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Book Reviews

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BOOK REVIEWS

I Too, Nicodemus. By Curtis Bok. New York: Alfred A. Knopf. 1946. Pp. vii, 349.

Reviewing this book is like trying to catch half a dozen frogs at once. It consists of a couple of exceptionally powerful short stories, a strong short story half finished and then capped with a bit of unimpressive news reporting, a number of courtroom episodes, a chapter of jurisprudence valuable principally to demonstrate that the author, Bok, excels as a writer rather than as a juristic thinker, several main theses or bills of goods which the author wants to sell to his readers, and a portrayal of the ordinary daily life of an interesting man, who is also a judge. This may not be all there is in the book, but these are the things which stick in the mind of the reviewer. All this is held together into something resembling a novel by the fact that most of it appears chronologically in the life of the judge, whose name is given as Ulen, but whom we sometimes suspect of being Bok. Perhaps he should have a hyphenated name and be called Ulen-Bok. The author himself tells us that the book is intended neither as a novel nor a collection of court stories, but as something between the two. The friends, family life, religion, and even the vacations of the judge are brought in, so the author asserts, because these have to do with his conduct as a judge. The author puts it a little more impressively, but that is what he means, and that is one of his theses or bills of goods. From this we gather that Bok has been under the influence of a group of modernistic juristic thinkers called Realists, for that is also one of their major theses or bills of goods. It is odd that Bok, revealed here by his handiwork as a mystic and a deeply religious man, should have been so much influenced by a school of jurists who are extreme materialists. Bok is not willing to confess the influence, as witness the fact that on page 47 he writes, "Take a man and a bench. Put them together and shake well before using. Serve at ten o'clock each morning. The state of the stomach after dosage constitutes justice, and nothing else does." This is a version (somewhat fuddled) of that extreme form of Realism known as Gastronomical Jurisprudence. But the author puts these words not in the mouth of Ulen (Bok) but of a minor character, one Nathan, a lawyer, whose ideas Bok does not necessarily sponsor.

The author puts into the book enough about sex to insure the book's popularity. The reviewer is not sure whether this was done with an eye on the market, or in an effort at an appearance of unconscious simplicity in accepting life as it is; at any rate the reviewer has the strong

impression that the simplicity is not an unstudied one. Thus one of the judge's children, in a simple little family scene, is reeling off a jargon (p. 72) he has picked up from radio advertisement; and he begins, "Fertilized eggs from fecund hens." At another point (p. 63) Bok accounts for the fact that a father did not go into the room where his small adopted son was having an arm set, on the striking theory that men know it is wise not to suffer in each other's presence. "It went back to their both being bulls and each having to know what kind of bull it was he had to deal with." Ho, hum. The pun as to the nature of this proposition is a bit too obvious for the reviewer to set it forth.

On the other hand the story of Jon and Sara Sander is partly a drama of sex, but it is something of an altogether different sort from the kind of thing just referred to; it is a powerful story drawn out of life, depressing but extraordinarily gripping, and done with a mastery which leaves no doubt that Bok at his best is a writer of first rank. This superlative story has an importance in the book beyond its own great worth; it is used in such a way as to impress upon the reader another of Bok's theses, that law is not a dry science but part of life. The story does not begin in the courtroom. For a while it looks like a separate story in the middle of the book. The writer seems to abandon the doings of Ulen, and starts a story of the life of Jon and Sara Sander, which he develops from their childhood. It is only after they have murdered Sara's new born baby that their drama moves into Ulen's courtroom and becomes a murder case. Nor does it stop in the courtroom. It goes on from there, and we see the effect of the judge's decision on the lives involved. Thus we are left with an impression of life flowing through a court, rather than an impression of cases having a complete existence there. The writer in this story reaches a height; the story has greatness, the thesis it supports is true, and the process by which the story illustrates the thesis is more powerful than mere argument. It is true that one character, Sara's father, is made to behave to fit the story, rather than allowed to behave as such a father would behave. Such a father would quietly have kept an eye on Sara after she deserted her home, but that might have prevented the story from happening, hence this father did not do so. But novelists who have been ranked among the greatest (off hand I have in mind Dickens and Emily Bronte) have gone to maddening excesses in making their characters behave at times to fit a story. Bok's small erring in that direction can be the more readily forgiven by reason of the quality of the story thus furthered.

A story of a vastly different sort, but to the reviewer's taste as superlatively good as that of Jon and Sara Sander, is the story of the life of Ulen's small daughter, Julia, and her death at the age of four. This exquisite account of a little child's doing, and her father's ability to join

his mind with hers and be her comrade, show to advantage Bok's fine intuitive understanding of what goes on in the minds of diverse sorts of people, big and little. His strong mystic streak comes into play when the man and the little girl go on an excursion together, he in a dream, she in her fancy, and their conversation afterwards skillfully leaves the implication that the dream and the fancy were identical. This mystic theme deepens in power when they go on a later excursion together when she has just been killed and he knocked unconscious by a drunken driver, and the relation of the earlier excursion to the later one appears. The delicate skill with which all this is molded into a story cannot be shown in a review, it can only be declared. Bok has a little harder time accounting for the presence of this story in his book; he does so on the basis that it is part of the life of the judge, which has a bearing on what he is as a judge.

The book includes a chapter (the next to the last) of just plain jurisprudence in which the author boldly sets forth his own philosophy of law without the subterfuge of speaking through any of his characters. As intimated before, Bok does not emerge as a first class juristic thinker. Unhappily more laymen are likely to read this chapter on jurisprudence by Bok, who doesn't know much about it, than are likely to read books by Pound, who does. Bok has some good ideas, well put, but not all of his ideas call for such praise. He has the Realist's usual suspicion of rules (p. 324). There is no use in the reviewer refuting or applauding this position; refutation and applause in abundance are to be found in voluminous current juristic writing. Bok goes along with the Realists in condemning the idea of "government of laws and not of men," and in so doing displays no comprehension of what is packed into that phrase. He himself has gone far to demonstrate that law has to do with ongoing human life, but he is singularly blind to the breadth of the human experience which has gone into the making of this principle which he curtly labels "sonorous nonsense" (p. 327). A better informed Bok, with his strong feeling for life and for people, could perform a service by translating the dry historical account of humanity's struggle against tyranny back into terms of human beings, their lives, their hopes, their suffering, their wars, and the rivers of their blood which had to be shed to bring into being what is here called "sonorous" and "nonsense." Bok thinks that most people are decent enough to have an instinctive dislike for laws. This idea is familiar enough to anyone acquainted with the New Testament, but whether people are decent enough to live without them is not even debatable, as witness our murderous conduct in the field of internationl relations, where the compulsion of law is lacking. A suspicion of the writer's good judgment intrudes upon the enjoyment of his book by anyone who has been asked to review it when such a

reader comes across such statements as that law will be adopted internationally when well enough administered nationally (p. 329). There are few national administrations of law which do not already compare favorably with our international lawlessness. But perhaps this is mere intrepidity in a field where the author is unencumbered by much knowledge. Bok's great strength is his feeling for the personal in law; he would have contributed more if he had added his philosophy to that which we already have instead of impeaching much the value of which he has missed. The author's persistent belittling of right and wrong would seem to the uninitiated to be individual perversity. It still seems to the reviewer to be perversity, although such perversity has grown familiar by reason of the fact that a whole school of "modern" thought has made this perversity part of its creed. The quotes about "modern" are added because there is really nothing new about the thought that right isn't right. Bok doesn't really believe this himself; he is a partisan of "intuitive good living" (p. 327); and without some distinction between right and wrong "intuitive good living" would become mere intuitive living. The reviewer wonders if one of Bok's own characters hasn't run away with him; if the amazing fact that there never once crossed Sara Sander's mind the idea that right and wrong were involved in her conduct does not demonstrate the consequences of ruling out the existence and value of right and wrong.

Getting back to the book as a whole; one source of great strength in Bok's writing lies in a rather rare quality, rare at least in those no longer young; the ability to see the fascination and mystery in the commonplace. Life appears to remain fresh to him, its newness not worn off. An outstanding weakness seems to be that he puts down his ideas as they come, without much discrimination between the good ones and the bad ones, those of value and those without. Sometimes Bok appears to be laboring for effect; not that the best of authors do not do so, but they manage so well that the effect and not the laboring attracts the attention. At other times the book is so strong that one grows unconscious of the book and through it looks out at life illumined by it.

It would not be in order to close without mention of the idea which gives the book its name; an idea which Ulen, the judge, employs in the effect he tries for when he passes judgment upon those before him; the idea that people can reimagine their lives and start anew. What success Ulen had in trying for this is revealed in the last chapter, the aftermath of the cases he tried. The author laughs at us a bit, and indulges the feeling of futility to which sensitive men are sometimes subject, in the final scene. Sara Sander has had at least something of a rebirth; her talent has found expression in a statue which is on ex-

hibit; Ulen has seated himself to contemplate it; Sara, overcome by curiosity, peeks around a corner to see how it affects him, and finds he has fallen asleep.

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The Process of International Arbitration. By Kenneth S. Carlston. New York: Columbia University Press. 1946. Pp. xiv, 318. $4.50.

Wars have introduced, or produced, the atomic age; but war is not the only method which has been used with increasing frequency during the last fifty years for resolving controversies between sovereignties. Within the same period and for a hundred years before, there has also been an increase both in the number and importance of international disputes settled by adjudication. The Anglo-Saxon peoples may feel some pride in the part they have taken in this development; the Jay Treaty in 1794 between Great Britain and the United States revived a process which had been practically dead for three centuries. Since 1850 arbitration proceedings between these two countries have been notably successful even where national feelings were aroused. Other nations have used the arbitration process for the settlement of thousands of claims. The Spanish-American states might now be an American Balkan area had it not been for the frequency with which they turn to impartial tribunals for the solution of their difficulties. From the history of this one hundred and fifty years of arbitration practice certain conclusions can be drawn as to the procedural rules followed by international judicial tribunals. With travel between nations becoming simpler every year, more international contacts and more international claims are certain to arise; the prospect is for an increasing resort to international adjudications.

The Process of International Arbitration is the result of study in this field. The title does not use the term arbitration as meaning something different from adjudication; the author recognizes that there is no fundamental distinction, and applies the same rules whether the tribunal is called a court made up of judges or a commission made up of arbitrators. The book does not attempt to cover the whole subject of procedure in international adjudication. The problem of evidence is not dealt with at all, and there are only a few suggestions about the case and the counter-case, the pleadings in which the litigants present their dispute to the tribunal. Scattered through the volume are a number of suggestions upon the drafting of the *compromis,* or arbitration treaty,

suggestions which should help avoid various difficulties which have not always been avoided in the past.

The author's interest is in those fundamental rules of procedure upon the observance of which the binding effect of the decision of an international tribunal is most likely to depend in his opinion. He discusses the minimum procedural requisites for a valid award, a tribunal free of fraud or collusion, an opportunity to each party to present his case to the full tribunal, and a final decision supported by a public statement of reasons. A failure to meet any one of these requirements is recognized as justification for treating the award as a nullity; there is a due process of law in such tribunals as in the courts of the United States. This is an element of strength in the international adjudication process, but the weakness inherent in the process as long as it is on a purely voluntary basis without compulsory jurisdiction in an established world wide judicial system, is also made apparent. Since no executive power is available to enforce the award, the practical result is to constitute the unsuccessful litigant as his own court of last resort, to decide whether the minimum procedural standards have been met. Or a litigant state can withdraw its representative from an arbitration tribunal before a hearing is complete, and thus automatically deprive the tribunal of jurisdiction by making impossible the necessary hearing by a full court. Such an action would presumably be a violation of the arbitration agreement, but that fact would not validate an award made in disregard of the rule requiring a full hearing.

The right of a tribunal to grant a rehearing for error of law or newly discovered evidence is discussed; as long as the tribunal is still in existence it may properly re-open a case and revise its decision. One chapter deals with the doctrine of "essential error," the concept that an award may justifiably be repudiated as founded on basic error, something which cannot be classified as lack of jurisdiction, nor fraud, nor any failure to meet the minimum procedural standards, but is yet error so serious and obvious that it annuls the award. The discussion leaves the impression that a whole volume could be devoted to the subject without clarifying it and that possibly the doctrine is itself fundamentally erroneous. Only two points are clear on the subject; first the limits of any such doctrine are most shadowy, and, second, the doctrine, without any practical necessity, offers the vaguest, and so the easiest argumentative justification to the unsuccessful litigant who is looking for an escape from obligations. The doctrine has not been frequently applied by international tribunals; its disappearance would strengthen international law.

About half of the book is taken up with a discussion of the jurisdictional limits of international tribunals. This is probably the most valuable feature of the book for reference purposes. Such jurisdiction is

based exclusively on the consent of the parties, expressed or implied in the treaty or *compromis* upon which the proceeding is heard. The *compromis* specifies the question or questions submitted, and thus limits the tribunal to the specified subject matter; it may also provide what facts are to be treated as relevant, prescribe certain rules of law to be followed, or contain many other terms, all of which are customarily treated as conditions upon the submission consent, and so as limitations upon the jurisdiction. If any of these limitations be disregarded, and the defect is not waived by failure to object within a reasonable time, the decision may be treated as of no effect.

The soundness of this conclusion is obvious upon the most superficial examination. Where jurisdiction is based solely upon a limited consent given by a sovereign state an award disregarding any such limitation cannot be binding upon the state. Equally obvious, however, is the proposition that the arbitral tribunal set up by a valid treaty must be allowed to determine its own jurisdiction when the problem is raised. The only alternative would be to hold that whenever either party chose to raise the question of jurisdiction, the tribunal, lacking authority to pass upon that question, must abdicate. Such a rule would defeat the purpose of the parties in setting up the tribunal.

The author of course recognizes the problem created by this conflict; very likely it is one of the principal reasons which led him to write the book. In municipal law we meet this situation by allowing the court to pass upon its own jurisdiction, subject to review on appeal. In international law there is as yet no organized appellate jurisdiction; the only possible solution is to allow the tribunal to pass upon its own jurisdiction in order to make an award, and to leave to the unsuccessful litigant state, in exercise of its sovereignty, the decision as to whether it will respect the award or refuse to do so on the basis of excess of jurisdiction. It is possibly surprising that in comparatively few cases have defeated states taken the latter course; once the problem has been submitted to an international court or commission, the disposition is to carry out its award, though the state may at the same time announce that in its opinion the tribunal acted in excess of its authority.

The distinction between municipal law and international law in the solution of this problem is not so clear as might be supposed. In municipal law, too, we finally reach a court of last resort, which must determine its own jurisdiction without possibility of judicial review. Enforcement of its decree must be left to another government organ, which may be unsympathetic with the court's decision. When the United States Supreme Court in *Worcester v. Georgia,* 6 Pet. (U. S.) 515 (1832), held a Georgia statute invalid and accordingly granted a writ of habeas corpus to release the petitioner who was convicted under the

statute, President Jackson is reported to have said, "John Marshall has made his decision; now let him enforce it." At any rate, the petitioner was not released, but served out his full sentence in the Georgia penitentiary, according to Cohen, *Handbook of Federal Indian Law* (1942), p. 123. Such a failure of justice is rare, however, in a well organized political system, as witness the recent prompt surrender, pursuant to a court decree, of all claims to the office of the governor of the state of Georgia, by one who had shown every inclination to support his claim by the use of state police. He felt that defiance of the well established judicial authorities would endanger his political future.

The book is for the most part a discussion of individual cases illustrating the topics of the several chapters, with one or two general sections introducing each chapter. It would be strengthened if each chapter concluded with a comprehensive analysis of the problem as developed in the cases. The most important paragraphs in this book are those which emphasize the necessity of taking some steps to establish the international judicial system on a firmer basis to give it more nearly the same authority over fully independent and sovereign states that our courts have over litigants. The author speaks of the resolution of the American Bar Association in 1944 proposing the establishment of an International Judicial System, with circuit courts sitting for specified terms in the capital of each member nation. This is an ambitious program, but certainly no more than is needed. He would also give the International Court of Justice appellate jurisdiction in international disputes, limited to the review of serious errors of law, such as excess of jurisdiction, a step which would do much to deprive the unsuccessful litigant of the right to repudiate the award.

The soundest basis for the authority of a court is a record of successful performance creating a tradition of respect for its decision. It is not essential that the individual litigant feel such respect; if the society of which he is a part respects the court, there is pressure upon him to submit. Our one world will not continue much longer without a similar unity of political organization. A strong argument can be made that one of the steps in that direction which is now most practicable would be along the lines suggested by the author, strengthening by a better organization the system of international adjudication which already has a respectable history of successful operation.

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