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RECENT TREND IN COURT DECISIONS IN CALIFORNIA*

By JUSTICE JESSE W. CARTER†

Ninety-six years ago Justice Stephen J. Field, then a member of the Supreme Court of California, in his dissenting opinion in *Ex parte Newman*,[1] said:

> "The law is a science, whose leading principles are settled. They are not to be opened for discussion upon the elevation to the bench of every new Judge, however subtle his intellect, or profound his learning, or logical his reasoning. Upon their stability men rest their property, make their contracts, assert their rights, and claim protection. It is true that the law is founded upon reason, but by this is meant that it is the result of the general intelligence, learning, and experience of mankind, through a long succession of years, and not of the individual reasoning of one or of several judges. . . . It is possible that some intellects may rise to the perception of absolute truth, and be justified in questioning the general judgment of the learned of mankind. But before the legitimate and just inference arising from the general acquiescence of the learned can be avoided, the error in the principles recognized should be clearly shown. We should not blindly adhere to precedents, nor should we more blindly abandon them as guides."[2]

The thought expressed by Justice Field in the foregoing excerpt was epitomized by Lord Hardwicke nearly 200 years ago in these words: "Certainty is the mother of repose; therefore, the law aims at certainty."

If these concepts were dominant in the formation of court decisions there would obviously be more unanimity and less conflicts, and there would be no occasion to talk about trends in court decisions. But judges are human beings and their thinking is influenced by their backgrounds of education, training and associations, past and present. It cannot be denied that these are times of conflicting social, economic and political philosophies, and the impact of these philosophies is felt not only by the executive and legislative branches of our government but by the judicial branch as well. We quite often hear the words "liberal," "conservative," "reactionary," "middle-of-the-road," "left," "right." These terms are all as equally applicable to judges as they are to those in the executive and legislative branches of our government. Who answers a particular designation may be the subject of some conflict but there seems to be pretty general agreement in their application. Holmes was said to be a liberal in civil rights cases and in cases involving the right of the people through their legislatures to experiment in attempting to solve social and economic ills, and many of his greatest dissents were in these fields, while in some other fields he was considered a conservative.

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[1]9 Cal. 502 (1858).

[2]*Id.* at 526.

Students of history recognize that the trend of court decisions is influenced by the point of view of the majority on the major issues of the times. The number and character of the dissents depend upon the ability, convictions and industry of the minority. In some of my dissents, I have referred to the trend of decision of the Supreme Court of California during the last few years.

To my mind this trend has been decidedly reactionary. This statement is made advisedly and is based upon numerous recent decisions rendered by a majority of the Supreme Court of California in which the court has, by a non-liberal construction of the Constitution and laws of this state, denied litigants rights to which they were entitled.

To be more specific, the Supreme Court of California has by a series of decisions during the past two or three years stricken down the remedial provisions of the Workmen's Compensation Act designed to protect employees who suffer industrial injuries as a result of the serious and wilful misconduct of their employers. I recently stated in one of my dissents in these cases that by its recent decisions in this field the Supreme Court of California had wiped out forty years of progress in nullifying, by interpretation, a statute which was designed to bring social justice to the working men and women of this state. I am one of those who can remember the plight of the injured workman before the Workmen's Compensation Act was adopted. It is now a matter of history that the adoption of the Act by the Legislature of California was bitterly fought by employer groups, and after its adoption it ran the gamut of adverse court decisions for many years. It might be of interest at this point to quote from the biennial message of Governor Hiram W. Johnson to the Legislature of California in 1917 in which he reviewed the incidents leading up to the adoption and early period of the operation of this Act. He said:

> "The new philosophy of government, which has obtained in California had its best and most sharply defined demonstration in the workmen's compensation law. In 1911, we stood at the threshold of a great unexplored governmental field. Behind us were the humiliation and shame of thirty years of exploited government, cynically administered for a few. With hope in democracy renewed by the first experience with the direct primary, with undefined, yet certain knowledge of democracy's obligations, we turned from the old sordid materialism, and looked to the greater promise of activity for humanity itself. We entered falteringly the unexplored field, and then our steps grew firm and our vision broad, and today no commonwealth has gone farther or built better for humanity.
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> "Those who believed that industry should bear the burden of its accidents, that its maimed and its injured should not be cast forever upon the scrap heap of humanity, were tirelessly seeking a legal remedy. It was realized that the frightful burden of accident should not be wholly upon him least able to bear it, but the path to relief through the intricate mazes of the law was difficult to find. The legislature of 1911 adopted an elective law

which, though not wholly effective, afforded opportunity for an educational propaganda and a thorough investigation.

"The first Industrial Accident Commission, consisting of A. J. Pillsbury, Will J. French and Willis I. Morrison, prepared an elaborate workmen's compensation law which was presented to the legislature in 1913, was duly adopted, and became operative January 1, 1914. While this law was pending and before it had undergone the actual test of administration, it was the center of perhaps the bitterest contest that has been waged over any enactment of recent years. And out of all the bitterness and abuse and denunciation of that contest which may come to you who are now assuming legislative duties, is the lesson that must ever be learned by him who would fearlessly represent those who have entrusted him with power. Every day, during the session of 1913, all those newspapers of the State of California which have ever been opposed to any sort of social justice, published page after page, not alone of so-called conservative argument against the 'corroding socialism' of the state government, but of the foulest abuse of every individual advocating the law. To public scorn and ridicule and contumely we were held up as 'destroyers of industry,' 'looters of business,' 'traitors to the state,' 'arrant demagogues pandering to the worst elements of our citizenship.' . . . The law nevertheless passed. Six months after it had been operating, we had the satisfaction of listening to the leaders of labor and the representatives of the largest employers in the State of California, united in a public gathering in universal praise of the act. Today, employer and the employee alike join in commendation. . . . No man in public life would have the temerity to suggest the repeal of the Workmen's Compensation Law, and this law has been the vindication and the justification of California's social program.

"In order to preclude the possibility of adverse decisions by the courts, certain provisions of the law will probably have to be re-enacted, and the amendments in this regard will be presented to you by the commission."[3]

While I think I am safe in saying that no one in public life today would advocate the repeal of the Workmen's Compensation Act, and the tendency of the Legislature has been to extend and liberalize its provisions, some of the recent decisions of the Supreme Court of California[4] have had the effect of destroying or drastically curtailing the benefits which the provisions of the Act were designed to confer upon the injured employees. This has been true notwithstanding the express mandatory provisions of the Act imposing upon the courts the duty of liberal construction to the end that the benefits sought to be conferred on injured employees will be obtained by them.

[3]1917 Senate Journal 14 at 19, *et seq.*

[4]Hawaiian Pineapple Co. v. Ind. Acc. Com., 40 Cal.2d 656, 255 P.2d 431 (1953); Mercer-Fraser Co. v. Industrial Acc. Com., 40 Cal.2d 102, 251 P.2d 955 (1953); Sutter Butte Canal Co. v. Ind. Acc. Com., 40 Cal.2d 139, 251 P.2d 975 (1953); Cal.-Western etc. Ins. Co. v. Ind. Acc. Com., 39 Cal.2d 104, 244 P.2d 912 (1952); Fireman's Fund etc. Co. v. Ind. Acc. Com., 39 Cal.2d 529, 247 P.2d 707 (1952); Liberty Mut. Ins. Co. v. Ind. Acc. Com., 39 Cal.2d 512, 247 P.2d 697 (1952); Aetna Life Ins. Co. v. Ind. Acc. Com., 38 Cal.2d 599, 241 P.2d 530 (1952); California-Western States Life Ins. Co. v. Ind. Acc. Com., 38 Cal.2d 880, 242 P.2d 13 (1952); Bryant v. Industrial Acc. Com., 37 Cal.2d 215, 231 P.2d 33 (1951); Cal. Shipbuilding Corp. v. Ind. Acc. Com., 31 Cal.2d 278, 188 P.2d 32 (1947); Aetna Cas. & Surety Co. v. Ind. Acc. Com., 30 Cal.2d 388, 182 P.2d 159 (1947); Pacific Freight Lines v. Ind.Acc.Com., 26 Cal.2d 234, 157 P.2d 634 (1945); Garcia v. Industrial Accident Com., 40 A.C. 705, 263 P.2d 8 (1953).

Another field in which the trend of decision by the Supreme Court of California in recent years has been ultra-conservative is in negligence cases where the court has, in numerous cases, deprived the parties of the right of trial by jury by holding, as a matter of law, that the evidence was insufficient to sustain a verdict reached by the jury. This conclusion has been reached in many cases where the verdict of the jury was approved by the trial judge in denying a motion for a new trial, affirmed by unanimous decision of a district court of appeal and decided by the Supreme Court by a division of its members. It has been my position in each of these cases that when an issue of fact is submitted to a jury, its decision thereon, in the absence of prejudicial error in the admission or rejection of evidence or erroneous instructions to the jury, should be final. I can see no escape from this rule if the constitutional provision that "the right of trial by jury shall remain inviolate" is to be upheld.

Until the last few years the traditional rule in this state was that only in cases where the uncontradicted evidence was such that reasonable minds could not differ that the issues of negligence and contributory negligence might be decided as issues of law. In many recent cases,[5] the Supreme Court of California has ignored this rule by the simple process of arbitrarily disregarding the determination of the trier of fact and holding, as a matter of law, that the evidence supporting such determination was insufficient. In one recent case,[6] however, the majority cited the cases which established the reasonable minds rule and then misstated the rule and refused to apply the correct rule to the case. In that case the majority stated:

> "Whether or not defendant was guilty of negligence or plaintiff was guilty of contributory negligence is ordinarily a question of mixed fact and law and may be determined as a matter of law only if *reasonable men following the law* can draw but one conclusion from the evidence presented."[7] (Emphasis added.)

In that case, the majority reversed a unanimous jury verdict approved by the trial court on a motion for a new trial and affirmed by a unanimous decision of the District Court of Appeal. This reversal was based on the sole ground of insufficiency of the evidence to support the verdict. The undeniable

[5]Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663 (1953); Hawaiian Pineapple Co. v. Ind. Acc. Com., 40 Cal.2d 656, 255 P.2d 431 (1953); Better Food Mkts. v. Amer. Dist. Teleg. Co., 40 Cal.2d 179, 253 P.2d 10 (1953); Atkinson v. Pacific Fire Extinguisher Co., 40 Cal.2d 192, 253 P.2d 18 (1953); Sutter Butte Canal Co. v. Ind. Acc. Com., 40 Cal.2d 139, 251 P.2d 975 (1953); Mercer-Fraser Co. v. Industrial Acc. Com., 40 Cal.2d 102, 251 P.2d 955 (1953); Gill v. Hearst Publishing Co., 40 Cal.2d 224, 253 P.2d 441 (1953); Goodman v. Harris, 40 Cal.2d 254, 253 P.2d 447 (1953); Pirkle v. Oakdale Union etc. School Dist., 40 Cal.2d 207, 253 P.2d 1 (1953); Burtis v. Universal Pictures Co., Inc., 40 Cal.2d 823, 256 P.2d 933 (1953); Kurlan v. Columbia Broadcasting System, 40 Cal.2d 799, 256 P.2d 962 (1953); Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947 (1953); Turner v. Mellon, 41 A.C. 44, 257 P.2d 15 (1953); Barrett v. City of Claremont, 41 A.C. 69, 256 P.2d 977 (1953); Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990 (1952).

[6]Gray v. Brinkerhoff, 41 A.C. 183, 258 P.2d 834 (1953).

[7]*Id.* at 187, 258 P.2d at 836.

implication of this decision is that the twelve jurors, the trial judge and the three members of the district court, as well as I, who did not agree with the majority, could not be classified as "reasonable men following the law." In other words, the view of the majority was that they themselves were the only "reasonable men following the law" who had participated in that case. In this case I might add that the verdict was in favor of the defendant.

I was engaged in the active practice of law for over twenty-six years before I became a member of the Supreme Court of California. I participated in the trial of over a thousand cases; over three hundred of these cases reached the appellate or Supreme Court on appeal and in none of these cases was a decision of the appellate or Supreme Court based on the insufficiency of the evidence to support the decision of the trial court or jury. In those days lawyers felt, and had a right to feel, that when issues of fact were determined by the trial court, or jury, and the case was appealed, the factual determination by the trier of fact would be accepted by the appellate court. While there may have been cases in those days in which this rule was violated by the Supreme Court, or a District Court of Appeal, they were few and far between. Now the exception has become the rule as I have in mind no less than fifteen cases in which the Supreme Court has decided the factual issues contrary to the trial court or jury in the last two years. It goes without saying that I dissented in each of these cases.

If there is any proposition that should be settled in this state it should be the oft-repeated rule that it is the function of an appellate court, in reviewing the evidence, to resolve all conflicts in favor of the respondent and that all legitimate and reasonable inferences must be indulged to uphold the verdict and that when a verdict is attacked as being unsupported by the evidence, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted, or uncontradicted, which will support the conclusion reached by the trier of fact. I maintain that this rule has been ruthlessly violated by a majority of the Supreme Court of California in many recent decisions. In my opinion this trend of decision not only does not advance the science of jurisprudence or aid in the administration of justice but is a serious impediment to each of these objectives. Aside from the inability of an appellate court to determine from the cold record the credibility of witnesses or the weight of the evidence, it has the effect of placing an undue burden on the members of the Supreme Court whose sole duty is to decide questions of law based upon the factual determination of the trier of fact.

In the book, *Trial Judge*, by Justice Bernard Botein,[8] the author states:

> "A major reason for a trial judge's concern about his decisions in nonjury proceedings is that an appellate court will rarely disturb his deter-

[8]Simon & Schuster (1952).

mination of the facts. This stamps the trial judge's finding with a disturbing finality.

"The finding of the facts, which entails the acceptance of the sound, and the rejection of the unsound, evidence, and the final packaging of the remaining ingredients at the end of the trial court production line, are almost exclusively the function of the trial judge or jury. The package may be labeled judgment for plaintiff or defendant.

"Seldom may an appellate court change or reject such findings. It may decide that on the facts as found in the trial court, the law was misapplied or misunderstood, so that the verdict or decision went in favor of the wrong party. In that event they may say, 'We've looked into the package and think you've put the wrong label on it. We won't disturb the contents of your package, but we're going to change the label so that it will read in favor of the other party.'

"The appellate court may also decide that the trial judge admitted improper evidence or excluded proper evidence, or that he instructed the jury erroneously. Then it may reverse the verdict or decision, and send the case back to be tried anew. It then says in effect to the trial court, 'We have examined the ingredients of your package, and find that it contains certain harmful substances.' Or, 'We find that you left out certain ingredients which, in the public interest, we feel should have been included to ensure the purity of your product. We are therefore returning your package, and directing that you process it once more, in accordance with the formula we are now giving you'."[9]

Another respect in which recent decisions of the Supreme Court of California have retarded the administration of justice is by curtailing the power of a trial judge in granting a motion for a new trial on limited issues. For many years section 657 of the Code of Civil Procedure has provided that the trial court may grant a motion for a new trial on part of the issues only. Up until about a year and a half ago most of the appellate court decisions held that under this section a trial judge had the power to grant a motion for a new trial on the issue of damages only in a personal injury action where the damages awarded were either excessive or inadequate and that his ruling would not be disturbed in the absence of a gross, manifest and unmistakable abuse of discretion.[10] The same rule was applied to such an order as to an order granting a new trial on the insufficiency of the evidence. But in August of 1952 the Supreme Court of California held that it

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[9]*Id.* at 131.

[10]Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 117 P.2d 850, (1941); Estate of Everts, 163 Cal. 449, 125 Pac. 1059, (1912); Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680 (1944); People ex rel. Dept. of Public Works v. McCullough, 100 Cal.App.2d 101, 223 P.2d 37 (1950); Ona v. Reachi, 105 Cal.App.2d 758, 233 P.2d 949 (1951); County of Los Angeles v. Bitter, 103 Cal.App.2d 385, 229 P.2d 466 (1951); Perry v. Fowler, 102 Cal.App.2d 808, 229 P.2d 46 (1951); Parks v. Dexter, 100 Cal.App.2d 521, 224 P.2d 121 (1950); J. Levin Co. v. Sherwood & Sherwood, 55 Cal.App. 308, 203 Pac. 404 (1921); Rigall v. Lewis, 1 Cal.App.2d 737, 37 P.2d 97 (1934); Spencer v. Nelson, 84 Cal.App.2d 61, 190 P.2d 40 (1948); Wold v. League of the Cross, 107 Cal. App. 344, 290 Pac. 460 (1930); Amore v. Di Resta, 125 Cal.App. 410, 13 P.2d 986 (1932); John-

was an abuse of discretion for a trial court to grant a new trial in a personal injury action on the issue of damages only where the damages awarded by a jury were inadequate.[11] This holding was made in four personal injury cases where the evidence both as to liability and damages was conflicting. The theory of the majority opinions in these cases seemed to be that the jury compromised the issue of liability in favor of the plaintiff with the understanding that a small amount of damages would be awarded, and that it was therefore unjust to the defendant for the case to be retried on the issue of damages only. In one of these cases the court squarely held that the issues of liability and damages were so interwoven that a just conclusion could not be reached with respect to the issue of damages without retrying the issue of liability. This holding was clearly contrary to the holding of this same Supreme Court in *Fuentes* v. *Tucker*,[12] decided in 1947, where it was held that the issues of liability and damages in personal injury actions were entirely separate and distinct and that where liability is admitted by the defendant it is error to allow evidence of liability over defendant's objection.

There can be no question but that the effect of the holding of the Supreme Court in the *Leipert, Rose, Cary,* and *Hamasaki* cases is to deprive the trial court of power to grant a new trial in a personal injury action on the issue of damages only, where the damages awarded by the jury are obviously inadequate, and to require a re-trial on all of the issues even though it is obvious to the trial court and to everyone connected with the case that there is little or no doubt as to the liability of the defendant. Thus, so far as this type of case is concerned, the salutary provision authorizing the granting of a new trial on a part of the issues only is a nullity. It is obvious that by this provision the Legislature sought to make it possible to facilitate the disposition of cases of this character and thus save the time of the court and the expense and burden to litigants which necessarily results from protracted trials. Certainly the trial judge who sees the witnesses, hears the testimony and observes its effect upon the jury is in a better position to say whether the amount of the verdict was affected by the evidence as to liability than an appellate court which has only the printed record before it. I there-

stone v. Johnson, 38 Cal.App.2d 700, 102 P.2d 374 (1940); Adams v. Hildebrand, 51 Cal.App.2d 117, 124 P.2d 80 (1942); Crandall v. McGrath, 51 Cal.App.2d 438, 124 P.2d 858 (1942); Bauman v. San Francisco, 42 Cal.App.2d 144, 108 P.2d 989 (1940); Pacific Tel. & Tel. Co. v. Wellman, 98 Cal.App.2d 151, 219 P.2d 506 (1950); Tumelty v. Peerless Stages, 96 Cal.App. 530, 274 Pac. 430 (1929); Cox v. Tyrone Power Enterprises Inc., 49 Cal.App.2d 383, 121 P.2d 829 (1942); McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 146 P.2d 34 (1944); Henslee v. Fox, 25 Cal.App.2d 286, 77 P.2d 307 (1938); Zeller v. Reid, 26 Cal.App.2d 421, 79 P.2d 449 (1938); Martin v. Donohue, 30 Cal.App.2d 219, 85 P.2d 913 (1938); Ohran v. Yolo County, 40 Cal.App.2d 298, 104 P.2d 700 (1940); Tornell v. Munson, 80 Cal.App.2d 123, 181 P.2d 112 (1947); Woods v. Eitze, 94 Cal.App.2d 910, 212 P.2d 12 (1949); Tripcevich v. Compton, 25 Cal.App.2d 188, 77 P.2d 286 (1938).

[11]Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324 (1952); Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335 (1952); Cary v. Wentzel, 39 Cal.2d 491, 247 P.2d 341 (1952); Hamasake v. Flotho, 39 Cal.2d 602, 248 P.2d 910 (1952).

[12]31 Cal.2d 1, 187 P.2d 782 (1947).

fore say that the obvious effect of the recent decisions of the Supreme Court of California in this field is to retard and obstruct the administration of justice.

A few years ago the Supreme Court of California held that a married woman was barred from recovering for her personal injuries by the contributory negligence of her husband because the recovery would be community property under the law of California and her husband would thereby profit from the result of his own wrong.[13] In that case I dissented and the Legislature, at the following session, attempted to overcome the effect of the majority decision.[14] This amendment has not been interpreted by the Supreme Court, but the case of *Zaragosa* v. *Craven* has been widely criticized by text writers and courts of other states. In 1952, a case involving this question came before the Supreme Court of New Mexico.[15] After referring to the *Zaragosa* case, the Supreme Court of New Mexico refused to follow it and concluded its opinion saying:

> "We are of the opinion that reason, justice and a fair interpretation of our community statute, construed either in the light of the common or Spanish law, require that we hold the cause of action for the personal injury to the wife, and for the resultant pain and suffering, belongs to the wife, and that the judgment and its proceeds are her separate property. She brought her body to the marriage and on its dissolution is entitled to take it away; she is similarly entitled to compensation from one who has wrongfully violated her right to personal security. If any writer has ever said a kind word for the majority holding [in the *Zaragosa* case], it has escaped our notice.
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> "Under the majority doctrine, if the wife were riding a horse she had brought to the marriage and some driver of a motor vehicle negligently struck her and the horse, throwing both into a wire fence, breaking the leg of each and also disfiguring them, the cause of action for the damage to the horse would belong to the wife, but that for the injury to her would belong to the community and the husband would receive one half of the proceeds of a judgment. In addition, the husband could, if he desired, refuse to bring suit for the injuries the wife had sustained. We decline to adopt such a rule in New Mexico."[16]

It seemed to me at the time the *Zaragosa* case was decided, and I am still of the same view, that the majority opinion in that case deprived the wife of a right to which she was entitled under any reasonable interpretation of the law or consideration of justice and I am pleased to know that this view has been accepted in some of the other jurisdictions where community property law prevails.

In civil rights cases, the Supreme Court of California has nullified the Fourth Amendment to the Constitution of the United States and section 19 of article I of the Constitution of California by holding that evidence ob-

[13]Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949).
[14]CALIF. CIV. CODE § 171 c. (Deering, 1953).
[15]Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952).
[16]*Id.* at 494, 245 P.2d at 832, 833.

tained in violation of these provisions is competent and admissible in the courts of this state. The effect of this holding is to abrogate the right of privacy in California. This great right is expressed in the Fourth Amendment to the Constitution of the United States, and it reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This exact provision is found in the Constitution of our state in section 19, article I.

The United States Supreme Court, speaking through many great judges and in a great number of cases, has staunchly refused to allow this right to be violated. In the highest court of our country, the protection extends even further than the literal words of the Amendment. No evidence obtained in violation thereof may be used against a defendant in the federal courts.

In California, due to an unfortunate line of decisions, evidence illegally obtained is admissible in the courts. With these holdings I have always been in disagreement.[17] I have always taken the position that the decisions of the Supreme Court of California have given aid and comfort to so-called officers of the law who are so lacking in respect for the constitutional provisions here involved that they ruthlessly violate them with impunity. To them the constitutional right of privacy does not exist, and they make an empty, hollow mockery out of the oath which they took to support the Constitution.

Under the law of this state any police officer may break into any home, seize anything he may desire and this may be used against a defendant despite the fact that no warrant had been issued, and that the breaking and entering may have been done on mere suspicion or conjecture. These constitutional provisions were adopted to prevent this very evil.

It is indeed regrettable that the majority of the Supreme Court of California has seen fit to perpetuate a rule which permits peace officers to flout these constitutional mandates. This rule was first pronounced by the Supreme Court of California in *People* v. *Mayen*,[18] which was followed by the cases of *People* v. *Gonzales*,[19] and *People* v. *Kelley*.[20] Abuses which have been practiced under this rule have been declared by the Supreme Court of the United States to be of such gravity and so inhuman as to shock the conscience of mankind and that "this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities."[21] While the

[17]See dissenting opinion in People v. Rochin, 101 Cal.App.2d 140, 143, 255 P.2d 913 (1950); *reversed* by United States Supreme Court, Rochin v. California, 342 U.S. 165 (1952).

[18]188 Cal. 237, 205 Pac. 435 (1922).

[19]20 Cal.2d 165, 124 P.2d 144 (1942).

[20]22 Cal.2d 169, 137 P.2d 1 (1943).

[21]Rochin v. California, 342 U.S. 165, 172 (1952).

reversal of the Supreme Court of California by the Supreme Court of the United States in the *Rochin* case was not based upon the Fourth Amendment to the Constitution of the United States but upon the due process clauses of the Fifth and Fourteenth Amendments to that Constitution, it cannot be denied that had the courts of California followed the federal rule with respect to excluding evidence obtained as the result of an unlawful search and seizure, the *Rochin* case would never have occurred.

It cannot be denied that it lies within the power of a majority of the Supreme Court of California to change the rule which permitted and encouraged the shocking and inhuman conduct of peace officers depicted in the *Rochin* case. The courts of last resort of many other states have seen fit to adopt and follow the federal rule relating to the admissibility of evidence obtained as the result of an unlawful search and seizure.

On December 6, 1950, the Supreme Court of Delaware, in the case of *Rickards* v. *State*,[22] overruled two prior decisions of that court and adopted the federal rule with respect to the inadmissibility of evidence obtained as a result of an unlawful search and seizure; that is, search without a search warrant. In the course of its opinion in this case, the Supreme Court of Delaware stated:

> "Courts following the Federal rule adopt the view that the efficient prosecution of criminals cannot justify a deliberate invasion of the right of the citizen to be made secure against the violation of specific constitutional guarantees, and that the suggested remedy of a civil action is as a practical matter no remedy at all. The Federal rule is a practical attempt to help preserve the constitutional guarantees.
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> "We prefer the rule followed in the Federal courts. We conceive it the duty of the courts to protect constitutional guarantees. The most effective way to protect the guarantees against unreasonable search and seizure and compulsory self-incrimination is to exclude from evidence any matter obtained by a violation of them.
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> "We believe that as long as the Constitution of this state contains the guarantees to the citizen referred to, we have no choice but to use every means at our disposal to preserve those guarantees. Since it is obvious that the exclusion of such matters from evidence is the most practical protection, we adopt that means. It is no answer to say that the rule hampers the task of the prosecuting officer. If forced to choose between convenience to the prosecutor and a deprivation of constitutional guarantees to the citizens, we in fact have no choice."[23]

While it is my privilege, it is not my pleasure to write dissenting opinions. I would much prefer to concur with the majority or have them concur in opinions prepared by me. The preparation of a dissent requires extra effort—it is an additional burden and one that I choose to avoid whenever possible. But I believe it to be my solemn duty when the majority departs

[22] 45 Del. 573, 77 A.2d 199 (1950).
[23] *Id.* at 585, 77 A.2d at 205.

from settled rules of law in rendering its decision, to call attention to the error in a dissenting opinion in the hope that the error may be corrected by a subsequent decision or by the Legislature. A dissenting opinion may also be helpful in cases which are subject to review by the Supreme Court of the United States. The latter court has held in accord with my dissent and reversed the Supreme Court of California in several cases in recent years.

I have mentioned only a few of the cases in which I have disagreed with the majority since I have been a member of the Supreme Court of California. My dissents cover a wide variety of subjects and speak for themselves. They present my view on the propositions of law involved in each of the cases. They are now recorded judicial history. I have no apology to offer for any of them, notwithstanding the fact that certain isolated statements and phrases have been selected from some of them and criticized as being intemperate by some eminent authorities. I claim the privilege of using language appropriate to the occasion to express my view and I am not disposed to permit even dean emeritus Roscoe Pound of the Harvard Law School to tell me what language I should use when depicting the gross injustices which may result from a majority decision of the Supreme Court of California. I might say right here and now that I have failed to find language strong enough to give expression to my views in some cases. The language used should be equal to the occasion. A decision which is only a mild departure from settled principles should not be dealt with the same as one which outrages justice and lacks even a semblance of reason or common sense to support it. When the inimitable Franklin Delano Roosevelt depicted the sneak attack of the Japanese on Pearl Harbor, he declared that that incident would "live in infamy," and when that master of rhetoric and oratory, Sir Winston Churchill, referred to those brigands, Hitler and Mussolini, who plunged the world into the worst holocaust of all time, he used the words "guttersnipe" and "jackal." But why belabor the obvious? If the language used is inappropriate it reflects more on the dissenter than on the majority and its value and effect will be appraised by both contemporary observers and posterity.

Of greater importance than the language used in either a majority or dissenting opinion is the reasoning or philosophy upon which the opinion is based—what rules of law are announced—on which side does justice lie—or in other words, who is right? The answer to this question depends upon one's point of view. I do not claim that I have always been right. I may have been wrong many times, but I feel it is my duty to the people of California to give them the benefit of my opinion on all major issues which come before the Supreme Court. This I have attempted to do. I claim no credit—seek no acclaim or recognition for what I have done or may do in the future—it is my job as I see it, and as long as I have the physical and mental capacity, I shall continue to perform that duty.