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JUDICIAL LEGISLATION IN NEW YORK

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"Judicial Legislation" in the opprobrious sense of the term, has been described as comprehending "judicial decisions which construe away the meaning of statutes, or find meanings in them that the legislature never intended." (Bouvier's Law Dictionary, Rawles Revision 1897, see "Judge-Made Law"). In colloquial professional parlance, however, the phrase is given a wider scope, being often employed to characterize cases in which a court, disregarding the rule, *stare decisis,* has sought to do what it conceived to be justice on the facts. The tendency towards judicial arbitration, as distinguished from the scientific administration of the law, has been noticeable in most American State courts during the past few decades; there certainly has been a very marked development of the tendency in the courts of New York. It has been a professional by-word in that State for many years that, no matter what the result in the courts below and no matter what the condition of the authorities, it was good policy to appeal any unsuccessful case having decided merits to the court of last resort. Besides equitably adjusting particular controversies, the New York Court of Appeals has shown a disposition towards directly usurping the legislative province, that is towards the original effectuation of contested principles of public policy, the administration of important arbitrary classifications, even the formulation of comprehensive rules of conduct and business. It is proposed in this paper briefly to summarize a few extreme, though typical, instances.

A beginning may be made—at first glance perhaps somewhat paradoxically—with a case in which the Court of Appeals disregarded the scientific demands of legal development, not through innovation, but by adherence to the *stare decisis* rule. In *Marlin Fire Arms Co. v. Shields,* (171 N. Y. 384), it was held that false and malicious attacks upon a product of manufacture published in a magazine, for which the manufacturer has no remedy at law because of his inability to prove special damage, are, nevertheless, not the subject of equitable cognizance and their future publication cannot be restrained by injunction, because that would amount to an injunc-

tion against a libel. According to the facts admitted on the demurrer the letters complained of, ostensibly coming from outside persons and which contained what purported to be statements of fact as well as criticisms upon the plaintiff's merchandise, were "sham letters, written and published by defendant in furtherance of a design to force plaintiff to advertise with him, or, failing in that, to gratify his malice." This decision leaves the law of the state in an anomalous condition. The courts of New York, in common with other American courts, go to great lengths in enjoining unfair competition through indirect deception, such as simulating other persons' trade marks or names, the wrappers upon their merchandise, etc. But when it comes to unfair competition by direct lying a plaintiff is remediless. This decision was made by a divided court and it reversed the Appellate Division, which was in favor of granting the injunction. In view of the many instances in which the Court of Appeals has ignored or expressly repudiated the obligation of *stare decisis,* some of which are hereafter cited, it would be idle to contend that the underlying policy of the decision was mere general conservatism. It seems highly probable that the real reason was a conviction on the part of the majority of the judges in the highest tribunal that the scope of the remedy of injunction should not be further extended but arbitrarily limited. It is true that it had been the rule of the common law for a long period that an injunction would not lie to prevent the publication of a libel. The historical reasons for this rule, especially as to libels against persons, are well known and their force has largely disappeared. The Marlin Fire Arms case raised no question of personal defamation, and it is submitted that the way was entirely open to hold that, although a libel *per se* might not be enjoined, a malicious and mendacious form of business warfare would be prevented, although incidentally it involved a libel against a thing. This would have been analogous to the position taken by many courts that, while an injunction would not issue against crimes as such, the fact that acts injurious to property also constituted crimes would not protect them from equitable intervention. Some of the injunctions granted by various courts against boycotting and other forms of Labor warfare incidentally restrained acts of defamation as well as crimes. It is well known that during the past few years there has been considerable agitation against "government by injunction." Certain popular factions have been jealous of the right to enforce judicial mandates by contempt proceedings without trial by jury. Legislation has been advocated to circumscribe and define that power of

the courts. Many prominent and conscientious members of the bar, in different sections of the country and of all shades of political affiliation, have exerted their influence in favor of the movement. We cannot but regard the arbitrary limit set upon the natural development of the law by the New York Court of Appeals as sympathetic with and effectuating an extra-judicial sentiment.

The next illustration involved a substantial disregard of *stare decisis,* and incidentally, as a pretext, the introduction of an independent principle stretched in its application to the point of absurdity. Probably all American lawyers are more or less familiar with the elevated railroad litigations in the city of New York, which have resulted in the payment by the railroads of millions of dollars as damages. The principle which was settled, after most elaborate argument by counsel and careful deliberation by the Court of Appeals, was that the building of an elevated structure in the streets of a city, although not solid but resting on supports separated by wide intervals, and the operation of trains thereon, did not constitute a legitimate street use; that the rights of light, air and access of abutting owners, independently of whether they or the city owned the fee of the streets, were substantial property rights, protected by the constitution and which could not be taken without compensation; that the road was a trespasser and that it might be enjoined from maintaining its structure and continuing operation until it had made compensation.

In *Fries v. N. Y. & H. R. R. Co.,* (169 N. Y. 270); *Muhlker v. N. Y. etc., R. Co.* (173 N. Y. 549), and *Sauer v. City of New York,* (180 N. Y. 27), it was held by the same court that a steam railroad or a municipal corporation, acting under statutory authority and direction, without being obliged to make compensation, might be permitted to construct and use an elevated viaduct in a street, which more seriously invaded—indeed almost entirely destroyed—the easements of light, air and access. The pretext referred to was derived from *Radcliff's Executors v. The Mayor,* (4 N. Y. 195), which was a change of grade case, and the doctrine of which, though applying to a veritable change of grade, has been repudiated in many jurisdictions because of its manifest injustice. It would seem that nothing further is required to characterize these late decisions than the statement that a majority of the Court of Appeals with a straight face classified a viaduct as a change of grade. The decisions were not made without serious dissent both by the courts below, which were overruled, and in the Court of Appeals itself. The brief dissenting opinion of Vann, J. of the Court of Appeals in the Sauer

case, given below in a note, sufficiently indicates what should have been held, according to legal consistency and common sense.[1] The real explanation of the decisions quite clearly was the supposed necessity of saving municipalities and certain classes of common carriers from the operation of legal principles previously declared.

The third illustration is furnished by the decision in *Matter of Totten,* (179 N. Y. 112). In that case the Court of Appeals, after the manner of a legislature or a codifying committee, formulated the following proposition of law:

"A deposit in a savings bank by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies, or until he completes the gift in his lifetime by some unequivocal act or declaration, such as a delivery of a pass book, or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance remaining on deposit at the death of the depositor."

This decision has been widely commented upon by legal journals and, so far as the writer is aware, has been unanimously disapproved. It is inconsistent with earlier authorities in the State of New York It introduces a serious anomaly into the law of trusts; indeed, a trust that is revocable at the will of the creator can hardly be said to be a trust at all. It impugns the policy of the statute of wills, by permitting a disposition of property to take effect only after death, without following the testamentary requirements. On the other hand, as a piece of constructive legislation the decision could hardly be too highly praised. It effectuates a custom which has grown up among the humbler classes of people who, in placing their money on deposit in trust for other persons, often intend to retain the right to use it, principal as well as interest, during life, but that whatever remains at the time of death shall go to the *cestuis que trust.* Under

[1] "I dissent upon the ground that the construction by a municipal corporation of a new and independent street in the form of a bridge 50 feet high and 63 feet wide, extending lengthwise through block after block over an existing street, which, graded and paved for years, is left undisturbed except by the huge columns supporting the elevated structure, is neither the improvement of the street as a street, nor a proper street use sanctioned by precedent, or coming within the reasonable contemplation of the parties when the fee of the surface street was acquired from the abutting owner, who has no access to the aerial street from his own premises; and when this is done without compensation it is a taking of private property for public use in direct violation of the Constitution."

the law as it stood the estates of depositors, who as trustees had drawn money from accounts, would be liable to refund the same to the *cestuis que trust.* The validation of the business custom in question seems so unobjectionable, indeed so desirable, that the writer has on various occasions advocated the enactment of a statute on just the lines laid down in the *Matter of Totten.* He did not believe that a court would venture upon such a radical innovation and it is difficult to justify it as an exercise of judicial power.

The last example to be cited is the case of *Griffin v. Interurban St. Ry. Co.,* (179 N. Y. 438). This decision affords perhaps as serious an instance of judicial legislation as could be discovered. It involves the nullification of the express language of a statute by "construction" and also expressly disregards the rule, *stare decisis.* The Act in question (section 104 of the Railroad Law) imposes a penalty "for every refusal" to comply with the requirement to issue transfers to passengers. In spite of this unmistakably clear language, and the fact that in construing similar language in other statutes the court had recognized the intention to provide for cumulative penalties, it was held that only one penalty could be recovered in a single action for refusal to give a transfer, and that the institution of the action is to be regarded as a waiver of penalties previously incurred. The opinion contains the following naive language:—

"Referring once more to the language of section 104 of the Railroad Law imposing the penalty, we find the single sentence in which it is contained opening with the words 'for every refusal to comply.'

"It is quite obvious that the legislative intention to permit the recovery of cumulative penalties for refusals of the defendant to comply with the provisions of the Railroad Law in regard to the transfer of passengers is as clearly manifested as in any of the cases cited.

"Notwithstanding this fact, a majority of my brethren are of opinion that while the rule for the recovery of cumulative penalties, as already adverted to is firmly established by the early decisions of this court, yet the changed conditions in our modern life in great cities render its modification imperative."

In a paper on "The Doctrine of Stare Decisis," read at the Section of Private Law of the Congress of Arts and Sciences, at St. Louis, in September, 1904, and published in the Michigan Law Review for December, 1904, (3 Mich. L. Rev. 89), the Hon. Edward B. Whitney, now of the New York bar, shows the causes and explains the processes that are tending to break down the *stare decisis* rule as a scientific method of legal development. There is in the first place

the enormous quantity of reports of decided cases. "The President of the American Bar Association in 1902, in his annual address to the Association, stated that the law reports of the then past year contained 262,000 pages and estimated that a man by reading 100 pages a day might go through them in eight years; by which time there would be new reports on hand sufficient to occupy him for fifty-six years more." This torrent of literature is, of course, the result of the vast, ever increasing bulk of litigation, so that with the accumulation of precedent there is constantly less and less possibility of examining and digesting it. Mr. Whitney remarks:—

"Nevertheless the judges and the bar and community at large have all continued nominally to treat the doctrine of *stare decisis* as still in full force; and, with all the modern difficulties in their way, so many judges stand bravely by it that the citizen must always be prepared to have it enforced against him in a given case with a rigidity and technicality that would have been quite improbable in the days when time permitted the precise state of facts and the precise line of reasoning underlying each previous authority to be more carefully analyzed, and tacit limitations to the breadth of its statements recognized. On the other hand, as the wilderness of authorities presented upon the briefs of counsel tends every year to become more hopeless, the courts in general tend more and more to decide each case according to their own ideas of fairness as between the parties to that case, and to pass the previous authorities by in silence, or dispose of them with the general remark—one of those remarks that the recording angel is supposed to overlook—that they are not in conflict. Different men, however, are of different minds. As the time spent upon oral argument and subsequent consideration of each case tends to lessen, the chances of difference in decision of two substantially similar cases coming before different sets of judges, or even before the same judge in different years, tends to increase. Apparent conflicts of authority thus arise. Subtle distinctions are taken in order to reconcile the conflict if possible. The law is thrown into doubt, and a lawyer thereafter cannot advise his client how to act in order to enjoy his rights and keep out of harassing litigation. The point in conflict reaches the court perhaps again and again, and distinctions grow subtler and subtler, until once in a while a happy solution is found by holding that some then comparatively recent case, although avowedly but distinguishing the earlier ones in some incomprehensible manner, really overruled them. Thus for a moment the doctrine of *stare decisis* fails to operate, and by its failure the law is clarified, reason triumphs, useless litigation ends, and the citizen learns how in one contingency to protect his rights."

In this condition of affairs judges indulge the delusion that they are observing *stare decisis* merely because they cite precedents. The truth is that, much in the same manner that expert witnesses are

procurable to give almost any opinions that are desired, judicial precedents may be found for any proposition that a counsel, or a court, wishes established, or to establish. We are not living under a system of scientific exposition and development of abstract principles, but, to a large degree, under one of judicial arbitration, in which the courts do what they think is just in the case at bar and cite the nearest favorable previous decisions as pretexts. More and more our vast accumulation of case law tends to dwindle in authority and assume the vitual status of opinions of the Jurisconsults under the system of the Civil Law. The special object of the present paper is to call attention to an aggravated form of the tendency, which naturally appears to its fullest extent in a State, like New York, where there is the largest number of courts and the greatest volume of litigation. The Court of Appeals has followed the policy of judicial arbitration of private controversies for many years. It has now developed the disposition to act as an independent and creative law-giver—to engage in what, from any point, must be termed judicial legislation.

A great deal of casuistry and verbal hair-splitting has been expended in attempts to define the precise function of the courts as law-makers. In a striking passage in his "Ancient Law," Sir Henry Maine contends that every time a court renders a new decision on a common law point, thereby modifying or extending the canon of the precedents, the process is one of "virtual legislation." Cases are readily imaginable in which a court, acting entirely on a common law basis, might be compelled to essay legal creation. In *Industrial & General Trust Co. v. Tod,* (180 N. Y. 215), Judge Vann, speaking for a majority of the Court of Appeals, said: "The common law will not halt or surrender because the situation is novel and the ordinary methods of proving values are not available, but will resort to some practical means that will be just to both parties."

Even if we imagine an entirely novel controversy, arising out of, say, a new invention or discovery, as to which there is no statutory regulation, a common law tribunal could not turn the parties out of court for lack of law. The court would proceed to adjudicate the rights of the litigants, resorting to analogies from such precedents as were deemed most nearly applicable. Here, indeed, would be a signal illustration of "virtual legislation."

While none of the attempted definitions of judicial law-making power may be satisfactory, its general nature is well understood. The courts constantly are required to make new law, but in so doing they should proceed by development and extension of settled principles. Radical departures from existing rules, abrupt changes

of law, arbitrary discrimination between substantially analogous states of facts, should be made only by a legislature; and constitutions forbid special legislation even by the representatives of the people unless some legitimate basis of class distinction is made to appear. When—as has been shown to have been done in New York—a court lays down broad rules of public policy; applies one principle to one class of litigants and the opposite principle to another class, though the circumstances are the same; formulates affirmative rules of right and remedy for special kinds of property or business; changes the statute law radically because in its judgment the legislature has been ill-advised, or tardy in heeding the voice of reform; then certainly it may be said that the province of the legislature has been usurped. The disposition of the respective departments of an American government to self-aggrandizement by encroachment upon the rightful domain of other departments is well recognized, and, on the whole, the legislative department has been the chief aggressor. But in the broad field of boundless opportunity afforded by the litigation of New York, its judiciary may be seen to have manifested the same tendency on quite an elaborate scale.

The present writer concurs with Mr. Whitney in the view that "codification is the one and only remedy that has ever been suggested which amounts to more than the merest palliative, and which has received substantial support from any influential section of the profession and the public." An authoritative canon, recognized by the bench and the bar as *the* law, is the only possible corrective of discretionary judicial arbitration and of the further developed spirit of judicial lawlessness, exemplified in important phases of judicial legislation. In 1886 the American Bar Association by a small majority adopted a resolution that the principles of substantive law, so far as settled, should be reduced to a statutory form. On the other hand, at about the same time, the New York City Bar Association voted down by a large majority even the proposal to codify the common law on special subjects, to be taken up one at a time. Undoubtedly a large proportion of the American bar still disapproves of the policy of codification and the attitude of the bar of the city of New York has been very influential. There the opposition to codification has been led by certain very able, very distinguished men, whose convictions were unquestionably sincere. The arguments of these gentlemen, cogently put as they were, would not, however, have so overwhelmingly prevailed, if the rank and file of the profession had not had constantly before their eyes the horrible example of the New York Code of Civil Procedure. To

the average New York lawyer the word "code" is apt to bring up overshadowingly the awful calamity of a Practice Act, with its hundreds of sections of statute and its thousands of decisions construing them. The disastrous result of elaborate and exact codification of a subject as to which it never should have been attempted, has been artfully used to discredit the entire policy. As a matter of fact, codification of substantive law, piecemeal, has been very frequently successful in New York and elsewhere. The original Revisers of the New York Statutes codified the subject of Trusts and Powers, rendering simple and clear a branch of the law theretofore very complex and recondite. Their work stands today, and scarcely anyone would deny that that particular piece of codification has been a great boon to the public. The Negotiable Instruments Law is a conspicuous example of successful codification, both as respects inter-state uniformity, and intra-state certainty of the law. Mr. Whitney believes that codification will be accomplished within the lifetime of men already admitted to the bar, but not "until the present system has become so overloaded that the American bar with substantial unanimity will decide that almost any kind of codification would be an improvement." The immediate duty of observant and thoughtful lawyers would seem to be to encourage the codification of separate topics as opportunity occurs, and to promote belief in the efficacy of the general policy.

Two additional suggestions may be offered. During what is to be regarded as a transitional stage in our jurisprudence, it will be of great practical service to the bar and the public if the judiciary will take to heart the recent language of Chief Judge Cullen, in his concurring opinion in *Rosseau v. Rouss,* (180 N. Y. 116):

"I concur in the opinion of Judge Vann that Eva Rosseau, the mother of the plaintiff, was the party under whom the plaintiff claimed, and therefore, under section 829 of the Code of Civil Procedure, not a competent witness to personal transactions between herself and the defendant's testator. I think, however, that no sound distinction can be drawn between this case and our decision in *Bouton v. Welch,* 170 N. Y. 554, 63 N. E. 539. It is true that in that case the defendant released her dower by joining in the execution of the deed by her husband. But the trial court found that the agreement out of which the defense arose was made by the plaintiff's testator, not with her, but with her husband. No matter what ground, however, the case might have been decided upon, as a matter of fact it was actually decided on the proposition that where a third person sues on a contract made for her benefit she does not derive her interest from the party who furnishes the consideration for said contract. We are now about to hold the exactly contrary doctrine, and I think

it but fair to the profession that under such circumstances we should expressly retract the Bouton Case, not seek to distinguish it, or leave is as a false light to deceive the unwary."

The profession has become so accustomed to "distinctions" that did not distinguish, to casuistical discussion for the sake of preserving the appearance of consistency, that Judge Cullen's words are most grateful.

Second: The movement which some time since gathered considerable strength, for the suppression of dissenting opinions, should be entirely abandoned. The writer has been pleased to notice a recent reaction in sentiment upon this subject. Two of the leading American legal periodicals[1] lately have published well considered articles advocating the continuation of the practice of reporting dissenting opinons. It may for the present be conceded that, with an ideal policy of legal development under the *stare decisis* doctrine, dissenting opinions would be objectionable as casting uncertainty upon the law. But, according to existing conditions, the legal "certainty" obtainable from a decision by a bare majority amounts to a species of Fool's Paradise. Knowledge of the views of the minority may be of material aid in casting the probabilities of the court's action in another case with slightly different facts.

Wilbur Larremore.

1. 14 *Yale Law Journal* (Feb., 1905), 191; 39 *American Law Review*, (Jan.-Feb., 1905), 23.