December 1962

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John Reid
New York University

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Henry Brannon and Marmaduke Dent: The Shapers of West Virginia Law, Part I

JOHN REID *

Professor Reid has searched for some time for a book or pamphlet written by Judge Dent, entitled Socialism Resistless: Or His Kingdom Cometh or True Socialism. Thus far, the search has not produced the document. Anyone knowing where this book or pamphlet may be located is requested to contact the West Virginia Law Review.—Editor.

Legal history is the bantling of law studies in America. While tolerated in a few states, it is, in others, all too often a sterile learning, occasionally praised but seldom pursued. Several jurisdictions, notably Massachusetts and New Hampshire, have recently capped years of quiet activity with detailed and scholarly dissertations tracing local judicial institutions back to their beginnings, over three hundred years ago.¹ Others, such as Utah and West Virginia, states which were not established until the second half of the last century, do not even have the vignette with which to start a monograph. The reasons are varied. In Utah the Church controls many of the records and insists upon the right of censorship, thus putting a dampener on serious, objective investigation.² In West Virginia the difficulty seems to be that the profession is apathetic towards its heritage.³ This is in sharp contrast to New Hampshire where Chief Justice Kenison recently testified to the practical importance of legal bi-

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* Assistant Professor of Law, New York University.

1 SMITH, COLONIAL JUSTICE IN WESTERN MASSACHUSETTS (1961); HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS (1960); PAGE, JUDICIAL BEGINNINGS IN NEW HAMPSHIRE (1959). See also DIMOND, THE SUPERIOR COURT OF MASSACHUSETTS: ITS ORIGIN AND DEVELOPMENT (1960).


³ Despite the fact that West Virginia has practically no written legal history, a recent survey reported that West Virginia lawyers thought they could still "do with less." Mueller & Skolnick, BAR REACTIONS TO LEGAL PERIODICALS: THE WEST VIRGINIA SURVEY, 11 J. LEGAL ED. 197, 202 (1958).

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ography\(^4\) and where publication has been supported by the organized bar.\(^5\)

Just what accounts for this difference between West Virginia and New Hampshire is something which cannot be satisfactorily explained. In fact, at first impression, it might be guessed that West Virginia would have a greater interest in legal history than New Hampshire because, after all, it was established as the result of a legal controversy (\textit{i.e.}, Virginia's right to secede from the Union), while New Hampshire was settled for no better reason than that fishing was good on the Piscataqua River. One explanation might be the fact that judicial biography has been the foundation upon which much of the legal history of nineteenth century America has been built. Had New York not had a Kent, Massachusetts a Shaw, and New Hampshire a Doe, our knowledge of the legal history of those states might be no further advanced than is our knowledge of the legal history of West Virginia, not only because the study of their lives furnished the material upon which to build but also because their colorful personalities aroused a curiosity in legal history which no West Virginia judge has been able to kindle.\(^6\) Governor Atkinson, an amateur historian, if there ever was one,\(^7\) tried to remedy this but unhappily went too far.

\(^4\) "We can never fully understand our legal traditions and institutions unless we also appreciate the fact that the pioneering genius of Jeremiah Smith was solidified by the judicial dignity of William Richardson, that Joel Parker's introduction of equity was made workable by the patient labor of Samuel Dana Bell, that Ira Perley's inevitable temper was balanced by Henry A. Bellows' distaste for controversy, and that Charles Doe's reforms succeeded only after overwhelming the desperate rear-guard action of Alonzo P. Carpenter," Kenison, \textit{New Hampshire Chief Justices in the Nineteenth Century}, 2 N.H.B.J. 93 (1960).

\(^5\) It is significant that Professor Marke, in his discussion, for the \textit{Annual Survey of American Law}, of work currently being done in legal history, has recently devoted much of his limited space to praising New Hampshire scholarship. Marke, \textit{Legal History and Bibliography}, 1960 \textit{Ann. Survey Am. L.} 627, 629-30 (1961); Marke, \textit{Legal Bibliography and History}, 1959 \textit{Ann. Survey Am. L.} 691, 693-94 (1960).

\(^6\) In reviewing a book on Lincoln's law practice, Professor Kimball bemoaned the expenditures of effort which go into duplicating works on Lincoln as a lawyer which might be more meaningful if directed towards a study of mid-west law practice in general in the nineteenth century: "To most readers, history seems so much more interesting, somehow, when one ties it to a well-known name and face." Kimball, Book Review, \textit{7 Utah L. Rev.} 285, 286 (1960).

\(^7\) He was also an amateur historiographer, sharing with Carlyle the notion that "Biography is the only true history." \textit{Atkinson, Bench and Bar of West Virginia} iv (1919). (See also similar remarks by Dean Jones, Jones, \textit{Introduction}, \textit{id.} at ix.) Atkinson may have stopped to consider what "true history” was, but he overlooked the problem of what constitutes "true biography."
In his *Bench and Bar of West Virginia* he depicted every lawyer about whom he wrote in such glowing colors that readers are left with the impression that the West Virginia Bar before 1920 was made up of saintly though dull supermen or else that Atkinson was either naive or a credulous blurbist. To have to depend upon such a book as a major source of material would have an unfortunate effect on the prospects for legal history in any jurisdiction. Actually there is some puissance in Atkinson's approach because (although he unintentionally burlesqued it by failing to acknowledge that every West Virginia lawyer is not a great lawyer) the great man theory does have a place in the writing of legal history. Roscoe Pound has spoken of "the personal stamp of the great lawyer" which he found upon all the legal systems he had studied. And Justice Frankfurter has suggested that we cannot have an adequate judicial history until we rescue the court from "the limbo of impersonality." The disservice which Atkinson did West Virginia was to obscure the fact that, at the turn of the century, when West Virginia law was emerging from the period of the "founding fathers," the Supreme Court of Appeals was dominated by two colorful personalities, two "shapers"—Henry Brannon of Weston and Marmaduke Dent of Grafton. A study of these two men would go far toward laying the foundation for a legal history of West Virginia. Their rivalry is the stuff from which good history is made. Their "stamp" is indelibly pressed on West Virginia law. Strong, opinionated judges, they stood on opposite sides of many of the most challenging problems of their day and, by tugging and pulling against one another, they not only, as a pair, contributed more than any other two judges to the ultimate course of West Virginia law, but, as glossarists of competing social philosophies, they made that law reflect the West Virginia in which they lived.

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5 "The personality of Labeo, of Julian, and perhaps of Papinian has entered into Roman law. The stamp of Tribonian is on the Corpus Juris and thus on the great quarry of legal materials for the modern world. The stamp of Du Moulin and of Pothier is on French law. To mention no others, Henry II and Coke and Mansfield stand out as personally responsible for things of the first moment in English law. In American law Marshall has been pronounced rightly the creator of the constitution . . . . Kent and Story were the chief actors in the reception of English law in the forepart of the nineteenth century, without whom it might not have been complete. Shaw and Gibson and Ruffin and later Doe left their marks upon the law of their jurisdictions and to some extent upon the law of the whole country." POUND, INTERPRETATIONS OF LEGAL HISTORY, 138-39 (1923).

9 Frankfurter, The Commerce Clause Under Marshall, Taney, and Waite 5-6 (1937). Frankfurter was speaking of the United States Supreme Court.
The West Virginia in which Henry Brannon and Marmaduke Dent lived at the end of the nineteenth and the beginning of the twentieth centuries, may be glimpsed by a study of their judicial opinions. It was a land of Bible and jug, of vendetta and vigilante; of moonshine and mountaineers; of land grabbers and oil jobbers; of The Strange Schemes of Randolph Mason and The Night of the Hunter; of veterans who had served in rival armies and homes still rent by civil war; of women born to home-spun tiers who would live to be buried in store-bought clothes and men born to venatic youths who would live to be buried in mining shafts; and of commercial drummers with battered suitcases alighting from the noonday train and of geographical recluses to whom the peaks around their valleys were the curbstones of the world. It was a land of tight little communities in which the county seat was the paragon of culture, sophistication, and diversion. The railroad did not come to Weston until 1879. Morgantown was not connected with Fairmont until 1886. It was not an affluent land but, with the recent discovery of oil, gas, and coal, it was as prosperous as most of the nation; a different state from that of the “Help Pull West Virginia Out of the Mud” campaign of the 1920's and the “depressed areas” legislation of the 1960's. It was a land served by the small law office with books piled high on tables beneath a green-shaded light bulb hanging from the ceiling and a stream of indigent clients with petty cases climbing a long dark flight of squeaking stairs. From such offices John W. Davis would go to New York to manage larger matters and Newton D. Baker would start for Washington to handle affairs of state. But Brannon and Dent would never escape from the West Virginia law office nor would they ever try. While on the bench they dealt with the petty cases of an agrestic people—the petty cases which form the heart of the American legal system, for they reflect the every day society of turn-of-the-century West Virginia just as the cases in the Yearbooks reflect the aristocratic society of medieval England.

Henry Brannon, an Episcopal of Irish descent, served two terms on the Supreme Court of Appeals, from 1888 to 1912. He originally was elected as a Democrat but, in 1900, disenchanted with Bryanism, ran as a Republican. Marmaduke Dent, a Presby-

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10 Vandervort, The Supreme Court of West Virginia, (Part III), 12 GREEN BAG 292, 299 (1900). Vandervort, the contemporary historian of the Brannon-Dent court, says that Brannon had been a Democrat but, nevertheless, “is quite liberal in his opinions.” Ibid.
terian of English-Welsh descent, served only one term, beginning in 1893. He lost his bid for reelection, in 1904, falling victim to the shift in political fortunes which had made West Virginia a Republican state. All his life, Dent remained a staunch, uncompromising Democrat.

The differences between the two men—their philosophical leanings, their judicial attitudes, their social prejudices, their legal lodestars, their jurisprudential ideals, as well as their respective places upon the court, may best be discerned from the cases in which one dissents from the other's opinion. These were the cases where competing traditions battled to control the future direction of West Virginia law; the cases which shaped its course in the first half of the twentieth century.

Typical of these cases was Gall v. Bank—typical because Brannon wrote in his usual laconic style while Dent quoted poetry, because Brannon approached on the narrow road of precedent while Dent arrived on the board avenue of principal, because Brannon's opinion consists almost entirely of quotations from authorities which support his position while Dent has only one direct quote, because Brannon takes the side of a bank while Dent takes the side of a farmer, and because Brannon wrote for the court while Dent filed a lone dissent. The plaintiffs alleged that they, as sureties for a bond, had signed an agreement with the defendant bank to compromise the claim, in return for which the defendant promised to cancel the bond. After they paid, the defendant did not cancel and, instead, brought legal action to collect the remaining amount. The plaintiffs prayed for equitable relief, asking that the court enjoin the action and decree cancellation of the bond.11

"In short," wrote Dent, "their allegation is that the proceedings at law are in furtherance of the fraud perpetrated on plaintiffs by withholding from the plaintiffs the bond stipulated after plaintiffs had fully complied with their part of the compromise.12

"The rights upon that bond were legal rights, if any existed," Brannon said, "the right of defense against that bond based on the compromise and payment was a legal defense, both cognizable at law."13

12 Id. at 601, 40 S.E. at 392 (dissenting opinion).
13 Id at 598, 40 S.E. at 392.
"The question," Dent replied, "is not as to which court has the prior jurisdiction, but whether equity has jurisdiction to prevent the defendants from doing what they bargained not to do to the harrassment and injury of the plaintiffs."

Brannon preferred to reply on familiar axioms. "Where the right is legal," he wrote "equity will not exercise jurisdiction, if the legal remedy is adequate."

Dent thought the "remedy at law is wholly inadequate" and listed five reasons why, summing his position up by warning: "Under this holding in all cases of concurrent jurisdiction fraud by increasing fraud may select its own tribunal and thereby oust the jurisdiction of equity."

Brannon was not impressed. "Even when there is no action at law actually pending," he insisted, "equity does not take jurisdiction to cancel a document except under special circumstances..."

"Discovery, disadvantage at law, deprivation of evidence, deceit practiced, and default of legal remedy, all call for equitable interference," Dent replied. "The equity of this case is too plain for further comment. It is not though an infringement of the ordinary policy of the times to surrender the uneducated farmer to the protecting care of the educated banker. The law demands it, equity sanctions it, and blind justice weeps and pleads in vain. For

'There is no power in Venice,  
Can alter a decree established.  
'Twill be recorded for a precedent.  
And many an error, but the same example,  
Will rush into the state.'"

Judge Dent's reference to the uneducated farmer down-trodden by the educated banker was not idle chatter inserted into this case

14 Id. at 603, 40 S.E. at 393 (dissenting opinion).
15 Id. at 601, 40 S.E. at 392.
16 Id. at 601-02, 40 S.E. at 392: "Fourth, plaintiffs are compelled to endure the harassment, the prolongation and the uncertain vicissitudes of a law suit, while the defendants enjoy the full benefit of the fraud perpetrated by them in securing a compromise and breaking it, and have within their power the evidence on which the plaintiffs' right of recovery depends. Fifth, it is neither equitable, just nor right to send plaintiffs to a court of law and thus aid the defendants in the perpetration of their fraud..." (dissenting opinion).
17 Id. at 603, 40 S.E. at 393 (dissenting opinion).
18 Id. at 598, 40 S.E. at 391.
19 Id. at 604, 40 S.E. at 393 (dissenting opinion) (citations omitted).
only to be forgotten by the next. As his contemporaries well knew, he was ever prepared to balance the interests of parties, and, if justice required, give facts greater weight than law. In one case he boldly stated his theory that a judge, when expounding law, must take into consideration that indefinable criteria called "justice," when he dissented from a decision overturning a verdict against a railroad:

"In this case there is a powerful and wealthy corporation on the one hand with numerous and influential friends, and a bereaved widow and fatherless children on the other, and my deep sympathies for the appeals of the helpless and needy may cause me to hold the scales of justice unequally between them; but it is my sincere judgment, that the evidence should not only have been submitted to the jury, but, as it now stands, is plainly sufficient to warrant a verdict in favor of the plaintiff. My convictions may appear unreasonable to others; yet, while I highly esteem the more mature judgment of my associates, an approving conscience can be the only arbiter that a judicial officer can recognize in discharging his individual duties."20

No one disagreed with this philosophy more than Judge Brannon. He felt that conscience was hardly a safe guide for a court to follow. While, he too, deplored the hardships and sufferings which the law left some people to bear alone, he regarded them as the expected, normal risks of living in a society blessed by the achievements of the industrial revolution. Experiments with abstract justice should never be substituted for the safety of established precedent, no matter how harsh. In one case he met the issue head on, and, brushing aside compassion for the victim, insisted that the defendant corporation be given every benefit of an extremely narrow interpretation of the fellow servant law.

"The defendant is entitled to the benefit of that law, over sympathy or feeling for the unfortunate boy, and it ought to be so declared. The fact that Buskirk was a minor does not take him out of the rule of fellow servants... courts applied the rule to children of twelve and fourteen years. The fact that the boss took him from his usual line of work does not alter the case, because that boss was

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a mere fellow servant, and it must appear that he had authority to act."21

The significance of the fellow servant rule has long since been legislated out of the law by Workmen Compensation Acts. But at the turn of the century it was still a very live issue in West Virginia. There was probably no better index to the social philosophy of a judge than his opinions in fellow servant cases. As might be expected from the last quotation, Brannon took a very strong stand on what he termed "this subject of fellow-servantcy (to coin a word to express the idea in one word)."22 He had freely called the employee who had directed the boy to divert from his usual line of work "the boss," yet insisted that for purposes of recovery against the plaintiff's employer he was a mere fellow servant until it was shown "he had authority to act." Dent's position had originally been somewhat similar to Brannon's. In one of his first cases he reversed a plaintiff's verdict against his employer as "capriciousness," scolded the jury for "preconceived prejudices and feelings," and laid down as harsh a rule as could be expounded under the common law.23 Within four years he had come to see fellow servant cases in a different light and, by 1897, was attempting to set West Virginia on a new course by dissenting from the approach endorsed by his colleagues. In what was, perhaps, the most interesting of these cases, he found himself in the unusual position of arguing for stare decisis.24 While Brannon, who was attempting to give employers even greater immunity than they had previously enjoyed by establishing the rule that a master is not liable for negligence resulting from an act usually "in the line of one who would be a fellow servant," freely admitted he was departing from West Virginia precedents.25 Brannon felt an

24 "The rule of stare decisis applies with impregnable force in this instance, and from which there is no escape, even if the court were so inclined, unless by an utter and reprehensible disregard of all precedent." Jackson v. Norfolk & W. R.R., 43 W. Va. 380, 401, 27 S.E. 278, 287 (1897) (dissenting opinion).
25 "The prop has fallen from under these decisions. We ought to do right. The supreme court [of the United States] has reversed itself. Why should not we do so? It is not a rule of property." Id. at 392, 27 S.E. at 283. It is interesting to note that stare decisis, as an abstract principle, had few more vocal champions than Judge Brannon. "Quite lately I have defended the rule of stare decisis in our court. I avow myself, except in very rare instances, determined to stand by the rule of stare decisis, especially in matters of property right." Brannon, The Supreme Court of Appeals of West Virginia, 25 PROC. WEST VA. BAR ASSN. 108, 122 (1909).
employer's liability to an injured employee should not depend on the rank or grade of the negligent servant nor the fact he had authority over the injured man, but rather on the "character of the negligent act." Dent preferred to rely on traditional distinctions such as "vice-principal" or "superior servant" which pegged liability on rank rather than act. The clash was never sharper. Dent again balanced the helpless victim who cannot bear the loss against the large corporation which could more easily do so. Brannon was concerned about the effect such a solution would have on the business community.26

Lurking always in the background of these decisions, and explaining in part the sharply divergent attitudes of Brannon and Dent, were their contrasting philosophies of the place of business in society and the role which government should play in regulating private enterprise. As is to be expected, Brannon's philosophy verged on laissez-faire. A man who felt the common law could do little to aid a person physically injured by a corporation while that corporation was performing a legal function, was unlikely to find merit in the suggestion that the economy would be strengthened if the legislature undertook to police business activity. Natural law, he suggested, dictates a dog-eat-dog atmosphere in the commercial world and it cannot be helped. In a case involving no less a master of jungle warfare than Standard Oil of New Jersey, Brannon, in holding that a small corporation had no action against a large corporation which intended to destroy it and was destroying it, so long as the large corporation acted lawfully,27 unburdened himself of many thoughts

26 While in the Jackson case, supra note 24, is perhaps the best opinion for comparing Brannon and Dent's contrasting views concerning the imposition of risks upon business enterprises, it reveals only one dimension of their struggle, for judges capable of taking such opposite stands on principles were quite likely to regard facts from entirely different points of view and come up with completely contrary interpretations. For an excellent example of Dent reading facts to benefit a plaintiff and Brannon reading them to favor a railroad see, Meeks v. Ohio River Ry., 52 W. Va. 99, 43 S.E. 118 (1902) (Dent for the court, Brannon dissenting). In what is perhaps the classic case of this type, Dent even inferred that Brannon was juggling the facts to suit himself. See, Miller v. Insurance Co., 54 W. Va. 344, 46 S.E. 181 (1903) (Brannon for the court, Dent dissenting).

27 The plaintiff (engaged in transporting petroleum by pipe lines and tank cars from Vonano to Parkersburg and in storing oil) accused Standard Oil of "maliciously and wickedly contriving and intending to ruin the plaintiff and its business, and render its plant and property worthless..." Brannon held that a combination and agreement by several persons to do a lawful act, violative of no duty owed another, is not an unlawful conspiracy subjecting them to an action by him, though the act was intended to and did injure him. Transportation Co. v. Standard Oil Co., 50 W. Va. 611, 40 S.E. 591 (1901).
on the problem, including an analogy to another master of the jungle—the lion.

"It is the act of persons and corporations, by union of means and effort, drawing to themselves, in the field of competition, the lion's share of trade. This is not monopoly condemned by law. The lion has stretched out his paws and grabbed in prey more than others; but that is the natural right of the lion in the field of pursuit and capture. Pity that the lion exists, his competing animals may say; but natural law accords it the right, it is given him by the Maker for existence." 26

Brannon's version of laissez-faire had Darwinian undertones.

"That in these days of sharp, ruinous competition some perish is inevitable. The dead are found strewn all along the highways of business and commerce. Has it not always been so? The evolution of the future must answer; but we do know that thus far the law of survival of the fittest has been inexorable. Human intellect, human laws cannot prevent these disasters. The dead and wounded have no right of action from the working of this imperious law. This is a free country; liberty must exist. It is for all, this is a land of equality, so far as law goes, though some men do in lust of gain get advantage. Who can help it?" 29

Dent, who missed the human tragedy which could result from struggles between Brobdingnagious, did not quarrel with Brannon in cases involving impersonal business corporations fighting for survival. Instead he concentrated his judicial compassion on the individual Lilliputian being stepped on by a careless and unconcerned Gulliver. In situations involving potential peril to citizens, Dent was willing to go much further than his colleagues in imposing positive duties or even seeking governmental regulation. After all, he pointed out, the law had created corporations, so why should it be denied power to define and enforce the steps, which are necessary to curtail whatever hazards they may pose for the general public. He expressed his thought in Raines v. Chesapeake & O. Ry., in which Judge Holt, speaking for the majority, had held that a railroad has a right to assume that a trespasser, walking on the tracks, will step

26 Id. at 617-18, 40 S.E. at 593-94.
29 Id. at 621, 40 S.E. at 595.
aside in time to escape the danger of an onrushing train. While the remainder of the court restricted their thinking to the confines of precedent-logic, Dent sought to show that law is a matter of degree, and that what constitutes trespass on truly private property should not necessarily be called trespass on property belonging to certain public corporations.

"While the law regards a railroad track to be the private property of the company, and the use thereof as dangerous and perilous, yet it lies open to the commons, and offers a dry, smooth, even, level and convenient walkway for pedestrians, especially in populous communities and is therefore a source of great temptation to the public. The law, in permitting railroad companies to rush their trains through the country at a great rate of speed, requires them to adopt the necessary means to warn trespassers out of their way in time for them to escape death. The ringing of the bell and sounding of the whistle are not matters of much exertion; neither do they in any way interfere with or impede the running of trains."

This was a theme to which Dent often returned. Railroads existed by the grace of the public and the public expected them to be operated with safety. Brannon did not agree. He believed that a

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30 "Common sense and common justice applied to the practical affairs of the managing of railroads and the running of trains require, that there must be left to engineers some margin for forming their judgment, which may still be discreet, and some latitude of conduct which may in either event be held to be prudent. He will not, on pain of conviction of negligence in a matter involving life and limb, be held to make, on the spur of the moment, a nicely accurate estimate of the probability that one walking on the track is insensible of his danger, from the mere fact that he is on the track within a distance within which the train cannot be stopped, for common observation shows that persons fully aware of the approach of the train cross the tracks, or fail to step off, although the train may be within such distance; for one second or a half second in time, and two steps or three in distance, will put him out of danger." Raines v. Chesapeake & O. R.R., 39 W. Va. 50, 62, 19 S.E. 565, 569 (1894). Later that same year Judge Holt softened his attitudes, at least as to drunkards, by suggesting that had the trespasser on the track been a boozer, known to be unconscious or heedless of his dangerous exposure, "it will not be denied that the duty would have arisen to take such precautions as were proper to avoid infliction of injury." Fisher v. West Virginia & P.R.R., 39 W. Va. 366, 392, 19 S.E. 578, 588 (1894) (dissenting opinion).


32 For the case which best depicts the different approaches taken by Brannon and Dent on this problem, so important in turn-of-the-century West Virginia, see, Bias v. Chesapeake & O. R.R., 48 W. Va. 349, 33 S.E. 240 (1899). (Dent for the court, Brannon dissenting.)
trespasser on a railroad track could not collect damages for injury unless the railroad was guilty of wanton or gross negligence.\(^{33}\) although given the right set of facts he would uphold a plaintiff's verdict.\(^{34}\) Dent, in direct contrast, wanted to assess punitive damages against railroads in death cases "for the preservation of human life and prevention of unnecessary homicide."\(^{35}\) Their positions are summed up by two quotations from a tort case in which the engineer, when he first spotted the one-year-old victim on the track, mistook it for a chicken.

**Brannon:**

"[T]he company is not bound to reduce speed or stop when an object is seen on track which it has no reason to believe is, but by possibility may be, a human being."\(^{36}\)

**Dent:**

"The undisputed circumstances show that there was no natural object in the way to prevent the engineer from seeing the child. The situation, therefore, necessarily raises the presumption of negligence, and casts on the defendant the burden of showing that a proper lookout was kept, and the failure to see the child was occasioned by other fault than that of the engineer."\(^{37}\)

As this quotation shows, Dent was more willing than Brannon to impose positive duties upon railroads; duties which required them to take positive measures to protect lives and property. It also shows that he took a common sense approach to these problems, by pointing out what practical steps were possible and balancing these steps against the legal maxims which his colleagues were following. Nowhere was this "positive-duty, common-sense" approach in sharper contrast to the more "legalistic, precedent-bound" approach of Brannon than in *Kirk v. Norfolk & W. R.R.*, in which the plaintiff sought to recover the value of cattle killed by the defendant's engine on the

\(^{33}\) Huff v. Chesapeake & Ohio R.R., 48 W. Va. 45, 35 S.E. 866 (1900).

\(^{34}\) Gunn v. Railroad, 42 W. Va. 676, 26 S.E. 546 (1896).


\(^{36}\) Couch v. Chesapeake & O. R.R., 45 W. Va. 51, 59, 30 S.E. 147 (1898). In this case there was no majority opinion and no dissent. The court was evenly divided and although Judge Dent's opinion appears first, Judge Brannon's is the one which prevails since it affirms the action of the lower court sustaining the railroad's demurrer.

\(^{37}\) *Id.* at 53, 27 S.E. at 148.
defendant's track. Speaking for the Court, Judge English held that, since the paramount duty owed by a railroad is to its passengers, it may, in freezing weather, use salt to free its frogs and switches from ice, if this is the only effective method, even though salt may have a tendency to lure stock onto the tracks and endanger their lives. In a short, concurring opinion Brannon said "We hold the company not responsible for killing or crippling the cattle..." He accepted the defendant's testimony that salt was the only means of keeping the frogs and switches free of ice. In a biting dissent, which reads like an argument in conference chambers, Dent pointed out that salt was not the only means, it was merely the cheapest means, and if the railroad chose to save money by using salt, it, and not the owner of the cattle, should bear the consequences.

In his dissent, Judge Dent, with bitter sarcasm, asserted that the majority's opinion "must be repugnant to the sense of justice of every reasonable man not learned in the intricacies of railroad jurisprudence." This reference to "railroad jurisprudence" should touch a responsive cord in anyone familiar with the myths of American legal history. For, if there is one thing most lawyers seem to believe, it is that at the turn of the century the railroads had a stranglehold on state appellate courts. This stranglehold is blamed

39 Id. at 729, 24 S.E. at 642 (concurring opinion).
40 Id. at 731-32, 24 S.E. at 642-43: "It is plain to be seen that while the witness says the use of salt was absolutely necessary, and that there was no known substitute for it, yet that the real object in its use was to avoid the additional expense caused by the necessary labor involved in keeping the frogs and switches free from ice and snow in cold weather. In other words, it was a 'penny wise and pound foolish' policy, causing the unnecessary destruction of other people's property, and increasing the dangers to its trains and passengers, which could have been avoided by a small outlay, less than the expense of defending this suit; for it alone will cost the company more than sufficient to have kept these particular frogs and switches free and clean from snow and ice, and properly lubricated, by manual labor, for many winters—or if the salt was absolutely necessary, which sounds like mere foolishness to an untutored savage at least, to have kept a man on guard for many cold nights and days, and secured the plaintiff and others from the loss of their stock, and avoided a decision by this Court of that as law which must be repugnant to the sense and justice of every reasonable man not learned in the intricacies of railroad jurisprudence.

'To say that the use of salt is the only effective mode of freeing frogs and switches from ice and snow in cold weather is to close our eyes to ordinary human experience. But to say that the use of salt is the only effective mode of freeing frogs and switches from ice and snow in cold weather without an additional expense for manual labor and proper lubricants is, no doubt, true. If the company adopt the cheaper of two modes to accomplish the same purpose, it is no more than justice to require it to provide against the increased danger, occasioned by its choice, to the property of others." (dissenting opinion).
41 Ibid.
for all sorts of legal anomalies (grouped under the vague heading "railroad law") and railroad power is said to have been omnipotent, a notion unsupported by scientific research. There are simply too many intangible factors which are, as yet, unmeasured to permit anything but an educated guess. There is no disputing they were powerful; in some states almost as powerful as the government. But this is not the same as saying they controlled the course of decisional law. Admittedly their influence was great; perhaps even decisive whenever a judge was able to identify their interests with his own.

It might be suggested that Marmaduke Dent's willingness to decide cases contrary to the interests of railroad-defendants marks him as a man of political courage. While there could be something to this (for, after all, the railroads could assert a more positive reaction to judicial shiftings than could their unorganized opponents), it would hardly be crediting him with a feat of derring-do. It is true enough that the main employer in Dent's home town was the Baltimore & Ohio, but a Grafton lawyer could make a living representing the other side. Furthermore, the railroads were by no means as powerful in West Virginia as they were in some other jurisdictions. Supreme Court Judge Daniel B. Lucas, while a member of the legislature, had been "particularly bitter against what he claimed were the unjust privileges possessed by the railroad companies in this State," and he was, by no means, a lone voice crying in the wilderness of public apathy. As early as 1873 the Grange had succeeded in pushing through the legislature laws fixing maximum passenger and freight rates and preventing unjust discrimination. Almost two decades before Dent began dealing with railroad cases from the bench, no less a figure than Johnson N. Camden had been summoned before the bar of the State Senate to answer charges of contempt for refusing to disclose the amount of rebates the Camden Consolidated Oil Company had been allowed by the Baltimore & Ohio. The Grange was still a power in West Virginia politics during the years Dent was in judicial office. The last legislature before his election had contained forty-five grangers out of sixty-five members. It was, therefore, not exactly political suicide

42 Vandervort, The Supreme Court of West Virginia, (Part II), 12 Green Bag 234, 244 (1900).
43 Ambler, A History of West Virginia 399 (1933).
44 Ibid.
to oppose the railroads. Dent had a reputation of not being a railroad man long before he went on the bench, and this certainly did not hurt him with the Populists who were the first to nominate him for the court. In 1888, at their second annual meeting, he had urged the members of the Bar Association to petition Congress and the legislature for laws restricting the right of a railroad to remove a case from a local court on the grounds that it was a non-resident. In support of his resolutions he related a tale of railroad machinations as humorous as it was tragic.

"I had a case against a railroad company. — They brought some sixty-five great big engines right in front of my house that blew over twelve hundred bushels of cinders right in front of my house. I restrained them from doing that. They certified my case to Parkersburg; it lies there undetermined but the injunction still holds. When they found they could not blow in front of my house, they went to some poor little Irish woman and blew out those engines within forty feet of her house. They blew into everything she had, every crack of the house. I had them arrested eighteen times; I had them fined eighteen hundred dollars; they appealed in every case—eighteen times. Then they claimed to be non-residents of the State

46 In support of his resolution Dent said: "Any railroad corporation can come into the State of West Virginia and take our lands from us under this act of eminent domain, rob us of our property, and when we dare to bring them into our courts of justice they tell us they are nonresidents of the State of West Virginia, and not subject to the jurisdiction of the courts of West Virginia. This is a great wrong. They make affidavit that they can not get justice in our courts. They insult our judges, juries, and the members of the bar . . . This is a serious question and I have stood it as long as I can. They remove cases from our circuit courts saying that they cannot get justice from the judges. Not satisfied with that, they now propose to remove cases from justices of the peace. They say 'because we can not get justice, we will remove the case from your jurisdiction.' When my experience has been that railroad corporations always get more than justice from every side. It is not for the purpose of justice that these cases are removed. It is an insult heaped upon our courts and juries. As long as they only insulted our judges and juries, I could stand that, but they have gone further than that; they have gone and insulted our poor little justices, and removed cases from them on the ground that they can't get justice, when everybody knows that a free pass could get justice from almost any justice in this State. Therefore, I offer these resolutions, and I want this Association to memorialize Congress and have it fixed so they can't claim their nonresidence." Minutes of the Meeting, PROC. 2ND ANNUAL MEETING WEST VA. BAR ASS'N 71-72 (1888).
and got an injunction from the court and still blew before the woman's house. She brought a little suit before a justice of the peace, and the railroad company said if necessary they would take that to Parkersburg. Why, I don't know. I am not posted on these questions. I have never been in that court. The company says that it is their court; I don't know the reason or why. I think we had about a half dozen of those cases. The first thing I knew, they got a certiorari and took our little case a hundred miles away, and every time you ride to that place you have to pay a tax to them before you can get there to stop them from blowing. I got her an injunction and stopped them from blowing and away went that case out of that court.\(^{47}\)

Now, whether the blowing of cinders into his Grafton home made Dent anti-railroad or whether he had already embarked on a career as plaintiff's attorney in railroad liability suits, is a question which might possibly be answered if we had available the office records of his law practice. It is not important, however. What is significant is the fact that, in 1892, when he first ran for the Supreme Court of Appeals, anti-railroadism was by no means lethal. What was politically reckless in California could be politically profitable in West Virginia. It might not contain as much mileage as the other side of the coin, but it was effective for a short run.

Dent was never a railroad baiter in the demagogic sense. His position was not so much that of politician as of student of law. He did not quarrel with those who stressed the importance of the railroad to West Virginia's economic well being. He just insisted that this was not the only consideration; that the law in shielding the railroads from the hungry scavengers waiting to feast on their carcasses, should not ignore the legitimate claims of "poor little Irish women." Judge Brannon, on the other hand, was impressed by the opposite argument and, as might be expected, stressed the disadvantages railroads faced in jury trials. Prejudice against railroads on the part of jurors was a serious problem in West Virginia. Judge Dent readily admitted this. Although he did not agree with Zachary Taylor Vinson of Huntington that jury verdicts in these cases were nothing less than "confiscation of property under the

\(^{47}\) Id. at 72-73.
forms of law," Dent once found it necessary to speak out against jurors in railroad cases who "... are derelict in the discharge of their duties if they ignore the evidence without cause, and find a verdict according to their preconceived prejudices and feelings." Now, it does not seem unreasonable to suggest that the appellate court's reversal of plaintiff's verdicts in railroad cases can be attributed to a need to correct this prejudice as much as to any reverse prejudice in favor of railroads. Keeping this balancing process in mind, a check of the opinions in the West Virginia Reports, written when both Brannon and Dent were on the bench, does not reveal that a disproportionate number of them were decided in favor of the railroads. Admittedly, a tabulation of naked numbers, without considering what is behind those numbers, without separating the big important cases in which the railroads were vitally interested from the minor cases they could afford to lose, means little. But, as bare statistics, unsupported by careful analysis, they can be used to balance the bare assertion, unsupported as yet by historical research, that the railroads controlled the Supreme Court of Appeals. Volume 46 and volume 47 offer as good a sampling as any. They cover the century's turn, from March 18, 1899, to April 14, 1900, and came at the middle of Judge Brannon's two terms in office, at a time when Judge Dent had thoroughly mastered his material and was in a fighting mood. Of the eighteen railroad cases in those two volumes, one may be ignored since it was an action between two railroads. Of the remaining seventeen, ten

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48 Vinson, Railway Corporations and the Juries, 17 Proc. West Va. Bar Ass'n 42, 43 (1901). "Every American lawyer felt that the Dreyfus trial was an outrage upon justice for the reason that his triers were hostile to him and his cause. Yet, I am sure that it is the experience of every lawyer engaged in that character of litigation known as damage cases against railroad corporations, that in State Courts the juries as a rule are partial to the plaintiff and biased against the corporation. It has become a common saying among members of the bar that 'if the case can only get to the jury there will certainly be a verdict for the plaintiff.' We all know that this hostility to railway corporations does exist in the minds of the average jury and it so warps their judgments as to render it well nigh impossible to get the same consideration at the hands of a jury for a railway corporation that an individual defendant would receive under the same circumstances."


50 Glen Jean, & D. Ry. v. Kanawha, G. J. & E. R.R., 47 W. Va. 725, 35 S.E. 978 (1900). In this case, Dent "held" for neither railroad, but rather reversed, "in part" only, a judgment of the lower court dismissing the action. Although litigation between two railroads did not involve the liability issues which usually divided Brannon and Dent, it is interesting to note that two years earlier a suit between these same railroads had seen Brannon dissent from an opinion written by Dent. Kanawha, G. J. & E. R.R. v. Glen Jean, L. L. & D. W. R.R., 45 W. Va. 119, 30 S.E. 86 (1898).
were decided in favor of the railroad,51 seven in favor of the other side.52 In all but four of these the railroad was the defendant and, most significantly, in all but two judgment below had gone against the railroad.53 Thus, the fact that the Supreme Court of Appeals decided ten in favor of the railroad and only seven against the railroad, must be balanced against the fact that the lower courts had, in the same cases, rendered fifteen judgments against the railroads and only two in their favor.

Out of these seventeen cases, perhaps five can be regarded as significant.54 That is, these five involved principles important to the railroads for, had they been decided against the railroad party, they could possibly have become costly precedents in the future. In the decision of these cases, Brannon sides with the railroad for five times, Dent three. In the really big issue, involving a child trespasser on the tracks, Brannon dissented sharply from Dent's opinion that the railroad had a positive duty to maintain

51 Loving v. Norfolk & W. Ry., 47 W. Va. 582, 35 S.E. 962 (1900) (action for ejection from train; McWhorter reverses judgment for plaintiff); Neal v. Ohio River R.R., 47 W. Va. 316, 34 S.E. 914 (1899) (action for diverting a water course and causing damage; Brannon reverses judgment for plaintiff); Seldomridge v. Chesapeake & O. R.R., 46 W. Va. 569, 33 S.E. 293 (1899) (master-servant; Brannon reverses judgment for plaintiff); Ravenswood, S. & G. Ry. v. Woodyard, 46 W. Va. 558, 33 S.E. 285 (1899) railroad sues to recover property; (Brannon reverses verdict for defendants); Price v. Chesapeake & O. R.R., 46 W. Va. 538, 33 S.E. 255 (1899) (action for ejection from train; Brannon reverses judgment for plaintiff); Claiborne v. Chesapeake & O. R.R., 46 W. Va. 363, 33 S.E. 262 (1899) (railroad complains of the size of an eminent domain award; Brannon reverses); Guinn v. Ohio River R.R., 46 W. Va. 151, 33 S.E. 87 (1899) (eminent domain and nuisance action against railroad; Brannon reverses judgment for the plaintiff); McVey v. Chesapeake & O. R.R., 46 W. Va. 111, 32 S.E. 1012 (1899) (administrator sues on wrongful death; McWhorter reverses judgment for plaintiff.)

52 Lewis v. Chesapeake & O. R.R., 47 W. Va. 656, 35 S.E. 908 (1900) (loss of freight; McWhorter affirms judgment for plaintiff); Kay v. Glade Creek & R.R., 47 W. Va. 467, 35 S.E. 973 (1900) (action for seizing land for railroad construction and for fire started by locomotive sparks; Brannon affirms judgment for plaintiff); West Virginia & P. R.R. v. Harrison County Court, 47 W. Va. 273, 34 S.E. 786 (1899) (public bond subscription; Brannon affirms decree for County Court); Uhl v. Ohio River Co., 47 W. Va. 59, 34 S.E. 934 (1899) (right of way and way of necessity; Dent reverses verdict for railroad; Brannon concurs in special note); Landers v. Ohio River R.R., 46 W. Va. 492, 33 S.E. 296 (1899) (personal injuries; divided court [McWhorter] affirms judgment for plaintiff; Brannon and English dissent); Bias v. Chesapeake & O. R.R., 46 W. Va. 349, 33 S.E. 240 (1899) (wrongful death; divided court [Dent] affirms verdict for plaintiff; Brannon and English dissent); Hoover's Adm'x v. Chesapeake & O. R.R., 46 W. Va. 268, 33 S.E. 224 (1899) (wrongful death; Dent reverses judgment for defendant railroad).

53 Ironically, these two judgments (Uhl and Hoover's Adm'x, ibid) were reversed by Dent.
a lookout. It might be argued that Brannon's partiality towards railroad defendants stemmed from the fact he had been president of the abortive Weston & West Fork Railroad Company and a leading organizer of the Clarksburg, Weston & Glenville. This would be grossly unfair. If this experience played any part in shaping his approach towards these cases, it was more likely that it made him sensitive to the perils of the business community than because he had a financial interest in railroads, per se. The principles he sought to establish in these cases fit, hand and glove, with his jurisprudential attitudes already mentioned. The same is true for Dent. While Dent stressed the helplessness of the average citizen confronted with the awesome resources of a great railroad corporation, Brannon stressed the role railroads were playing in opening up for development the backwater reaches of a mountain state. The two men complemented one another and, while both were on the Supreme Court of Appeals, "railroad law" in West Virginia sometimes seems to have been the victim of a judicial tug of war.

[This article will be concluded in the February issue.]