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Ode to a Chief Justice or On First Looking into Hickman's Burke

R. Hickman Walker

Ode to a Chief Justice

or

On First Looking Into Hickman's Burke

EDITOR'S NOTE: On December 6, 1948, the monthly meeting of the Denver Bar Association was devoted to honoring the retiring Chief Justice of the Supreme Court, Haslett P. Burke. In addition to the eloquent eulogy of Associate Justice Benjamin C. Hilliard, R. Hickman Walker, also a former associate of Judge Burke on the supreme bench, delivered the following oration. Even in cold print the words of Judge Walker warm like a glass of old sherry.

President Knowles, Judge Burke, other Judges, Members of the Bar:

This day's program has been occasioned by a weird occurrence—the voluntary retirement of a member of our Supreme Court. Without having received, or having any reasonable expectation of receiving, a nudge from the people, and while, as was said of Moses on Nebo, "his eye is not dim nor his natural force abated," this amazing man, the recipient of today's honors, is stripping the ermine from his shoulders by his own hands. Hardly sounds decent, does it? An affront to the gods.

For myself I accept the apologia issued last spring. But to the cynical I allow the choice of two hypotheses; either that we have all been wrong in attributing to Harry Truman the exclusive possession of a supernatural political prescience, or, more plausibly, that Judge Burke did not like his job and felt that he had given it a fair trial.

That he had given it a fair trial is evident from the fact that it is now more than thirty years since he was raised from the District bench, at an election held at a time when the attention of the people was fixed upon the closing victories of the first World War. He can, however, claim two subsequent studied ratifications. And it will soon be thirty years since he issued his first appellate opinion, appearing in 66 Colorado at Page 37, under the equivocal pseudonym of "Mr. Justice Burks"—the result of a natural timidity in the circumstances. That timidity soon converted to a flaming temerity, as Mr. Justice Burke and thrice Mr. Chief Justice Burke, proceeded over three decades, to write not less than 729 opinions of the court, including 85 criminal affirmances (and a surprising number of criminal reversals) and 11 disciplinary proceedings; knocking down, in his course, 500 pairs of legal ears, reddening the faces of half a hundred public officials, administering extreme unction to his full share of legal careers, and in general, leaving a multitude of impressions and perhaps a few cicatrices upon Corpus Juris Coloradonis, and the public life of his State. To complete the statistics, Judge Bruke dissented many times, but during all this period he wrote fewer than 12 dissenting opinions, evidently having no fondness for the thin consolations of that inffectual exercise.

The Burksian opinion (I had to coin that one)—the implement of this tremendous impact—is never very long, commonly occupying not more than

2 or 3 pages of the Colorado reports. The Burksian opinion does not sag with an over-load of citations, nor is it dreary with long marches of endless quotations. The author evidently had confidence in his own power of expression. And rightly so. For the style, flavored with an attractive literary turn, is both excisive and incisive, as it levels a keen knife at the heart of the contentions that lie before him.

Through the pronouncements of this strong-minded Judge, blows a breeze of robust common sense, of undeceived wisdom and penetration as if in the application to the particular case, the law was receiving a new bath of that Reason which is supposedly its ancestral element.

Fields especially indebted to Judge Burke's labors are Criminal Law, Constitutional Law, Wills, Irrigation, Workmen's Compensation and Titles to Fugitive Silver Foxes. If you have not read the opinion in the case of *Stephens Company vs. Albers* in 81 Colorado you have missed the most fascinating opinion in all the Colorado reports, as he settles the ownership of MacKenzie Duncan. MacKenzie Duncan was not a Scotsman. He was a silver streak in the Colorado open, seeking freedom and finding death, and by the pen of Judge Burke, immortality.

The administrative and superintending sides of his Court ever received from Judge Burke an alert, progressive and effectual attention. Bar associations and individual lawyers, in matters of reforms in practice or in relation to the handling of individual cases, have always found him accessible, helpful and, except on the bench, cooperative. The profession and the lay public have drawn freely upon his gift of eloquent and graceful speech. If the Supreme Court is a cloister, Judge Burke has worn his cowl far back and has been often out of bounds.

Has he an Achilles heel? None that I know of. But talking, within the last few months, with a pedagogical friend of mine and giving him my private opinion of Judge Burke, he surprised me by saying: "I used to play pool with young Platt Burke when he was a young fellow about Sterling, he is the Judge, isn't he?" I could not answer that one, as the name, parted on the side as it must have been, was not familiar to me. But if it was he, a few things were explained: his sociability, his urbanity, and his coolness when behind the 8-ball, as for instance upon first looking into a petition for rehearing.

Judge Burke, you may, without vainglory, reflect that when those of us who now honor you shall have all vanished from this mortal scene, such has been the extent and such the quality of your judicial service, you in your turn will have taken your place with the potent spirits who rule Colorado jurisprudence "from their urns," with Hallett and Helm, with Steele and Campbell and their compeers. Pending the arrival of that distant date, whether it shall be your choice to accept the assignment given to men in their Autumn by that sweet poet who himself died at twenty-six, and "stray

about in quiet coves," "with your wings close-furled," or whether, as your extraordinary endowment of energy presages, you shall again heed the call to public service, perhaps of a less secluded kind, let me certify to you that the Members of this Bar will remain your friends, and that their interest, their respect, their admiration, and the best of their wishes will always follow you.

The Basing Point Pricing System

By ROBERT E. FREER

Chairman, Federal Trade Commission

EDITOR'S NOTE: Last spring, in the case of *Federal Trade Commission vs. The Cement Institute*, 68 S. Ct. 793, the U. S. Supreme Court supported the Federal Trade Commission in outlawing the use of the basing point system as a means of unfair competition. The controversy over the wisdom, if not the law, of that decision has been raging ever since. During the latter part of November, S. Arthur Henry, attorney for the Colorado Manufacturers' Association, graciously consented to write an article for DICTA on this controversial subject. In casting about for someone equally competent to support the other side of this question, your Editor was happy to learn that the retiring Chairman of the FTC himself had been invited to Denver to speak before the City Club on December 28, 1948. Commissioner Freer's speech on that occasion is reprinted below, with thanks to him and to the City Club, which thereupon invited Mr. Henry to present his views on the following Tuesday, January 4, 1949. Mr. Henry's remarks will appear in the February DICTA.

A little over a year ago I came to Denver and spoke to the Purchasing Agents' Association of Denver on the subject "Markets—Managed or Free." In that talk I sought to explain some of the Commission's cases and decisions involving so-called basing point pricing systems and other forms of price-fixing by a geographical formula.

Since that time a great deal of water has flowed over the dam, and these activities of the Commission, which had very little public notice at the time I spoke, have become the center of a veritable storm of controversy in the press and in business circles. I have re-read that 1947 Denver speech in the light of all the unkind things which have been said about the Federal Trade Commission since then, and would not change a word of it now.

I will be a member of the Federal Trade Commission for just three more days now, after which I will resume the private practice of law, a decision which was forced upon me by some thirteen years of trying to live in Washington on a salary which was fixed at a not too munificent level back in 1914. Since this is my swan song as a member of the Commission, I want to speak as frankly and forthrightly on this question as I can, free from the fear that anything I say will be thrown back at me either in a Congressional hearing or in the brief of some party before the Commission in a later case.

There is a great and burning question which has been posed to the small business man and the general public in recent months and it is that sort of a question which supplies its own answer. The entire business community