Bramble Bush

K. N. Llewellyn

THE BRAMBLE BUSH

ON OUR LAW AND ITS STUDY

K. N. Llewellyn

OCEANA PUBLICATIONS, INC. NEW YORK • LONDON • ROME

Library of Congress Catalog Card Number 51-1727

ISBN 0-379-00073-3

Second printing 1965
Third printing 1969
Fourth printing 1973
Fifth printing 1975
Sixth printing 1977
Seventh printing 1981

Manufactured in the United States of America.

There was a man in our town
and he was wondrous wise:
he jumped into a ***BRAMBLE BUSH***
and scratched out both his eyes—
and when he saw that he was blind,
with all his might and main
he jumped into another one
and scratched them in again.

FOREWORD

These lectures grew out of an attempt in 1929 and 1930 to introduce the students at Columbia Law School to the study of law. They were privately printed in 1930, and met with reasonable favor. But I found out early that their bite for a beginning law student lies rather in November than in September; and a man's own ideas—especially on perspective and whole-view—change as he gains experience. Hence for ten years I planned and worked over a rewrite.

Then it slowly became clear that I have no business to rewrite. The young fellow who wrote these lectures just isn't here any more, and the job he did has its own virtue, and I have no right to mess it up with Monday morning quarter-backing which has used two decades in getting from Saturday to Monday morning. Hence I republish with no more change than is normal as a man corrects page-proof: a comma deleted here, a clarification wrought there—but within the limits of one line or two.

How to accomplish any introduction is a problem as perennial as it is perplexing. Of one thing I remain persuaded: across the problem of material, and indeed of method, cuts that of manner. The primer type of textbook introduction has been well done and yet found wanting. The materials-to-work-with type is, thank Heaven, today a flourishing line of thought, work and publication, and already beginning to bear.

But a right text is a different thing. It should be a *standing* introduction. It should be simple. It should seem to lie open to a student who has never met the law, and give him a footing. He need not fully understand it all, or any of it; but out of each page, each sentence, he should get enough to help him in his work.

But the work of a right text-"introduction" has then only begun. It ought to invite, excite, to a second reading and to a third and to a fourth. Each reading, in the measure that the reader has moved on into the law and gained a further wherewithal to read, should introduce him further. This is the only right goal. With all its surface simplicity, an introduction must cut as deep as its author has wit and strength to see the way. It must cut for that deepest simplicity which is true meaning.

I still think this ideal obvious. An introduction, like a teacher, must gain and not lose in retrospect, or be a half-thing. Hence no man's solution is likely either in matter or in manner to seem sufficient to himself, much less to others. But as we begin slowly to discover how to approach these vital matters simply, it becomes vital in a new way to remember that the sound quest cannot be for the simple-via-the-shallow; it must drive on despite all defeat toward the simple-via-the deep.

Meantime, in regard to presentation, let me repeat a full sentence from the earlier preface. It states doctrine I still stand to: "And I care little for propriety, and less for manner, if—as I believe—occasional lapses from the accepted taste and dignity of print give more hope of making vivid to the students who are a teacher's life some of the more passionately held convictions which motivate his living."

ACKNOWLEDGMENTS

The only persons who seem to have been left out of the list of acknowledgments in the prior private printing are Adam, Euripides, Genghis Khan, Alpha Centauri and my cats.

These errors of omission are obvious, but are they significant? The discussion here proceeds on a horse-sense basis to lay out for seeing various things which I take to be obviously so to any moderately experienced eye which will take time to look and think. Is a lyric poet to waste time giving acknowledgments to the first guy who happened to put on paper that a lily of the valley is a loveliness?

The young man who prepared these lectures had sense enough to know that he was offering no original ideas, that he was merely drawing on and attempting to shape into a thing *seen* some stuff from a great and noble common reservoir of observation. What the young man had not yet discovered was that Cititis was a disease abroad in the land. Victims of this mental disorder hold the delusion that nothing *is*, except in print; and that even what is in print is tabu to use unless some print is cited. I have been fighting Cititis, especially in law reviews, now for many years. (The cure is to ask: Where did Aristotle get his stuff from?) I shall not here contribute to its spread.

Correcting an error: "What these officials do about disputes...

On page 3 appear the words: *"What these officials do about disputes is, to my mind, the law itself."*

These words express a deep and often sad truth for any counsellor: he can get for his client what he can actually get, and no more. They express a deeper and often even sadder truth for any litigant: "rights" which cannot be realized are worse than useless; they are traps of delay, expense and heartache. The words pose the problem of the need for personnel careful, upright, wise. They signal the possibility of differential favoritism and prejudice on the one hand; the possibility, on the other, of much good being brought out of an ill-designed and limping machinery of measures. In so far the words are useful words, and true ones, and I have let them stand.

They are, however, unhappy words when not more fully developed, and they are plainly at best a very partial statement of the whole truth. For it is clear that one office of law is to control officials in some part, and to guide them even in places where no thoroughgoing control is possible, or is desired. And it is clear that guidance and control *for* action and by others than the actor cannot be had out of the very action sought to be controlled or guided. Moreover, no man sees law whole who ever forgets that one inherent drive which is a living part of even the most wrongheaded and arbitrary legal system is a drive—patent or latent, throbbing or faint-pulsed, impatient or sluggish, but always present—to make the system, its detail and its officials more closely realize an ideal of justice. That drive works in ways so complex and varied as to be but dimly suggested in "what these officials do," in regard to any given occasion. Thus the words fail to take proper account either of the office of the institution of law as an instrument for conscious shaping or of the office and work of that institution as a machinery of sometimes almost unconscious questing for the ideal; and the words therefore need some such expansion and correction as the foregoing.

But there is more to the matter than this. The history of these thirteen short words sheds troubling light on the methods, manner and ethics of a style of controversy in jurisprudence which is now happily waning but against which it still pays to warn. Let me note that at the time of the tentative printing I had already served four years as a Commissioner on Uniform State Laws and had completed the drafting for the Commissioners of a rather ambitious statute, and that a few months before *The Bramble Bush* I had brought out a book on Sales with what is I think still the most detailed discussion in print of the use of cases and statutes in advocacy and in counselling, and with a sustained critique of the rules in that field, looking not only to more effective analytical statement but also to that reform of them which now forms the core of the Uniform Commercial Code. Against that background came the teapot tempest in which "realism" (which was and still is an effort at more effective legal technology) was mistaken for a philosophy and made the scapegoat for all the sins (real and supposed) of administrators and autocrats and the ungodly in general. No piece of ammunition in the whole teapot compares in the frequency of its use, nor yet in the irresponsibility

thereof, with our little thirteen-word passage. With its help, I was shown to disbelieve in rules, to deny them and their existence and desirability, to approve and exalt brute force and arbitrary power and unfettered tyranny, to disbelieve in ideals and particularly in justice. This was painful to me. But it was even more painful to observe that none of the attackers, exactly none, gave any evidence, as they slung around the little sentence, of having looked even at the rest of *Bramble Bush* itself. A single sentence, if it made a good brick-bat for a current fight, was enough to characterize a whole man and his whole position. And that ought to be painful to anybody. I have in mind at the moment passages from twelve different writers in which the poor sentence was marshalled to convict me of one or more intellectual crimes; and the passages are by no means all signed by inexperienced youth: Dickinson, Goodhart, Kantorwicz, Kocourek, Patterson, Pound, e.g., are names of power. And I take a perverse pride in one passage in which "BRAMBLE BUSH, page 3," alone, leads off a list of eighteen citations whose every other member is a full article or a full book.

In retrospect it is amusing, and the story reads like rather grotesque farce. I think that is because our methods, manners and ethic of controversy in jurisprudence have tremendously improved. All over the country, as all over the Western World, jurisprudes have begun to try to read a man as they should: for his wheat, sorting out his chaff. It is interesting that Cardozo was at work on that line on the "realists" by 1932, while the hurricane was already in full sweep across the tea leaves.

And so to work

As indicated already, and as is developed in the *Afterword*, this is not the book that I should write today. I feel a lack especially in the failure to get before the reader at the outset the idea of the crafts of law, of their value to the prospective craftsman, of his obligation to those crafts. But there is at least this to be said in mitigation: the first craft of law a man must learn is the craft of the law-student; and to that one the lectures as written attempt to give both body and meaning.

K.N. LLEWELLYN

Columbia University Law School
December, 1950

THE BRAMBLE BUSH

TABLE OF CONTENTS

Chapter I
WHAT LAW IS ABOUT

You have come to this school to embark upon the study of the law. Most of you have in the back of your heads an idea that as a result of that study you will become lawyers. Some of you have some notion of what it is that a lawyer does. You think of a man who tries cases before courts. Or do you think particularly of a man to whom to turn in case, for any reason, you happen to get arrested? But what a court does, what a lawyer does in court, and what he does outside, what relationship either court or lawyer has to the law, what relation the law school has to any of these things—around these things, I take it, there floats a pleasant haze. If it were not pleasant, you would not be here. Perhaps you would not, if there were no haze.

What I propose to do is to take up successively a series of questions. First, and today, what is this law about, which you propose to study? Second, and tomorrow, what is the machinery for going about this study; what are you going to have to do in this school and how can you best go about doing it? Third, what are the opportunities that the school offers and what are some of the problems that you will have to solve here, and what are some of the ways of their solution? And lastly, how does the study of the law here bear upon the work that you will do and the life that you will live when you leave this school and go into the practice?

We have no great illusions, my brethren and I, as to how much good it will do you to be told these things in advance. We have learned by bitter experience that you will not take the things we tell you very seriously. You conceive this, I take it, to be somewhat in the nature of the pep meeting to which you were exposed when you first entered college. You expect me to tell you that you should be earnest about your work, and get your back into it for dear old Siwash, and that he who lets work slide will stumble by the way. You sit back with a cynical detachment, prepared in advance to let this anticipatory jawing slide comfortably off your neck and rump. Let him have his say. That is what he gets his pay for. But we, the sophisticated youth of this new century, we know that he means little of what he says, and what he does mean, as far as *he* is concerned, means nothing to us. The

ungovernable hand of fate has put him in the chair; no help for that. The workings of society require us to let his mouthings fan our ears. Another of the conditions to admission to the bar.

We have, I say, no great illusions as to how much good this talking at you is to do. Still we must perform our duty as we see it. Not only that, but after some sweat of spirit we have arrived at the conclusion that some things need saying, even to the wilful deaf. They shall be said!

There is yet another thing upon which experience long and sad has caused us disillusion. We have discovered in our teaching of the law that general propositions are empty. We have discovered that students who come eager to learn the rules and who do learn them, *and who learn nothing more*, will take away the shell and not the substance. We have discovered that rules *alone*, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, *mean* anything at all. Without the concrete instances the general proposition is baggage, impedimenta, stuff about the feet. It not only does not help. It hinders. And since what I am to say to you is said while there is vacuum in your heads, the likelihood of its taking hold, or its taking on meaning, of its having utility for you at the present time, is very slight. It would be slight enough if you had any will to hear.

Yet it needs saying. It needs saying because there is great joy in heaven when even one lost sheep is gathered to the fold. It needs saying because there is always an odd chance, an odd chance worth eight hours of your time and mine, that something of what is said may stick long enough to be on hand *when the concrete problems do develop* before you, on hand to help your thinking when they come.

What, then, is this law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential; disputes to be settled and disputes to be prevented; both appealing to law, both making up the business of the law. But obviously those which most violently call for attention are the actual disputes, and to these our first attention must be directed. Actual disputes call for somebody to do something about

them. First, so that there may be peace, for the disputants; for other persons whose ears and toes disputants are disturbing. And secondly, so that the dispute may really be put at rest, which means, so that a solution may be achieved which, at least in the main, is bearable to the parties and not disgusting to the lookers-on. This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.**

There are not so many, I think, who would agree with me in thus regarding law. It is much more common to approach the law as being *a set of rules of conduct*, and most thinkers would say rules of *external* conduct to distinguish them from the rules of morality: be good, sweet maid, and let who will be clever. And most of the thinkers would probably say rules *enforced by external constraint*, to distinguish them not only from rules of morality, but also from some phases of custom, such as wearing ties and Paris garters. And many thinkers would add, rules *laid down by the state*, in order to distinguish them from the commands of a father, or the regulations of a university, or the compulsion to be a Democrat in Georgia. Most thinkers, too, would take these rules as *addressed to the man on the street* and as telling him what to do and what not to do. To most thinkers, I say, *rules* are the heart of law, and the arrangement of rules in orderly coherent system is the business of the legal scholar, and argument in terms of rules, the drawing of a neat solution from a rule to fit the case in hand—that is the business of the judge and of the advocate.

All of which seems to me rather sadly misleading. There is indeed much, in some part of law, to be said for this view that "rules laid down *for* conduct" are the focus, quite *apart from disputes*. Rules that everyone's income tax return must be made out on the same type of form do not look to disputes so much as to convenience of administration. Rules as to fencing elevator shafts look primarily to avoiding not disputes, but injuries. And indeed it may properly be said that as civilization grows more complex there is a widening slice of law in which disputes as such

*For necessary expansion and correction, see e.g. pp. 14, 40-1; 61-3; 78-82; 85 ff.—and especially ix-xi.

sink out of sight, and the focus of law becomes the arrangement or rearrangement of business or conduct to get things done more quickly, more easily, more safely. It may properly be said that in many such cases there is not even (as there is in requiring travel on the left side of the road or on the right; or in fixing *the* one effective form for validating will or deed) a purpose of dispute-avoidance running *beside* the purpose of convenience. It may properly be said, finally, that even where the purpose clearly is dispute-avoidance, that purpose in turn often sinks into the background, and men talk about contracts, and trusts, and corporations, as if these things existed in themselves, instead of being the shadows cast across the front stage by the movements of the courts unheeded in the rear. All of this, however, goes not so much to the importance of "rules" as to the *non-exclusive* importance of *disputes*. Whether about disputes, or about when wills are valid, or about the form for income tax reports, we come back always to one common feature: The main thing is what officials are going to *do*. And so to my mind the main thing is seeing what officials do, do about disputes, or about anything else; and seeing that there is a certain regularity in their doing—a regularity which makes possible prediction of what they and other officials are about to do tomorrow. In many cases that prediction cannot be wholly certain. Then you have room for something else, another main thing for the lawyer: the study of how to make the official do what you would like to have him. At that point "rules" loom into importance. Great importance. For judges think that they must follow rules, and people highly approve of that thinking. So that the getting of the judge to do a thing is in considerable measure the art of finding what rules are available to urge upon them, and of how to urge them to accomplish your result. In considerable measure. Rules, too, then, and their arrangement, and their logical manipulation, make up an unmistakable portion of the business of the law and of the lawyer.

In any event, and whether I am right or whether I am wrong in this analysis, it is certain that you will spend much of your time attempting to discover and to study and to remember and to see the meaning of these so-called *rules of law* which judges say they are bound by, which judges say they have to apply. If I am wrong you can perhaps rest content when you have found out what the

judges say. If I am wrong, you can believe what they say and be happy. But if I am right, finding out what the judges *say* is but the beginning of your task. You will have to take what they say and compare it with what they *do*. You will have to see whether what they say matches with what they do. You will have to be distrustful of whether they themselves know (any better than other men) the ways of their own doing, and of whether they describe it accurately, even if they know it. Nor is this all. If I am right you will also have to look into the question of what difference what the judges do is going to make to you, or to your client, or to any other person who may be affected by the judges' rulings on disputes. And even that will not be all. For when you find out what difference the judges' acts will make, you will then be confronted with the task of figuring what you, or your client, are to do about it. If the judges say a contract with your buyer that he will not resell below a certain price will be illegal, and not enforceable, if they are likely to fine you or send you to jail for making such a contract, but you still want your goods resold throughout the country at a single price—what can *you* do? That is a problem for invention, for ingenuity; the problem of inventing a method of action which will keep you free of difficulty and will produce the results you want in spite, if you please, of what the judges in a case of dispute may be expected to do. If I am right, in a word, the action of the judges past and prospective becomes a piece of your environment, a condition of your living—like the use of money—with which you must reckon if you want to get where you would go to. And you cannot then rest content upon their *words*. It will be their *action* and the available means of influencing their action or of arranging your affairs with reference to their action which make up the "law" you have to study. And *rules,* in all of this, are important to you so far as they help you see or predict what judges will do or so far as they help you get judges to do something. That is their importance. That is all their importance, except as pretty playthings. But you will discover that you can no more afford to overlook them than you can afford to stop with having learned their words.*

You will have noted, I hope, that I have been talking chiefly about disputes, whereas the ordinary man's thinking about law is

*For needed correction of this passage, see page 3, n.

in terms of "ax-murderer breaks up love nest" or of "bobbed-haired bandit loots three banks"—or at the very least, of Mr. Volstead. But, as a matter of logic, crime and those who commit crime and the conviction or acquittal of those who say that they have not committed crime, although the district attorney alleges savagely they have, all belong under the head of disputes. As a matter of logic they are but one such class of disputes: those which are deemed to affect less two particular private parties who may be incidentally concerned than they affect the whole body of the public, as represented by the state officials. Not merely as a matter of logic, but as a matter of practical importance, *disputes* is a larger and more important category than the category *crimes*. The criminal business of the courts bulks large, yes; but in terms of quantity it does not bulk so large as the civil business. We can afford, therefore, to think of law as relating primarily to disputes, and to think of crimes as only one piece of the business of the law. On the other hand, crimes are a peculiarly important piece of that business. They are the piece which it seems so essential to deal with that we do not always wait for the aggrieved party to act before the state official steps in; that indeed we do not trust the aggrieved party to handle the affair, even when he has made a complaint. So that if you have looked over the list of courses offered in the school, it may already have struck you as somewhat strange that you find but one course in the undergraduate curriculum allotted to this whole field of crime, while all the rest is taken up with the civil side of law. I suppose that the reason for this somewhat astounding fact is that we expect very few of you to practice on the criminal side. Some of you, to be sure, and especially those who have some ambitions in a political way, may for a time go into the public prosecutor's office. A few of you may go further and undertake to emulate the noted defenders of those accused of crime. But in the main it will be an accident if five percent of you touch criminal practice more than incidentally in the course of your professional careers. That is more than regrettable, as it is also regrettable that the criminal bar in the large enjoys anything but an enviable reputation. But regrettability does not change conditions, and I surmise that the curriculum has been constructed with reference to conditions and not with reference to regrettabilities.

But I should say here, as I shall say again, that whatever the