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Forum Juridicum: Juridical Legislation

George W. Hardy Jr.

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JURIDICAL LEGISLATION*

GEORGE W. HARDY, JR.†

When two of the justices of the highest Court of our country view the present trend of rulings by their Court as tending to make the law a game of chance rather than a chart for governing conduct;[1] when these distinguished jurists declare "defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed;[2] when one of these same justices caustically describes the tendency of the Court as one calculated to bring adjudications into the same class as a restricted railroad ticket, good for this day and train only;[3] when decisions of the Court once marked by the preponderance of an august and respect compelling unanimity of opinion are now punctuated not infrequently by one or more dissenting opinions, and even one or more concurring opinions; when two justices of the majority join in writing a concurring opinion for the sole and only purpose of criticizing the dissent of another justice;[4] when opinions are so argumentative as to more resemble advocates' briefs than judicial pronouncements; when all these things have come to pass, there is small wonder that the conditions which have resulted are become matters of discussion not only among members of the profession, but subject, indeed, for widespread newspaper comment and radio forums.

The vast feeling of uncertainty which pervades the minds of all members of both bench and bar, federal and state, has indeed become a matter of concern. There is a rather widespread inclination to fix the blame, if any blame be attached, upon a tendency of our courts to overstep the constitutional bounds determining

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† Judge, Court of Appeals, Second Circuit, State of Louisiana.

1. Mahnich v. Southern Steamship Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944), dissenting opinion of Mr. Justice Roberts joined in by Mr. Justice Frankfurter.

2. Ibid.

3. Dissent of Mr. Justice Roberts in Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944).

4. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 590, 64 S.Ct. 281, 88 L.Ed. 333 (1944), special concurring opinion of Justices Black and Murphy.

the separation of branches of our government. In other words, both lawyers and laymen are using and abusing the phrase, "judicial legislation."

Is it indeed true that our courts, through their judgments, are willfully crossing the line of demarcation and trespassing in fields of legislation and administration from which they have been fenced by constitutional barriers? Or it is rather evident that our courts have reached the point where the clean and obvious cleavage between branches has been so blurred that they have unintentionally strayed into what is now a twilight zone, a no-man's land between the non-political judicial and the political legislative and executive branches of government? Or is it reasonable to conclude that the complexities of modern times, the stepped-up pressure of life itself, the revolutionary changes in social, economic and political relationships have necessitated a relaxation in the observance of what once were clearly marked and easily ascertained boundary lines?

These are obviously both proper and timely questions for discussion, and since a resolution of these matters so vitally affects the people of the entire nation, and so essentially depends upon the will of that people, it is both just and fitting that such a resolution be based not alone upon the results of professional analysis, but rather upon such an analysis made in the light of both the public need and the public will.

The comment of Justice Holmes, "Judges do and must legislate,"[5] is frequently quoted. But, there is an earlier declaration by the same author made before he became a judge, ". . . in substance the growth of the law is legislative."[6]

Quite possibly the change in point of view which occurs to one who has left the bar and assumed the duties of the bench is due more to lessons learned by experience than to inconsistency of thought. The Yankee from Olympus was not immune to such a change, and his expression with reference to legislation by the judges is only one of many such expressions, the most notable and emphatic, perhaps, being the one of Charles Evan Hughes who declared that the Constitution is "what the judges say it is."[7] As a matter of fact, we have all accepted the inescapable conclusion that courts do legislate, but for generations we have remained undisturbed by this knowledge because such legislation

5. Dissenting opinion in Southern Pacific Co. v. Jensen, 244 U.S. 205, 221, 57 S.Ct. 524, 531, 61 L.Ed. 1086, 1100 (1917).

6. Holmes, Common Law (1881).

7. Charles Evan Hughes Addresses, 139.

has been carefully confined to more or less explicable and understandable types and phases of statutory law. But, now, we are asking ourselves, and others, "Have our courts gone too far, have they departed from the traditional form and character of judicial legislation, and are they now, under the guise of interpretation and through the use of the principles of legislative intent and public policy, infiltrating through the ramparts of constitutional defenses?"

It was Judge Walter Clark of North Carolina who well expressed this danger in these words:

> "Whatever tends to increase the power of the judiciary over the legislature diminishes the control of the people over their government, negatives the free expression of their will, is in conflict with the spirit and express letter of the organic law, and opposed to the manifest movement of the age."

Most certainly, every member of every court in the land would deny the imputation that is implicit in the question we have phrased above. But, it is still possible that courts have been gently led into error through their own well-intentioned desire simply to aid and assist congressional and legislative efforts to conform to the needs of a rapidly changing and increasingly complex social and economic ideology.

In an address delivered last year at the annual meeting of the American Law Institute in Philadelphia,[8] Justice Robert H. Jackson recognized the decline of the principle of *stare decisis*: "We may also agree, I am sure, that our times have witnessed considerable relaxation in the authority of the precedent." ". . . no lawyer today feels such assurance that a pat case will bring him victory or defeat as lawyers once felt."

For the existence of the conditions which he decried, Mr. Justice Jackson blamed an increased pace and pressure; remarked upon the enormous multiplication of precedents; noted the increase during the past century in numbers of courts of last resort, of intermediate courts of appeal, and of various specialized tribunals, acknowledged his own inability to absorb the output, and reached a rather discouraging conclusion on this particular point, which he expressed as follows:

> "Legal opinions seem subject to the same natural law that affects currency; inflation of the volume decreases the value

8. Jackson, The Decline of Stare Decisis (1944) 28 J. Am. Jud. Soc. 6-7.

of each unit. When so many issues of opinion compete for acceptance, they inevitably suffer a discount.

"But the increased volume of opinion affects the intrinsic value of many precedents as well. They are made of baser metals when the pace is fast and the volume large."[9]

It would seem that the logic of this development of cause and effect is somewhat open to criticism. An increase in number of tribunals devoted to the interpretation of law ought to lighten the burden, and that it would lighten the burden would not be open to question if it could be assumed that these tribunals could rely upon the authority of established principles as enunciated by our highest courts, both state and federal. But the feeling of uncertainty has permeated from the top stratum of judicial authority down through the succession of lower tribunals, until there remains only a sense of perplexity, an atmosphere of confusion. An apt illustration in support of this observation is found in the recent case of *Spector Motor Service, Inc. v. Charles J. McLaughlin*,[10] which originated in Connecticut and was considered on appeal from the Federal District Court by the United States Circuit Court of Appeals, Second Circuit.[11] The opinion of the majority of the court indicated that, because of the recent trend of decisions of the Supreme Court, it was justified in assuming jurisdiction and passing upon the matter. Justice Hand, in a pithy opinion, summed up his dissent in this manner:

"Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."[12]

The Supreme Court, with one justice concurring in the result and one justice dissenting, vacated the judgment of the court of appeals and remanded the case to the district court with directions that the bill be retained pending the determination of proceedings to be brought with reasonable promptitude in the state court.

Thus, we see that courts have joined the lawyers in fascinating but fruitless participation in a game of guesswork.

Many of the inconsistencies evident in recent jurisprudence have undoubtedly resulted from the over-emphasis which courts have placed upon the "intent" principle of construction. As a

9. Id. at 7.
10. 323 U.S. 101, 89 L.Ed. 105 (1944).
11. 139 F.(2d) 809 (1943).
12. Id. at 823.

rule the interpretation of recently enacted legislation presents no grave difficulties. In spite of the increased pressure, pace and volume of litigation to which reference was made by Justice Jackson, the members of courts, in most instances, manage to keep abreast of current events, of the needs, the underlying reasons and the supporting principles of the more important phases of legislation. In addition to this feature, which may be classified under "matters of common knowledge," there is opportunity for presentation of data for the guidance of a court in determining intents, which is extremely valuable and important as an aid to final determination.

But, it is in the interpretation of legislation adopted years, decades or even generations since that the greatest difficulties are presented. In what is undoubtedly, at times, a strained and unnatural effort to ascribe certain intents to this character of legislation, to conform what a court regards as legislative "intent" to modern social and economic concepts, courts unquestionably fall into error. The very debates and committee hearings of legislative bodies on these subjects are not reliable guides, and due to the lapse of time there is a correspondingly greater margin for error in the conclusions reached.

The changes and departures from precedent which demand our attention might have been absorbed without any noticeable jar to our established concepts of jurisprudence if they had evolved over a period of time. However, they have not taken place in the luxury of leisure, but have developed in the comparatively short period of a decade, progressively increasing over this period in tempo and in multiplicity until we have become bewildered and confused.

The excellent permanent edition of "Words and Phrases," printed in 1940, which is represented as covering judicial constructions and definitions "from the earliest times," contains 162 citations under the phrase *Public Policy*. Reference to the supplement covering matters under the same heading in the period 1940-1944, inclusive, discloses approximately 550 citations. It cannot be contended that matters of public policy of our nation have grown at such an astounding rate as to explain this tremendous increase. But, it is true that more matters touching public policy are comprehended in our statutes, and more and more the effect of legislation upon public policy is being considered by courts with reference to both old and new legislation.

In pursuit of the will-o'-the wisp of public policy, courts

sometimes lose themselves in a maze of theories when adherence to practical considerations might lead unerringly to more reasonable and beneficial conclusions. In *McNabb v. United States*,[13] the Supreme Court evolved a new rule, and excluded evidence consisting of information elicted from suspected murderers between the time of arrest and their production before a committing magistrate, a procedure required by formalities of law. The Court made no pretension that the admissions from the suspects had resulted from any sort of coercion, nor did the Court find any violation of constitutional provisions, but, apparently, in its zeal and excess of interest in the protection of individual rights, it produced a judgment which has been severely criticized as contrary to public welfare. The news carried by this morning's press of the Supreme Court5s decision setting aside the conviction of the German bundists, though the text of the Court's opinion is not yet in hand, would indicate a continuance of the Court's policy in the direction fixed by the *McNabb* doctrine.

It should be borne in mind that it is not in any sense the duty of a court to make policy, and when, even in well-intentioned instances, it so far departs from the traditionally accepted and constitutionally defined functions of a court as to engraft the ideas of its members, as to what they think should be policy, onto the trunk of the body politic, such action indubitably subjects the court not only to sharp criticism, but diminishes the respect of the general public, a respect heretofore approaching reverence, in which it has been held.

As to the influence of the adjudications of federal courts upon state tribunals, it must be remembered that the public policy of the United States, or, should we say, interpretations of the public policy of the United States as given by federal courts, are not necessarily controlling on matters which concern the internal policies of the several states. There are numerous instances where state courts have refused to follow pronouncements of public policy by the federal judiciary, and these actions are not only justifiable but eminently proper. Public policies of the State of Louisiana, for example, need not necessarily accord with public policies of our federal government any more than they need accord with the public policies of other states. For this reason doctrines advanced by the federal judiciary affecting such matters of policy, unless there is an underlying basis involv-

13. 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943).

ing constitutional rights, are neither controlling nor necessarily persuasive.

Courts cannot by judicial pronouncements remedy all the injustices, inequities and inequalities which result from even the wisest and most meticulously prepared statutory enactments. In literally hundreds of cases we find the declarations made by the courts themselves that they are not responsible for, nor is it within their province to rule upon, the wisdom, vel non, of legislative enactments. Courts can, with propriety, and, in my opinion, *should* point out defects in legislation and suggest corrective and remedial measures for the consideration of legislative bodies. But action beyond this, on such matters, unquestionably goes beyond the true purpose of the judicial function.

It should be definitely understood that these observations are not intended, and should not under any circumstances be construed, as advocating the binding of the judiciary by technical rules or the circumscribing of its true functions by the application of artificial, antiquated and obsolete precedents, which should be more honored in the breach than in the observance. But, it is emphatically intended to convey the idea that courts must steadfastly resist the very real temptation to project judicial authority across the lines which mark the limits of their powers, obligations and responsibilities under the clear provisions of constitutional limitations.

The effect of this tendency to pursue legislative intent, and in effect to rewrite statutes by changing the plain and unambiguous meaning of words used in the statute, is not confined to our federal courts, for the trend is increasingly evident in the opinions of state courts. Specifically, in our own state we find that the opinion of the supreme court in *Thornton v. E. I. Dupont de Nemours & Company*,[14] was predicated upon an interpretation by the Court to the effect that the words "maximum percent of wages" in subd. 1 (B) of Section 18 of Act 20 of 1914, as amended,[15] were intended to mean "maximum compensation." Upon this ground the court reversed the judgment of the district court, which had been affirmed by the Court of Appeal for the First Circuit, maintaining a plea of prematurity and dismissing the suit of a plaintiff who had been paid by the employer since his injury, not the maximum amount of compensation of $20.00 per week, but his regular weekly wage of $55.00. Upon the filing

14. 207 La. 239, 21 So.(2d) 46 (1944).
15. Dart's Stats. (1939) § 4408.

of suit, the employer discharged the employee, removed him from the payroll and placed him on workman's compensation at the rate of $20.00 per week during the period of disability. Two justices concurred in the opinion of the majority, one of them writing a separate concurring opinion, and two justices dissented, one of them, Judge Rogers, writing a dissenting opinion, in which he expressed a very pertinent fear as to the effect of the majority opinion, as follows:

> "I fear that the decision in this case holding that an employee may obtain a judgment against his employer as soon as an injury is suffered, even though there is no dispute as to the amount due as compensation, and even though the employee is receiving his full wages, will result in employers feeling compelled to immediately discharged their injured employees and to put them on compensation, thereby putting an end to the practice followed by many employers, particularly those who carry their own liability insurance, of assisting those of their employees who are injured during the course of their employment in regaining their health."[16]

It would seem that both public policy and the intent of the legislature as expressed by the "liberal construction" policy, in the best interest of the employee, would have indicated a holding that the word "wages" as used by the legislature in the act itself, should be construed as meaning "wages"!

In the recent, and as yet unpublished opinion of the supreme court in the case of *Clara Thompson, Tutrix v. Vestal Lumber & Manufacturing Company*,[17] the court held the definition fixed in paragraph (H), subsection (2), of Section 8 of the Employers Liability Act, as amended:

> "The term 'child' or 'children' shall cover only legitimate children, step-children, posthumous children, adopted children and illegitimate children acknowledged under the provisions of Civil Code Articles 203, 204 and 205,"[18]

as being inapplicable to an action by illegitimate children.

The cited case was brought by the mother of two minor children claiming damages under Article 2315 of the Civil Code, and, alternatively, compensation for the death of their father. The

16. 207 La. 239, 21 So.(2d) 46, 60 (1944).
17. 22 So. (2d) 842 (La. 1945).
18. La. Act 20 of 1914, as amended [Dart's Stats. (1939) § 4398].

petition set forth that the petitioner and the decedent, the father of the children, had lived together in open concubinage or common law marriage, of which union the two children were born; that the said children were the illegitimate children of the deceased employee, never acknowledged by him by notarial act, but living with him in the same house and dependent upon him for support. Exceptions of no cause or right of action were sustained by the district court, which judgment was affirmed by the Court of Appeal, Second Circuit. Writs were granted by the supreme court and on the original hearing the judgment of the court of appeal was affirmed. From this judgment the chief justice and two of the associate justices dissented, one of the justices filing a dissenting opinion. A rehearing was granted, and on rehearing there was judgment annulling the judgment of the district court as affirmed by the court of appeal, overruling the exception of no cause or right of action and remanding the case for further procedure. The right of action for damages under Civil Code Article 2315 was denied. The opinion, in which all members of the court concurred, distinguished a number of cases in which recovery had been denied to illegitimate children, and, by implication at least, squarely overruled the holding in *Beard v. Rickert Rice Mills*.[19]

The effect of the holding in the *Thompson* case is that, for the present, at least, dependent illegitimate offspring are not barred from recovery of compensation on account of the death of a parent, provided they were actually living under the same roof in the sense of constituting a part of the family of the decedent.

This holding can be, and is, justified only on the ground of public policy, and likely is in accord with those social plans which, to use the words of the dissenting opinion on original hearing of the case, would pass on to industry, and ultimately to the public, the compensation provided for in the act, and thereby eliminate the likelihood of leaving illegitimate children to shift for themselves or to become public charges.

But, however much we may agree with the broad social principle involved and with the effect of interpretation accorded, this decision squarely poses one of the important questions involved in our discussion. To what extent are courts at liberty to go in conforming to currently accepted social and economic trends of thought when such conformance necessitates a so-called "interpretation" of unambiguous definitions, terms and provisions of

19. 185 La. 55, 168 So. 492 (1936).

statutes? Should courts so pursue a predilection in this direction as might bring them in conflict with certain well-established, cardinal principles of constitutional law? These principles have become so firmly imbedded in both our federal and state jurisprudence that no court would consider directly countenancing their breach. It is regarded as fundamental that courts will not disregard the letter of a law under the pretext of pursuing its spirit, that construction may not be substituted for legislation, that interpretation shall not go beyond the domain of ambiguity. And there is still a further rule of construction, sanctioned by long tradition, enunciated and reiterated in a long line of cases, that after a statute has been judicially construed, such construction with regard to contract rights, is regarded as becoming a part of the statute itself. The corollary of this proposition is that a change of such construction affects contracts in the same manner and to the same degree as a legislative amendment of the statute. It is this fundamental conception of judicial interpretation upon which lawyers have so long relied in advising clients as to their rights or liabilities. The theory which supports the rule is obvious. It is not the function of courts nor judges to assume the burden of political considerations. Fundamentally, in our scheme of government, the judiciary is nonpolitical. In theory, conformation to trends and changes in public needs and desires is left to the legislative and administrative branches of government, and, unquestionably, these branches bear the obligation of responding through appropriate legislation to current public sentiment. It is for courts to reconcile political legislation with broad principles of justice and equity whenever such reconciliation is possible and compatible with recognized and accepted ideals and principles. The "take-a-chance" doctrine is incompatible with the principle of steadfast adherence to fundamentals. Weathervane fluctuations in opinion are abhorrent to all conceptions of judicial conduct.

It has not been the purpose of this discussion to offer any panacea for the ills and aches which appear to be afflicting both lawyers and judges, but it has been its intent to present frankly the questions that must and unquestionably will be answered in due course of time.

And, finally, by way of conclusion, we come to the subject of this address. This subject has been chosen by design to point a distinction between the idea of *judicial legislation,* which in one sense at least, connotes the unauthorized making of law by judges and courts, and *juridical legislation,* which is conceived to be that

desirable and enduring contribution, through and by a well-considered and established jurisprudence, to the great body of constitutional law.

Perhaps small consolation is offered in time of distress by the observation that all this will pass, but by experience we know it to be true. The disaffections and uncertainties engendered by "judicial legislation" will not last. The unrest attendant upon the cataclysmic effects of a world at war, the period of change, of adjustments, all this will pass away, and in the near future, or so we hope, will remain in our minds only as little memories of little troubles.

One swallow does not make a summer, nor does one case necessarily establish a precedent, though it may have overturned one. It may be under new statutes of Congress, new acts of the legislature, which seek to remake the scheme of things nearer to our heart's desire; it may be through or by a combination of any number of things which shall come to pass that order and certainty will re restored. The means and instrumentalities may not yet be plain. But of *one* thing we are assured, *one* certainty remains, even in the midst of uncertainty,—*our faith in the democratic processes of government and in the laws which assure the protection and continued existence of these processes.*

And, meanwhile, perhaps it may be well for judges to adopt the advice of Pope, although the advice was given with reference to another subject:

"Be not the first by whom the new is tried,
Nor yet the last to lay the old aside."