THE SPOKEN WORD

THE ARGUMENT OF AN APPEAL BEFORE THE CALIFORNIA SUPREME COURT

BY DONALD R. WRIGHT*

I cannot adequately express to you how honored I feel to have been selected to deliver the first lecture of the newly created Justice Lester W. Roth lectureship on advocacy in our trial and appellate courts. As many of you must know, a very generous individual who desires to remain anonymous has endowed these lectures through a donation to the Law Center of the University of Southern California, and the lectures will continue annually for the next quarter century. By the year 2004, I am inclined to the view that almost everything that can be said about the skills, duties and responsibilities of the trial and appellate advocates will have been spoken. I am indeed fortunate; I have a clean slate upon which to write; I can map out as broad or narrow a trail as I choose to travel as no one has preceded me.

But first, I cannot allow this occasion to pass into history without paying my own tribute to the great justice and gentleman in whose honor this series of lectures has been created. I was indeed fortunate, when, in 1968,

* Chief Justice of California, 1970–1977. Remarks delivered as the First Annual Lester W. Roth Lectureship on Trial and Appellate Advocacy at the University of Southern California, April 18, 1979. Unpublished typescript in the collection of the Law Library of the University of Southern California School of Law.

I was appointed to the court of appeal, to have been placed on the division presided over by Justice Roth. Never was a neophyte given a warmer welcome that was I; no one could have been treated with more thoughtfulness and kindness than was I. Justice Roth did not even chide me when shortly after my arrival on the court, I foolishly fell out of an orange tree, breaking my right arm and incapacitating myself for some weeks from performing the very duties I had been appointed to undertake.

Almost immediately, we became good friends and my wife, Margo, and I cherish the warm relationship that we soon enjoyed, not only with Lester but with Gertrude, his most gracious and charming wife of over a half century.

Justice Roth has presided over Division Two of the Second Appellate District for over fourteen years with great distinction, and his many published opinions are models of legal scholarship, clarity and, generally, of brevity. I shall always be grateful that I served my apprenticeship as an appellate justice under his guidance. He was the finest boss under whom I served in the appellate structure. I say that *not* because he was the *only* boss I ever worked under, but because it would have been impossible to find a warmer, kinder and more helpful human being anywhere in the judiciary of this state. Lester, I personally thank you; I salute you, and my one wish is that the few remarks I make today will be at least partially worthy of you and of the anonymous donor who made these lectures possible.

I have discovered that the subject "Trial and Appellate Advocacy" is an *all* encompassing theme, and many lawyers, judges and professors can talk for hours and hours and even days and days upon various facets of the topic. Rather than taking a hit or miss approach or attempting to cover too broad a field, I intend to confine my remarks primarily to my most recent experiences as a member of the judiciary. It is the area with which I am most familiar, as for a period of seven years ending in 1977 I served as chief justice of California.

But having served as a judge or justice for almost two dozen years, and at every level of the judicial structure, I have, of course, been exposed to almost every type of legal legerdemain which might possibly be termed "advocacy." Therefore, this afternoon I shall confine my remarks almost exclusively to argument of an appeal before the California Supreme Court, a tribunal before whom many of you have appeared or will appear in the

days and years which lie ahead. Of necessity, of course, I will be compelled to include a few remarks on oral advocacy which would be applicable in any court, trial or appellate.

"Although appellate argument is a common occurrence and represents the culminating competitive effort in the legal contest, it is probably a fact that this is the least qualitative accomplishment of the bar as a whole."[1] That is one reason I wholeheartedly endorse the clinical programs which have been included in the curricula of this law school and of others throughout this country. And this also is the reason I strongly support the moot court programs which have become of increasing importance since I entered law school a half century ago this fall.

I cannot describe in a few words what makes successful oral advocates. I can tell you how one of our legal giants describes them. Bernard E. Witkin tells us that the successful and "[e]xperienced appellate advocates get their kicks out of winning an appeal on the merits of their clients' cases or their own skill; *and* the reversal or affirmance of a judgment, *coupled with a sizable fee,* brings all of the fulfillment which their psyches desire."[2] I think even the whimsical Bernie would concede that his description is slightly simplified.

Before launching into my "case in chief," I should define some of the rules or procedures which proscribe the activities of those who would present their clients' cases to the California Supreme Court. You will forgive me if in the talk I mix my tenses. Sometimes the past tense will be used as frequently as the present. It is difficult to break a habit of some years and I still think of the tribunal most fondly as "my court" or at least, "our court."

You are probably aware that throughout this nation appellate tribunals are divided between "hot" and "cold" courts. The California Supreme Court and, I believe, most of the divisions of the courts of appeal, are "hot" courts. This means quite simply that at the time argument begins on any matter all of the justices have read a rather lengthy memorandum prepared by a colleague, generally with the assistance of his or her staff. Only that particular justice who is responsible for the preparation of the

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[1] Raymond Wilkins, *Argument of an Appeal,* 33 Cornell L.Q. 44 (1947) (lecture delivered at Cornell Law School on May 2, 1947).

[2] Bernard E. Witkin, talk to students of Justice Friedman's class at UC Davis School of Law, November 20, 1978 on "The Joys of Appeal."

memorandum has *at that time* reviewed the briefs and supporting documents. We will all so do at a later time.

And if that justice is diligent, and almost all whom I have known possess that trait, the calendar memo, as we call it, will state the facts of the dispute in a forthright manner and will indicate how the matter reached our Court. Also contained in the memo will be found a statement of issues that are to be resolved, a résumé indicating what the justice believes the current law *is* or *should be* and a recommendation, sometimes in the alternative, as to what disposition should be made of the appeal. Briefly stated, a justice who has done his homework, who has read the memo and who has made innumerable notes on that memo addressed to himself for use at the time of argument, comes onto the bench with a pretty fair knowledge, occasionally erroneous, as to what the case is all about.

A "cold" court, on the other hand, consists of a tribunal in which the justices or judges generally have little and sometimes no knowledge of what lies ahead and will seek enlightenment from the counsel who appear for argument.

Our California Supreme Court adheres to a rather rigid time allocation, allowing each side one-half an hour to present argument of counsel. In certain instances when we had a matter before us of monumental importance, such as *People v. Anderson*,[3] the first opinion in the United States outlawing the death penalty as being both cruel and unusual, or *Serrano v. Priest*,[4] the first opinion holding that a right to an education is fundamental, or the reapportionment cases, *The Legislature of the State of California v. Reinecke*,[5] we were more generous with time, allowing each side a full hour or more for argument. Appellants may, of course, reserve time for rebuttal, but such time must be deducted from the overall allotment and should be (but seldom is) limited to true rebuttal.

In earlier days when courts, lawyers and litigants apparently had considerable time at their disposal, a single argument might frequently extend for days and days. "It has been stated for instance, that the arguments of Webster, Luther Martin and their colleagues in *McCulloch v. Maryland* consumed six days, while in the *Girard* will case Webster, Horace Benney and others for the

[3] 6 Cal.3d 628 (1972).

[4] 3 Cal.3d 580 (1971).

[5] 10 Cal.3d. 196 (1973).

whole of ten days assailed the listening ears of the court."[6] I need not mention that those days are gone forever. Now a clock sits on the podium and the advocate must keep one eye on it, the other on his or her notes.

Further, the Supreme Court of California, except for the death penalty cases, is not required to grant a hearing on any particular petition or on any specific number of petitions presented to it. We are not a court to correct error, and with over eleven hundred judges and justices in California, you may be certain that each may commit an error at least once each week, if not each day. You can easily comprehend that we cannot spend all of our time correcting deviations in evidentiary matters, legal principles, facts and/or procedures.

Our Court was, and I presume still is, a questioning Court, and the advocate can expect to be interrupted frequently, if not constantly. With most of the justices, I defy any human being to guess with any degree of accuracy how a particular justice will vote by the questions he has asked. Other justices are less subtle. Frequently, upon leaving the bench I have remarked, somewhat facetiously, to a colleague, "I thought you made the best argument of the day." Superb oral advocates such as the late John W. Davis have stated that an advocate should rejoice when the court asks questions. This conclusion, in my opinion, warrants some scrutiny. If the inquiring justice is truly seeking further illumination on a point raised by counsel, or if a member of the court is truly challenging the correctness of counsel's reasoning, the accuracy of the authorities cited or their application to the case before the court, the advocate should welcome the questioning and, by supplying appropriate answers, be able thereby to score a few points.

And may I assure you from long personal experience that few incidents in the courtroom are more frustrating than, in answer to a question, to receive a reply from counsel such as, "If the court will bear with me for just another moment or two, I will be coming to that," and then to have the argument end with the question still unanswered. In the situation I have mentioned, counsel should at once indicate what his answer will be when he or she reaches the appropriate part of the argument, and counsel should never, never sit down until the question has been laid to rest.

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[6] Hon. John W. Davis, "The Argument of an Appeal," from an address delivered before the Association of the Bar of the City of New York, October 22, 1940, reprinted as *Case on Appeal,* Trial and Appellate Practice Handbook 93 (1952).

At times it has appeared to me that a justice and an advocate will engage in extended colloquy for no other apparent purpose than for the justice to attempt to convince the advocate of the errors of the latter's reasoning. This may lead to an excellent display of oral fencing, but I have not found it generally to be productive. This occurs at all levels of advocacy from the lowest court in the land to the United States Supreme Court. John W. Davis recalled an instance when a former justice of the Supreme Court engaged counsel in a long series of questions just as the latter began his argument. Chief Justice White was heard to moan audibly, "I want to hear the argument." "So do I, damn him," growled his neighbor, Mr. Justice Holmes.[7]

And one final note on the subject. If the question calls for a negative answer, do not attempt to evade or mislead the court. Answer the question truthfully and quickly. Those you are trying to convince will be gratified that at least one issue has been disposed of *and* at a saving of time. One further word on the California Supreme Court is that we encourage argument and we do not take kindly to a statement by counsel such as "argument waived" or "submitted on the briefs and petition."

With the general guidelines or, if you will, idiosyncrasies, I have described as mandated by our Supreme Court, please permit me to address a few thoughts on the general subject of argument of an appeal. I have reviewed a great number of books selected for me by your most able librarian, Professor Albert O. Brecht, in preparation for these remarks. Reference after reference was made by various authors to an address delivered before The Association of the Bar of the City of New York almost forty years ago by the Hon. John W. Davis, the extremely talented advocate I mentioned earlier in this talk. For example, Lloyd Paul Stryker in his splendid book, *Art of Advocacy,* published in 1954, sets forth almost verbatim much of the speech of Mr. Davis. As so many references were made to that address, I tracked it down and I, too, shall refer to it from time to time. Generally speaking, Davis' remarks tally almost completely with my own experience of nearly two dozen years as a jurist. One caveat I start with, as does he: never forget that the justices are those at whom you aim your argument and that oral argument should have but one goal — a dedication to be of assistance to the court. All too frequently, I must confess, such is not the case.

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[7] *Id.* at 102.

Davis proposed a decalogue to guide argument. Some points are almost identical to those on the views I have already expressed in speaking of the California Supreme Court. Others of his ten are inapplicable to the California courts; others are so apparent that I shall do no more than mention them.

At the top of his list he proposes that the *advocate in his imagination* should change places with the court, one I confess I never entertained. As Davis said, "courts of appeal are not filled with Demigods. Some members are learned, some less so . . . . In short, they are men and lawyers much like the rest of us . . . . If the places were reversed, and you sat where they do, think what it is you would want to know about the case. How and in what order would you want the story told?"[8] In other words, prepare yourself mentally to tell the justices what the case is all about.

After going through the mental device I have described, state the facts. Of course, this rule is not so important in arguing before the California Supreme Court because, for reasons already revealed to you, the justices are generally well acquainted with such, but the advocate must point out the salient facts, the ones upon which he or she relies. And the facts must be stated with complete candor, or if you wish to characterize it by another term, they must be stated with complete honesty. In my experience, I have observed all too frequently counsel who failed to follow this principle and who were quickly caught up by a member of the Court. Much valuable time and sometimes the cause were lost as a result. Insidious is the lingering doubt that remains in the minds of the justices as they retire to their conference room. Frequently I have heard one of us remark to our colleagues, "But he wasn't honest with us!"

Of course, no one can expect the degree of honesty demonstrated by Abraham Lincoln upon the occasion of his first appearance before the Illinois Supreme Court. His entire argument consisted of the following remarks:

> This is the first case I have ever had in this court, and I have therefore examined it with great care. As the court will perceive by looking at the abstract of the record, the only question in the case is one of authority. I have not been able to find any authority to sustain my position, but I have found several cases directly in point

[8] *Id.* At 97.

> on the other side. I will now give these authorities to the court, and then submit the case.[9]

Nothing of a similar nature has ever occurred during my judicial experience, I assure you.

Davis, in his address, stated that after the factual declarations, the advocate should state the law upon which he or she relies. I have no quarrel with that procedure and would most certainly endorse it. If a statement of fact has been properly done, he says,

> the mind of the court will already have sensed the legal questions at issue, indeed they may have been hinted at as you proceed. These may be so elementary and well established that a mere allusion to them is sufficient. On the other hand, they may lie in the field of divided opinion where it is necessary to expound them at greater length and to dwell on the underlying reasons that support one or the other view.[10]

If the interpretation of a statute enacted by our Legislature in Sacramento is at issue and the particular law is honeycombed with ambiguities, as is often the case, I frequently fall back upon the spoof of a literary figure, A. P. Herbert, who wrote in one of his classic essays on "The Uncommon Law": "If Parliament does not mean what it says; it must say so." I was so intrigued with this quotation that I once suggested to my good friend, Mr. Justice Mathew O. Tobriner, that he use it in one of his opinions. This he promptly did, thereby foreclosing me from placing it in one of my own writings.

Davis further suggests that the advocate should always go for the jugular vein. "More often than not there is in every case a cardinal point around which lesser points revolve like planets around the sun."[11] Or if you prefer, like the ten moons of Jupiter, revolve around that giant planet. I too urge that the advocate go for the all-important point or points. Counsel who persist on proceeding on the theory that every point, however trivial, should be presented at oral argument may in the end simply put his or her listeners in a condition commonly labeled soporific. Such minor points

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[9] Sir Edward Abbott Party, Seven Lamps of Advocacy 19 (1924).

[10] Davis, *supra* note 3, at 100.

[11] *Id.*

can well be included in the brief to support and defend, if need be, the principal point covered by counsel at argument.

Several other of the rules formulated by Davis require little or no expansion from me. He enjoins the advocate to read to the court only sparingly and from necessity. You may be amazed at how quickly the mind wanders when counsel begins to read at length from authorities, be they well known or obscure. This is true especially, as is often the case, when he or she mumble the words, omitting anything resembling emphasis, and turns the head away from the microphone.

A further commandment in which I wholeheartedly concur: counsel must know the record from cover to cover as "it is the *sine qua non* of all effective argument."[12] I cannot tell you how many hundreds of times a member of our Court became aware that what counsel was stating *was not* supported by the record. Nothing is more devastating to an otherwise effective argument than to have the advocate fail to respond to a question from the Court: "Where do you find that in the record?" Counsel must either concede defeat or attempt to evade the question. A successful advocate has to be aware of all that has gone before and plan his strategy accordingly. "Statements off the record are just as bad in the oral argument as in the brief. The inevitable *dénouement* may or may not be close at hand, but its effect, whenever it occurs, will be equally baleful."[13] St. Thomas More, in his *Utopia,* wrote, "They have no lawyers among them, for they consider them as the sort of people whose profession is to disguise matter."[14] I feel certain St. Thomas must have had in mind in penning those lines the advocate who speaks or writes off the record. Mr. Justice Cardozo put it this way: "Nothing will forfeit the confidence of the court more effectively than the misstatement of the record or a statement of fact off the record."

The final admonition which I will shortly obey myself: *sit down*. Several of the most successful oral advocates in this state will frequently use only a fraction of the time allotted to them. Having only a few major points to impress upon the Court, they will aggressively focus argument on such issues, and, having conveyed in clear and concise language the facts, the

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12 *Id*. at 104.

13 Wilkins, *supra* note 1, at 45.

14 *Id*. At 46.

issues, and the applicable law, will yield the balance of the time. The effect is often electric and *often* most successful.

As stated by Davis,

> The process of appeal from one tribunal to another is very old in the history of human justice. No matter in what form it is carried on, the essentials of an appeal are always the same, and there is nothing new to be said about it. The need for an appellate process arises from the innate realization of mankind that the human intellect and human justice are frail at best. It is necessary therefore to measure one man's mind against another in order to purge the final result, so far as may be, of all passion, prejudice, and infirmity. It is the effort to realize the maximum of justice in human relations; and to keep firm and stable the foundations on which ordered society rests. There is no field of nobler usefulness for the lawyer.[15]

I said early in these remarks that appellate oral argument was probably the least qualitative accomplishment of the bar as a whole, but such need not be the case. As Mr. Justice Cardozo wrote in his essay, "The Game of the Law": "Skill is not won by chance. Growth is not the sport of circumstance. Skill comes by training; and training, persistent and unceasing, is transmuted into habit. The reaction is adjusted ever to the action . . . . The alchemy never fails."[16] May I extend the hope that each of you will become a brilliant oral advocate.

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[15] Davis, *supra* note 3, at 105.

[16] Benjamin Cardozo, The Law and Literature and Other Essays 172 (1913).

BERNARD E. WITKIN ON HIS 80TH BIRTHDAY

BY RAYMOND L. SULLIVAN*

It was only yesterday — just ten evanescent years ago — that we honored Bernie Witkin on his seventieth birthday. The tributes were thicker than advance sheets; the applause music sweeter than a plaintiff's verdict; the laurels lavished on him a veritable halo transforming, if only for a moment, his puckish visage into a serene presence of uncommon quiescence and incredible demureness. Today he is with us again — as indefatigable and irrepressible as ever. Author and lecturer, critic and wit, doctrinaire and a man for all reasons, this chanticleer of the law — singing it clear, so to speak — now heralds a new decade of unabated vigor. What is this magic of his? What words can sum it all up? Shall we borrow those of the suave lyricist of his youth: "You're the top! You're the Coliseum! You're the top! You're the Louvre Museum,"[1] or shall we take them from his idol of an earlier era and his favorite librettist:

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* Associate Justice, California Supreme Court, 1966–1977. Remarks delivered at the luncheon honoring Bernard E. Witkin on his 80th Birthday, May 22, 1984. [Editor's note: These remarks appeared in the tribute book prepared for Justice Sullivan's 80th birthday celebration by a group of his former clerks, headed by Ray E. McDevitt, now a past president of the California Supreme Court Historical Society, who graciously made them available for publication. — Selma Moidel Smith]

[1] Cole Porter, "You're the Top," *Anything Goes* (1934).

> The law is the true embodiment
> Of everything that's excellent.
> It has no kind of fault or flaw,
> And I, my lords, embody the law.[2]

It has long been our good fortune that our honoree in a large sense is the embodiment of the law. In a long love affair with it, he has composed his still unfinished symphony — *Summary of California Law*, with variations on sundry procedural themes, scored with sound harmonics and performed by him on countless lecture platforms with matchless wit, quip, paradox and interpretation. No cloying déjà vu for this artist; no abject submission to archaic rules which might become in Holmes' words: "The government of the living by the dead." His artistry exudes the tonic quality of fresh air with rolling arpeggios of raillery, staccato jabs at false idols, and with it all a melody line of ingenious subtlety, fine-tuning the mirthful mouthful of his message.

Daunted by no target too exalted, he has been known on occasion to direct his talents to this state's highest tribunal. In 1968, in the full flush of youth one might say, he was rhapsodic, suggesting that "perhaps round table would better describe this loose coalition of crusading knights errant and mildly disapproving squires. Here in this contemporaneous Camelot, under the wisdom and restraint of a latter-day King Arthur, a measure of unity is miraculously achieved." In 1974, in the serenity of senior citizenship, he was more jurisprudential: "This is a court," he said, "which is not synthesized or polarized; its collegiality is balanced by a rampant individuality and its blocs fall apart when they come up against irrefutable logic, irresistible social conscience, or individual prior conviction." How does he get away with this? What is his secret? How do we sum him up? I borrow some remarks I made ten years ago:

> Few members of the California Bar have had such a pervasive influence on the profession as Bernie Witkin. Few lawyers can look back on such a record of total commitment to the scrutiny, dissection and careful crafting of legal principle. No legal writer and lecturer in our time has so captivated the admiration and respect

[2] W. S. Gilbert, "The law is the true embodiment," *Iolanthe; or, The Peer and the Peri* (1882).

of the profession with intelligence, sophistication and style. None has pursued with such constant ardor, a calling which, in Holmes' fine phrase, "gives such scope to realize the spontaneous energy of one's soul." Throughout all these years he never seems to change.

And so it is today, and so, we predict, it will be for many years to come. To you, Bernie, and to your lovely Alba, we offer our congratulations, our affection and our every wish for your continued happiness.

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JUSTICE RAYMOND SULLIVAN ON HIS 80TH BIRTHDAY

BY BERNARD E. WITKIN*

YOU'RE THE TOP!

This is for me a day to remember and a time to reciprocate. On two separate occasions (my 70th and 80th birthdays) Ray Sullivan graciously undertook to describe my tenacious hold on life in the law, and to extol my modest talents. It is therefore both my privilege and my right to eulogize Ray Sullivan. And there is an additional reason why it is most fitting that I be chosen to speak for this select group gathered here to honor our esteemed and beloved friend:

I am the most senior ex–law clerk present; indeed, I am probably the oldest ex–law clerk alive in this state.

No one here needs to be reminded that Justice Sullivan, in his many years on the California Court of Appeal and Supreme Court, produced a steady flow of the best legal thinking that can be found in the reports

* Remarks delivered at Associate Justice Raymond L. Sullivan's 80th birthday celebration, January 31, 1987. [Editor's note: These remarks appeared in the tribute book prepared for Justice Sullivan's 80th birthday celebration by a group of his former clerks, headed by Ray E. McDevitt, now a past president of the California Supreme Court Historical Society, who graciously made them available for publication. — Selma Moidel Smith]

of American high courts. In his superbly crafted opinions, principles and rules are expounded with clarity, irreconcilable decisions are delicately reconciled, and egregious judicial errors are urbanely transformed into mere differences of viewpoint on distinguishable facts.

But there is more in Sullivan opinions than high quality judicial reasoning; and tonight I propose to offer a few extracts — perhaps familiar to some of you — which demonstrate his versatility, humanity, and emotional depth.

Needless to say, I draw my material from that vast compilation of the distilled wisdom of our creative judiciary — *Witkin's Summary of California Law,* 8th Edition in eight volumes, soon to be the 9th Edition in 13 volumes.

First, *THE ERUDITE SULLIVAN.*

For the first time in jurisprudential history, he set forth a definitive classification of the forms of that abominable product of inept opinion writers — DICTUM.

The case is *Hollister Convalescent Hospital v. Rico,*[1] in which a prior unanimous opinion of the Supreme Court — only ten years old — was scrapped in order to restore the hitherto sacrosanct doctrine that the time to appeal, as prescribed by statute or rule, is jurisdictional. How was this done? By describing what the two dissenting justices called "the spirit which animated that opinion" as "UNNECESSARY AND OVERBROAD DICTA," "ILL-CONSIDERED DICTA," "ERRONEOUS DICTA," "PANORAMIC DICTA," and "PERSISTENT DICTA."

Second, *THE IRATE SULLIVAN.*

Is he all sweetness and light and gentle tolerance, or can this calm philosopher take umbrage and express outrage? You bet; he is, after all, an Irishman; and what could possibly arouse this cultivated Irishman's ire more than a wholly mistaken conclusion drawn by his associates on the high court?

It happened in *Fracasse v. Brent,*[2] where the majority held that an attorney discharged by his client without cause could not recover the fee specified in his contract of employment. Ray — an old trial lawyer — lowered

[1] 15 Cal. 3d 660 (1975).

[2] 6 Cal. 3d 784 (1972).

the boom, demonstrating in his dissent that the opinion had no foundation in "logic, authority or fundamental fairness." This was his mildest castigation: "By their decision today, the majority repudiate a rule supported by an impressive array of authority and replace it with one which will reduce an attorney–client contract to a hollow and meaningless act."[3]

Third, *SULLIVAN THE HUMORIST.*

This unsuspected talent of our great stylist appears in *Estate of Russell,*[4] where the testatrix left nearly all her estate to "Chester H. Quinn and Roxy Russell." Quinn, her close friend, survived her. Roxy, her dog, predeceased her. The deadpan opinion construes the will as an attempted disposition to Quinn and Roxy as tenants in common, with Roxy's gift void for lack of capacity to take. But then, to avoid misconceptions as to the scope of the decision, footnote 22 adds:

> As a consequence, the fact that Roxy Russell predeceased the testatrix is of no legal import. As appears, we have disposed of the issue raised by plaintiff's frontal attack on the eligibility of the dog to take a testamentary gift and therefore need not concern ourselves with the novel question as to whether the death of the dog during the lifetime of the testatrix resulted in a lapsed gift.

Fourth, *THE EMPATHIC SULLIVAN.*

In *Castro v. State of California,*[5] in which the English literacy voting requirement of our Constitution was held to be an unconstitutional denial of equal protection to persons literate in Spanish, the justice wound up the opinion with these words:

> We cannot refrain from observing that if a contrary conclusion were compelled it would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land . . . .[6]

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[3] *Id*. at 798.
[4] 69 Cal. 2d 200 (1968).
[5] 2 Cal. 3d 223 (1970).
[6] *Id*. at 243.

Fifth, *THE ECSTATIC SULLIVAN.*

In *Serrano v. Priest*,[7] that our method of financing the public school system by local property taxes was an unconstitutional denial of equal protection, the opinion concludes:

> By our holding today we further the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and the inspiration of this country. "I believe," he wrote, "in the existence of a great, immortal, immutable principle of natural law, or natural ethics, — a principle antecedent to all human institutions, and incapable of being abrogated by an ordinance of man . . . which proves the *absolute right* to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all . . . ."[8]

The departure of this gifted scholar and jurist from the Supreme Court left a void which has not been filled. Today, that Court of seven members has only one veteran on it, and the new chief justice, facing the formidable task of organizing a Court and staff to cope with an unbelievable caseload, needs all the help and support that he can possibly get. And a few nights ago, in the interlude between sleep and wakefulness, I had a vision of a super-senior *pro tem* justice — a master of the judicial craft — respected as Holmes and learned as Hand — taking his place beside the Chief and pointing the way out of the wilderness.

But what are my "Words worth" when those of the poet himself, with only the slightest emendation, are both adequate and timely?

> Raymond! Thou shouldst be sitting at this hour:
> Lucas hath need of thee:
> The Court is a fen of stagnant waters:
> with calendars clogged and boxes stalled:
> While grim-faced law clerks, like lordless Samurai,

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[7] 5 Cal. 3d 584 (1971).

[8] *Id*. at 619.

Scan the Duke's list with wild surmise.
Your calm voice could give us hope,
Revive collegiality, restore productivity,
Keep the peace, and increase the pace.
Oh raise us up, return to us again;
And with your blithe spirit and magic pen
Bring order out of chaos.

(For those of you who may have forgotten it, the original poem follows.)

MILTON! thou shouldst be living at this hour:
England hath need of thee: she is a fen
Of stagnant waters: altar, sword, and pen,
Fireside, the heroic wealth of hall and bower,
Have forfeited their ancient English dower
Of inward happiness. We are selfish men;
O raise us up, return to us again,
And give us manners, virtue, freedom, power!
Thy soul was like a Star, and dwelt apart;
Thou hadst a voice whose sound was like the sea:
Pure as the naked heavens, majestic, free,
So didst thou travel on life's common way,
In cheerful godliness; and yet thy heart
The lowliest duties on herself did lay.[9]

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[9] William Wordsworth, "London, 1802" (1807).

APPOINTMENTS TO THE CALIFORNIA SUPREME COURT

EDMUND G. BROWN, SR.*

MR. LOWENSTEIN[1]: When I run into students, as I occasionally do, who hold the view that successful politicians are all either crooks or sell-outs or wishy-washy or whatever, I like to hold up as one of the primary exhibits against that point of view, Pat Brown. Unfortunately, some of my students now are young enough so they don't know who I'm talking about; but for those who know anything about Pat Brown, it's a very persuasive exhibit indeed. So it is my pleasure to introduce to you the former district attorney of San Francisco, the former attorney general of California, and the former governor of California, Pat Brown.

GOV. BROWN: Thank you very, very much. I am very, very surprised to hear that there are students at the School of Law, the University of

* Governor of California, 1959–1967. Remarks delivered at the The Chief Justice Donald R. Wright Memorial Symposium on the California Judiciary at the University of Southern California, November 21, 1985, sponsored by the Judicial Committee of the California State Senate, et al. Published in Proceedings and Papers, Timothy A Hodson, ed. (Sacramento: Senate Office of Research), 25–33. [Editor's Note: The introductory portion of these remards is included here in part to highlight the prescience of Gov. Pat Brown's comment about the eventual return to public office of his son, Gov. Jerry Brown, whose first two terms had ended in 1983. — Selma Moidel Smith]

1 Daniel H. Lowenstein, Professor of Law, UCLA School of Law.

California at Los Angeles that haven't heard of Governor Edmund G. Brown, Sr.

MR. LOWENSTEIN: They're getting young enough so pretty soon they won't have heard of Jr. either [laughter].

GOV. BROWN: Oh, he'll be back — don't worry.

My remarks are going to be non-chronological.

I had the great privilege of appointing, I think, nine members to the Supreme Court of the State of California. And I'm going to quickly go over their names just so you'll get a little idea of the philosophy of a governor in making appointments to the highest court in this state.

But you have to go back a little bit with me, because I was admitted to the Bar in October of 1927. I didn't have the privilege of going to college at all. I went directly from high school into law school. I suppose it was because I was always a young man in a hurry. However, not having gone to college gave me somewhat — somewhat, I underline that — of an inferiority complex; and I always felt that there were — I'm not so sure now, but I always felt that there were people that were much smarter than I and I was willing to call upon other people for advice in legislative matters and the tremendous importance of a governor in making appointments.

But, I practiced law for a period of seventeen years before I ever held a public office of any kind. I would appear before judges in various counties around the Bay Area, and I was impressed with some who were so courteous to a young lawyer and some that were so, I'll use the term, ugly. When I became governor, I tried my level best to get a real background on the appointment of all of the judges that I made. But when you appoint, and I think any governor serving a period of eight years will appoint 700 or 800 judges, you can understand that all of the men or women that you appoint are not going to be great jurists.

The fact is, however, that I think those seventeen years of practice in the civil courts before the municipal court, the superior court, appellate courts, and occasionally in the Supreme Court of the State of California, never in the Supreme Court of the United States, and as district attorney, you would run into the many judges that you appeared before or your deputies would make reports upon them. And one of the things that impressed me very much in my appointments was Earl Warren. When I was district

attorney in San Francisco, Governor Warren appointed two young men who were extraordinarily able lawyers in my office — a man by the name of Al Weinberger and a man by the name of Charles Perry — both of whom were Democrats. Now, I mentioned that only to show you that here was a governor that had appointed judges because of their ability — not because of their political affiliation. He had to get their legal reputations from other lawyers and judges in San Francisco. And, Warren's method impressed me very much. I wanted to have a bench of able people, of able men and women. But, the Warren appointments impressed me very, very much.

You have to remember, too, that I became governor after twenty years of Republican governors; Earl Warren was governor, I think, for a period of three terms, almost twelve years. It was sixteen years — no, it was three terms of Earl Warren and a term and a half of Goodwin Knight. But before that, Governor Olson had appointed four judges. He had appointed Chief Justice Phil Gibson. He had appointed Roger Traynor. He appointed Justice Carter. And I can't think of the other judge that he appointed. So here was a Democratic governor appointing four justices. Then Earl Warren, serving eleven years, appointed only one; and Governor Knight only appointed one. And I came along — they had been in office for a long period of time, so there was a natural change in the Supreme Court in the State of California.

I'm pointing this out to you to show how the appointments of a governor, how they can change, how important they can be. I think that Governor Reagan only had two appointments. And I think Jerry — I think my son had five or six. Now, the importance of that is that I've observed in some of the discussion the question whether there should be a change in the method of the appointments to the appellate courts.

I might say, weighing it all and watching the governors going back to Culbert Olson — Olson, Warren, Knight, myself, Reagan, Jerry, and now Governor Deukmejian — I do think that governors are really trying to appoint people that will do a good job in their appointments.

And I think that the fact is that the Supreme Court of the State of California has been regarded as one of the best courts in the United States. Some of the law review writers, some of the other jurists throughout the state feel that it was during my administration that the appointments not only made by me, but the appointments made by Warren, made the

California Supreme Court the best court, even better than the Supreme Court of the United States.

I want to just name the people that I appointed so you get an idea of the kind of people I appointed and the source of the recommendations to me. The first man I appointed was Ray Peters who had been a law secretary to the Court after he left law school. In addition to that, he gave a bar review course; and, he was regarded as a truly brilliant lawyer. I might add that when I was district attorney of San Francisco, I appointed two men and someone sued me, sued me because I made these two appointments illegally. There were two war veterans. They were both San Franciscans. But they worked in the Alameda District Attorney's office. They came to me and sought an appointment and I appointed them. But they had not had two years' experience. The charter of the County of San Francisco provided that they had to have two years' experience. Well, someone sued me for making an illegal appointment and got a judgment against me for $10,000. I can only tell you that when the salary of the district attorney of San Francisco was only $8,000 a year and to get a judgment for $10,000 — so after I lost it, I had to put up a bond of $20,000 so they wouldn't execute upon my property. And then it went to the appellate court, and I'm not going to go into what happened; but Ray Peters, writing the opinion, reversed that opinion of the superior court. So the first appointment that I made to the Supreme Court of the State of California was Ray Peters.

Now, if you think that was really the motivating force, I think the lawyers will agree that Ray Peters was truly a great jurist. Now, I'm not going into all the others. Tom White had started in the justice court of Los Angeles. He's been in the municipal court; he's been in superior court, the appellate court. And I appointed him. He was an elderly man when I appointed him. I think he was 68 years of age. And when I appointed him, he agreed to resign upon reaching the age of 70.

The next ones were Matt Tobriner, Paul Peek, Stanley Mosk, Louis Burke, and Ray Sullivan. And then I had the great opportunity of appointing Roger Traynor as the chief justice of the Supreme Court of the State of California.

In all of these appointments, of course, you had to get the Qualifications Committee approval, consisting of the chief justice, the senior presiding justice, and the attorney general of the State of California. I didn't

want any jurist or any person I appointed disapproved. There was no formal way of asking for this approval. There was no formal way in the Constitution or any of the codes. So, I would call the chief justice. I would tell him that I intended to appoint blank, what do you think about it? And, going further, I would ask the chief justice for his recommendations. I can tell you that when Chief Justice Gibson resigned I spoke with him, and he highly recommended Roger Traynor to be his successor. And when Roger Traynor became the chief justice, it was my practice to call him and ask him about the appointments. He would then confer with the other members of the Qualifications Commission (the senior presiding justice and the attorney general). I knew before the appointment was announced whether there would be approval.

I really feel that the State of California has the best system of making appointments to the higher courts in the United States. The appointments, of course, to the Supreme Court of the United States must be confirmed by the Senate of the United States. But, you don't have that real Qualifications Commission of people that are working in the law every day — the chief justice, the senior presiding justice, and the attorney general. The attorney general is really the only political figure in the group. And you will observe, I'm not commenting or criticizing in any way at all, you will observe that when Governor Deukmejian was the attorney general, that he disapproved of several of my son's appointments to the Supreme Court. I can't pass on the reasons why he did. But I would call attention to the fact that in the statements made by — in the paper prepared by yourself, that you pointed out the tremendous difference between Associate Justice Clark on the Supreme Court and the other appointment made by Governor Reagan, Chief Justice Wright — two appointments by Governor Reagan, and absolutely philosophically different. And there's no way in the world you're going to avoid the philosophy of the governor in the making of the appointments to the various courts in this state. I'm not talking about the appellate court because I haven't had the time to research the appointments that were made.

I can only tell you that I was tremendously proud of my appointments. In the making of appointments, the question that I would ask was the legal ability of the lawyer. In Southern California I didn't know the ability of too many lawyers. I had a group of lawyers whom I respected and I would

ask them for recommendations. They were lawyers in large firms and individual practitioners. I think I had six Democrats and two Republicans in this group from whom I sought their opinions. They would give their recommendations very, very objectively.

I'm not trying to personalize these remarks, but you have to look at the character of the governor and his political philosophy in trying to find out whether the system that we now have is a good one or a bad one. I really wanted judges that were humane. I wanted people that knew the law but were gentle and understanding. In the seventeen years that I was in private practice, I appeared in courts all over the state. Sometimes the judges were really mean and intolerant, particularly during the first two or three years of my practice. With one of the judges before whom I appeared in a preliminary hearing in the municipal court in San Francisco, I started to put on my case and the judge said, "Counsel, I want you to put your case in this order." This was in a preliminary hearing. And I said, "If the Court pleases, I prepared this case and I'd like to put it on the way I planned." He says, "You put them on in the way that I tell you to put them on or we will not hear anything further in this case." I said, "If the Court pleases, I'm through." And I stopped the case. The person was held to answer. I might say, this man came up, recommended for appointment to the Supreme Court later on [laughter]. He had been appointed to the appellate court by another governor. He came highly recommended to me by one of my large contributors. I could not forget the mean way that he treated me when I was a young lawyer.

The other things that were important were the opinions of other lawyers. I would confer with Roger Traynor after he became the chief justice. And, I might say that he made several recommendations. I accepted every one of them. I made recommendations and he accepted mine, of course, or they wouldn't have been approved by the Qualifications Commission. But, he recommended me to Ray Sullivan, who was in San Francisco. He had been an associate of William Malone who was the Democratic chairman. And I was a little bit, a little bit afraid to, not afraid, that's not the word. I didn't want to appoint a political figure. But Roger Traynor called me, came up to Sacramento, and he told me that Ray Sullivan was a great jurist. And as a result of that, I appointed him. And I think that the bench and bar of California recognize Ray Sullivan as one of the best judges that I had the privilege of appointing.

I'm calling these things to your attention so that you'll be able to see what a governor does in trying to make good appointments. Governor Reagan, in his appointment of the chief justice, later said he was disappointed. He spoke critically of the chief justice, later said he was disappointed. But I think the bench and bar agree with Stanley Mosk's opinion of this great chief justice.

There are so many other things that I could say about the appointments to the Supreme Court, but let me conclude by saying that the appointments by the governor, with the approval of the Qualifications Commission (the chief justice, the senior presiding justice and the attorney general), resulted in excellent appointments to the appellate court and the Supreme Court. This is true, whether it happens to be a Ronald Reagan or a Jerry Brown or a Governor Deukmejian. I think we have a good system. I'm sure that any system could be improved upon. But, as I look back on the appointments to the appellate courts (and I'm not talking about the superior courts — it would take too long to get into that) — that are here today, looking at the origins of the present system of appointments that I think as an old governor that it's a good one. Thank you. [Applause]

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