Denver Law Review

Volume 7 | Issue 12 Article 4

January 1930

Judges

John H. Denison

JUDGES

*By Judge John H. Denison of the Denver Bar**

I

PLUTARCH tells of Caesar that he divorced his wife because she had been so compromised that some disbelieved her innocence and that Caesar's wife must be above suspicion.

One would like to hear her side of the case; whether she thought that Caesar's wife's husband ought not also to be above suspicion and whether she had not some claim to his loyalty and his powerful protection against wrong. But she, so far as we know, was silent.

Not so with the judges of our courts. They may give a reason for every judicial act and usually do so. The judges of our higher courts do so at great length and it is right that they should for there are more reasons why they should be above suspicion than why Mrs. Caesar should be so.

II

There are many kinds of judges, not easily classified. The categories are not mutually exclusive and admit of no exact definition.

A great majority of judges are well intentioned. In that respect they are like a majority of mankind; but the proportion of well intentioned judges is greater, I think, than of men. It would be strange if it were not so, because they who spend their lives in consideration of what is right and wrong, not only ought and usually do know what is right better than ordinary men but become more disposed toward it.

But an occasional Bacon or Jeffreys is found on the bench; lawyers of great ability but using it for their own profit or advancement, excusing themselves to themselves by one argu-

---

*Formerly Chief Justice of the Colorado Supreme Court.

ment or another as necessity may require. Such are rare among us, but here and there a judge, like Bacon, accepts favors, immunities, gratuities, presents, promotions, and persuades himself that he is just notwithstanding; or prostitutes his office for political favor or advancement like Jeffreys.

III

A long time ago a lawyer friend of mine told me of a conversation he had with one then on the bench in Colorado about the influences that operated on courts and judges and the judge said to him that he was influenced by his friendships and could not help showing favors to his friends. The circumstances were such that he was understood to mean his political friends. I do not think that he meant that he would deliberately decide a case wrongly for friendship's sake, but that his discretion would be exerted to that end; perhaps as illustrated by the following:

A judge once said to me that in a case of political importance to his party, when the question was evenly balanced, he decided according to his party's advantage. He was putting it forward as the right thing to do. He would, I think, have resented an accusation that he "leaned" toward his party, or favored it judicially, still more that he favored his own advantage. But what else would he be doing? The decision would favor his party and would be to his and his party's advantage and it would be so because he "leaned" that way enough to overcome what would otherwise have been an even balance. He would be biased, in the literal sense of that term. If one like him but of the opposite party were in his place, the case would go the other way. The decision then would be for political reasons, not for legal ones, but his duty is to decide according to law; legal reasons were the only reasons he could consider if he kept on lines of duty and honor; the law and his oath permit a judge no other line of argument.

The judge's position, however, was otherwise wrong because it is impossible and absurd.

Impossible: because it is harder to tell whether a question is evenly balanced than to decide it. It is a more difficult matter to investigate a legal point until by all the pros and cons

one has shown that the question is even to a scale "within the estimation of a hair" than to show it to tip one way or the other. This is so because at last no such question is evenly balanced. There is a right and wrong to every legal question. To follow his plan, he must first decide what constitutes an even balance, and whether the case in hand meets the definition. Seldom does a case involve one question only. Must they all be evenly balanced, that is, every vital legal question in the case be so close that the judge cannot make up his mind which way to decide it? Surely they must, or else there would be a legal reason for a decision.

Absurd: Suppose there is but one question upon which the case depends. How can he be sure that his mind is evenly balanced? When is a question evenly balanced? What does he mean by "evenly balanced"? Does he mean that he cannot determine an issue of fact? That is sometimes difficult but never impossible. He always has a new trial or further evidence on call at his will, and when at last there is an even balance the rule of burden of proof requires a decision in the negative. Does he mean that he does not know what the law is? Let him study, read and investigate and ask for further argument. Does he mean that the authorities are equal in number and weight, or in such confusion that a clear rule cannot be deduced from them? Then he is free and can decide as he thinks the law ought to be. And here is the crucial point. If a judge ever reaches this position, which is not often, is he absolved from his duty to decide according to law? May he say "I do not know the law" or "I do not know the application of the law to present facts and so I will decide for political reasons, for the side which I personally favor and for my own advantage"?

There is, of course, but one answer to such a question and the judge himself knows it and proves that he knows it by giving other reasons for his decision. He knows that his real reason would be thought wrong and so dares not state it, but if he states any at all, which he usually does, states reasons which he intends shall be received by the bar and public as the real and as sound and sufficient reasons for his decision. Indeed in every case a judge either advances his true reasons, upon which the question of even balance is out of the case altogether, or

he intends to mislead and by giving false reasons conceal the true one.

It would seem that the proposition in question would lead to more injustice than is at first obvious, because one who is disposed to decide one way is inclined to find reasons for so doing and his eyes will tend to see in every case a doubt and in every doubt an even balance. The opposite side then, is fighting with one hand tied. His lawyers will work for their fees and not with any hope that their arguments will be of any avail.

To reduce this proposition to its lowest terms, it is thus: If a judge knows no sufficient legal reason, he may decide for a political one. This *is* absurd and it is fortunate for the country that not many judges think it otherwise.

IV

A Bacon has not deliberately determined to do wrong. I will accept presents from both sides, perhaps he says to himself, but will decide according to law and equity. Even after Bacon had been found guilty he said he was the justest judge that had sat for seven ages.

There is a class of judges that take the same position now. Like their famous predecessor they cannot understand why, if they decide aright, their conduct should be criticized. Sometimes such a one takes the position that he has received the gratuity for some reason not connected with the litigation of the donor, or as a reward for other services; sometimes that it is received after the decision, intending to provoke the inference that it did not influence him. It seems impossible to convince him of his sin, or rather that his act was a sin.

A good test of the righteousness of such a stand is to ask yourself whether you would like to have a judge in your case accept gratuities from your opponent. Would you like to have him, pending the case, expecting or even considering the possibility of such a thing? Would you like to have him, while the case was pending, contemplating employment by your opponent after the decision? Would you like to have the judge accept such employment? No, his position would be as wrong as that of the political judge and for the same reason.

V

It was told of the late Mr. Justice Brewer that, shortly after he went on the supreme bench of the United States, a great public corporation offered him the position of its chief counsel at a salary several times greater than that which he was receiving. The corporation then had a case before the court which involved rights of enormous value, and, from his previous decisions, the men in control believed or feared that he would be against them, so they planned to remove him from the bench in a lawful manner by employing him themselves. The offer was not accepted and the company lost the case. Some of the members of the corporation were said to have attributed their defeat to the, let us say, resentment of the great jurist at their conduct. That a judge of his character would allow his feelings to govern or influence his decision we cannot believe, and, of course, every lawyer knows he could not have controlled the other members of the court; but, if the purpose of the offer was to influence the decision, it failed.

What, then, would have been wrong with an acceptance of it? To resign from the bench is not, *per se,* worthy of criticism. To accept the position of chief counsel for a corporation is not. Perhaps the circumstances were such that Mr. Justice Brewer might have accepted the position and resigned before the case was heard, and so have relieved the matter from all question as to influence on *his* decision. Indeed, as the story went, such was the intention. Was there a good reason why he ought not to do so? We think there was. If he knew or reasonably suspected the purpose he surely ought not to accept, because by accepting he would be possibly aiding in a decision upon improper reasons. But there is a further reason: Next to having courts worthy of trust, the most important thing is to have the public understand that they are so. The acceptance of such a position under such circumstances, though with perfect honesty and honor, would, if the case should go for the corporation, be misunderstood by a great number, perhaps a majority of the people of this country. A vague influence, powerful and wide, though erroneous, would tend to create and support the suspicion, if not the belief, that

there was a secret "pull" of some kind from which the court was not wholly free, and the respect due that tribunal would be thereby weakened. It is, then, the duty of a judge to avoid the appearance of evil, as well as evil itself, and the acceptance of the employment, as we have above supposed, would have violated that duty.

We do not vouch for the truth of the tale about Mr. Justice Brewer, but it accords with his character and well serves as an illustration of our thesis that a judge ought to be and ought to keep himself, like Caesar's wife—above suspicion. It is a height difficult to attain, but any judge can approach it and most judges do.