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BOOK REVIEWS

The Dissenting Opinions of Mr. Justice Holmes. Arranged, with introductory notes, by Alfred Lief, with a foreword by Dr. George W. Kirchwey. New York: The Vanguard Press, 1929. Pp. xx, 314.

The Social and Economic Views of Mr. Justice Brandeis. Collected, with introductory notes, by Alfred Lief, with a foreword by Charles A. Beard. New York: The Vanguard Press. Pp. xxiv, 419.

Mr. Justice Holmes. Contributions by Benjamin N. Cardozo [etc.]. Edited by Felix Frankfurter. New York: Coward-McCann, Inc., 1931. Pp. xii, 241.

Mr. Justice Brandeis. Essays by Charles E. Hughes [etc.]. Edited by Felix Frankfurter, with an introduction by Oliver Wendell Holmes. New Haven: Yale University Press, 1932. Pp. x, 232.

In 1881 there appeared a volume called "The Common Law." Its author was a Boston lawyer just turned forty. He had served gallantly in the Civil War. He had edited an edition of Kent's Commentaries. He was the editor of a law review and had been a lecturer at the Harvard Law School. But he was then perhaps best known as the son of the genial physician, essayist and poet whose paper on puerperal fever had justly fixed his reputation with the medical faculty but whose "Autocrat" and humorous verse had brought general fame. The father was doubtless one of the few members of the Saturday Club who could poke fun at Brahmin foibles. The son had certain of his father's qualities, a sceptical turn of mind, professional devotion, and a sense of literary form worthy of the originality of his ideas. In the next year, '82, came that "stroke of lightning"—to use his own phrase—which changed his whole career. He became a judge on the Massachusetts Supreme Judicial Court, later its Chief Justice, and after twenty years' service a Justice of the Supreme Court at Washington. After almost fifty years on the bench—just a year ago—he retired, aged almost 91, but preserving to the last that independence of temper, acuteness of intellect and philosophic breadth of view for which his name had become a byword: *par excellence*, the Lawyer as Philosopher, one might even say, the Lawyer as Hero.

"The Common Law" was itself an extraordinary book, but even more so when one remembers that it was written before Maitland's first essay. Holmes had no historical precursor in America unless we count Bigelow. Ames, Thayer and Gray all came later. In England, Maine had broken ground, but the work of Pollock, Maitland and Vinogradoff was still in the future. The study of the history of legal science was in its infancy. The return to the Year Books, however, was not all.¹ Holmes showed a new critical spirit toward the past: history was only a means to an end;² and logic was made the handmaid of experience.³

The qualities we have noted in the scholar were soon manifest in the judge (what a fascinating task for Holmes's future biographer it will be to follow through the thousand cases of his Massachusetts judicial tenure the development of his doctrines!).⁴ And later, as a Justice of the Supreme Court he, like Marshall, never forgot "that it is a constitution we are expounding."⁵ For the Supreme Bench demands a skill in statecraft often beyond the technical lawyer. No judge has seen more clearly than Holmes that progress means change, experimentation, perhaps repeated failure: "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."⁶ His scientific detachment has led him to withhold condemnation of experiments with which he disagreed both as to means and object: "Otherwise a constitution . . . would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*."⁷

¹"I . . . having done my share of quotation from the Year Books." Address at Langdell Dinner (1895), *COLL. LEGAL PAPERS* (1920) 138.

²" . . . Continuity with the past is only a necessity and not a duty." *COLL. LEGAL PAPERS* (1920) 211; and again: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." *Id.* at 187.

³"The life of the law has not been logic; it has been experience." *THE COMMON LAW* (1881) p. 1.

⁴See Frankfurter's classified list of Holmes's Massachusetts opinions in (1931) 44 *HARV. L. REV.* 799.

⁵*McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819).

⁶*Truax v. Corrigan*, 257 U. S. 312, 344 (1921) (dissent). Cf. "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. N. Y.*, 198 U. S. 45, 76 (1905).

⁷*Otis v. Parker*, 187 U. S. 606, 608-609 (1903).

But where he has found the challenged power, or the constitutional guarantee, clear, and his own moral conviction supports his judicial conclusion, he has always spoken with fervor.⁸ His innate scepticism, his belief that "the best test of truth is the power of the thought to get itself accepted in the competition of the market,"⁹ his readiness to give the other fellow's opinion—especially if it be that of a legislature—the benefit of the doubt, have earned for him the name of "liberal." John Dewey believes that this combination of belief in the conclusions of intelligence, freedom of thought, and room for social experiment justifies the epithet.¹⁰ But this is very far from saying that Holmes is the advocate of a new order, either social or economic.¹¹ His liberalism is an attitude of mind and is much nearer akin to the sceptical detachment of a grand seigneur of the Eighteenth Century than most suppose.

We have in Mr. Justice Brandeis, with whose name Holmes's is so often linked, a different type of man and of "liberal." Born in Kentucky in 1856, a Jew, whose parents left Bohemia after the Vienna rebellion of '48;¹² also a product of the Cambridge legal tradition and a Boston lawyer, but until the age of 60 engaged in the hurly-burly of social controversy; stigmatized by all the vile and violent things which an outraged plutocracy could find for this Tribune of the Plebs when appointed by President Wilson to the Supreme Court some sixteen years ago;¹³ Louis D. Brandeis comes very near to realizing the ideal lawyer of the future as foreseen by Holmes, a "man of statistics and the master of economics."¹⁴ That mastery which now stamps his opinions, especially in the untrammelled expression of dissent, when every statement is fully documented, comes from those years before 1916, when he fought in courtroom, legislative lobby and on the platform, without fee or

⁸ As in his dissents upon the child labor law, *Hammer v. Dagenhart*, 247 U. S. 251, 277 (1918); upon freedom of speech, *Abrams v. U. S.*, 250 U. S. 616, 627 (1919); upon Government wire-tapping, *Olmstead v. U. S.*, 277 U. S. 438, 469 (1927); or upon naturalization tests, *U. S. v. Schwimmer*, 279 U. S. 644, 653 (1928).

⁹ *Abrams v. U. S.* (dissent), *supra* note 8.

¹⁰ *Justice Holmes and the Liberal Mind*, THE NEW REPUBLIC, 11 January 1928, reprinted in Professor Frankfurter's book at p. 33.

¹¹ See, for instance, *Economic Elements* (1904) in COLL. LEGAL PAPERS (1920) 279.

¹² Josephine Goldmark, THE PILGRIMS OF '48 (New York, 1931).

¹³ Professor Beard points out in his introduction to Mr. Lief's book that among American Bar Association ex-presidents, Taft, Root and Choate all vigorously opposed the nomination. P. ix.

¹⁴ *The Path of the Law*, COLL. LEGAL PAPERS (1920) 187.

other reward, for Boston's control of its street railways, for cheaper gas in Boston, against the New Haven's New England railroad monopoly, for cheaper industrial insurance, for shorter hours for women workers, in arbitration of the cloakmakers' strike, in exposure of bureaucracy in the Ballinger conservation controversy against the money trust, and as adviser to the Interstate Commerce Commission on railroad management.¹⁵

His liberalism has the same foundation as Holmes's in a profound belief in the necessity for liberty. "Those who won our independence," he has said, "believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . and that this should be a fundamental principle of the American Government."¹⁶ And he believes in democracy. But there are profound differences between the two "liberal" judges. Brandeis distrusts certain economic trends. He distrusts big business not only as a political oppressor of the "little fellow" but because of its inefficiency. He looks to social legislation to remedy social ills. He finds the best safeguard of "natural" liberty in economic freedom, for he realizes keenly that employers may indirectly usurp the former, as to the vast army of the employed, by directly stifling the latter. He has a creed, in other words, which he seeks to justify by faith and works, rather than a sublime tolerance of the mistakes of mankind in its striving, by trial and error, toward a higher goal. But he finds with Holmes a common ground in the belief that progress implies experimentation. Take, for example, a recent and notable dissent in which after dwelling upon the "unbridled competition" which is, rightly or wrongly, thought by many to have brought us to our present pass in which "misery is wide-spread, in a time, not of scarcity, but of over-abundance," he pleads for freedom in social legislative experimentation: ". . . we must ever be on our guard, lest we erect our prejudices into legal principles. If we would guide by

¹⁵ See his *BUSINESS—A PROFESSION* (Boston, 1914), and with its foreword by Ernest Poole; and his *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* (New York, 1914); for fugitive essays and addresses on these matters there collected. A few excerpts are reprinted in Mr. Lief's book.

¹⁶ Concurring opinion in *Whitney v. California*, 274 U. S. 357, 373 (1927).

the light of reason, we must let our minds be bold."¹⁷ Nor does he think that the "process of trial by error, so fruitful in the physical sciences," should stop here, for he would apply it, as his dissent in a more recent case indicates, even to the judicial process of the court itself, and not let *stare decisis* bar the way to a new position justified by newly ascertained facts.¹⁸

There is every reason, therefore, why we should welcome new books on Holmes and Brandeis. Professor Frankfurter's volume on Holmes is a symposium of reprinted pieces by many hands, including among others Cardozo, Learned Hand, Laski, Morris Cohen, Lippman, and Wigmore. If it contained nothing else—and what else it does contain is very good indeed—the book would justify itself by bringing before a larger public Professor Frankfurter's long and careful essay, "Mr. Justice Holmes and the Constitution."¹⁹ The similar volume on Brandeis is made up of essays contributed to the Harvard, Yale and Columbia Law Reviews in November 1931 on the occasion of his reaching his seventy-fifth birthday. Chief Justice Hughes contributes a short notice, Professor Frankfurter a long and valuable essay on his constitutional decisions, while others consider him in various aspects. Most significant is the brief foreword by Justice Holmes. "Whenever he left my house," Holmes says of his friend and former brother-justice, "I was likely to say to my wife, 'There goes a really good man.' I think that the world now would agree with me in adding what the years have proved 'and a great judge'."

In Mr. Lief's volume on Mr. Justice Holmes are included a brief essay on "Natural Law,"²⁰ fifty-five dissenting opinions, and eighty pages of excerpts from majority opinions. Why dissenting opinions? Because, undoubtedly, Holmes has for years led a minority of the court which has refused, to cite a single instance of constitutional interpretation upon which reasonable men may differ and differ widely, to find "in the vague contours of the Fourteenth Amendment" much that his colleagues saw there. And then, too, dissenting opinions have more individual flavor. Mr. Lief's volume on Mr. Justice Brandeis includes 80 pages of "Ideas expressed before 1918"; while the rest embraces 30 of his opinions; but the whole

¹⁷ *New State Ice Co. v. Liebmann* (dissent), 285 U. S. 262, 311 (1932).

¹⁸ *Burnet v. Coronado Oil and Gas Co.* (dissent), 285 U. S. 393, 405 (1932).

¹⁹ Reprinted from (1927) 41 HARV. L. REV. 121.

²⁰ Reprinted from (1918) 32 HARV. L. REV. 40.

hardly justifies the sonority of the title, "Social and Economic Views of Mr. Justice Brandeis." In both volumes a short, non-technical and quite helpful statement of the background is prefixed to each case, and the cases are classified under general headings, with special captions for each case. It may be regretted that the last sometimes savor of the tabloid newspaper, as "What price water?", "Gas Across the Borders," "Tried by White Men," "Near-War of the States." These two books should do much, however, to bring two of our greatest judges home to the layman, and will, of course, be welcome to the lawyer who will find in their compact and readable form many old friends of the official reports. The lawyer will regret, however, that citations of court decisions have been omitted in the opinions as "only of technical interest": one can as well forget, in regarding a stream, the banks which give it course or the occasional boulder which causes a new avulsion.

Of the two judges, Brandeis, it must be admitted, suffers most from such a selective process. If Holmes's opinions read more easily and his brilliant epigrams stick in the memory longer than the words of Brandeis, it is because Holmes employs a more philosophical approach and generalizes, but with great conciseness, from the particular facts, while Brandeis is inclined to pile up cumulatively his arguments on top of a great array of facts amassed in support of his conclusion. Holmes has, moreover, a marvellous sense of literary form. But if we read today the scintillating maxims of La Rochefoucauld and not the judgments of D'Aguesseau, no moral reflection is thereby implied: one form is simply better calculated to survive as literature.

MANGUM WEEKS.

Washington, D. C.

Taxation in North Carolina. Sponsored by The North Carolina Club at the University and The North Carolina Conference for Social Service. Chapel Hill: The University of North Carolina Press, 1932. Pp. 80. \$50.

It is a highly commendable service to North Carolina which the sponsors and authors of this bulletin have performed. Compressed into eighty pages are fifteen very compact articles on tax problems of immediate concern to the state. Twelve economists and public officials, Clarence Heer, John P. Stedman, S. H. Hobbs, Jr., A. S.

Keister, Fred Morrison, D. G. Brummitt, A. D. McLean, R. B. Tower, W. G. Query, Frank Coxe, Sennett Conner, and A. W. McAlister, discuss the cost of government in the state, the present sources of revenue, and the possibilities of new sources.

To state the contents in the merest of outlines, the bulletin says: North Carolina, as most other states, is confronted with real difficulties in public finance. A heavy load of public debt has been incurred, but it represents value received. The state ranks rather low in per capita wealth and income and necessarily must pay a larger rate if it would have the services more wealthy states provide. There are no superfluous governmental services the abandonment of which would cut the tax bill greatly. A large part of our revenue goes for debt payments which will be with us a long time. Education accounts for three-fifths of the reducible costs; so a decrease in taxes must be largely at the expense of that service. Compared with other states North Carolina taxes are not excessive. They may, however, be inequitably distributed. Property pays about fifty per cent of the taxes in this state, and this is next to the lowest percentage in the United States. Farm property, although it contributes only about one-fifth of the property taxes, is exceedingly hard pressed because farm incomes have declined so greatly. The North Carolina inheritance and income tax rates are among the highest. Interstate competition both in these and in franchise taxes are restraints on much further extension. A general sales tax or a tax on selected commodities offers a field for additional revenue. The final chapter is entitled "A Tax Program for North Carolina." It enunciates a long term program and a fearless present-day tax policy for the state, that North Carolina may not lose what has been gained, and to this end that the principle of ability to pay be applied to the surplus wealth in the state, giving this wealth an opportunity to justify its existence. This last is not a very specific policy and obviously there are grave obstacles in the way.

There is considerable misinformation about taxes in North Carolina and a reliable, up-to-date discussion of so vital a problem is most welcome. For the most part the authors have limited themselves to factual information with a minimum of opinion. Several articles are so packed with facts and figures that one desires more interpretation, and especially when the opinions in these particular articles, though rare, are very convincing.

Chapel Hill, N. C.

E. M. PERKINS.