Editorial: Mr. Anderson Dissents

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MR. ANDERSON DISSENTS

It was William Jennings Bryan who, when a Kentucky ex-governor stood in front of him at the 1912 Democratic convention shouting "Are you a Democrat?" answered, "My democracy has been certified to by six million and a half Democratic voters. But I will ask the secretary to record one vote in the negative if the gentleman will give me his name." An almost equally solitary protest was that expressed to the recent elevation to the United States Supreme Court bench of Justice Benjamin Nathan Cardozo; the protest was voiced by one Mr. Anderson, former president of the New York Anti-Saloon League, former resident of the New York state penitentiary.

The criticism came, however, as an almost lone note of discord in a nationwide chorus of approval of the Cardozo appointment, a non-
political appointment which stands forth as an oasis in a not especially fertile desert of executive selections. From all groups, parties, and factions comes praise for this distinguished bachelor jurist, leading exponent of the school of legal thinkers who believe the law should be adjusted to social conditions instead of social conditions to the law. For it was Cardozo himself who once said, "The outside truths of life, the great and unquestioned phenomena of society are not to be argued away as myths and vagaries when they do not fit within our little molds. If necessary we must remake the molds. We must seek a conception of law which realism can accept as true."

Such a conception of the correlation of the law to social wellbeing would, however, of necessity include judicial notice of past custom and historical traditions. This Justice Cardozo conceded when, although he refused to join in offering up "victims to the gods of jurisprudence upon the altar of regularity," he stated "* * * Logic and history and custom have their place. We will shape the law to conform to them when we may but only within bounds. The trends which the law serves will dominate them all. There is an old legend that on one occasion God prayed and his prayer was, 'Be it my will that my justice be ruled by my mercy.' This is a prayer which we all need to utter when the demon of formalism tempts the intellect with the lure of scientific order."

It is expected that the Empire State jurist who for two decades has exercised a liberalizing effect upon the law of that state will vote to maintain the five to four majority now enjoyed by the so-called "liberals," meaning those Supreme Court members who oppose invoking the Fourteenth Amendment to declare unconstitutional legislative acts controlling business and industry. At any rate there is no question as to the high regard in which the newest addition to the Supreme Court membership holds his immediate predecessor, for Justice Cardozo in the Yale Law Review wrote, "* * * If I begin to quote from the opinion of Justice Holmes, I hardly know where I shall end, yet fealty to a master makes me reluctant to hold back." Perhaps some such fealty prompted the statement concerning dissenting justices, "The dissenter speaks to the future and his voice is pitched to a key that will carry through the years."

Whether he is compelled to dissent or not there is a soundness to Cardozo's views, a vigor to his presentation, a background of social justice for his viewpoint, only too rarely encountered in judicial opinions. And so, though it was with a feeling of sadness that this nation viewed the retirement from legal tribunals of so distinguished a thinker and jurist as Justice Oliver Wendell Holmes, there is some compensation in the fact that his place will be taken by a man who will maintain
the humanitarian view of law to the defense of which Justice Holmes dedicated his life, a man whose views are well expressed in his decision on the constitutionality of the New York permanent housing statute where he wrote:

"* * * The multiple dwelling act is aimed at many evils but most of all it is a measure to eradicate slums. It seeks to bring about conditions whereby healthy children shall be born and healthy men and women reared in the dwellings of the great metropolis. To have such men is not a city concern merely. It is the concern of the whole state. * * * The end to be achieved is quality of men and women. If moral and physical fibre of its manhood and womanhood is not a state concern the question is, what is. Till now the voice of the courts have not faltered for an answer."

Nor while there are men of the calibre of Benjamin Nathan Cardozo upon Supreme Court benches will that voice falter in the years to come. For his elevation to his new position of dignity and responsibility the nation will remain eternally grateful, "Justice" Anderson to the contrary notwithstanding.

Robert W. Hansen

TRIAL BY TABLOID

In 1915 an eminent American jurist appeared before the New York Constitutional Convention and delivered this somber declaration: "The greatest evil and the most vicious one in this state is that of trial by newspapers. I don't see anything that can mitigate this evil. I don't see why in making this new constitution you cannot do something to protect the administration of justice, even if it should involve a modification of the freedom of the press."

The audience was respectfully attentive. Even after the suggestion of the abridgement of a constitutional right no murmur of "heresy" could be heard. The man who had spoken was William Howard Taft, former Chief Justice of the United States.

The indictment of this phase of our judicial system is well founded, and not even the most optimistic among the members of the bar would be so audacious as to assert that present-day newspaper accounts of judicial proceedings do not tend to influence the decision of courts and juries.

This is especially true in the case of criminal prosecutions where the newspaper accounts of the arrest and arraignment of the accused are often of such a nature as not only to deprive the accused of his right to a presumption of innocence, but also to create a presumption