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You're The Top! Remarks Delivered at Justice Sullivan's 80th Birthday Celebration†

by
B. E. WITKIN

This is for me a day to remember and a time to reciprocate. On two separate occasions (my 70th and 80th birthdays), Ray Sullivan graciously undertook to describe my tenacious hold on life in the law and to extol my modest talents. It is therefore both my privilege and my right to eulogize Ray Sullivan. And there is an additional reason why it is most fitting that I be chosen to speak for this select group gathered here to honor our esteemed and beloved friend: I am the most senior ex-law clerk present; indeed, I am probably the oldest ex-law clerk alive in this state. No one here needs to be reminded that Justice Sullivan, in his many years on the California Court of Appeal and Supreme Court, produced a steady flow of the best legal thinking that can be found in the reports of American high courts. In his superbly crafted opinions, principles and rules are expounded with clarity, irreconcilable decisions are delicately reconciled, and egregious judicial errors are urbanely transformed into mere differences of viewpoint on distinguishable facts. But there is more in Sullivan opinions than high quality judicial reasoning; and I propose to offer a few extracts—perhaps familiar to some of you—that demonstrate his versatility, humanity, and emotional depth. Needless to say, I draw my material from that vast compilation of the distilled wisdom of our creative judiciary—*Witkin's Summary of California Law*, 8th Edition in eight volumes, soon to be the 9th Edition in 13 volumes.¹

† Mr. Witkin prepared the following remarks for Justice Sullivan's 80th Birthday Party in 1987. He has generously given us permission to reprint his remarks in this tribute issue.

1. B. E. WITKIN, *SUMMARY OF CALIFORNIA LAW* (9th ed. 1987).

First, The Erudite Sullivan

For the first time in jurisprudential history, he set forth a definitive classification of the forms of that abominable product of inept opinion writers—dictum.

The case is *Hollister Convalescent Hospital v. Rico*,² in which a prior unanimous opinion of the [California] Supreme Court—only 10 years old—was scrapped in order to restore the hitherto sacrosanct doctrine that the time to appeal, as prescribed by statute or rule, is jurisdictional. How was this done? By describing what the two dissenting justices called “the spirit which animated that opinion” as “unnecessary and overbroad dicta,” “ill-considered dicta,” “erroneous dicta,” “panoramic dicta,” and “persistent dicta.”³

Second, The Irate Sullivan

Is he all sweetness and light and gentle tolerance, or can this calm philosopher take umbrage and express outrage? You bet. He is, after all, an Irishman; and what could possibly arouse this cultivated Irishman’s ire more than a wholly mistaken conclusion drawn by his associates on the high Court?

It happened in *Fracasse v. Brent*,⁴ where the majority held that an attorney discharged by his client without cause could not recover the fee specified in his contract of employment. Ray—an old trial lawyer—lowered the boom, demonstrating in his dissent that the opinion had no foundation in “logic, authority or fundamental fairness.”⁵ This was his mildest castigation:

By their decision today, the majority repudiate a rule supported by an impressive array of authority and replace it with one which will reduce an attorney-client contract to a hollow and meaningless act.⁶

Third, Sullivan the Humorist

This unsuspected talent of our great stylist appears in *Estate of Russell*, where the testatrix left nearly all her estate to “Chester H. Quinn and Roxy Russell.”⁷ Quinn, her close friend, survived her. Roxy, her dog, predeceased her. The deadpan opinion construes the will as an attempted disposition to Quinn and Roxy as tenants in com-

2. 15 Cal. 3d 660, 542 P.2d 1349, 125 Cal. Rptr. 757 (1975).

3. *Id.* at 669-73, 542 P.2d at 1356-58, 125 Cal. Rptr. at 764-66.

4. 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972).

5. *Id.* at 802, 494 P.2d at 22, 100 Cal. Rptr. at 398.

6. *Id.* at 798, 494 P.2d at 18, 100 Cal. Rptr. at 394.

7. 69 Cal. 2d 200, 444 P.2d 353, 70 Cal. Rptr. 561 (1968).

mon, with Roxy's gift void for lack of capacity to take. But then, to avoid misconceptions as to the scope of the decision, footnote 22 adds:

As a consequence, the fact that Roxy Russell predeceased the testatrix is of no legal import. As appears, we have disposed of the issue raised by plaintiff's frontal attack on the eligibility of the dog to take a testamentary gift and therefore need not concern ourselves with the novel question as to whether the death of the dog during the lifetime of the testatrix resulted in a lapsed gift.⁸

Fourth, The Empathic Sullivan

In *Castro v. State of California*,⁹ in which the English literacy voting requirement of our Constitution was held to be an unconstitutional denial of equal protection to persons literate in Spanish, the justice wound up the opinion with these words:

We cannot refrain from observing that if a contrary conclusion were compelled it would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land.¹⁰

Fifth, The Ecstatic Sullivan

In *Serrano v. Priest*,¹¹ holding that our method of financing the public school system by local property taxes was an unconstitutional denial of equal protection, the opinion concludes:

By our holding today we further the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and the inspiration of this country. "I believe," he wrote, "in the existence of a great, immortal, immutable principle of natural law, or natural ethics, a principle antecedent to all human institutions, and incapable of being abrogated by an ordinance of man . . . which proves the *absolute right* to an education of every human being that comes into the world, and which, or course, proves the correlative duty of every government to see that the means of that education are provided for all."¹²

The departure of this gifted scholar and jurist from the Supreme Court left a void that has not been filled. Today, that Court of seven members has only one veteran on it, and the new Chief Justice, facing

8. *Id.* at 215, 444 P.2d at 363, 70 Cal. Rptr. at 571.

9. 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).

10. *Id.* at 243, 466 P.2d at 259, 85 Cal. Rptr. at 35.

11. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

12. *Id.* at 619, 487 P.2d at 1266, 96 Cal. Rptr. at 626 (citations omitted).

the formidable task of organizing a Court and staff to cope with an unbelievable caseload, needs all the help and support that he can possibly get. And a few nights ago, in the interlude between sleep and wakefulness, I had a vision of a super-senior *pro tem.* justice—a master of the judicial craft—respected as Holmes and learned as Hand—taking his place beside the Chief and pointing the way out of the wilderness. But what are my “Words worth” when those of the poet himself, with only the slightest emendation, are both adequate and timely?

Raymond! Thou should'st be sitting at this hour:
 Lucas hath need of thee:
 The Court is a fen of stagnant waters:
 With calendars clogged and boxes stalled:
 While grim-faced law clerks, like lordless Samurai,
 Scan the Duke's list with wild surmise.
 Your calm voice could give us hope,
 Revive collegiality, restore productivity,
 Keep the peace, and increase the pace.
 Oh raise us up, return to us again;
 And with your blithe spirit and magic pen
 Bring order out of chaos.

For those of you who may have forgotten it, the original poem follows.

Milton! Thou should'st be living at this hour:
 England hath need of thee: she is a fen
 Of stagnant waters: altar, sword and pen,
 Fireside, the heroic wealth of hall and bower,
 Have forfeited their ancient English dower
 Of inward happiness. We are selfish men:
 Oh! raise us up, return to us again;
 And give us manners, virtue, freedom, power.
 Thy soul was like a Star, and dwelt apart:
 Thou hadst a voice whose sound was like the sea:
 Pure as the naked heavens, majestic, free.
 So didst thou travel on life's common way,
 In cheerful godliness; and yet thy heart
 The lowliest duties on herself did lay.¹³

13. *London 1802*, THE COMPLETE POETICAL WORKS OF WORDSWORTH 287 (Andrew J. George ed., 1932).