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

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"Railroad law" was a problem which West Virginia shared with the rest of the nation. To bolster their arguments, Brannon and Dent could turn to precedents in other jurisdictions, as Brannon did when he attempted to do away with the doctrine of "superior servant" or "vice principal" in the fellow servant rule. "Oil law" was a different matter, however. The discovery and development of the West Virginia oil fields during the years before spindletop—before the great Texas and California finds—presented the Supreme Court of Appeals with unique legal problems and give it what was perhaps its one great opportunity to expound law in an entirely new area. Brannon's biographer has staked out for him claim to the lion's share of credit for this work. "New problems had to be faced," he observed, "particularly those arising in regard to oil-bearing properties, and his decisions on questions of leaseholds commanded the respect and approval of other jurisdictions wherein oil development occurred at periods subsequent to its appearance in West Virginia." There is no denying that Brannon rendered valuable service in defining the law covering oil leases. But so, too, did Dent. At least he had enough interest in the problems involved

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† See note 25, supra.
Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S.E. 433 (1903); McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 S.E. 508 (1902); Knotts v. McGregor, 47 W. Va. 566, 35 S.E. 899 (1900).
Eclipse Oil Co. v. Garner, 53 W. Va. 151, 44 S.E. 131 (1903); Lowther Oil Co. v. Gruffey, 52 W. Va. 88, 43 S.E. 101 (1902); Lawson v. Akin, 48 W. Va. 348, 37 S.E. 596 (1900); Trees v. Eclipse Oil Co., 47 W. Va. 107, 34 S.E. 933 (1899); Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S.E. 923 (1899).
not to leave their development solely in Brannon's hands. He filed concurring opinions in a few of these cases, including some in which Brannon had written unusually long majority decisions, and also dissented on occasion. This shows he appreciated their significance, yet at the same time, his inherent distrust of some sections of the business community prevented him from attributing to them special importance. His approach was usually governed by an educated common sense, as in one dissent when he suggested that his colleagues were giving too much weight to the fact that oil was involved.

"In no other kind of a case except an oil case would this Court for a moment entertain such a bill, but oil is so lubricating that it sometimes causes the wheels of justice to slip a cog, and if the guardians thereof are not on the alert it may cause oleaginous construction of principles of equity to produce more irreparable damage than it prevents."

Judge Dent reviewed election cases much the same way. He magnanimously admitted that, along with "railroad jurisprudence" and "oleaginous construction" in oil matters, election cases were potentially too fulminant for his colleagues—his all-too-human colleagues—to deal with objectively. He and Brannon, belonging to opposite political parties, almost always disagreed in election decisions, with Brannon usually writing for the majority. In Morris v. Board of Canvassers, Brannon rejected an application for a writ of mandamus filed by the Democratic candidate for recorder of Charleston. Dent attributed this "departure from the fundamental prin-

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61 Henne v. South Penn Oil Co., 52 W. Va. 192, 206, 43 S.E. 147, 153 (1902) (concurring opinion); Harris v. Cobb, 49 W. Va. 350, 358, 38 S.E. 559, 562 (1901) (concurring opinion; Brannon dissenting).
62 State v. South Penn Oil Co., 42 W. Va. 80, 107, 24 S.E. 688, 698 (1895) (concurring opinion).
64 Haskell v. Sutton, 53 W. Va. 206, 227, 44 S.E. 533, 541 (1903) (dissenting opinion).
65 Exception: Kirkpatrick v. Deegans, 53 W. Va. 275, 44 S.E. 465 (1903) (Dent concurred; Brannon dissented).
66 The election complained of occurred just a few months after the Democrats suffered disaster in November, 1900. Brannon was reelected and another Republican, Poffenbarger, replaced English, a fact to which Dent may have been referring when he wrote in his dissent: "Having much against my will been reduced to the position of dissenting member of the Court, I would like to dissent oftener than I do, were it not for waste of time that can be more profitably used, the pressure of other duties and the fear
principles of justice" to "the peculiar exegencies of this litigation." Speaking directly to Brannon he wrote:

"Such bias arises from the frailty of human nature. From it no one is entirely free although sometimes the unconscious victim thereof may deceive himself into the belief of absolute freedom therefrom. It affects the moral conscience and renders it weak and vacillating when it should be strong and stable. The person who is the slave thereof deserves our pity as well as condemnation for a fellow feeling or rather failing should make us wonderous kind.

It is this bias that murdered Socrates in the name of the State for the protection of youth, betrayed mocked, and crucified Christ for the preservation of Israel, and established and sustained the Spanish inquisition, that pure and undefiled religion might be maintained on the earth."

Strong words, perhaps, especially since Dent was as partisan a Democrat as Brannon was a Republican. But, election cases being what they are, they have little interest or importance today, save of being too captious and critical. Therefore I studiously avoid doing so. But sometimes the conclusions [sic] of my worthy associates are so palpably wrong, their construction of law so subversive of truth and right, their reasoning so unsound and fallacious, that it would require a much more social disposition than mine to remain silent under the torture inflicted by their departure from the fundamental principles of justice." Morris v. Board of Canvassers of City of City of Charleston, 49 W. Va. 251, 265, 38 S.E. 500, 506 (1901) (dissenting opinion).

Ibid. In Daniel v. Simms, 49 W. Va. 554, 581, 39 S.E. 690, 701 (dissenting opinion), Dent suggested that in election cases "ordinary courts cannot be expected to arise to such sublime heights of justice. To do so is to count political martyrdom at the hands of political associates." By 1904 he, himself, was apparently ready to count martyrdom for he concurred in an opinion upholding the election of a Republican. Doll v. Bender, 55 W. Va. 404, 47 S.E. 293 (1904). Interestingly enough, his prediction proved correct. He never received another chance to abandon his party. By the time the next election appeal came up, he had been defeated for reelection. In Stafford v. Board of Canvassers, 56 W. Va. 670, 675, 49 S.E. 584 (1904) he noted as "the last act of my judicial career" that "Political prejudice or bias, I am aware, is not objection to a judge, yet it has been the prolific source of injustice and wrong, and even cruelty, from time immemorial and always will be until the people adopt some way of selecting their judicial officers independent of their party affiliations. . . ."

For their most interesting election case see Payne v. Staunton, 55 W. Va. 202, 46 S.E. 927 (1904) (Brannon for the Court; Dent dissenting). Brannon ruled that a clerk has such interest as entitled him to refuse an inspection of records in his office by private citizens when such inspection is not called for by law.
for the light which they shed on the personalities, attitudes, and rivalries of the men who made West Virginia law.

Another problem which sheds light on the contrasting outlooks of Brannon and Dent, and which was also somewhat peculiar to their times, was murder. The home of the vendetta and the Red Men was badly plagued by a rash of homicides and some lawyers even thought that the very basis of society was endangered. The Supreme Court of Appeals reacted strongly to the situation, Brannon to a greater extent than Dent. Although he was willing to construe strictly special statutes, such as the "Red Men's Act," Brannon was very reluctant to disturb murder convictions obtained under traditional common law definitions, and usually could be counted upon to uphold a jury verdict of guilty. While he freely

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70 Addressing the Bar Association in 1887, former United States Senator Waitman Willey linked the Red Men with every peril from unionism to anarchism: "For every week, aye, every week, the mob, in some section or another, is committing the gravest acts of violence—whipping, shooting, and murdering American citizens—wresting persons accused of crime from the custody of the law, and executing them without process or authority of law, and these outrages are multiplying with fearsome frequency. The catalogue of banditti engaged in this lawless violence, begins to tap the memory: "Regulators," "Red-men," "Mollie McGuires," "Bald Knobbers," "Ku Klux," "Boycotters" and all the forms of intimidation and violence which the barbarous spirit of "be boycot" [sic] inspires. And yonder at your industrial and commercial centers, are the secret conclaves of socialism, agrarianism and anarchism, conspiring for the subversion of our American institutions, ready with bombshell and torch and dynamite to destroy property and life, and whatever hinders their revolutionary purposes." Willey, Law and Lawyers — Their Relation to a Republican Form of Government, PROC. OF 1887. ANNUAL MEETING WEST VA. BAR ASSN. 114, 118 (1887).

71 Dent's approach to criminal cases was shaped, to a great degree, by his religious fundamentalism. State v. Davis, 52 W. Va. 224, 43 S.E. 99 (1901). He gave talionic support to capital punishment. ("Life for life is its [the law's] demand, not alone that it may be vindicated and the criminal punished, but for the protection of society and a warning to others suffering from a like depravity"). State v. Kohne, 48 W. Va. 335, 37 S.E. 553 (1900). Brannon's attitude was based more on the danger-to-society argument than on religious grounds. Being less puritanical than Dent, he was willing to give mountain men a benefit of the doubt in cases of lewd and lascivious cohabitation he might not have accorded in murder cases. See, State v. Miller, 42 W. Va. 215, 24 S.E. 882 (1896).

72 State v. Flaherty, 42 W. Va. 240, 24 S.E. 885 (1896) (Brannon reversed because motion for change of venue should have been granted since an impartial jury was unobtainable in county); State v. Bingham, 42 W. Va. 234, 24 S.E. 883 (1896) (Brannon reversed because lower court when it instructed jury that it was immaterial who was the first aggressor, the conspirators or the injured party.).

73 State v. Allen, 45 W. Va. 65, 79, 30 S.E. 209 (1898) (dissenting opinion by Brannon).

74 For examples of Brannon upholding murder convictions during a single calendar year see State v. Hager, 50 W. Va. 370, 40 S.E. 393 (1901); State v. Williams, 49 W. Va. 220, 38 S.E. 495 (1901); State v. Mooney,
disagreed with the findings of juries in railroad cases, and occasion-
ally restated the facts to satisfy his own interpretation, he protested
whenever his brethren did this to the benefit of defendants in
criminal cases. Dent was more consistent. He usually opposed
any invasion of the jury’s function by the Supreme Court of Appeals
in either civil or criminal cases. And he was far more willing than
Brannon or the other members of the Court to grant new trials
for errors or technicalities, large or small. He did not dissent in
State v. Mooney when Brannon upheld a murder conviction even
though the prosecutor had warned the jury, “Turn him loose and
he’ll kill someone else.” But he filed a memorable dissent in
State v. Shawn—a somewhat similar situation. The defendant had
been convicted of an unusually brutal murder, having deliberately
shot the husband of his wife’s sister while she was pleading for his
life. In the course of the trial the prosecutor had made three remarks
before the jury to which the defense objected:

“If you sentence the prisoner to the penitentiary for life,
it won’t be five years till he will be let out on some excuse
or pretext, and return home to enter on a new course of
crime. ‘This is the grand culmination an epidemic of
crimes that have been committed in this [Hampshire]
county.’ ‘He is so steeped in crime that he has no friend
to sit beside him during the trial.’”

Neither Brannon nor Dent doubted that Shawn was guilty. It was
just that Dent was disturbed about the prejudicial effects which
these remarks may have made on his chances to have received a

49 W. Va. 712, 39 S.E. 657 (1901); State v. Madison, 49 W. Va. 96, 38
S.E. 492 (1901). For a criminal case (abetting the theft of a horse) in
which he dissents from a reversal of the conviction that same year see State v.
Ellison, 49 W. Va. 70, 38 S.E. 574 (1901). For a conviction of first degree
murder with death penalty which he reverses see State v. Cobbs, 40 W. Va.
718, 22 S.E. 310 (1895).

In one case he concurred in the reversal of a conviction for rape,
but tried to narrow the opinion by objecting to the Court’s passing on the
credibility of state witnesses. State v. Hull, 45 W. Va. 767, 778, 32 S.E.
240 (1899) (concurring opinion).

See his note concurring with Brannon, id. at 779, 32 S.E. at 245.
But see also his opinion in State v. Kerns, 47 W. Va. 266, 34 S.E. 734 (1899).
In a concurring opinion Brannon felt called upon to remark; “I intimate no
opinion as to the guilt or innocence of the accused.” Id., at 272, 32 S.E.
at 245 (concurring opinion).

See State v. Clark, 51 W. Va. 457, 472, 41 S.E. 204 (1902) (dissent-
ing opinion).

40 W. Va. 1, 20 S.E. 873 (1894).
Id. at 12-13, 20 S.E. at 877 (dissenting opinion).
verdict of life imprisonment rather than the death sentence which he got, while Brannon was disturbed about the consequences of failing to bring him to a swift and well-deserved final punishment.

"There is no evidence before the jury," Dent wrote, "to justify any of these expressions. From them the jury might infer—and for this purpose they were evidently uttered—that the accused was guilty of many crimes, and this was the grand culmination of his wicked career, and that, if sent to the penitentiary, he would be back in five years to repeat these crimes."81

"For myself," Brannon answered, "I can not say the remarks of Counsel now in hand were legally condemnable."82

"What language," Dent asked, "could be stronger or more reprehensible? It was used for no other purpose than to arouse human passion, and prejudice the prisoner in the minds of the jury, converting them into an unreasonable mob, with vengeance in their hearts, rather than a calm deliberate tribunal of his fellow-men, coolly reaching the unbiased verdict to which the law and evidence unenvingly point."83

"[T]he case made by the evidence," Brannon said, "was so strong against the accused that his counsel conceded before the jury that he was guilty of murder in the second degree, and virtually conceded it in the first degree, and only asked a verdict for a life term in the penitentiary, rather than death, and the evidence abundantly sustains the finding of murder in the first degree."84

"Granting," Dent replied, "that the prisoner was guilty of murder in the first degree—which I do not pretend to dispute—the law, in tender consideration of human frailties, seeks to distinguish between the different degrees of depravity entering into each particular commission of the highest of crimes, and, in doing so, weights the motives that led to the criminal act."85

Brannon did not think that this had much to do with the words objected to: "They could only bear on the mode of punishment, and we see that death is not an undue punishment for the deed, and the jury was vested with absolute discretion to impose

81 Ibid.
82 Id. at 8, 20 S.E. at 875.
83 Id. at 13, 20 S.E. at 877 (dissenting opinion).
84 Id. at 10, 20 S.E. at 876.
85 Id. at 13, 20 S.E. at 877 (dissenting opinion).
it or not. This being so, ought we to set aside a verdict plainly right under the evidence, merely for these remarks?"

"It is better," Dent concluded, "that the guilty escape than any should be unjustly punished. And no man who is not totally depraved should be denied the opportunity which imprisonment for life affords him of repenting his crimes, redeeming his life, and making preparation to stand before the bar of that all-wise Judge, from whom no secret thing can be hidden, and who will condemn our disobedience to His statutes according to the standards we have created for our fellow men. May He have mercy on the soul of Daniel D. Shawn when it is ushered into His presence in obedience to the final judgment of this Court."

Oil cases, election cases, and murder cases all posed problems which everyone agreed were serious. The seriousness of the problem of married women, however, was something which Dent invented almost singlehanded. Admittedly it would have been troublesome even if he had not been there to add fuel to the flames, but he was there—actively and passionately championing womankind and motherhood and shedding judicial tears over the legal gait to which truculent men made their females prance. When he contemplated the laws which "brutal man" had raised up to enslave "the mother sex," Dent felt he understood why Madame De Stael once said "with biting, yet truthful sarcasm, that the more she saw of men, the more she admired dogs!" His was a zeal which Henry Brannon did not and could not share. And since Brannon was unwilling to sit silently by while Dent attacked time-honored doctrines of the common law, they often disagreed in these cases.

The most interesting is Schamp v. Security Sav. & Loan Assn. because it throws as

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86 Id at 10-11, 20 S.E. at 876.
87 Id. at 14-15, 20 S.E. at 877-78 (dissenting opinion).
88 In 1897, the President of the West Virginia Bar Association told the annual meeting: "A Bar Association meeting would be considered anything but a success at which no speech was made, address delivered, paper read or resolution offered, touching on the vexed question of the laws relating to married women." Crogan, President's Address, 12 Proc. W. Va. Bar Assn. 23, 33 (1897).
91 See, Harvey v. Curry, 47 W. Va. 800, 35 S.E. 838 (1900) (Dent for Court; Brannon dissenting); Dickel v. Smith, 38 W. Va. 635, 18 S.E. 721 (1893) (Dent for Court: Brannon dissenting); Dent's belief in the basic goodness of women may explain why he interpreted in a different light facts which Brannon suggested showed that a woman had been mixed up in a fraud. Vandervort v. Fouse, 52 W. Va. 214, 219, 43 S.E. 112 (1902) (con-
much light on how Brannon and Dent interpreted statutes as on how they felt about the rights of married women and also because it has an ironic twist. Dent, the champion of women, is, in this case, due to his antipathy towards so-called “married-women law,” arguing against a woman who seeks to shield herself behind a special statute designed to protect her by restricting her power to pledge her separate real property to secure a loan. The more tradition-bound Brannon thought the pledge-deed clearly void, and voted to uphold the lower court’s decree cancelling it. He probably considered Dent’s talk about these statutes making woman the “slave of man” pure nonsense. In any event, he felt it had nothing to do with the solution of the case.

“The construction of this statute, as I see it,” he said, speaking for the Court, “is that a married woman is totally prohibited from charging her estate with any debt except in the cases specified in the statute. These cases are exceptions out of the disability created for her by the statute. For you will observe that the statute says that she may charge her estate ‘in the following cases, in the following manner, and to the following extent, and not otherwise.’”

“A married woman,” Dent replied, “is forbidden in this section to borrow money to enhance her separate estate if she wishes to do so, and execute a deed of trust on such estate to secure the same, and, after she has it, there is no law forbidding her to do what she pleases with it, any more than if she were a feme sole. She can give it to her husband, pay his debts with it, or burn it up. It is her separate property, absolutely at her disposal.”

“It cannot be said,” Brannon wrote, “that this loan is valid because used in acquiring personal estate. A debt may be created in the very act of acquiring personal or real estate, but there can be no borrowing for the purpose of acquiring personality, or to pay a debt existing for its prior purchase, for the power to borrow is limited to the purposes of paying purchase money on realty or for improvement on it. No other borrowing is legitimate under the statute. This was purely a loan. The law can look at it in no other light.”

As Dent approached the end of his judicial career he grew wiser and sadder. The day of revelations arrived when he finally had to admit that “man, poor man, is not wholly to blame.” State v. Jones, 53 W. Va. 613, 45 S.E. 916 (1903). See also, Brown v. Nutter, 54 W. Va. 82, 85, 46 S.E. 375 (1903).


93 Id. at 51-52, 28 S.E. at 711 (dissenting opinion).

94 Id. at 49, 28 S.E. at 710.
“The Court,” said Dent, “is probably misled by the language used under the second head, but by transposing the same, according to the plain intention of the legislature, it will read: ‘A debt created for money borrowed by her for the full payment of the purchase money of her separate real property, or for the payment of such buildings and improvements thereon’;—not referring to a present borrowing, but to a past borrowing, for which a present debt exists.”

The two judges now began to get a bit peeved at one another. Brannon: “I cannot agree with the view of Judge Dent that only pre-existing debts, and not fresh loans, come under the ban of this statute. He suggests the only ground to sustain this deed, but I respectfully say that it is not tenable.”

Dent: “The opinion of the majority of the Court renders the statute contradictory and inconsistent, not to say foolish and senseless.”

From this low point they quickly rose to the broad plateau of principle and policy.

Brannon: “This statute was made to defend a married woman’s separate property against her own improvidence, want of business capacity, and importunity and duress by her husband. And we all know that there is more danger of loss of a married woman’s estate from new loans than from old debts. She is not very likely to charge her property with previous debts, but we will all know how likely she is to do so under the stress and pinch of present need of herself or her husband. There was really much more need to defend her against poverty and ruin from loss of her separate estate from new loans, than from antecedent debts. . . .”

Dent: “[T]he claim is that she dare not, even with the consent of her husband, pledge, pawn, or mortgage her property to any extent or amount, unless she makes known to the ‘lords of creation’ for what special purpose she is about to use it, and that must be as designated in section 12. What a turning back of the dials of time, and resurrecting barbarous and heathen customs, when woman was regarded as the mere irresponsible slave of man! Not only this,
but the law is made to out-Herod Herod, for not only is she to be protected against herself, but also against her husband. In short she is reduced to the condition of being the mere ward of the law."

On only one other topic did Marmaduke Dent feel so passionately as on the rights of married women—the topic of God. "He was," wrote Governor Atkinson, "invariably found on the moral side of every question which arose in civic matters." This was an understatement. He was not only found on the moral side, he defined it, expounded it, and sometimes even invented it, as, for example, when he dissented in one case from an opinion written by Brannon and suggested that the first canon of judicial construction made agreements subservient "To the supreme will of God, expressed through the dictates of conscience and known as the moral law." This was a rather sophisticated notion, even for West Virginia, and it is doubtful if many people followed his reasoning. Yet, on most of these occasions, he was probably reflecting the prevailing attitudes of his jurisdiction which sat solidly astride the Great American Bible Belt during those confident, comfortable days at the turn of the century. Many, perhaps a majority, of his fellow citizens expected their judges to stand up and be counted on every issue involving God, evil, and the flesh. As students of textualism they could appreciate his frustration at the inability of mere man to apply talionic justice. And few quarreled when he affirmed his belief in the supremacy of natural law or when he expressed the thoughts that King Alfred had written the Ten Commandments into the Saxon Codes and that the Bible was part and parcel of English common law. Few, that is, except Henry Brannon. When Dent cited the Book of

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99 Id. at 53, 28 S.E. at 711 (dissenting opinion).
100 Atkinson, BENCH AND BAR OF WEST VIRGINIA 74 (1919).
102 Boggess v. Richard's Adm'n, 39 W. Va. 567, 577, 20 S.E. 299 (1894): "The maxim of the moral law is tooth for tooth, eye for eye, reputation for reputation, property for property, and life for life, or what is called, 'restitution in kind.' Human ingenuity and wisdom could not devise a practical plan for carrying out this maxim without the infliction of the greatest cruelties, and often times the greatest injustice. So, leaving the equality which this law demands to the final arbitrament of Him who can weigh the motives and intentions, and from whom no secret is hidden, and on whom no deception can be successfully practice, the common-law . . . provides a pecuniary reparation . . ."
103 Thompson v. Cox, 42 W. Va. 566, 568, 26 S.E. 189 (1896): "The laws of man can make or destroy rights, but cannot change the laws of morality, for they have been placed beyond their search or control by a Supreme Legislator."
Exodus as authority for awarding exemplary damages and overturned the long-standing West Virginia rule against them on the grounds that the common law is not agnostic, atheistic, or deistic, but Christian. Brannon protested:

Judge Holt, English and myself, lest we be misunderstood, conclude that a short note, to express our position, is called for in view of the opinion in this case. In consultation we suggested that we did not feel called upon, in a judicial opinion, to assert or deny any particular, distinctive Christian creed or dogma . . . While we, as individuals, have the highest regard and respect for Christianity generally, we do not think it proper, in an opinion of this court, to appear to espouse or enforce any particular or distinctive Christian creed.

Brannon's manner is that of a parent scolding a sheltered child. He occasionally adopted this tone when dealing with Dent who could be very exasperating at times. After all, not only did Dent have the annoying habit of coming up with such crotchety citations as Exodus, completely oblivious to his colleagues' obtestations, but he had by far the sharpest tongue on the Court and seldom hesitated to express himself openly and to the point. Theanimadversions he directed against Brannon could be especially biting. He would describe Brannon's opinions in such uncharitable terms as "foolish," "senseless," "unreasonable," "contradictory," "inconsistent," and even "unjust."

"I cannot concur in the conclusion in this case," he wrote of a Brannon decision, "because it is unreasonable and productive of gross injustice." And in one concurring opinion, he inferred that pride kept Brannon from agreeing with him, by concluding with the challenge:

"Let the poet resume his pen
And prove himself the best of men."

Nor was Dent a man to be awed by the weight of numbers. At a

105 See Mayer v. Frobe, 40 W. Va. 246, 22 S.E. 58 (1895).
106 Ibid.
107 Ibid.
108 See text at note 97, supra.
time when his three colleagues on the four-man bench were Judges McWhorter, Brannon, and English, he wrote:

I concur in the conclusion in this case, but not with that portion of Judge McWhorter's opinion which tends to abrogate the common law disability of husband and wife to enter into valid legal contracts with each other during coverture. He unwittingly falls into the same error inadvertently committed by Judge Brannon, in the case of *Bank v. Atkinson*, 32 W. Va. 203, (9 S.E. 175), and following Judge English, in *Miller v. Cox*, 38 W. Va. 747, (18 S.E. 960).”

There were times when Brannon's efforts to get Dent to conform to the majority's standards, and Dent's tart refusals to do so, led to rather unjudicial backbench procuracy. After looking over the docket of *Hartigan v. Board of Regents of West Virginia University*, an action in which a dismissed college professor was seeking reinstatement, Brannon decided that Dent should remove himself from the case. It was the leading *cause celebre* of turn-of-the-century West Virginia; probably the bitterest of the noisy, titillating jangles which periodically erupted between the University's imported, short-lived, sometimes puritanic presidents and their native, insubordinate, dissention-ridden faculties. The Dent family was involved in the squabble. Not only was Judge Dent, the University's first graduate, emotionally committed to the old faculty, but his brother was of counsel for the plaintiff and his son-in-law, former Acting-President Robert Allen Armstrong, although not a party, had been dismissed along with Hartigan and stood to benefit should the Court order reinstatement. Judge Dent reacted strongly to the exhortation that he not participate. When Brannon wrote an opinion denying the power of the Court to interfere with a decision of the Board of Regents, Dent filed a dissent in which he not only put the suggestion on public record but used it to fling back at his colleagues the slur of partisanship.

“The charge has been made that I am moved by prejudice or through interest in the result of this case. The best evidence of prejudice or undue interest is the evasion

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111 Mynes v. Mynes, 47 W. Va. 681, 697, 33 S.E. 935 (1900) (concurring opinion). See also note 66, supra.
112 Hartigan v. Board of Regents of West Virginia University, 49 W. Va. 14, 38 S.E. 698 (1901) (dissenting opinion).
or departure from the fundamental principles of law and justice as settled by the decisions of the court and preserved by the text writers. A man's heart must be known by his works. In this opinion I have endeavored to adhere strictly to the fundamental principles of justice as settled and determined by the decided weight and preponderance of authority and have not attempted in any manner to evade, confuse or misinterpret the many decisions in relation to these principles. From the chaff that has accumulated from the careless work of incompetent and partisan judges I have sought to secure the true grains of wheat.\textsuperscript{113}

Perhaps the most remarkable result of Dent's refusal to disassociate himself from the case was that his colleagues decided to disassociate the case from him. They did not admit him to their conferences and, after the opinion was written, Brannon would not let him see it. This rather unjudicial treatment was a bit too much for the querulous, garrulous Dent to suffer in silent and it, also, he put on public record in his dissent:

“For reasons known only to themselves my associates denied me knowledge and inspection of their opinion and syllabus until after it was handed down or became public property. This is a matter of judicial courtesy or ethics, and as a learned judge once said that courtesy is a mere matter of taste about which there is no disputing and from which there is no appeal since duelling has been abolished, every judge has a right to treat his conferers as he sees proper according to his inward consciousness and outward experience. Not having been admitted to their exclusive consultations over, nor been made aware of their written conclusions until after given to the public, I deem it my duty to review these conclusions, as some of them appear [sic] to me to be plainly violative of the true principles of law and justice, and the opinion as a whole to be evasive, inconclusive and unsatisfactory as an exposition of sound law, although an admirable paper for other purposes. It asserts that the University belongs to the executive department of the state government with which the courts have no right to interfere; that a professor is not an of-

\textsuperscript{113} Ibid.
ficer, and therefore has no rights under constitutional or statutory law which the courts may protect, and, if an officer, that there are many decisions which hold that officers may be removed without notice or hearing. These decisions are then quoted and commented on as authority, although they have been rejected long since by the best authorities, both courts and text-writers, including this Court. . . .

Now a judge willing to parade judicial bickerings in public and chide his colleagues in official opinions was not likely to spare either the lower courts or the bar. It was inevitable that Dent, who seemed unable or unwilling to repress his feelings or to curb his words, would eventually give offense either to litigants or counsel. They, unlike his fellow judges, could not attempt to silent him by excluding him from the conference chamber or answer him by filing dissenting or concurring opinions. The most any of them would do was complain privately—any of them, that is, except a Brannon. When, in *Holt v. King,* Dent directed an obloquy against Judge Brannon's nephew, William W. Brannon, a leader of the Weston County Bar, and suggested he was guilty of "the many imputations of collusion apparently justified by the facts and circumstances of this case," Brannon did not accept it sitting down. He went before the Bar Association and, complaining that Dent had reflected "most seriously and severely upon my honesty and integrity," asked that the Committee on Grievances be instructed to "Study the whole case carefully, investigate the whole subject and report the facts and circumstances to this Association, together with such recommendations as may seem proper in the premises." With very little discussion, the Association approved the investigation and a year later, while Brannon himself was President, the Committee reported that it had found him completely innocent of any wrong-doing. Although it expressed regret "that the Judge

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115 Reversing a murder conviction, Dent once asserted that the trial judge had "misapprehended, misconstrued, and misapplied the law, and thus misled the jury." *State v. Cross,* 42 W. Va. 253, 259, 24 S.E. 996 (1896).
116 In one opinion Dent remarked: "This case appears to be one of dry technicalities indicative of the want of meritorious defense." *Thompson v. Newlin,* 51 W. Va. 346, 347, 41 S.E. 178 (1902). In an election case he expressed confidence that the patriotism of the people will see to it that "the evil prognostications of contestant's counsel with prove groundless." *Dail v. Hollandsworth,* 39 W. Va. 1, 6, 19 S.E. 557 (1894).
117 *Holt v. King,* 54 W. Va. 441, 47 S.E. 362 (1903).
118 *Minutes of the 1903 Meeting,* 19 PROC. W. VA. BAR ASSN. 61-64 (1904).
used certain of the language found in the opinion," the Committee refused to criticize Dent. "A proper respect for the highest State Court forbids."

"We have no idea Judge Dent meant to do Mr. Brannon any injustice, and we have no thought that Mr. Brannon intended or was guilty of any corrupt practices. We therefore recommend the following:

Resolved, that this Association regards Mr. W. W. Brannon a member of the Association, a citizen of high standing and worth, and a lawyer of integrity and ability and worthy of the public confidence."

The moderate tone and inconclusive fence-straddling of the report may have led some to regard the whole affair as much ado about nothing. But the tone was expected; what else could the Committee say? That the Bar Association had sponsored the investigation in the first place was what discommoded Dent and brought him to what must be regarded the low point of his judicial career. Furthermore, it may be doubted if he overlooked the fact that the resolution had been offered by a Brannon, who was a railroad lawyer, during 1903, a year in which he, Dent, was fighting against heavy odds, an election, which he lost.

While the incident is of importance to the biographer of Marmduke Dent, its chief value to the historian of West Virginia law is that it delineates, in unmistakable terms, the low esteem in which the bar and the public held the Supreme Court of Appeals. The Court suffered from disrespect, neglect, and even outright abuse. The very year Dent went on the bench it had been attacked in a twenty-six page, anonymous pamphlet which criticized twelve recent opinions, three of them by Brannon. What makes this the lowest ebb of the Court's prestige is not so much the pamphlet itself as reaction to it. The attitude of the Bar Association showed that

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120 One of these was Hull v. Hull, 35 W. Va. 155, 13 S.E. 49 (1891), in which Brannon held that a covenant of warranty applies to the estate conveyed, and cannot enlarge the estate. Of this the anonymous writer said: "Now is not this just simply and altogether amazing? And if it were not in print, to be read and known of all men, would it not be absolutely incredible that any judge, at least in our State, could announce such doctrine? In the paucity of words, in the poverty of language, we can only exclaim with Dominie Sampson—Prodigious! Prodigious!" quoted in Minutes of the Meeting, 6 Proc. W. Va. Bar Assn. 45 (1892).
lawyers were by no means inclined to rush to the judges' defense. Although they all deplored the pamphlet's tone, few were willing to defend the Court and most preferred to use it as an excuse for putting on record their dissatisfaction with the judiciary. They rejected a resolution which called upon them to treat the court with respect and in its place passed another mildly rebuking the pamphleteer for his anonymous character and intemperate language. It may be doubted if anyone in the state was surprised by this. Disparaging the courts was an old West Virginia custom. Lawyers had a long list of gripes, among which were complaints that judges seldom held conferences before writing opinions and that some decisions were the result of "log-rolling," that the Court took too much time rendering decisions, yet failed to give advocates

121 Id. at 17-22.

122 The resolution read in part: "Courts and judicial officers in the rightful exercise of their functions should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is an attorney's duty to give them his moral support in all proper ways, and particularly by setting a good example in his own person of obedience to law." Id. at 73. Ten years later the Bar Association did adopt a code of ethics containing similar provisions. 17 Proc. W. Va. Bar Assn. 57 (1902).

123 "Resolved, that this Association while not passing upon the justice or merits of the criticism on the decisions rendered by the Supreme Court, contained in the anonymous pamphlet recently circulated throughout the State, does not approve either the anonymous character of the pamphlet or the intemperate language used therein." Minutes of the Meeting, 6 Proc. W. Va. Bar Assn. 87 (1892).

124 Nor did anyone miss the implication of the Bar Association's action. Just before the resolution in the last footnote was passed, O. Johnson, a former Judge in the Supreme Court of Appeals, told the members of the Association: "I do not think you ought to have brought the Court in here and slaughtered it in this way." Id. at 86.

125 The evidence seems to indicate that they often failed to hold consultations. See discussion Minutes of the Meeting, 19 Proc. W. Va. Bar Assn. 65-66 (1904). It was not until 1903 that the Supreme Court adopted the policy of holding preliminary conferences on every case in advance of opinion and thus ended the "possibility of a one judge decision in the court of last resort." Atkinson, Bench and Bar of West Virginia 146 (1919).

126 The anonymous pamphlet charged that the decisions of the Supreme Court were arrived at through log rolling. By an agreement among the judges, one of them took all the books and papers in a case and would later return with an opinion in which they would all concur. Minutes of the Meeting, 6 Proc. W. Va. Bar Assn. 84 (1892).

127 In 1903 it was alleged that a lawyer, in an out laying district, would have to read the newspapers carefully to see how his case had been decided. If he saw that he had lost and he wanted to learn why, he would have to write to the Clerk of Court, or to some lawyer in Charleston to discover the court's reasons. Minutes of the Meeting, 19 Proc. W. Va. Bar Assn. 80 (1904).
enough time to argue their cases; and that delays of justice were the judge's fault—one more reason why he and his judgments were not accorded the respect of former days. In fact, whenever a West Virginia lawyer had a good word for the judiciary, it usually turned out to be a backhanded compliment, as when the President of the Bar Association remarked in 1902: "The judges are usually better lawyers than the rest of us; they should be. They have so many good lawyers to teach them."

Though few were ready to come to the defense of the judges, there were none who denied that they labored under rather trying circumstances. The handicaps were many and well-known. They included the fact that the judiciary system had been designed for another era and a different economy; that, functioning in a new

120 In about 1900 the Supreme Court reduced the time permitted for oral arguments from three hours (appellant) and two hours (appellee) to one hour and a half (appellant) and one hour (appellee). Long-winded West Virginia lawyers thought this was asking the impossible. As one expressed it: "It is hardly conceivable that counsel can separate, point out to the Court, and argue the questions arising in cases with any degree of satisfaction to themselves or in such a manner as to properly aid the Court in the disposition of cases, within the time allowed them." Mollohan, The Association, Its Work, Past and Prospective, 16 Proc. W. Va. Bar Assn. 22, 28 (1901). The bar succeeded in having the reduction rescinded. See Atkinson, Bench and Bar of W. Va. 146 (1919).

129 Nineteenth-century West Virginia lawyers never blamed themselves for delays; always the judges. Said Robert White of Wheeling: "I do think that one of the great causes of the law's delay is not so much the bar (and I speak it, I trust with proper respect) as it is the bench. I remember far enough back sir, that when questions of law arose before judges of the olden time, they were disposed of promptly and quickly—a case went on trial and was finished. But how is it today? You can get in your ordinary common pleas courts of this State, and most anywhere, so far as I know, and file a demurer to a declaration, good, bad or indifferent. All you have to do is to seek to assign some reason for it; and the judge must write it down, and carry it away with him, and, examine some law books, and he will take days and weeks before he will decide a simple question." Minutes of the Meeting, 6 Proc. W. Va. Bar Assn. 27 (1892).

130 Of course, as White pointed out, this was lamentable: "In my judgment there ought to be some system somewhat as in the past; that when a judge went upon the bench, he was looked upon as a man of ability and his opinions were respected and his judgments were respected by the people." Ibid.

131 Dailey, Recent Legislation and Decisions in West Virginia, 19 Proc. W. Va. Bar Assn. 93, 100 (1903). In a similar vein was the attitude of the author of the anonymous pamphlet. As Judge Johnson pointed out: "This gentleman [i.e., the writer] has taken particular care to say that they [the Supreme Court judges] are upright, honorable gentlemen, but they don't know much." Minutes of the Meeting, 6 Proc. W. Va. Bar Assn. 78 (1892).

132 As Judge Jacobs said in 1899 of the judiciary system which had been instituted in 1872: "Devised for a people ruled by traditions more than law, construed by men whose statesmanship was of the rural and plantation type, it can not be helped to apply it without friction and disappointment to the business interests of a people which has left its leading strings." Jacobs, Remodeling the Judiciary, 13 Proc. W. Va. Bar Assn. 75, 80 (1899).
state, it had not had time to build traditions;\(^ \text{133} \) that it was an itinerant court in days when travel was neither expeditious nor enjoyable and boarding houses were the acme of comfort;\(^ \text{134} \) that its salaries were the lowest in the nation\(^ \text{135} \) (which was in keeping with its prestige);\(^ \text{136} \) that it was understaffed\(^ \text{137} \) and undermanned,\(^ \text{138} \) almost

\(^ {133} \) The newness of the court is shown by the fact that in 1900, when Dent had been on the bench seven years and Brannon even longer, three of the four original members of the Supreme Court of Appeals were still alive (Berkshire, Maxwell, and Brown) and two were still actively practising law. Vandervort, *The Supreme Court of West Virginia (Part I)*, 12 *Green Bag* 187, 190 (1900).

\(^ {134} \) It was characteristic of West Virginia lawyers that when they spoke of this, it was seldom the hardships suffered by the judges which concerned them, but rather the inconveniences they, themselves, encountered. One attorney expressed the typical attitude when he complained that the law dividing the state into three divisions meant that a litigant had but one opportunity a year for submitting his cause unless he transferred by notice and followed it out of its "grand division." "This boarding house policy of itinerating the Supreme Court about the State subserves no public good. It may flatter the vanity of the particular locality where the Court sits, but it is observed that it does not accelerate the decision of causes—in fact, rather the contrary." Jacobs, *op. cit. supra* note 132 at 81.

\(^ {135} \) In 1901, a year in which New York paid the Chief Justice of its Court of Appeals $10,500, the salaries of Brannon and Dent were $2,200. The *Green Bag* suggested this was not as bad as it seemed since "the term of office is twelve years, considerably longer than that in many of the States which pay larger salaries." Note, *Judicial Salaries*, 13 *Green Bag* 12 (1901). The Committee on Judicial Administration and Legal Reform of the State Bar Association preferred to dwell on the fact that salaries in the five surrounding states averaged $5,300. *Minutes of the Meeting*, 18 *Proc. W. Va. Bar Assn.* 24 (1902).

\(^ {136} \) In reply to the charge that the Supreme Court of Appeals had poor judges because salaries were so low, John Hutchinson of Parkersburg remarked: "It is true, also, that insufficient salaries do not generally command the services of the best minds; and this is true of all professions and places, except in the Congress of the United States." *Minutes of the Meeting*, 6 *Proc. W. Va Bar Assn.* 42 (1892). This was one issue which found members of the bar more or less sympathetic with the Court. "Why should a lawyer who tries a case in court receive $100 a day and a Judge upon the bench, who by one ruling, can dynamite the legal propositions he submits clear out of court, receive the magnificent salary of $4.93 and 1 mill per day?" Campbell, *The Proper Method of Nominating Candidates for Judicial Offices and the Salaries to be Paid Judges*, 17 *Proc. W. Va. Bar Assn.* 73, 74 (1902).

\(^ {137} \) John A. Campbell thought the West Virginia judge was working under extremely difficult conditions: "Equip him for all this, give him the facilities to do all this, strike the rock of your public credit, open the doors of your treasury and give him the means, not only furnish him with a stenographer, but a secretary, an adjunct learned in the law from whom he can, upon a mere suggestion as to the lines of inquiry he desires to pursue, have laid upon his table a written report and brief of the entire law of the case and likewise the facts if necessary." *Ibid.*

\(^ {138} \) Judge Jacobs said of the four-man court: "[T]he membership of the Supreme Court is too small for the volume and importance of the business to be handled. . . . [T]hey are overworked and have more to do than ought reasonably to be required of them. Jacobs, *op. cit. supra* note 132 at 80. In 1901 it was pointed out that even though the Supreme Court of Appeals
to the point of scandal;\textsuperscript{139} and that it had to struggle with a chaotic maze of statutes\textsuperscript{140} while working with an inadequate library.\textsuperscript{141}

To share in common such abuse and to labor together under such circumstances, may have furnished Brannon and Dent with a mutual bond as they travelled throughout the state. Despite sharp words, locked conference-door rooms, and sensitive nephews, their rivalry was intellectual, not personal. They stand as disciples of opposing West Virginia legal philosophies, not as examples of old West Virginia's prurience for vendettas. On the whole they worked together harmoniously; indeed, there seems little doubt that they derived mutual benefit from their association. On more than one occasion they joined forces to dissent when their two fellow judges upheld a lower court's judgment\textsuperscript{142} and, at times, were generous

\textsuperscript{139} "The present number, four, often divides equally and then a calamity happens. The Constitution gravely provides in such circumstances that the lower Court shall stand affirmed, but the decision shall be the law of that case only. . . . At this day the logic by which the convention \textit{[of 1872]} reached its conclusion to provide a Court which may, and of late frequently does, divide equally without providing for a break of the tie and then gravely nullifies the effect of the decision, is incomprehensible to the bar. It is a Chinese puzzle. Let us untie the knot by cutting it." Jacobs, \textit{op. cit. supra} note 132 at 80-81.

\textsuperscript{140} In 1887 Senator Willey criticized the "crude and inconsiderate legislation, which so often characterizes our civil and criminal codes—conflicting—incapable of interpretation—incomplete, sometimes absurd." He thought a glance at the state's statutory laws would enable anyone "to appreciate Shakespeare's weird description of the witches caldron in Macbeth." Willey, \textit{op. cit. supra} note 70 at 121.

\textsuperscript{141} Lack of books was an embarassment which the judges did not attempt to hide. In one case, Judge McWhorter wrote: "Defendant cites the case of Commonwealth v. Gillespie, decided by the court of Quarter Sessions and reported in 21 Pitts. L.J. 213, which I am unable to find in the library, from which the defendant's counsel quotes . . . " State v. McBee, 52 W. Va. 257, 262, 43 S.E. 121 (1902). The bar itself, was, often embarassed by lack of books, a factor which Brannon took into consideration when writing decisions, as, for example, when he appended a note to an opinion in which he had cited two English cases: "After the Court had considered the above opinion, it occurred to me that for use in practice where the English books are not accessible, it would be better to state a little more fully the holdings of the two English cases. . . ." Transportation Co. v. Standard Oil Co., 50 W. Va. 611, 625, 40 S.E. 591 (1901) (note by Brannon, J.).

\textsuperscript{142} Billingsley v. Clelland, 41 W. Va. 234, 21 S.E. 812 (1895) (English and Holt for the Court; Brannon joins in Dent's dissent); Town of Davis v. Davis, 40 W. Va. 464, 21 S.E. 906 (1895) (Holt, with whom English joins, for the Court; Dent and Brannon dissenting). For a case in which Brannon's majority opinion is supported by Dent and English dissents without comment, see Stockton v. Morris, 39 W. Va. 432, 19 S.E. 531 (1894).
in their praise for one another or in their acknowledgment of the other's help. It may be, however, that the most interesting influence which one had upon his fellow is largely unmeasurable—the effect which Dent's unrestrained approach to opinion writing had on Brannon's own style. When Dent came on the bench, Brannon was a rather laconic writer. Their different ways of viewing problems led them to adopt different routes of approach and, consequently, different literary styles. In no case can this better be appreciated than in Town of Davis v. Davis, in which they both wrote opinions dissenting from the decision of Judge Homer Holt which held that a town council had authority to abate as a nuisance a merry-go-round operated as late as ten o'clock at night and which, while bringing pleasure to many, kept a few people in its neighborhood awake. Brannon, laying stress on the reasonableness of law, the balance between the needs of the few and the pleasures of the many, and the necessity that police action not appear oppressive in a free society, objected to classifying a carrousel as an activity "to which the harsh and vigorous remedies provided by law for public nuisances shall be applied." His judicial style reflects his approach:

"This merry-go-round is not proven a nuisance, and is not, in its nature, such. It is an amusement from which children derive great pleasure and enjoyment, and, with them their parents. A great many most respectable grown people enjoy their presence in our towns. They want that element necessary to stamp them as nuisances—that their harm or annoyance shall be so expensive as to affect the public at large, not merely a few persons. Many things

\[\text{143} \text{ Brannon: "I consider the exposition of the law given in the opinion by JUDGE DENT as a correct, able and unanswerable one." Town of Weston v. Ralston, 48 W. Va. 170, 36 S.E. 446 (1900) (concurring opinion).} \]
\[\text{144} \text{ Dent: "On this question I include notes made by Judge Brannon, in which I concur." Billingsley v. Clelland, note 142, supra (dissenting opinion).} \]
\[\text{145} \text{ Exception: When upholding murder convictions Brannon could write opinions which read like the pulp fiction of the day: "His father was at his bedside when the wounded young man said, 'Pa, I don't want you to grieve for me; I am bound to die,' showing the deadly wound. A witness . . . says he heard a woman's voice outside the door say, 'Lordy, Kenos don't shoot,' and he replied, 'Damed if I don't' and then the shot." State v. Douglass, 41 W. Va. 537, 23 S.E. 734 (1895). But then, West Virginia judges had a special talent for writing murder opinions. Judge McWhorter showed how highly they had brought the art when he said of one killer: "He says, 'I killed her because I loved her.' He certainly had a very emphatic way of expressing his love." State v. Tucker, 52 W. Va. 420, 44 S.E. 427 (1903).} \]
annoy, perhaps hurt, a few persons, but a few must not make law for the many. A band discoursing music in a park, very frequently, in summer, no doubt, annoys aged or sickly persons in the neighborhood, and others tired of its music, from repetition; and shall we say it is a nuisance? . . . They must submit to the inconvenience peculiar to themselves. I do not attempt a discussion at large. We must not make government too rigid and exacting, upon even the amusements of the people, else it becomes, in their eyes, an engine of oppression and tyranny. The action of the council in this case, under the form of law, took away the right of the owner to use his property to earn a livelihood, and invaded the right of the people to go to a decent place for harmless and pleasurable amusements.¹⁴⁶

Judge Dent preferred to stress the human factor rather than the legal, and took as his theme the happy thought that "ordinary people, who love their own and their neighbor's children, find a sufficient recompense for all annoyance in their happy enjoyment of innocent pasttimes and sports, and observe the golden rule, 'As ye would that men should do unto you, do ye even so unto them.'" And his different approach led him to write in a different style from Brannon's, just as his search for common sense in the law led him to suggest what he thought were common-sense solutions to the problems; solutions which Brannon, who continued to stress the axioms rather than the degrees of law, was not prepared to offer. Dent agreed with Brannon's bare statement that the law cannot make things agreeable for every citizens and gave it new meaning:

"Such a scheme would not be devised by human ingenuity, for it is always too hot or too cold, too wet or too dry, too light or too dark, for some people. Always complaining, never satisfied, morbid, phlegmatic, continually annoyed, fault-finding, looking for slights, easily offended, hysterical, captious, haters of children and their enjoyments, a misery to themselves and a heaviness to their friends, is their history; and for such the law affords no remedy, as it can not administer to a mind and heart

¹⁴⁶ Town of Davis v. Davis, 40 W. Va. 464, 21 S.E. 906 (1895) (dissenting opinion by Brannon, J.).
diseased. On the judgment of such it is never safe to condemn a lawful calling as an offensive annoyance. . . .

"To testify that a thing is a nuisance does not make it so, but the witnesses must testify to the annoying characteristics. R. W. Eastman testified "that he goes to bed early and gets up early; that he sleeps best the first part of the night; that the noise of the merry-go-round interrupted [sic] him from sleeping; that his wife had the headache one night, and it annoyed her from sleeping; that the crowd around the merry-go-round hallooed and made a noise, and that the music annoyed him". To go to bed before 9:50 p.m. on a sultry summer night is out of the ordinary rule, in towns the size of Davis, and this was the hour the amusement stopped. Neither does ordinary music annoy the ordinary man, especially when in bed, nor should the joyous shouts of children at play. So far as his wife was concerned, she certainly was guilty of contributory negligence in having the headache; and, as to which caused her to lose sleep, she was the best witness. . Three were annoyed by the music, one by the noise of the crowd, one by the whistle, which he imagined blew, whether it did or not; and, being early bed-goers, they were each cheated out of from half to one hours sleep each night. This is the evidence of nuisance on which the judgement of abatement was founded, and the defendant deprived of his legitimate business. If the whistle was an offensive annoyance, the council could have prevented its blowing. If the music was an offensive annoyance, the council could have required the playing of tunes low and soothing, or stopped it altogether. The children's mirth and laughter could have been suppressed in the same manner, and their shouting could have been prevented by the promise of a free ride. And, that these witnesses should enjoy their twilight rest, they could have caused the 'machine' to abate at early candle-lighting, or when the chickens go to roost."147

Dent's approach, then, was to emphasize what Edmond Cahn calls the "law-consumer."148 It was an approach which stressed the

147 Ibid. (dissenting opinion by Dent, J.).
viewpoint of the human being, the citizen "buyer" of justice, whom
the law effects and was here characterized by a somewhat philosophi-
cal, somewhat cynical balancing of human frailities, individual
misanthropy, and just plain West Virginia cussedness. This
approach had much to do with his style of writing; a style which
may have been contagious. Although Brannon always remained
constant to his own axiom-directed approach, we find him by
December, 1903, after eleven years of sitting beside Dent, occasional-
ly, when special facts called for it, writing in Dent's looser, freer
style. He ever mastered Dent's favorite judicial paraph—the bit
of quoted verse. Consider this passage from a case in which a will
was contested on grounds of insanity and undue duress:

"Remember that the testatrix was a lonely widow, child-
less, friendless, desolate, her own kindred estranged, bitter
feelings between them, she cherishing resentment against
them, saying in her last solemn act that they had abondon-
ed her, sent her no helping hand. To whom more probably,
more reasonably, than to Stuart, who loved her, visited
her, expressed warm affection for her when others were
cold, and who, as she certifies in her will, befriended and
accomodated her? It is said there was illicit relation be-
tween them. It is not proven. Stewart denies it under oath.
But even if there was such relation, what of it? If she was
competent, the law gave her absolute power to will him
all she had. We cannot now try them for illicit intercourse.
They are both now in that city teeming with the countless
millions of all past time, and we have no right to condemn
without proof.

'No farther seek his merits to disclose,
Or draw his frailties from their dread abode,
(There they alike in trembling hope repose)
The bosom of his father and his God.'

References to "that city teeming with countless millions," light
dusting of quidnunces' tidbits, delicate balancing of the odds of
love, and quoting scrapes of verse, all add up to a style seldom
identified with Henry Brannon. But the approach was still his own.

149 For what is one of Dent's best discussions (not otherwise mentioned
in this paper) of the individual or consumer aspect of law, also involving
the right of children to play, see Gibson v. City of Huntington, 38 W. Va.
177, 18 S.E. 447 (1893).
150 Stewart v. Lyons, 54 W. Va. 665, 673, 47 S.E. 442 (1903).
He was primarily interested in the legal aspects of the case, not the human side. He wrote a detailed and sympathetic description of the personality of the testatrix as it bore on the issues of insanity and duress.\textsuperscript{151} He did not digress onto themes that would have attracted Dent's wandering pen. Finding that she was neither insane nor coerced, he gave but passing thought to why she would wish to cut off, without a penny, her own flesh and blood, recounting merely that she and they were estranged.\textsuperscript{152} This would not have satisfied Dent, any more than he would have been satisfied to have made the bare assertion that opponents of merry-go-rounds are unreasonable, without adding that the world is filled with such fusspots and cataloguing a few types. So, too, he here might have wished to stray off from the main question and to have asked why it is that the ties of kinship are sometimes slender, as shown by his approach to a somewhat similar case in which he decreed specific performance of an oral contract made by an old woman with distant relatives who had agreed to care for her in the last days. Painting the woman's condition in his own unique style, Dent rejected the claim of an heir-at-law in an opinion which typified his concern with the human factors which lay behind the doctrines involved.\textsuperscript{153}

No formal biography of Brannon or of Dent has been written and, consequently, we do not know enough about their lives, ambitions or prejudices to even attempt to suggest a theory explaining the personal differences between their approaches to the law and their judicial style. The little that we do know of their backgrounds is not very helpful. Both were cut from stock formed and nurtured by the same cultural, ethnic, and educational environment—the safe, comfortable world of the confident middle class that held the political asendancy in the central Atlantic states during the post-Reconstructive era. Although politically ambitious, Dent was nowhere near as successful in politics as was Brannon. To explain this by saying that Brannon was a railroad lawyer while Dent was plaintiff lawyer, that Brannon remained loyal to the orthodox while Dent played a rebel role, would be to discuss effect and not cause, and would leave still unanswered the constitutive question—why were

\textsuperscript{151} ibid.

\textsuperscript{152} Id. at 668-69.

\textsuperscript{153} E.g. Bryson v. McShane, 48 W. Va. 126, 35 S.E. 848 (1900): "Old age is naturally repulsive. The hair grows gray, the eyes sunken, the skin wrinkled and brown, the flesh shrunken, the figure bent, the limbs weak and trembling, the will feeble, the tongue garulous, the mouth toothless, the mind wandering, the habits careless and filthy. . . ."
their approaches to the solution of legal problems sometimes so contrary?

Henry Brannon was born the scion of a respected family on November 26, 1837, in Winchester, Virginia, grew up in the Shenandoah Valley, and was graduated from the University of Virginia in 1858. Marmaduke Dent was also born in Virginia—in the section which is now West Virginia—in the hamlet of Granville (later called Duke) on April 18, 1849. The great grandson of one of the original settlers of transmontane Virginia he spent his youth in Monogalia County, and, in 1870, became the first graduate of West Virginia University.154 After college, Brannon moved to the western mountains, read law in his brother’s office, became a member of the Virginia bar in 1859 and, the following year, was elected prosecuting attorney of Lewis County, a post which always eluded Dent in heavily-Republican Taylor county.155 Brannon also served two terms in the House of Delegates, another honor which Dent was denied. In 1880, Brannon was elected judge of the Eleventh Judicial Circuit (succeeding his brother) and went on from there to two terms on the Supreme Court of Appeals. Dent was permitted only one term and, after his defeat for reelection, ran for Congress but was again engulfed in the Republican tide which swept the state half a century ago. He died a broken, disappointed man on September 11, 1909, having been carried home to Grafton on the midnight train from Atlantic City where he had gone seeking relief from Bright’s disease.156 Brannon was more fortunate. Deciding not to run for a third term, he returned to his law practice and died, just after arguing a case in court, on November 24, 1914, two days before his seventy-seventh birthday. He retained his mental faculties until the end.157

It would be idle to ask which was the more successful and which was the greater judge. As for success, it would certainly seem that Brannon has the edge. His first term on the Court was awarded by a second, a recognition Dent vainly sought, and had he wished he might have been elected a third time. While the outcome of a political campaign hardly furnishes an adequate guide

154 "Dent . . . was also first president of the University Alumni Association and is the only person to hold the honor of having been elected president of the association three times." The Morgantown Post, October 27, 1955, p. 10, Col. 1.
155 Dent did, however, serve several years as city attorney of Grafton.
157 Atkinson, Bench and Bar of West Virginia 64 (1919).
for measuring the worth of a judge, especially in an age when the judiciary was caught in the tides of partisan politics, it is the yardstick which Marmaduke Dent probably used. Furthermore, Brannon succeeded in an area in which Dent would have dearly loved to have left his mark. He published a book on the Fourteenth Amendment which was highly respected while the only book written by Dent was apparently a failure—if it was printed at all. As to which was the greater judge, contemporaries again gave the edge to Brannon, and by a wide margin. Governor Atkinson called him, "perhaps the greatest jurist that West Virginia has ever brought forth," while praising Dent as an inoffensive man who had made few enemies. Their obituaries tell the same story. Brannon was eulogized as the *beau ideal* of West Virginia judges. The most said for Dent was that he had led a pure, clean life, and had written opinions more noteworthy for their style than for their substance.

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158 A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1901). For a decision in which Brannon dealt with the 14th Amendment, see State v. Sponaugle, 45 W. Va. 415, 32 S.E. 283 (1898).

159 Atkinson called it "a standard authority upon the questions raised" (Atkinson, op. cit. supra note 157 at 64) and Knott said it was a book "which by its depth of thought and scholarly style, is a distinct contribution to political science" (Knott, Henry Brannon, 2 DICTIONARY OF AMERICAN BIOGRAPHY 603, 604 (1929)).

160 The book had a wonderful title such as one might expect from Dent: SOCIALISM RESISTLESS, OR HIS KINGDOM COMETH. The frequent references to this book in Dent literature would tend to show that it was published. It was referred to during his lifetime (in the first directory of West Virginia University graduates Dent's name appears first and he lists himself as author of the book), as well as at his death (the Bar Association's biography of Dent called it a "booklet" entitled *True Socialism* and said that it "attracted much attention") and in recent times (The Morgantown Post, October 27, 1955, p. 10, Col. 1). This writer, however, has not only been unable to locate a copy, but has been unable to find a library which acknowledges ever having had one.

161 Atkinson, op. cit supra note 157 at 64. The official tribute of the Bar Association, on which Atkinson drew for his biography, was more reserved, referring to him as "one of the greatest lawyers that West Virginia has ever brought forth." Report of the Committee on Legal Biography, 30 Proc. W. Va. Bar Assn. 133 (1915).

162 "He had the wisdom of the historian; the wit of the poet; subtlety of the mathematician; the logic and rhetoric of the eminent lawyer." Ibid. Atkinson repeated this remarkable tribute verbatim. Atkinson, op. cit supra note 157 at 64.

163 "The ebequies were conducted by Rev. J. A. McClelland, the pastor, and Rev. J. H. Flanagan, past pastor of the Presbyterian church, both of whom eulogized the memory and life work of the departed jurist in glowing terms, setting up his clean, pure life as an example for others to emulate." The Daily Sentinel, Grafton, W. Va. Monday, September 13, 1909, p. 1, Col. 1.

164 The Bar Association's Committee on Legal Biography, which would reach poetic heights at the bier of Henry Brannon (see supra note 162)
Today, observers might reverse the estimate, for Dent's humanitarian approach to the law would probably strike a more responsive chord than would Brannon's insistence on precedents and legal logic. Such a judgment, however, must be made with historical perspective. To suggest that Dent was a man of justice while Brannon was a man of law would be unfair to Brannon if offered in the context of today's values. For justice usually seems preferable to mere law after the crises which gave rise to problems have been forgotten and the passionate feelings of the moment have faded into the ivory tower of scholarly debate. Dent was a sometime practitioner of what Karl Llewellyn calls the Grand Style of common law opinion writing. Brannon was a personification of the Formal Style. Llewellyn believed that the Formal Style reached its fullest flowering in the United States during the years when Brannon and Dent were sitting on the Supreme Court of Appeals. It was the accepted manner of deciding cases and the judge who plied it was regarded as having mastered the jurist's art. Now, he says, the Grand Style is again in favor and the Formal Style has passed into limbo along with the reputations of those who employed it. If this is true, and if the present judges of West Virginia are students of the Grand Style, than the influence of Marmaduke Dent could enjoy a new birth while that of Henry Brannon could go into eclipse and the laurels which their contemporaries bestowed on Henry Brannon could pass to the brow of Marmaduke Dent. But if scholars in this era of different criteria and different fashions were to dismiss Henry Brannon as merely an honest, intelligent judge of narrow vision, they would be repeating the mistake committed by his admirers when they dismissed the passion for justice which fired the unorthodoxy of Marmaduke Dent. Brannon was a product of his times, and the solutions which he offered to the challenges of those times was the main standard by which his contemporaries could judge him. He
could find little to say about Dent as a judge: "The many decisions written by him and appearing in volumes 37 to 56, both inclusive, of the West Virginia Reports, are strongly expressed, and the majority of them possess an individuality of style which was marked and forceful. Judge Dent possessed an unusual memory and a remarkable familiarity with the decided cases in Virginia and West Virginia. Many of his opinions were enlivened by quotations from the classics and brightened by flashes of native humor, and were frequently cited and commented upon by legal journals because of these characteristics as well as precedents for propositions of law."

expounded law in a West Virginia which needed industry and, with this in mind, stressed the need of protecting corporations which were opening the mountainous regions for commercial exploitation and development. Of course, Dent asked him, "Opened for whose benefit?" While some legal scholars might criticize Brannon for ignoring this question, or even for not appreciating its implications, they cannot criticize him for failing to answer it. After all, it is the question they are still debating.