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WHEN President Coolidge appointed Judge Swan to the Second Circuit, it was in some sense an act of faith. It is true that, as dean of the Yale Law School for more than ten years, he had shown uncommon talents as a leader and a teacher; that under him the school went forward as it never had before in an equal time; and that he had shown rare breadth of mind in the appointment of men who radically differed from his own views. However, the school had taken up all his time and allowed him no access to courts; and his earlier practice in Chicago—whither he went directly after he had finished his education—had been almost exclusively in chambers. Thus, when he became a judge, his acquaintance with courts had been very largely at second hand; and indeed, so far as concerns the actual trial of causes, such it remains today. It would have been easy, therefore, to assume that such a man, put on an appellate court, would prove to be more a scholar remote from practical affairs and given to speculation, than a judge who would be interested primarily in the just despatch of causes, and who would make no further excursions into the realm of theory than was necessary to support his decisions. Moreover, in 1927 it had not become as common as it now is to look to the schools to fill the bench; the tradition had not so much yielded that the law should grow by accretion, each step preparing for the next, and that courts should be jealous of attempts to lay down doctrines of wide generality. A legal theorist was the last kind of judge whom President Coolidge would have consciously chosen; and, in spite of the possibilities I have mentioned, it at once became evident that he had made no mistake, and that his act of faith had been justified. There had come to the court a judge, not given to remoulding the world nearer to the heart's desire, but one who sought in the body of our inherited law and in the statutes, those guides and directions which were to be both his limitations and his opportunities. On the other hand it also soon appeared that, although he was a "legal" judge in the sense I have just mentioned, he regarded the law, not as a set of fiats to be read literally, and rigidly applied to all occasions embraced within the words and only to those; but as the means of fulfilling the purposes of a living society, which could be comprehended only as they were step by step realized.

In temper and bearing he was transparently made for the office. His manners on the bench were, and are, a model; and—be it said in all humility—often an admonition to others whose composure is not equally proof against irritation. He speaks but little, and is no "ill-tuned cymbal"; he never seeks to bring out in advance what will appear in season; nor does he lead the argument far afield into pastures whence the return is tortuous and uncertain. When he does speak, it is to put a narrow question, directed to inconsistencies already apparent, or to the untoward consequences of that which has been said. He is never in the teacher's chair, nor does he drive counsel to confusion by successive advances, designed to end in rout. His urbanity is almost always unruffled; never, in an experience with him of over twenty years, have I known him to hector a lawyer, or abuse the advantage of his position which denies any retort in kind. He has as little of the bully as of the showman, and he has reaped from the bar the harvest which his courteous and considerate nature has sown. Not that he suffers fools gladly, or is ready to let those wander along who think that they shall be heard for their much speaking. To direct, and if necessary to curtail, argument seems to him as much a part of the judge's duty, as to listen; and listen he always does; or, at least he gives the appearance of listening, for he never adopts the not uncommon device of discouraging prosy advocates by a real, or assumed, show of contemptuous inattention. In conference he is open-minded, until he has heard what his brothers have to say, which he considers with respect and at times with too much deference; but, after he has once come to a conclusion, he is tenacious and very seldom yields. He is little given to dissent, being wholly without vanity, and—as it seems to me—not conscious enough of the importance of weakening the force of a wrong decision as a precedent. He is readier than most judges to take seriously petitions for rehearing (especially if he has written the opinion himself); not indeed, because of vacillation or of any shrinking from responsibility, but from an over tender scruple, coupled with entire absence of any pride of opinion. Incidentally, I have however, never observed that he, more often than other judges, votes to change the original result. On the other hand he is always ready to accept suggestion from his brothers in amending or even in rewriting his opinions, before they are handed down, if he agrees with the substance of the proposal. He will not overrule a precedent, unless he can be satisfied beyond peradventure that it was untenable when made; and not even then, if it has gathered around it the support of a substantial body of decisions based upon it. As a corollary, he is not given to wide commitments when he writes, for he distrusts the guidance which the present evidence and the present argument give, if the issues be amplified beyond what is necessary to dispose of the controversy. He believes that the industry of other

suitors to whom they may become vital, if expanded, is likely further to explore and illuminate them. Consistently with this, he does not seek to support his conclusions by resort to broad or speculative general principles; but, like an English judge, looks to the precedents or to the text for his warrant.

He finds his way through thickets of verbiage in statutes or regulations with more ease than any other judge of my personal acquaintance. In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against all possible evasion; yet at times I cannot help recalling a saying of William James about certain passages of Hegel: that they were no doubt written with a passion of rationality; but that one cannot help wondering whether to the reader they have any significance save that the words are strung together with syntactical correctness. Much of the law is now as difficult to fathom, and more and more of it is likely to be so; for there is little doubt that we are entering a period of increasingly detailed regulation, and it will be the duty of judges to thread the path—for path there is —through these fantastic labyrinths. Any facility in doing so is of the utmost importance; I envy its possessors, among whom my brother stands in the front rank. Again and again I have found myself utterly bewildered by the involution of phrase with phrase and of term with term, until his kindly light showed the turn which I had missed, and led me out of what had appeared to be a *cul de sac.* The talent, which can keep in solution, at whatever cost, these many ingredients and carry them all over into a final precipitate, is rare enough; but the talent which can do so without hours of distress and confusion is vouchsafed to only a scanty few.

His style is also a judicial model; simple, clear, severe, trimmed of ornament. He never seeks a display of learning, or a locution or phrase designed to divert his reader's attention from the substance he would convey, and to centre it upon himself; and in this he is protected, as few indeed of us are protected, by as complete an absence of any desire to startle and impress others with his endowments, as I have known on the bench or off. His propositions are well fortified by citation, and, in doubtful cases, he will exhaust the books before he is content with the result. An amusing instance of this was his opinion in what proved later to be the revolutionary case of *Erie Railroad Company v. Tomp-*

kins. That involved a tort committed in Pennsylvania, whose common-law on the point was different from the great body of decisions elsewhere. At first we were going to follow the Pennsylvania decisions for we did not know the others, and the briefs—as is so often the case—were inadequate. After much delving he found that, if we were to apply the "general law"—as we were then bound to do in a "diversity case"—the Pennsylvania rule did not govern; and so we held and were reversed by the epoch-making volte face of the Supreme Court. Had it not been for his hypertrophied judicial conscience, who shall say that we might not still be worshipping the Golden Calf of *Swift v. Tyson*?

In addition he has—so far as it is given to any of us to have it—that merit which perhaps should rank highest in point of style: *i.e.* not to be misled into assuming the conclusion in the minor premiss—not to beg the question. I can think of no single fault that has done more to confuse the law and to disseminate litigation. One would suppose that so transparent a logical vice would be easily detected; but the offenders pass in troops before our eyes, bearing great names and distinguished titles. The truth is that we are all sinners; nobody's record is clean; and indeed it is only fair to say that much of the very texture of the law invites us to sin, for it so often holds out to us, as though they were objective standards, terms like "reasonable care," "due notice," "reasonable restraint," which are no more than signals that the dispute is to be decided with moderation and without disregard of any of the interests at stake. So inveterate is the disposition to eschew all deduction in such cases, that some ironist might argue that, given the average judicial capacity for self-scrutiny, it is safer not to expose the springs of decision, because the chances of a right result are greater than that its support will endure disclosure. Perhaps so; maybe, for the ingenuous and the artless to beg the question is nature's self-protective artifice. That need not be answered; but as a conscious expedient it would corrupt. Besides, few of us would care to avow that the law prospers only in proportion as those who administer it know not what they do; or that to use its language with full understanding of its purport, will not in the end promote its progress.

So much then for manners, acumen, and style. These count for much in a judge; far more than often we are prepared to admit; but, when all is said, the real test is how truly does he interpret law. Even as far back as Aristotle judicial interpretation was seen as an essential in the structure of a civilized society;[1] but it has vexed men from the beginning and will continue to vex them till the end, how far the occasion

1. "It is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars." (Politics: Book II fol. 1269(a)). "Some things can, and some things cannot be comprehended under the law, and this is the origin of the vexed question whether the best law or the best man should rule. For matters of detail about which men deliberate cannot be in-

which provoked an "enactment,"—to adopt his term—and the purpose which infused it—be it constitution, statute, precedent or regulation—shall prevail to set its limits, or to enlarge its comprehension. This is not the place to attempt an answer—perhaps there is none anyway—; it is enough that, whatever it is, in any event it must always be ad hoc. It is true that in archaic societies law, which is usually itself a sacred text, is read, like other primitive sacred texts, to cover every situation which falls within the exact content of the words, and to exclude every situation which does not. But as soon as a society becomes conscious of self-direction, it begins to apply in some measure a "literary"canon—to borrow from Matthew Arnold—: that is, it begins to read the text, not *sub specie aeternitatis*; but with the recollection that in origin it served to compose some existing conflict of interest, and that this should serve to interpret it. The extent to which such societies permit their judges to do this is the extent of their confidence in them: more properly, in modern times at any rate, the measure of their own confidence that they can trust themselves to select those on whose skill and sagacity they are willing to rely. There are indeed political philosophers who insist that a judge must inevitably choose between the dictionary and *tabula rasa*; but there is a plain distinction in theory between "interpretation" and "legislation," as well as a clear boundary in practise. Let the judge go as far afield as he will, in seeking the meaning of an "enactment"; if he is honest, he will never substitute his personal appraisal of the interests at stake, or his personal preference between them. It is true that he is not engaged in a historical reconstruction, as he is when determining an issue of fact; his task is more difficult, so difficult that it is impossible ever to know how far he has been successful. For it is no less than to decide how those who have passed the "enactment" would have dealt with the "particulars" before him, about which they have said nothing whatever. Impalpable and even insoluble as that inquiry may be, the method which he must pursue is *toto coelo* different from that open to him, were he free to enforce his own choices.

What then are the qualities, mental and moral, which best serve a judge to discharge this perilous but inescapable duty? First, he must be aware of the difficulty and the hazard. He must hesitate long before imputing more to the "enactment" than he finds in the words, remembering that the "policy" of any law may inhere as much in its limits as in its extent. He must hesitate long before cutting down their literal effect, remembering that the authors presumably said no more than they wanted. He must have the historical capacity to reconstruct the whole setting which evoked the law; the contentions which it resolved;

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cluded in legislation. Nor does anyone deny that the decision in such matters must be left to man, but it is argued that there should be many judges, and not one only." (Politics, Book III fol. 1287(b)).

the objects which it sought; the events which led up to it. But all this is only the beginning, for he must possess the far more exceptional power of divination which can peer into the purpose beyond its expression, and bring to fruition that which lay only in flower. Of the moral qualities necessary to this, before and beyond all, he must purge his mind and will of those personal presuppositions and prejudices which almost inevitably invade all human judgments; he must approach his problems with as little preconception of what should be the outcome as it is given to men to have; in short, the prime condition of his success will be his capacity for detachment. There are those who insist that detachment is an illusion; that our conclusions, when their bases are sifted, always reveal a passional foundation. Even so; though they be throughout the creatures of past emotional experience, it does not follow that that experience can never predispose us to impartiality. A bias against bias may be as likely a result of some buried crisis, as any other bias. Be that as it may, we know that men do differ widely in this capacity; and the incredulity which seeks to discredit that knowledge is a part of the crusade against reason from which we have already so bitterly suffered. We may deny—and, if we are competent observers, we will deny—that no one can be aware of the danger and in large measure provide against it.

My brother is not a man of neutral disposition, but of strong convictions resolutely held; he might be thought likely to allow these to enter into his judicial decisions. I will not say that any of us is without all tincture of such interjections; but he stands among those who are most completely free. In support of this I could adduce the overwhelming testimony of bench and bar, familiar with him and his work. They find in him a rectitude, which goes far beyond the elimination of all personal interest or concern; a rectitude which ignores his own beliefs and his own inclinations, and seeks for its sanction an authority, more commanding than the authority of himself or any other man—the authority of the collective will of a people, manifesting itself in their accredited declarations, as they strive, however blindly and inarticulately, towards their conception of the Good Life. To that authority alone he owns allegiance; and without stint and without alloy he has given himself to ascertain and to realize that conception. This he has done with patience, courage, insight, self-effacement, understanding, imagination and learning; and his success has been an achievement equalled by only a handful. It is well that we should seize upon a moment, in itself irrelevant, on which to celebrate an anniversary of such a public servant. We are aware that today the foundations of all that we hold dear are in the balance; and we live in just apprehension. Without such servants no society can prosper; without such servants no society can in the end even endure. Let us pause then to acclaim one, who—himself all unaware of his deserts—has so richly earned our gratitude, and whose presence helps us to take heart against our forebodings.