BOOK REVIEW

VENTURING TO DO JUSTICE. By Robert E. Keeton.[1] Cambridge: Harvard University Press, 1969. Pp. vi, 183. $6.95.

Reading this book reminded me of a passage in "Christ Stopped at Eboli," written by Carlo Levi.[2] The readers of Levi's book will remember that Mussolini and his fascist government exiled Levi to the boot heel of Italy for political reasons. There he discovered a country of hills and valleys, covered with clay, and inhabited by peasants with no hope for the future. He said, on a temporary visit to the north:

> I thought of my feeling of strangeness, and of the complete lack of understanding among those of my friends who concerned themselves with political questions, of the country to which I was now hurrying back. They had all asked about conditions in the South and I had told them what I knew. But although they listened with apparent interest, very few of them seemed really to follow what I was saying. They were men of various temperaments and shades of opinion, from stiffnecked conservatives to fiery radicals. Many of them were very able, and they all claimed to have meditated upon the "problem of the South" and to have formulated plans for its solution. But just as their schemes and the very language in which they were couched would have been incomprehensible to the peasants, so were the life and needs of the peasants a closed book to them, and one which they did not even bother to open.
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> At bottom, as I now perceived, they were all unconscious Worshipers of the State. Whether the State they Worshiped was the Fascist State or the incarnation of quite another dream, they thought of it as something that transcended both its citizens and their lives. Whether it was tyrannical or paternalistic, dictatorial or democratic, it remained to them monolithic, centralized, and remote. This was why the political leaders and my peasants could never understand one another. The politicians oversimplified things, even while they clothed them in philosophical expressions.[3]

Often, while studying and teaching law, I was discouraged by the failure of judges to see that they were following a precedent no longer valid (if it had ever been), and I have been disappointed by the judges' unwillingness to overrule cases. Over the last 10 years I have been more and more encouraged as the overruling of decisions increased. What

1 Professor of Law, Harvard University.

2 C. LEVI, CHRIST STOPPED AT EBOLI (1947).

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Professor Keeton has done is to write about the situations in which courts have been overruling cases from 1958 to 1968. In his words, the list of cases ". . . covers more than ninety overruling decisions on at least thirty-five topics, even if immunities and strict products liability are each counted as only one topic."[4]

Professor Keeton begins by discussing the ability of courts and legislatures to create changes in the law. His treatment of prospective overruling is the best I have ever read on the subject. His view of advocacy is persuasive—especially when he says:

> But the work of a careful advocate, when he is directing his attention to persuading a court rather than merely to stimulating enthusiasm among partisans, reflects a sensitivity to the obligation of the court to reach principled decisions—decisions that are not only reasoned but also are grounded on premises of nonpartisan character.[5]

When he writes about "evolutionary revision of legal doctrine,"[6] he refers to the fact that Cardozo did not overrule any cases in *MacPherson v. Buick Motor Co.*[7] Although Professor Keeton has a good explanation of the way he did it, in retrospect I think that overruling the earlier cases would have produced a sounder result.

Professor Keeton's discussion of juries and trial judges is very good. His thoughts about interpreting statutes are most interesting, especially his examination of the ways in which statutes can be written so as to leave either to the courts or to administrative agencies, or both, the power to rewrite the law. His comment about defective products made by manufacturers includes a discussion of *Goldberg v. Kollsman Instrument Corp.*[8] in which the New York Court of Appeals held that the mother of a passenger could recover for her death against Lockheed, who had manufactured the plane, but could not recover against American Airlines, who operated the plane, or Kollsman, manufacturer of the altimeter. This meant that "the man in the middle" was liable and those on each flank were safe. On the other hand, in Texas, one court held a manufacturer of impure food may be held strictly liable, and another held that a retailer was in the same position, while a wholesaler was not liable. Professor Keeton asks

4. R. KEETON, VENTURING TO DO JUSTICE 10 (1969).
5. *Id.* at 57.
6. *Id.* at 61.
7. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
8. Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). Professor Keeton's discussion begins on page 102 of his book.

whether this means ". . . that in Texas the man in the middle is safe and those on each flank are exposed . . . .?"[9] He recognizes that the cases decided by the two state courts can be reconciled but suggests that it might be better if all three of them were held liable, with possible claims for indemnity or contribution to those who can prove that they have not produced anything defective. His treatment of the difference between strict liability for defective products and action under warranties under the Uniform Commercial Code is also good.

Professor Keeton's discussion of traffic accidents, attacking the theory of fault liability, and substituting strict liability up to a certain amount—the proposal made by Professors Keeton and O'Connell—is a good defense of his position. On the other hand, I have read a good deal about their proposal and I believe a sounder solution may be found in the comparative negligence system.

This book is one which I think every law teacher, lawyer, and especially all judges should read with care. At the conclusion of the quotation from Levi's book, Levi observes, "The politicians oversimplified things, even while they clothed them in philosophical expressions." That is what I believe our judges used to do. It is evident that our judges and lawyers are becoming more aware of what the law ought to be, and more willing to overrule precedents, including those which interpret a statute.[10]

On the whole, whether Professor Keeton intended it or not, he has convinced me that the organization of our government, with executives, legislators, and courts, is probably the best form that has ever been developed up to the present. I hope, however, that judges will increasingly overrule bad decisional law. I can think of many areas in which we still need improvement—air and water pollution problems being current examples.

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9 R. KEETON, VENTURING TO DO JUSTICE 105 (1969).

10 Professor Keeton does not cite Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). In this case the defendant, a mass-producing contractor for homes, sold a house to a third person who later leased it to the plaintiffs. The defendant, in violation of the instructions given by the manufacturer of the water heater, did not install a mixing valve designed to prevent the water delivery temperature from being too high, and as a result the plaintiff's 16-month-old son was severely scalded when he turned on the hot water in the bathroom. The lower court gave judgment for the defendant. On appeal, the court held that the plaintiffs had an action in negligence against the defendant and also an action for breach of warranty of "habitability." Although liability against a contractor for negligence has been gaining support by overruling cases, a "warranty of habitability" is a new idea and probably a good one.

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