Inc. v. Quincy Mutual Fire Ins. Co.*, 254 App. Div. 768, 4 N. Y. S. (2d) 578 (2d Dep't 1938).

† Associate Professor of Law, Fordham University, School of Law.

ness even of accurately stated rules of law is very severely limited. This type of criticism of the Restatement work in general, and of the Restatement of Torts in particular, has led to an increasing tendency in the more recent volumes to set forth more of the reasons involved than was the practice in the volumes earliest published. This welcome tendency toward improvement in this regard is noticeable in the present volume. That the Reporters were keenly conscious of this aspect of their work is indicated by the increasing elaboration of reasons set forth in the comments to the black letter sections. Indeed, in repeated instances such comment now appears under such captions as "Rationale",¹ "Basis of protection",² "The natural flow theory",³ "The Reasonable Use theory",⁴ "Analysis",⁵ "Historical development",⁶ "Conflict of interests".⁷ For application to current controversies the Torts Restatement as it stands still needs, however, the guiding light of an accompanying treatise in which the reasons can be discussed and the authorities indicated upon the basis of which the rules set forth in the restatement were formulated.

The subject matter in the present volume is too extensive and varied for extensive detailed comment in a short review. A few remarks may be offered, however, on the inclusion here of the rapidly changing and highly controversial subject matter involved in unfair trade practices and trade boycotts as well as strikes and boycotts in labor disputes. The contending and conflicting social forces engaged in this field of controversy exhibit in marked degree the difficulties of reducing the adjustment of seriously conflicting vital interests to the orderly process of legal adjudication. Basic differences in fundamental assumptions from which legal rationalization can begin are frequently here so irreconcilable that common ground is very difficult to find. Deliberate resort to force and violence as the final arbiter is here very frequently encountered. The basic assumptions of the social utility of free enterprise and free competition recognized in the traditional common law are here insistently challenged by increasingly vocal and turbulent elements having little scruple about law violation if it serves their own interests. Pressure from conflicting interest groups in this field has in recent years given rise to several very significant items of regulatory legislation radically changing the formerly applicable common law. Further changes by legislation in one or more directions is in prospect. Administrative application of such regulation, notably through the Federal Trade Commission and through the National Labor Relations Board has to a large extent replaced court adjudication of controversies in the first instance in this field. Despite the manifest thoroughness and care with which this portion of the Restatement has been prepared by Professor Shulman and his advisers one may therefore wonder whether as a statement of anywhere actually applicable law this portion of the Restatement can have more than a fleeting ephemeral existence. Even an accurate instant photograph of existing law cannot long remain dependable in a rapidly changing subject matter. That in this respect the picture presented in this part of the Restatement is not dependable as actually applicable law even at the outset is manifest from the repeated cautions appearing at intervals that the effect of legislation such as that of the Sherman and

1. For example §§ 762 (comment a), 765 (comment a), 766 (comment b), 788 (comment c), 802 (comment b), 803 (comment b), 858 (comment a), 885 (comment c).

2. § 849, comment a.

3. Chap. 41, topic 3, Introductory Note.

4. *Ibid.*

5. *Ibid.*

6. § 867, comment b.

7. § 867, comment c.

Clayton Acts and the National Labor Relations Act are beyond the scope of the Restatement.⁸ It would seem that here the Restatement purports to state not presently applicable law as such but the common law ingredients that may chance to be involved in whatever the actually applicable law may be.

Even granting this severely limited scope of the Restatement material in this highly controversial field, questions aplenty remain with regard to how this material had best be handled. One writer's review of another's work in such highly controversial materials must inevitably take some color from their different points of view in looking at the subject matter. With this in mind then, a few observations arising from such differences may be offered.

As set forth in this part of the Restatement, secondary boycotts and sympathetic strikes are asserted to be lawful if the actors have a substantial interest in the third person's employment relations.⁹ No recognition is accorded the circumstance that the common law materials in this regard were sharply conflicting and that those materials have by many capable reviewers been appraised as preponderating against the legality of such conduct. Apparently Professor Shulman and his advisers are here following what they regard as "the better view" which ought to be followed. It would have been informative at this point to find more specific exposition of why that is regarded as "the better view". Possibly illuminating in this regard is the circumstance that among the advisers to the Reporter are found Mr. J. Warren Madden, the Chairman of the National Labor Relations Board, and Mr. Charles E. Wyzanski, Jr., Assistant to the Attorney General, who appeared as counsel for the National Labor Relations Board in its earlier leading cases before the United States Supreme Court, whereas it does not appear that attorneys representing the other side of the argument in labor disputes were even consulted. Moreover, while it is stated¹⁰ that the rule does not go to the full length of recognizing the class solidarity of workmen as a justification for secondary boycotts and sympathetic strikes, yet the elastic manner in which workmen's interest in the third person's employment relations is defined¹¹ would seem in effect to amount to no less. It would have to be a singularly obtuse and dull lawyer who could not find under some subdivision of Section 804, as broadly expounded in its accompanying comments, the phraseology conveniently apt for sheltering in the instance the conduct questioned. For instance, what cannot be brought within the broad sweep of such far reaching language as "the relation between the actor's employer and the third person with respect to competition", or "influence in employment policies"? Consciousness of the so-called class solidarity of workmen arises commonly because they recognize elements of competition by virtue of which the lower scale of wages or the unsatisfactory conditions of employment of a non-union employer may through reduced costs give him such a competitive advantage in the market as to force union employers to follow suit or go out of business. How seriously this threatens the wage scale or standards of working conditions which unions have sought to build up for themselves is easily recognized. Under the language here used in the Restatement such influence of employment policies of other employers would seem to justify even a general strike. Under the language here used in the Restatement apparently it is immaterial that such a general strike is in essence an attack upon the general public in order thereby to put pressure on recalcitrant em-

8. §§ 762 (comment a), 768 (comment g), 785 (comment c), 788 (comment b), 802 (comment b), scope note to topic 5, immediately preceding sec. 807.

9. §§ 802-805, 808.

10. § 802, comment b.

11. § 804, especially comment d.

ployers who persist in defying the union. I have looked in vain for any recognition in this language of the Restatement that the interest of the public in the instance might outweigh the interest of the unionized group. I have not thus understood the common law materials. If at this point I am misconceiving the Restatement language, may not others even less minutely familiar with the materials in this field do likewise?

Another matter of point of view may be mentioned. The portion of the Restatement devoted to labor problems apparently is approached primarily from the standpoint that it is a struggle between employers and employees in the competition for the proceeds of enterprise. Nowhere is it definitely recognized that the competition between employees for the available jobs is in reality quite as fundamental a competition which the labor union movement so far as practicable seeks to eliminate. Hence comes picketing, as the natural accompaniment of strikes, in the effort to prevent the hiring of other workmen to replace those who have quit work. In this matter fair persuasion as a deterrent has very little effect since the new applicant for the vacant job is equally earnestly seeking the opportunity to work for his living. This is not only one of the greatest needs but is also one of the most fundamental rights of human beings "in the economics of free enterprise and in the politics of individualism." Fair persuasion by pickets failing to deter people who seek jobs through which to provide for themselves and their families, resort to intimidation and violence in order to deter them readily follows. It is a case of competition between rival groups of employees, the employer in such cases trying to take advantage of the presence of such competition, the striking employees by fair means or foul seeking in the instance to eliminate it. The public in the background as consumers who pay for the products in question are thus the ultimate parties to gain or lose by the outcome of this competitive struggle.

Again, the Restatement sections devoted to labor disputes nowhere deal with the problem of to what extent conduct *prima facie* actionable as assault, battery, etc., can become privileged by reason of its being perpetrated by strikers in defense of their jobs. It is recognized in the introductory note to the material on labor disputes that in the course of a strike and picketing workers sometimes throw stones, commit batteries, and damage land and chattels. To what extent such conduct may be privileged on grounds analogous to privilege for defense of property is a question of large moment in the appraisal of present day labor disputes. Popular consciousness readily recognizes that a workman has an interest in his job, by whatever label it is to be designated. Legal recognition of such interest to greater or less extent in various situations is not lacking. Consciousness of this interest is at least one of the factors that has led to the widespread public attitude that distinguishes violence by strikers in labor disputes from ordinary lawlessness. Could some thorough analysis of this aspect of labor disputes have been included in the Restatement, it might have helped greatly to clarify one of the practically most difficult problems in the whole range of labor troubles. While this matter is now far from settled, and the whole subject of labor relations is in rapid flux, it is, as yet, futile to hope that its formulation in the Restatement could achieve general acquiescence. Similar obstacles to setting forth settled rules of law are encountered, however, in connection with the entire field of labor disputes. The Restatement nevertheless ventures a systematized statement of rules of law relating to collective bargaining and refusal to work or deal. That is, however, only half the picture. Violence in labor disputes complicates that problem in application. Could not the Restatement also have ventured to identify one of the most fundamental interests in the whole field of controversy, namely the workman's interest in his job? With that foundation laid, could it not have ventured upon analysis of whether and to what extent violence in defense of the job may be

privileged on grounds analogous to privilege for violence in self-defense, in defense of family, or in defense of property? By including this aspect of labor disputes within its range would not the Restatement have presented a better balanced survey of the problem as it is actually encountered in practical life?

LAWRENCE VOLD†

CASES AND OTHER MATERIALS ON THE LAW OF WILLS AND ADMINISTRATIONS. (Second Edition). By Philip Mechem and Thomas E. Atkinson. Chicago: The Foundation Press, Inc. 1939.

Externals indicate a substantial break from the first edition of this book. The six hundred word preface is supplanted by one of ninety words; the copyright, the publisher, the format and appearance have all been changed. Of some two hundred thirty-seven cases reprinted in this edition of eight hundred forty pages, only about ninety-four appeared in the prior edition. The cases which are new here are not at all limited to cases decided since the first edition. Lacking space, the first edition excluded "certain borderline topics, such as . . . construction of wills"; whereas the one feature mentioned in this preface "is the increased and more explicit stress put on the construction of wills." There is no chapter on construction; but twenty cases are listed under that topic in the index.

This preface should have mentioned an excellent treatment in four chapters (a hundred pages) on descent and distribution. And the editors might have epitomized in their preface the reasons for some regrouping. There is no chapter, as formerly, on "Condition and Mistake," but there is one on "Mistake and Fraud." *Eaton v. Brown*¹ appears in a new chapter, "Instruments Offered as Wills." This chapter might have covered the query, met often in practice, whether probate shall be had where the instrument offered, though duly executed, will not (for any of various possible reasons) change the descent provided by statute.² A footnote in the first edition sufficed for nuncupative wills; here there are two cases and an elaborate note, in all covering five pages. The chapter "Integration of Wills" has doubled in size; that on "Revocation of Wills" has expanded from sixty to a hundred pages. These and other instances indicate that the editors have critically re-examined the entire field. *Bohannon v. Wachovia Bank*,³ a tort action for interference with the making of a will; and *Estate of Soper*,⁴ for construction of an *inter vivos* trust, are also included.

Many cases brought into this edition are notable for the conciseness with which the facts present the problem, and the opinion states the principle. *Mansfield v. McFarland*⁵ and *Gregory v. Lansing*,⁶ are excellent brief cases concerning the grant of local administration. *St. L. & S. F. R. Co. v. Goode*⁷ presents in six pages, several questions arising under Lord Campbell's Act. Similarly, *Jones Brewing Co. v.*

† Professor of Law, University of Nebraska Law School.

1. 193 U. S. 411 (1904); first edition, p. 252, second edition, p. 308.
2. Cf. *Landic v. Simms*, 1 App. D. C. 507, 514 (1893).
3. 210 N. C. 679, 188 S. E. 390 (1936).
4. 196 Minn. 60, 264 N. W. 427 (1935).
5. 202 Pa. 173, 51 Atl. 763 (1902).
6. 115 Minn. 73, 131 N. W. 1010 (1911).
7. 42 Okla. 784, 142 Pac. 1185 (1914).

Flaherty,⁸ on the fiduciary's liability for his contracts, *Jones v. O'Brien*,⁹ on his liability for his deposit in a bank which fails; and *In re Holmes' Estate*,¹⁰ on priorities between funeral expenses, administration expenses and federal taxes, offer, in brief compass, fact situations involving illuminating variations of important practical problems. The rights of grantees in good faith from devisees under a probated will as against the heirs, after probate has been revoked, are considered in *Steele v. Remm*.¹¹ And *Federal Trust Co. v. Cohen*,¹² on the claims of secured creditors in insolvent estates, presents neatly a question on which the Supreme Court divided five to four in *Merrill v. National Bank*.¹³ The seven pages devoted to *Price v. Hitaffer*¹⁴ seem justified; but *Hantzsch v. Massolt*¹⁵ could have been omitted.

Practically every case is annotated. These are not the notes of the prior edition. They average a half page each; but there is no uniformity among them. Some appear as footnotes, quoting, on the same page, a case cited in the case reprinted. But most of them are "Notes" and follow the case. In one instance there is a list of problems, from cases cited;¹⁶ rarely, the note merely cites other cases; usually the note is a compact digest of related principles. Passing from one page to the next, the reader is sometimes confused, momentarily, because footnotes are continued on the *bottom* of the next page, whereas Notes (in the same type, on a wider slug) continue at the *top* of the succeeding page.¹⁷ In about ten instances, instead of the Note, there is a text statement of a page or two in regular type, with footnotes to cases.¹⁸

The work is singularly free from typographical slips.¹⁹ Even errors in the official reports are reproduced, faithfully and without italics.²⁰ The editors cite the official reports, the National Reporter System, and the American Law Reports; previous references to other unofficial reports have been omitted. Similarly, respecting statutes, the editors cite Bordwell, Vernier, or the statute book. The law reviews are cited freely. The text of Professor Atkinson, like other texts, is cited very rarely. Anent the one question which is posed by the editors and left without answer or reference of any kind,²¹ see *Shields v. Shields*,²² and cases there cited.

The least satisfactory chapter in the book is the Introduction, "The Rationale of Succession." By vehemently challenging the assumption by law school students that our present rights of inheritance and of testation are justifiable, and by simply arranging in chronological order according to date of publication, excerpts chosen of

8. 80 N. H. 571, 120 Atl. 432 (1923).

9. 58 S. D. 213, 235 N. W. 654 (1931).

10. 1 A. (2d) 42 (N. J. 1938).

11. 50 Tex. 467 (1878).

12. 116 N. J. Eq. 201, 172 Atl. 502 (1934).

13. 173 U. S. 131 (1899).

14. 164 Md. 505, 165 Atl. 470 (1933).

15. 61 Minn. 361, 63 N. W. 1069 (1895).

16. P. 259.

17. Compare pp. 293-5 with 295-6 and 298-9.

18. See pp. 324, 641, 670, 690, 695, 730, 742, 757, 772 and 781.

19. P. 274, l. 6, "deprive" should read "deprived". P. 554, l. 27, "charge" should read "charged". P. 742, fourth line from the bottom, "see" should read "sue". P. 705, l. 20, "Infra p. 706" should read "below". P. 185, l. 15, "Mack" unusual for "Mackey".

20. P. 674, "Under Lord Campbell's Act and the state statutes *modified* on it"; p. 560, l. 28, "by comity and federal *treatise*"; p. 99, l. 36, "What appears *to the* earliest case."

21. P. 670, note 2.

22. *Shields v. Shields*, 101 F. (2d) 255 (App. D. C. 1938).

course by themselves, the editors lead the student to assume, instead, that our present system is indefensible, and that the writings of Dalton and of Rignano present the last word on the subject,—with *The State* to become, by statute, universal successor, within the space of a generation or two! Their final footnote indicates that criticisms of the Rignano plan (which are not set forth) have all been answered. Thus assumptions consistent with the existing social order are supplanted by others that are not. This review of the chapter is farfetched,—but not more so than the chapter itself.²³

Geographically, the cases reprinted cover the country: Twenty-two, representing one-tenth of them, are from New York. And of these, five are from the Appellate Division, and six from the Surrogates' Courts. The editor's willingness to use a good case from the lower courts is evidenced further, by the reprint of two from New Jersey.²⁴

After eleven years the editors have transformed their initial effort into this second edition, which is substantially the same despite these changes, but which, by reason of them, is much improved, both in appearance and in content.

VICTOR S. MERSCH†

23. Cf. Connor, *The Nature of Succession* (1939) 8 FORDHAM L. REV. 151.

24. *In re Julia*, 3 N. J. Misc. 976, 130 Atl. 733 (1925); and *In re Holmes' Estate*, 1 A. (2d) 42 (N. J. 1938).

† Deputy Register of Wills, Washington, D. C.; author of PROBATE COURT PRACTICE IN THE DISTRICT OF COLUMBIA.