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## Introduction—The Common Law Tradition: Deciding Appeals

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# WASHINGTON UNIVERSITY LAW QUARTERLY

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This symposium was in the press when Professor Llewellyn died. It has been decided to leave it unchanged, since it is our feeling that the most suitable memorial for a man like him is a collection of articles which treat his ideas as living and forceful—to be agreed with or not, but in any event to be thought about. None of the articles makes a real effort to evaluate finally his work and influence, and in a way this seems preferable, since such an evaluation tends to indicate that the influence is over, or so attenuated as not to be of any present importance. It is clear enough, as state after state enacts the Commercial Code, and as the reviews of *The Common Law Tradition: Deciding Appeals* appear, that this is not the case with Karl Llewellyn. The evident vitality of his work is, it seems to us, the sort of tribute he would have preferred.

## SYMPOSIUM

### THE COMMON LAW TRADITION: DECIDING APPEALS\*

#### Introductory Note

Stephen Spender remarked recently in a review of which he is editor, that there is considerable evidence of a current decline in the arts, and he gave as an instance the table of contents of *The Dial* for November 1922. That issue included writing by Eliot ("The Waste Land"), Yeats, Schnitzler, Sherwood Anderson and Pound, and illustrations by Picasso, Brancusi, Duncan Grant and Adolph Dehn. It is indeed a startling array, and it obviously could not be duplicated today.

American lawyers do not ordinarily consider themselves as having much part in the literary *zeitgeist*. Symbolism, futurism and surreal-

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\* Karl N. Llewellyn. Boston: Little, Brown Co. 1960. Pp. 565.

ism, one would assume, had little relevance for Ames, Thayer and Williston, and doubtless Cooley wrote his "Limitations" without reference to the doings of the Pre-Raphaelite Brotherhood. Yet very similar remarks to those of Mr. Spender were made by some contributors to the recent symposium conducted by the Yale Law Journal on the fortieth anniversary of Judge Cardozo's Storrs lectures. With the death of Hand, it was lamented, the golden age of American judging came to an end. The *Manchester Guardian*, as was pointed out, agreed. So perhaps there is some strange current in which we all—lawyers and litterateurs alike—are moving.

As a matter of fact, there is an even closer parallel to the literary situation that suggests that this may be the case. The same generation that made American literature of world-wide importance—one need mention only Eliot, Hemingway and O'Neill—also produced the first important group of American legal philosophers, the Legal Realists. Their work is very American despite some Continental parallels, (notably Ehrlich) and it has many obvious roots both within—such as Pound, Holmes and Cardozo—and without—especially James and Dewey—the legal world. But the movement (a term its "members" would not like) was regarded as very radical, and it hit the academic world with great force, arousing the same type of antagonism that the "modern" movement in literature created across the campus. Moreover, in the intervening years it has come to dominate American law schools, and hence American lawyers, in the same way that the modern movement has taken over departments of literature (although in a more subterranean fashion—many students who are in fact taught Realism have probably never heard the term mentioned). There is one final, sad parallel. There have been no successors of comparable significance, and the major work of the Realists was done thirty years ago. So one is tempted to sigh, in the words of an earlier lawyer, "for where is Bohun? where's Mowbray? where's Mortimer? etc. Nay which is more and most of all, where is Planagenet?"

To which one would have to answer, oddly enough, right here. For the situation with the law writers has, happily for the profession, one difference from that in literature. One of the major Realists, after having explained American law to the Germans, Cheyenne law to palefaces, and Businessmen to lawyers (with a number of other scattered shots along the way), has now written his major philosophical work to date. It is as though Eliot had just written something like "The Prelude," a poem that served as a culmination to all his earlier work.

Indeed, with this book, *The Common Law Tradition: Deciding Appeals*, Professor Llewellyn—for it is he—has brought to a close his

examination of the appellate process in this country. Since that has constituted the principal subject matter of the Realists' work, one must take this as the mature and ripened exposition of their position by one of the leaders of the school. As such, it is, if for no other reason, a very important book, for it is, in consequence, the closest thing one can have (in view of the Realists' influence) to a definitive statement of American legal thought about the principal stuff of our law—the decisions of appellate courts.

The first reviews of the book indicate that this is a fairly general reaction: the book is an important one, and it is accurate in what it says about the subject matter of investigation, the deciding of appeals. Of necessity, however, each review is written from a single point of view, and it seemed to us that it would be both interesting and worthwhile to get together in a symposium the reactions to the book of a number of people from different parts of the profession—and possibly even from outside—hopefully with different points of view. In this way one might perhaps get something like a representative general opinion. As can be seen from the contributions that constitute this symposium, we have succeeded in getting these different viewpoints and the result is indeed interesting, though, it is, perhaps, the expected one. The reactions are—with some notable exceptions to be sure—quite favorable and sympathetic.

It seems quite possible then that Professor Llewellyn has succeeded in stating to the satisfaction of the majority of the profession what American appellate courts do, and should do; that he has, in other words, brought one phase of the work of the Legal Realists to a full stop—for the time being anyway. As to what he has said, and what it means for the appellate bench, the contributions that follow are a sufficient statement. But it does seem worthwhile to remark that if this is the method of analysis which seems congenial to us, then surely it is now time to go one step further and apply the analysis that has been developed to the remaining parts of the legal scene, notably the trial process. It is not, after all, apparent that judges at that level behave in the same way as do those on appeals courts. In some ways they cannot possibly do so in view of the difference in what they do. Yet any statement on what law is that ignores them is woefully incomplete. Since we should presumably like to have such a statement, even if it would necessarily be tentative, we must hope for the analysis to be made. The difficulty is, of course, in knowing how to go about examining the work of trial courts, since there is nothing equivalent to the written opinion that one can analyze and study, and the problem of collecting data is a tremendous one, requiring a massive effort. Still, the aim, and hence the essential method of investigation, is made clear. It is to attempt to realize

Von Ranke's desire and to show things the way they actually happened. One hopes it will be more extensively used.

One has this hope, even though there is, unquestionably, a danger in the approach—that of committing the sin of Prometheus (or Adam). Perhaps in modern terms one might express it as the failure to recognize the limitations of the human intellect, or a lack of humility. It is all too easy, when one starts examining anything, to be too enticed by one's first observations, and to propound a whole theory on the basis of them. If this has the consequence of destroying one's father's gods, the frequent reaction is, all the better. So, if one discovers that judges do not simply turn out opinions mechanically according to "law," but are frequently influenced by economic, political, religious, personal and even physical reasons (notably bad digestion)—as they obviously are—one may tend to think that these are the only influences on them. Hence, that there is no "law" really. This becomes a very useful argument if one is attacking a court because one dislikes its decisions. One need not worry about what reasons the court gave, but can talk about the "real" reasons which will presumably be unpopular ones with the group being addressed. If widely believed, such a doctrine could destroy, or at any rate radically change a society, especially a judicially oriented one like ours.

It is this danger which particularly concerns Professor Llewellyn in his new book, and he attempts to avoid it, while at the same time taking advantage of the insights of the Realists' approach, by treating law as a "mystery" (the term is not his), using that word in all its meanings from that of a craft like cabinetmaking to that which is not known or understood. He emphasizes the former meaning, but leaves room for the latter. His approach seems to be a very useful one, since he does not claim to give final answers, but rather conclusions based on his observations which are admittedly not exhaustive, as, indeed, from the nature of the material, they could not be. The observation of new facts should clearly cause the conclusions to be changed. But he does not stop with merely stating the popular version of the scientific method. He directs that one is to make these observations and draw these conclusions with an attitude of respect for, and perhaps a little fear of, the thing being examined. Indeed, it is strange, in a way, when one remembers the horror with which Professor Llewellyn's work was greeted by the orthodox when it first appeared, to realize that although he has not changed his position appreciably, he has, in this book, displayed an attitude towards law that reminds one of nothing so much as Richard Hooker. For whether or not Professor Llewellyn would feel it useful or appropriate to locate "the law" in the "bosom of God," it seems clear that he be-

lieves "her voice (to be) the harmony of the world," and one has the strong feeling that he would not dissent too much from the rest of the statement:

[A]ll things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power: both Angels and men and creatures of what condition soever, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy.

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## A Study of 'The Common Law Tradition: Deciding Appeals' —Arno C. Becht\*

"I preach the neglected beauty of the obvious."<sup>1</sup>

The chief object of this review is to give an accurate idea of the contents of Professor Llewellyn's book, *The Common Law Tradition: Deciding Appeals*, thus supplying a general background for the other articles. The perfect review, for this purpose, would eliminate all personal reactions of the reviewer, but there are reasons why this ideal is impossible. The mere processes of selection and emphasis require some exercise of discretion, and, moreover, the book provokes responses which will probably show through to others even though they are unconscious. I have tried to compromise with the problem in this way: Part I is devoted to a quite extensive survey of the book, and in this I have suppressed my reactions as much as I could, (not entirely) and have let the author speak for himself a good deal of the time. In Part II I have tried to convey some impression of the book as a whole, an operation that obviously requires more subjective methods, and Part III is a collection of frankly personal comments which are offered for what they are worth and which may also serve to discount the less overt evaluations that have affected the rest of the review.

As the book, excluding the index, is 535 pages long, a review of the contents can only be a skeleton. Skeletons appeal to hardly anyone's sense of beauty, and they look a good deal more alike than complete bodies do. Hence, so far as the book has attractiveness and individuality, this review will inevitably misrepresent it unfavorably. Since the professional audience to which the *Law Quarterly* is addressed will allow for this as a matter of course, I would say nothing of it, but the problem is more complicated than condensations usually are.

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1. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 339 (1960) [hereinafter cited only by reference to page].