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JOHN H. DENISON, graduate of the University of Vermont, and of the Harvard Law School, a member of the Denver Bar since 1881, a judge of the Denver District Court for six years, a justice of the Colorado Supreme Court for ten years, one being as Chief Justice, professor of pleading at Denver Law School for 35 years, and occasional lecturer at other schools as well as writer upon the subject, was attracted, throughout his long and fruitful career, by the logical qualities of the unemotional field of legal pleading, studied in that field critically and constructively, and, in addition to the less tangible influences of his labors as practitioner, teacher and nisi prius judge, left permanent contributions to that branch of adjective law, in his decisions from the Supreme bench and his book now near publication, entitled "Code Pleading in Colorado." In ten years as a Supreme Justice, he wrote the opinion of the court in nearly 600 cases, and of these, approximately 160 dealt, in whole or in part, with questions of Code pleading and practice. In "Code Pleading in Colorado," due to issue this week from the Courtright press, Judge Denison, who corrected the final copy just before his death in the fall of 1935, leaves to the Bar of Colorado—and I think the Bar of the English-speaking world will also claim a share in the legacy—a volume of 750 pages, carrying citations of 2500 different Colorado cases, with concise text, critical comment and illustrative forms, incarnating the productive labors of a lifetime,—

> "Of his practice, the dearest issue,
> And of his old experience, the only darling."

Of the book, let me say that it is what the publisher claims it to be, a monumental work, and especially when one considers that the subject matter and its citations are limited to the single jurisdiction of Colorado. In his preface, dated October 9th, 1935, Judge Denison says that the object of the book is to show "what Code pleading is in Colorado and what it logically ought to be,"—a wide gap indeed. This object he pursues through 66 chapters, combining the methods of textbook, encyclopedia and digest, descending to the

minutest detail and rising to the broadest principle in the treatment of every conceivable question involving pleadings, motions, types of action (not, however, including practice), that has arisen in Colorado, embracing also special and statutory proceedings. Moreover, he supplies 100 forms. The work bears the impress of his unmistakable talent for condensation, and the style is that frugal, inornate one which made the syllabus of many of his opinions in the Supreme Court almost as long as the opinion itself. And everywhere present in the book is Denison, the relentless analyst, Denison, the legal antiquarian, Denison, the thorough scholar, and Denison, the candid.

On the Supreme bench, Judge Denison had a common-law mind, and a Code conscience. The Code he regarded as having the effect of law. In his opinions, I find no trace of the theory, later prominent upon that bench, that the Code is persuasive, but not binding—that it is an elaborate suggestion from an impotent, if not impertinent, source. On the contrary, Judge Denison remarks, in Williams vs. Stringfield (76 Colorado 343), almost naively, one would say: "However that may be, the Code must govern us." Wondering, apparently, if the courts would not obey the Code, how could lawyers be expected to. Not only did he regard it as law, but, while he did not regard it as ideal, neither did he consider it an ideal, like Christian precepts, to be satisfied by a loose approximation. He read in the Code, as plainly as if in terms therein expressed, from its prescription for "facts constituting the cause of action," and for "ordinary concise language," and from its definition of a "material allegation," and of "issues," and from its general scheme, the cardinal rule that only *ultimate* facts are to be pleaded, to the strict exclusion of evidentiary matter and conclusions of law. This was to him the key of the arch, and upon violators of this rule, almost equal in number to the membership of the Colorado Bar, he fell with cold and incisive fury. The disregard of this rule he attributes, in his book, in part to the influence of Judge Victor A. Elliott, who, first upon the Denver district and afterwards on the Supreme bench, favored the use, under the Code, of the equity methods of pleading for disclosure, rather than the common law method of pleading for issue—which latter

Denison says was clearly the Code object in all classes of cases. Against the pleading of evidentiary matter, conclusions of law, argument, hope and what not, he is able in his book to cite an astonishing array of Supreme and Court of Appeals decisions or dicta, and, whether he cites them all or not I do not know, but he might include in the list no less than twenty-five of his own opinions in which he fulminates against this universal vice, with growing impatience and gathering despair, exclaiming in 77 Colo., "It is an elementary rule of pleading—a rule more often ignored than obeyed, but a rule," and, in 80 Colo., "We are tired of citing the Colorado authorities on this point—they begin with Sylvis v. Sylvis, 11 Colorado." The rules of statement, given constant lip-service, had hung for years like the birch on the wall, more in terror than in use, but Denison took the rod down and began gleefully to lay about him among the spoiled and now amazed children. In his second year on the Supreme bench, he found no obscure offender in Adams and Gast, of Pueblo, and because, instead of pleading that the plaintiff and defendant made a contract, or that the defendant, in consideration, etc., undertook and promised (approved forms unquestioned for centuries, Denison says), they pleaded that the plaintiff made to defendant a proposition (stating it), and the defendant accepted it, Denison affirms a judgment against them on the pleadings, disregarding also their supplications for trial, upon denials of conclusions of law and denials of anticipated defenses. (Swanson Co. vs. Investment Co., 70 Colo. 83.) On the day Swanson Co. vs. Opera House Co. was handed down, the law of pleading in Colorado was a living thing. Yet Judge Denison was candid enough to admit that when the judicial spectroscope was trained on a complaint, it was not always easy to say which allegations lay within the spectrum of ultimate fact and which ran over into the infra-red of evidence on one side and which into the ultra-violet of legal conclusions on the other. He was driven early to say that "perhaps the only way to determine what is ultimate fact is by precedent," (67 Colo. 315)—a view which he expands in his book. He did his part toward establishing precedent in this regard. In fact, with a keen and well-founded apprehension of the richness of the field to be cultivated, he

was not at all averse from the didactic in his deliverances upon questions of pleadings. In a score of instances, he sends the bar, as well as its unlucky exponent in the particular case, to Chitty or Archbold or Estes, or, in many cases, furnishes the language and the form in extenso, for whole complaints or defenses, as well as for particular allegations and denials, and often sends the case back for complete repleading. If your action is in replevin, conversion, deceit, quiet title, contract, trespass to land or goods, seizure of exempt property, automobile negligence, alienation, criminal conversation, Denison has done your work for you, if you will only let him, in 65 to 85 Colorado, besides furnishing you innumerable ultimate fact sentences and phrases. In doing so, his clipped style results in some arresting sentences, as where, in Foley vs. Gavin (76 Colo. 287), he says: "Marriage is an ultimate fact,"—in defiance, it would seem, of divorce statistics.

Judge Denison, notwithstanding he was thoroughly grounded in common-law pleading and had an intense admiration for its insistence upon accurate analysis and uniformity of statement, and that his reputation in that regard extended as far as England, did not, in the Code Canaan, or, if you prefer, the Code Wilderness, put in much time sighing for the fleshpots of the discarded system. In his book, he says that lawyers have made the Code less simple than it really is. Neither in his book nor in his opinions, will you find any encomiums upon the Code, such as you will find in Pomeroy, whom Denison loved to cite. Nevertheless, the abolition of forms of actions, and of the distinctions between legal and equitable proceedings, Denison accepts ungrudgingly. In 74 Colorado (Clay R. Co. vs. Martinez, at page 10), he says, arguendo, "To hold otherwise would be to revert to common-law forms of action now happily abolished." We cannot suspect him of satire. In 78 Colorado (Ry. Conductors vs. Jones, at page 88), in holding it was no error for the trial court to refuse to rule whether an action was legal or equitable, he emphasizes that the evidence and the rules of evidence are the same, and asks, evidently in a skeptical moment, "If the Code has not abolished the label, what has it abolished?" adding, "We should stultify it." In Conroy vs. Cover (80 Colo. 434), now grown into a leading case, he maintained,

under Code provisions and with an invocation of the spirit of the Code, not unusual with him, the right of the court to grant relief to certain of the cestuis que trustent, notwithstanding the absence from the jurisdiction of others of them who, if present, would be indispensable parties. Many, indeed, are his liberal rulings, in the interest of substantial justice, where logic—a dominating factor in his mind—might have wrought a different result; as where he refused to give fatal effect to a corporate misnomer (66 Colo. 173), or to the absence of a replication, where the issue was treated as existing (68 Colo. 244), or to a variance (80 Colo. 325), or to the absence of an essential allegation in the complaint, where the answer nevertheless denied it, and evidence was taken regarding it (80 Colo. 26), where he upheld a complaint in the nature of an interpleader, but not within the literal language of the Code (74 Colo. 452), ruled that a mandamus to issue 70 different tax certificates stated but one cause of action (80 Colo. 325), rejected the metaphysical axiom that you cannot amend where there is nothing to amend by, and allowed an action against a dissolved corporation to proceed against the last acting board (82 Colo. 343), and ruled a plea of "unclean hands" unnecessary to the enforcement of that doctrine by the court, for whose integrity it was a shield (82 Colo. 75). The spirit of the Code was strong upon him and even his clinging to the common-law types of statement, his insistence upon the value of precedented forms, his continual use of the common-law nomenclature, as assumpsit, trespass de bonis, etc., were designed to prevent the seeds of destruction which lay in the body of the Code from coming to growth and harvest. For Judge Denison saw clearly—and in his book he puts beyond misunderstanding—that a system of pleading can be of no substantial service to the cause of justice if it licenses every pleader and every court, under a rule for the statement of facts constituting the cause of action, in ordinary concise language, to make his own selection, "out of his own head," as Judge Denison put it—of the ultimate facts, and the concise and ordinary language—more certain to be ordinary than to be concise—for their statement, so that an identical transaction is, for one pleader, stated as A, for another as B, and for another as all the letters of the alphabet. He saw,

with equal clearness, that the so-called common-law classifications of forms of action were not such at all, but were categories of causes of action, as trespass de bonis was an unlawful taking of goods, though no action were ever brought on it, and consequently, under the Code, a statement of a trespass de bonis was just as good a statement of a cause of action as before the Code. As statements of such causes of action, approved and uniform, were available, he welcomed them as exact compliances with the Code, and as furnishing to the Code some protection against the tendency to utterly diverse, ruggedly individualistic, and unsorted pleadings which the Code, in the hands of a profession not yet universally logical or analytical, had developed. In his book, he tends to despair:

> "Since the Code has thus far failed in its purpose to produce conciseness and directness in pleading and must continue to do so unless lawyers and courts shall develop customary forms of brevity and directness, which seems but remotely possible, it appears that the best course would be to adopt the English system; if not wholly at least partially, i. e., in all ordinary cases."

The English system referred to, of course, provides for simple statements of claim and defense, in language prescribed by the rule of court, non-demurrable, and leading directly to trial. Judge Denison would be interested to see—perhaps I should follow Brisbane and say, Judge Denison will be interested to see—to what scheme or system the Supreme Court of the United States, and its advisory committee, now formulating rules for all civil cases in the Federal district courts, will resort —a result to be known within a few months, and certain to be of immense importance in the future development of American pleading.

It is not every jurisdiction the size of Colorado which produces a matter in any, let alone in so difficult, a department of the law. In closing, permit me to apostrophize: "Oh, gentle and guileless spirit, wheresoever in the realms of the unembodied you now employ that steely and syllogistic mind upon ultimate fact indeed, be not disturbed to think that we still make of our complaint our opening statement and of our replication a closing argument, and anticipate defenses, and make argumentative denials, and neglect the sweet and commendable common counts. It may be that your 'Code Plead-

ing in Colorado' will furnish bench and bar the very instrument needed to develop a homogeneous, logical and practicable system of pleading in this tiny mundane jurisdiction, and thus may so right a genius as yours find full posthumous vogue."

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## "SCINTILLATING OMNILUCENCE"

(Journal, American Judicature Society, April, 1936)

A few months ago it was said in this Journal that opposition to bar integration had been driven to cover; that hostile arguments rarely appeared in print; and that opponents had retired to the last line of defense—personal influence with legislators. Shortly after that statement was made there appeared in Dicta, the Denver Bar Association's sprightly journal (Dec., 1935), an apparently serious argument against integration. Like all similar arguments it was essentially a priori argument. The writer, Mr. Albert M. Vogl, told of all the evil consequences which *would* follow compulsory organization. This line of argument becomes increasingly difficult as the years go by without evidence that any loss whatsoever has come through integration. It has to ignore all that is pertinent evidence, the history of the state bars which have been in existence for three years or more.

But the article was notable in introducing a new comparison and a fresh expression. The author called inclusive organization an effort to substitute "Boeotian mediocrity for scintillating omnilucence." Such a phrase is one to be studied, mastered and enshrined in one's inner consciousness. It affords spiritual release in a time of doubt and fear. To pave the way to appreciation of a linguistic jewel (for "omnilucence" does not appear in the latest American lexicon) it may be spelled thus—omni-lucence—and so explain itself. ("Shining upon all or everywhere," New English Dictionary, Oxford.) One can learn from Webster that Boeotia was a land in which the natives were notorious for their stupidity.

Having mastered this expression with a proper sense of achievement, the only question that remains is whether Mr. Vogl has been kidding his readers. In the succeeding number Dicta published an affirmative argument, written by Mr. Bentley M. McMullin. Did the editor of Dicta, in order to present both sides of a question which Colorado lawyers are at last beginning to consider earnestly, assign the negative to a writer who was willing to comply and do the best he could?* Such an attitude would be more or less routine to a lawyer. But the coinage of bright and shining new phrases is not routine—it is inspiration.

*Oh, Mister! you don't know our Albert Vogl!