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Judgment Intuitive

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servants, other agents, and contractors, including matters involving the fellow servant rule, non-delegable duties of the master, and defenses involving assumption of risk, contributory negligence, disobedience of orders, illegal employment, and the effect of workmen’s compensation acts. West Virginia law is substantially in accord with the Restatement. Of particular interest are the annotations dealing with the compensation of an agent (§§441-457), the agent’s lien (§464), the fellow servant rule (§§474-491), non-delegable duties of the master (§§492-520), and the defenses of the servant’s assumption of risk and contributory negligence (§§521-525).

In preparing the West Virginia Annotations to the Restatement of the law of Agency, Professor Davis has rendered a distinct service to the judiciary and bar of the state. This publication merits careful reading and study by judges and lawyers alike. Clarksburg, West Virginia.

LAWRENCE R. LYNCH.


"Cultivated mind is the guardian genius of democracy, and while guided and controlled by virtue, is the noblest attribute of man."1 This ideal pervades the present collection of essays and addresses by a scholarly jurist of the Southwest,—who has now set forth in carefully-phrased expression his creed of law and civilization. It has been said that men are never so likely to settle a question as when they discuss it freely; as a matter of course, we assume just opinions are best formed when one has no other wish than to know the truth. The material here thus offers many thoughtful observations on the common heritage of justice in modern society.

The author is equally known to the profession and to (what might be termed) the scholars alike. As a lawyer in active practice, as a federal district judge and now as circuit judge, he has not only found kindly critics in academic circles: he has even for a brief space dwelt among the infidels2 as a law school teacher, with all the rights and privileges appertaining thereto. "A deductionist, at least as applied to law, with a touchingly simple faith in syllogisms"3 he temporarily took "the king’s shilling and put his

1 President Mirabeau B. Lamar, First Message to Third Congress of the Republic of Texas, quoted by Judge Hutcheson, JUDGMENT INTUITIVE 11.
2 P. 94: "There in Looking Glass Land, where the professors live, ever making words mean what they choose them to mean."
3 P. 68.
red coat on”, and consorted with legal educators albeit with certain mental qualms. There are some judges who believe an austere demeanor necessary to their dignity; with gritty unfriendliness and laconic harshness, their mode of justice becomes forbidding indeed. One encounters nothing of the sort in these pages. It is a warm and generous spirit rather, pleading “for a certain kind of wishful thinking in the law.” The idealist in him is frankly urging for our age “the old, plain, individualistic words—industry, fidelity, honesty, purpose, friendship, courage, unselfishness, kindness and conscience.” On the other hand, the practical side is exemplified by concrete suggestions for social betterment,—as, to illustrate, in his discussion of the local jail and its “vast, changing, pitiful jail population.” Unfortunately, from the angle of political theory, there is all too little in the book that reflects the keen judicial understanding of difficult problems in administrative law.

Judge Hutcheson has assembled a collection of essays and addresses, (“written and published separately over the years”), believing modestly that each might present in readable form “a worth-while idea.” Their audiences indicate at least versatility: from commencement addresses to law review articles; or from Kiwanis Club to the American Law Institute. Analogously, the themes discussed vary between the extremes of relativity in present-day society and almost esoteric phrases of the judicial process. And as regards the latter, he confesses openly his mildly unorthodox theories. We may smile indulgently at the occasional scholar who eternally thrusts on us the ancient wisdom of Aristotle, since he happens to have studied that philosopher in the original. Not so here,—our jurist has something of really vital import, because in the centuries that separate Bracton and Mr. Justice Cardozo public interest in the behavior of judges has never waned. One may eagerly turn to his discourse for an illuminating exposition of that enormous legend of the law.

4 P. 75.
5 P. 137.
6 P. 10.
7 P. 123.
9 P. 6: “The absolutists are the drivers; they furnish the power, the energy of motion and action. The relativists are the governors. They correct excesses and tone down super-zeal. The beaten absolutist of today is the relativist of tomorrow, and the successful relativist of tomorrow becomes an absolutist again.”
The volume takes its name from the much-quoted Cornell Law Quarterly article of a decade ago, — "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision." Perhaps it would be best to let the author explain the essay in his own words:

"When the case is difficult or involved, and turns upon a hairsbreadth of law or of fact, . . . I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for a feeling, the hunch — that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way." Lest anyone get excited at the novelty of the idea that "the judge is a human being", it might be well to quote a similar utterance of sixty years ago:

"Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to public policy in the last analysis."

The inarticulate major premise, — to paraphrase Mr. Justice Holmes, — has become the "judicial hunch", in the stream-lined language of recent years. Judge Hutcheson limits his "sixth sense" thus:

"I speak of the judgment pronounced, as opposed to the rationalization by the judge on the pronouncement."

Holmes similarly separated decision and reasons:

"It is the merit of the common law that it decides the case first and determines the principle afterwards. . . . But in fact lawyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the ratio decidendi. In cases of first impression Lord Mansfield's often-quoted advice to the business
man who was suddenly appointed judge, that he should state
his conclusions and not give his reasons, as his judgment would
probably be right and the reasons certainly wrong; is not
without its application to more educated courts.17

Sometimes, these hunches lead to differing techniques: one can
easily contrast the dissents of Holmes in the *Lochner*17 and *Jensen*18
cases with his majority opinions in the statutory subjacent sup-
port coal litigation19 and in the stop-look-listen decision.20 The
same is to be said as to Cardozo’s decisions.21

The explanation at the bottom of all differentiation between
decision and opinion lies in the fact that “judging is administration
of justice according to law.”22 In other words, the judicial process
is simply an administrative task. “How greatly important it is
to the integration of law with the life it serves and rules, that the
judge be administrator, greatly conscious of his function and fully
master of his method.”23 It is as true now as it was in the reign of
Henry II, when the early common law was gradually gaining pre-
tsige. Perhaps the best proof of this will be found in the due process
cases: what the layman takes as a difference in kind is really but
a difference in form and degree.24 Justice according to law then
becomes one of the fine arts.

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17 Holmes, Codes, and the Arrangement of the Law (1870) 5 AM. L REV. 1.
19 *Southern Pacific v. Jensen*, 244 U. S. 205, 218, 221, 37 S. Ct. 524, 61 L.
Ed. 1086 (1917).
329 (1923). Brandeis, J., dissented from Holmes’ opinion. Holmes explained:
“It is a matter of degree . . . An interesting case when Brandeis and I
differed . . . .” SHRIVER, JUSTICE OLIVER WENDELL HOLMES: HIS BOOK
NOTICES AND UNCOLLECTED LETTERS AND PAPERS (1938) 168-169.
Holmes’ decision was somewhat limited by Cardozo, J., in the later case of
(1934).
382, 111 N. E. 1050 (1916), and General Rubber Co. v. Benedict, 215 N. Y.
18, 109 N. E. 96 (1915), and those of Cardozo, Ch. J., in *Palsgraf v. Long
Island R. R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928) and *Ultramares Corp. v.
23 P. 95.
24 See *Holmes, J.*, in *Hudson County Water Co. v. McCarter*, 209 U. S. 349,
355, 28 S. Ct. 520, 52 L. Ed. 828 (1908): “The limits set to property by other
public interests present themselves as a branch of what is called the
police power of the state. The boundary at which the conflicting interests
balance cannot be determined by any general formula in advance, but points
in the line, or helping to establish it, are fixed by decisions that this or that
concrete case falls in the nearer or farther side.”

Judge Hutcheson, (pp. 162-163), puts it thus: “With its hundreds of deci-
Such is the author’s theory of the judicial hunch and its implications. The average lawyer may wonder whether these notions are essential in the grind of local litigation. “The problem of the unprovided case” may arise only infrequently: after all, general propositions do decide concrete cases in ordinary law practice. Most legal business in smaller centres tends to become office work, and few practitioners handle important constitutional questions. No doubt Judge Hutcheson would readily concede that the “little small dice” are to be used only as a last resort in the marginal decisions in which “reasonable men may differ widely as to the place where the line should fall.”25 Moreover, the criticism of Professor Goodhart’s ideas as to ratio decidendi26 does not seem altogether satisfactory. If the major premise for the decision be inarticulate, (and often incapable of articulation), — if, after all, the decision is really but a hunch, — why employ these intuitions as binding precedents? We infer from this volume that the reasons given in the opinion may not be quite the real ones: why then embalm them into the living law? Surely there can be no justification for perpetuating the existing confusion between stare decisis and stare dictis.28

In form and style, the collection makes pleasant reading. There is a grace and felicity of expression one scarcely expects to find in the writings of a busy federal judge.29 His citation of authorities covers an unusually wide field; his contact with Louisiana jurisprudence has enabled an acquaintance with civil law authorities that few common-law jurists possess. The references to philosophical

27 Pp. 218 et seq.
28 The late Professor Oliphant pointed out clearly the extent to which courts have failed to distinguish between the two concepts of stare decisis and stare dictis. See his article, A Return to Stare Decisis (1927) 14 A. B. A. J. 71, 159.
29 E. g., p. 46: “If you can keep the freshness, the courage, the imagination, the fervor, the spirit of make-believe, of romance and of lovely youth; if you can go through life quenching not the spirit, despising not prophecies, proving all things, holding fast that which is good, life will be beautiful, wistful and winsome for you.”
texts wisely discriminate in their selection. It was probably too much to expect, however, that an index would be furnished.

A true disciple of Holmes, Judge Hutcheson has portrayed fairly in these writings the famous advice Pliny is said to have once received:

"To be engaged in the service of the public, to hear and determine causes, to explain the laws and administer justice, is a part and the noblest part of philosophy, as it is reducing to practice what the professors teach in speculation."

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This book is designed for use in a new first-year course instituted in the Harvard Law School at the beginning of the current academic year. It is one of the results of the recent intensive study and reorganization of the Harvard Law School curriculum. The purpose which shaped its design is revealed in the introductory chapter, where the authors explain the object of the course which it is intended to serve:

"It is the purpose of this course to give the basis for an understanding of the procedural law of the various jurisdictions in the common-law world — the United States, England, and the English-speaking dominions of the British Empire, all of which derive the main outlines of their legal systems from a common source, England. This course is concerned with fundamental procedural conceptions and methods, and their history; it is not a course in the practice of any particular state or jurisdiction. But it is designed to afford

30 P. 71: "... a conversation which I had had once with one whom I regard as the most really learned judge and jurist of his day.

'What do you read beside law books, Hutcheson? Do you read much philosophy? I have read about all of it, and it is nearly all buncombe.'"

One may speculate as to who this "most really learned judge and jurist" could have been. It would scarcely have been Holmes, for he believed that "philosophy widely understood is the greatest interest there is." SHRIVER, op. cit. supra n. 19, at 164.

31 Quoted to Holmes by Brandeis, SHRIVER, op. cit. supra n. 19, at 195.