

A Man of Law and Letters

MR. JUSTICE CARDOZO: *A Liberal Mind in Action.* By Joseph P. Pollard. New York: The Yorktown Press. 1935. \$3.

Reviewed by GILBERT H. MONTAGUE

IN the much discussed May 27 Supreme Court decision which overthrew NRA and its now famous Poultry code, Mr. Justice Cardozo remarked in a concurring opinion,

The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant . . . Here in effect is a roving commission to inquire into evils and upon discovery correct them. . . . If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot.

These phrases not only describe NRA, but they show also the quality that insures for Mr. Justice Cardozo's court opinions a permanent place in literature.

In the past hundred and twenty years, several hundred Supreme Court decisions have dealt with the distinction between interstate commerce over which the Federal government has jurisdiction, and intra-state commerce over which it has none. So obdurate is this subject to literary treatment, however, that even the greatest stylists among the Justices of the Supreme Court have not succeeded in making great literature out of this constitutional question. Chief Justice Marshall scored with a single maxim, "Commerce undoubtedly is traffic, but it is something more: it is intercourse," and this has lived and been quoted as legal literature long after its legal content has ceased to be very helpful. Many of Justice Holmes's opinions dealt with interstate commerce, and on this as on everything else he ever wrote Justice Holmes was always luminous, but he never coruscated as he did on other constitutional questions that for him had a more imaginative appeal.

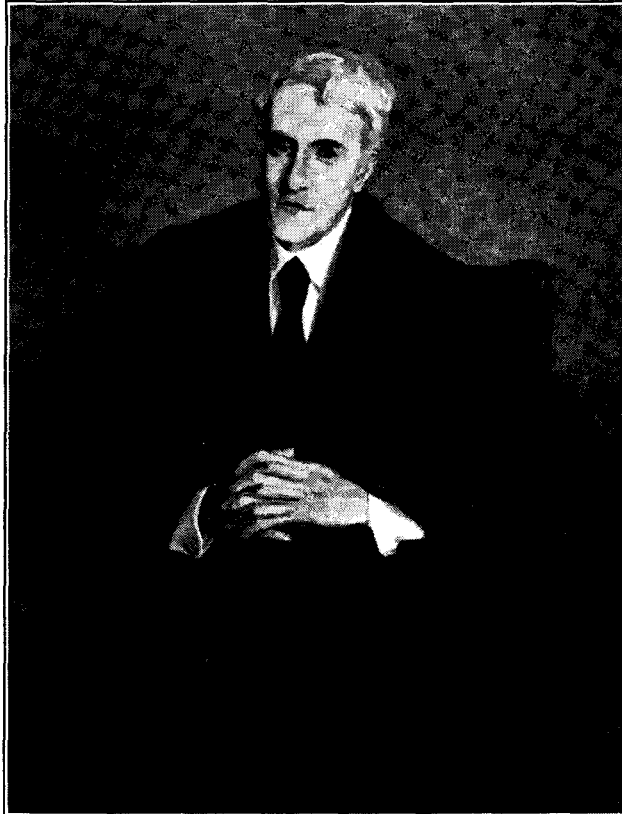
Against the flint of this unpromising topic, Mr. Justice Cardozo on May 27 struck off these lightning flashes:

I find no authority . . . for the regulation of wages and hours in . . . intra-state transactions. . . . There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is com-

municated perceptibly, though minutely, to recording instruments at the center.

And then quoting Judge Learned Hand, another master of literary expression among our Federal Judges, Mr. Justice Cardozo continued:

A society such as ours "is an elastic medium which transmits all tremors through its territory; the only question is of their size" . . . The law is not indifferent to considerations of degree. Activities local in their immediacy do



BENJAMIN NATHAN CARDOZO

Portrait by Bernhard Gutman

not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. . . . There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system.

The persuasive force of Mr. Justice Cardozo's literary gifts is demonstrated—as Mr. Henry W. Taft of the New York bar has elsewhere pointed out—in the extraordinary degree to which Judge Cardozo procured the assent of a majority of the New York Court of Appeals to his opinions while he was a Judge and later Chief Judge of that Court. Time and again this is revealed in Mr. Pollard's recital of cases of plagiarism, libel, censorship of morals, social welfare, civil rights,

workmen's compensation, labor troubles, conflicts of business and government, personal injuries, family strife, constitutional problems, and international affairs that arose in the New York Court of Appeals and were decided in opinions by Judge Cardozo, later Chief Judge Cardozo, prior to his appointment in 1932 as a Justice of the Supreme Court of the United States.

Readers of general literature will, it is hoped, follow Mr. Pollard's suggestion, and pursue their reading of Mr. Justice Cardozo in three slender volumes of lectures at Yale and Columbia, "The Nature of the Judicial Process," "The Growth of the Law," and "The Paradoxes of Legal Science," and also in Mr. Justice Cardozo's more recent collection of essays, "Law and Literature." These lectures are legal literature at its best. Here may be found, in extraordinary felicity of phrasing, truths that deserve to be pondered since the Supreme Court's May 27 decision. "The great ideals of liberty and equality," says Mr. Justice Cardozo, "are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. . . . The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now be-

longs to them, if only the power is exercised with insight into social values, and with suppleness of adaption to changing social needs."

Only the artist can raise law to the rank of literature. "The search," as Mr. Justice Cardozo has elsewhere explained,

is for the just word, the happy phrase, that will give expression to the thought, but somehow the thought itself is transfigured by the phrase when found. . . . A perception, more or less dim, of this truth underlies the remark of Graham Wallas that in some of the judges of our highest court there should be a touch of the qualities which make the poet.

When Mr. Justice Cardozo was appointed to succeed Justice Holmes, there was the assurance that "in some of the judges of our highest court" there would continue to be "a touch of the qualities which make the poet."

Footnotes to Romans à Clef

BY EARLE WALBRIDGE

MRS. WHARTON appears to have said the last word on *romans à clef* in her recent autobiography, "A Backward Glance."

All novelists who describe (whether from without or within) what is called "society life" are pursued by the idiotic accusation of putting "real people" (that is, persons actually known to the author) into their books. Anyone gifted with the least creative faculty knows how utterly beside the mark such an accusation is. "Real people" transported into a work of the imagination would instantly cease to be real; only those born of the creator's brain can give the least illusion of reality. But it is hopeless to persuade the unimaginative—who make up the bulk of novel readers—that to introduce real people into a novel would be exactly like gumming their snapshots into the vibrating human throng in a Guardi picture. If one did, they would be the only dead and unreal objects in a scene quivering with life. The low order, in fiction, of the genuine *roman à clef* (which is never written by a born novelist) naturally makes any serious writer of fiction indignant at being suspected of such methods. Nothing can be more exasperating to the creative writer than to have a clumsy finger point at one of the beings born in that mysterious other-world of invention, with the arch accusation, "Of course we all recognize your Aunt Eliza! . . ."

That doesn't really discourage me. The following list is a supplement to lists appearing in the Branch Library Book News of the New York Public Library, the *Publishers' Weekly*, and "The Author's Annual, 1929"—all hopelessly out of print.

Bennett, Arnold. *Lord Raingo*.

Raingo has the same cadence as Rhondda, and it is possible that Bennett had the latter in mind (see volume 3 of his *Journal*). Frank Swinnerton, writing about the book in *The Bookman* some years ago, ascribed the character to Beaverbrook, but later admitted his mistake.

Birmingham, G. A., pseud. (Canon Han-nay). *The Seething Pot*.

According to Stephen J. Brown's "Ireland in Fiction," Desmond O'Hara in this novel is a portrait of Standish O'Grady.

Bodenheim, Maxwell. *Duke Herring*.

"'Duke Herring' is supposed to be Maxwell Bodenheim's retort to Ben Hecht's 'Count Bruga' and 'A Jew in Love.' One customer said the other day, or maybe it was Walter Winchell, 'That's no wrist-slap!'" —*Publishers' Weekly*, July 25, 1931.

Boyle, Kay. *My Next Bride*.

Besides the obviously autobiographical element, the book contains characters studied from Raymond Duncan and Harry and Caresse Crosby.

Brackett, Charles. *Entirely Surrounded*.

A study of the intermittently idyllic life

led by Alexander Woolcott and his inner circle on Neshobe Island, Lake Bomoseen, Vermont.

Bridges, Constance. *Thin Air*.

The mystic, David Wendel, is drawn from John Langdon.

Buchan, John. *Greenmantle*.

"In the early days of the war he [Lawrence of Arabia] had, in some strange way, something to do with the Russian 'capture' of Erzerum, when the Turks all but laid down their arms. John Buchan's novel, 'Greenmantle,' in which the prophet leader of the Turks is pictured as an Englishman working for England, is supposed, by Liddell Hart, to be based on this incident." —*The New York Herald Tribune*, May 20, 1935.

Carroll, Lewis, pseud. (Charles Lutwidge Dodgson). *Through the Looking Glass*.

"Further pestering by the youngsters brought forth 'Through the Looking Glass.' In the Pool of Tears, the other two [Liddell] sisters appear, Lorina as the Lory, Edith as the Eaglet, Dodgson himself as the Dodo, and Godstow Robinson Duckworth, a tutor who went on the famous summer afternoon expedition, as the Dodo." —*New York World-Telegram*, Nov. 16, 1934.

Conrad, Joseph. *Lord Jim*.

"Jim Lingard, one of the Lingard brothers, was the model for Conrad's famous character Lord Jim." —Robert H. Davis in the *New York Sun*, April 4, 1933.

Crane, Stephen. *Wounds in the Rain*.

William B. Perkins is drawn from Ralph D. Paine, according to Vincent Starrett in Part Seven of the Colophon.

Davis, Richard Harding. *Soldiers of Fortune*.

A combination of Davis and John Hays Hammond, says Arthur Maurice.

—*Princess Aline*.

And that Princess Aline was Princess Alix of Hesse-Darmstadt, who married Nicholas to become Czarina and to share her husband's tragic fate.

Delafield, E. M. *Messalina of the Suburbs*.

Based on the murder in London of Edith Thompson's husband by Frederick Bywaters, her lover. Both were hanged.

Duke, Winifred. *Bastard Verdict*.

Harold Fieldend is evidently based on the case of Harold Greenwood, who was accused of poisoning his wife. Miss Duke has edited the trial for the Notable British Trials series and also written an essay on it in her "Six Trials" ("The Riddle of Rumsey House," p. 93-146). London: Gol-lancz, 1934.

(To be continued)



KATHERINA VON DOMBROWSKI

Amazons of Paraguay

LAND OF WOMEN. By Katherina Von Dombrowski. Translated from the German by the author. Boston: Little, Brown & Co. 1935. \$2.50.

MME. DOMBROWSKI'S story of Paraguay during the reign of its notorious third dictator, Francisco Lopez, is an historical novel in the rather formidable old-fashioned style, with a cast of some forty characters duly set down, program-fashion, just before the first chapter. Many of these, including Lopez himself and his French mistress, Mme. Lynch, are historical (there is even a glimpse of the American Minister of the time, the Hon. Charles A. Washburn), and to these are added various other figures and the local color picked up by an intelligent foreigner spending some time in the country.

It was during Francisco Lopez's reign that the little nation fought the combined forces of Brazil, Uruguay, and Argentina, an astonishing example of dogged courage which dragged on from 1864 until 1870 and just about killed off the entire male population capable of carrying arms and many women as well. This war, which finds some counterpart in the present endless struggle for the Chaco, naturally makes the background of the novel, but its epic character is blurred by the author's preoccupation with the more intimate day to day stories of some of her women, in particular, Lopez's mistress and a little native girl named Manuela.

In general, Mme. Dombrowski's sympathies are with the oppressed people rather than with their oppressors. Her novel, which follows events down to the killing of the tyrant and the flight of his foreign mistress, is the painstaking and plodding reconstruction of a vanished scene rather than a swiftly-moving story to be read for its own sake, but it will be found interesting, nevertheless, particularly by those curious about a people, who, whatever else may be said about them, certainly can take it.