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# Ablest Judge of His Generation

Henry J. Friendly†

It is an honor to have been asked to join in the tributes to Chief Justice Traynor. Although distance kept us apart, especially in recent years, he was often in my thoughts. These were not only of huge admiration but of deep affection.

My first meeting with Justice Traynor occurred while I was still a novice in the judging profession. In the early sixties I was asked to participate with an otherwise distinguished group in the dedication of the new home of the Duke University Law School. Professor Brainerd Currie invited me to dine at his house with Roger and Madeleine. I was prepared to behold greatness and I did. We ate well, drank well, and talked interminably. Thereafter we met frequently, on both coasts. Roger was a faithful participant in the sessions of the Council of the American Law Institute in New York and Washington. He intervened only when intervention was needed. After he spoke, there was no more to say. Also, during the later sixties, my wife and I often traveled to Berkeley to spend the Christmas holiday with our daughter, her law professor husband, and their children, and the Traynors lavished the season's hospitality upon us. On another occasion, when I had been invited to speak at Boalt Hall, our daughter arranged a dinner attended mainly by members of the faculties of the California and Stanford law schools and their spouses. The decibel level was high during the cocktail hour. Suddenly there was a hush. I asked my neighbor what had happened; he answered, "The Traynors have arrived." I have never seen such reverence displayed to any judge save Cardozo. Needless to say, Roger did not allow the hush to last more than a moment. Who will ever forget his resonant voice and inimitable chuckle?

My thesis is simply stated: For the thirty years of his service on the Supreme Court of California, from 1940 to 1970, Roger Traynor was the ablest judge of his generation<sup>1</sup> in the United States. I say this without hesitation, qualification, limitation, or fear of successful contradiction. Justices of the United States Supreme Court, of course,

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1. I have inserted the words "of his generation" in order to avoid need for comparison with Judge Learned Hand, who had preceded him on the bench by thirty years but continued to sit until 1961.

were able to and did effect more dramatic and important changes in our institutions, notably by applying most of the Bill of Rights to the states and enforcing the equal protection clause of the fourteenth amendment so as to strike down segregation and malapportionment. But no other judge of his generation matched Traynor's combination of comprehensive scholarship, sense for the "right" result, craftsmanship, and versatility. He illuminated and modernized every field of law that he touched, and, in the course of his long judicial service, he touched almost all.

The proof for my thesis lies in Justice Traynor's hundreds of opinions and scores of extrajudicial writings. Many of his latter afford insights into his theory of judging; the former embody its practice. Professor White has explored the theory in a chapter of his book, *The American Judicial Tradition*;<sup>2</sup> this also is a useful guide to Traynor's most important opinions in the law of torts, contracts, real property, judgments, criminal procedure, conflicts, and taxation.<sup>3</sup> In his opinions, as in his bearing, he seemed, in Professor White's phrase, "to personify the characteristics he sought in judging: detachment, intellectualism, impersonality, rationality."<sup>4</sup> The relentless logical march of some of his great opinions reminds one of Brandeis; he seems to be inspired, as I once wrote of Brandeis,<sup>5</sup> by Milton's lines:

What in me is dark  
Illumine, what is low raise and support;  
That to the height of this great argument  
I may assert eternal Providence,  
And justify the ways of God to men.

Take, as one example, *Bernkrant v. Fowler*.<sup>6</sup> The case concerned the administration of the estate of one Granrud, who was a California resident at his death in 1956. Less than two years earlier he had entered into a transaction in Nevada with plaintiffs, who were Nevada

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2. G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 292-316 (1976) ("Rationality and Intuition in the Process of Judging: Roger Traynor").

3. A more detailed analysis of the torts decisions is presented in chapter 6 of G. WHITE, *TORT LAW IN AMERICA* 180-210 (1980). Professor Brainerd Currie brought together the conflicts decisions through 1960 in chapter 13 of B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 629-89 (1963). One should add *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961) (en banc), mentioned by Currie as having been decided too late for discussion, B. CURRIE, *supra*, at 688 n.236, and analyzed below, *infra* notes 6-14 and accompanying text, and *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) (en banc). For an interesting recent application of *Reich* as developed by later California decisions, see *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 164-69 (3d Cir. 1980), *rev'd on other grounds*, 454 U.S. 235 (1981).

4. G. WHITE, *supra* note 2, at 301.

5. Friendly, *Mr. Justice Brandeis—The Quest for Reason*, 108 U. PA. L. REV. 985, 987 (1960), reprinted in H. FRIENDLY, *BENCHMARKS* 291, 295 (1967) (quoting J. MILTON, *PARADISE LOST* bk. I, lines 22-26 (M. Hughes ed. 1957)).

6. 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961) (en banc).

residents, resulting in Granrud's receiving partial payment of plaintiffs' debt to him and security for payment of the remainder in the form of a lien on plaintiffs' Nevada real estate. At a meeting in Nevada Granrud had promised in return that he would provide by will that any installments of the debt remaining unpaid at his death would be cancelled and forgiven. He failed to so provide, and plaintiffs sued in California to have the indebtedness cancelled and the property reconveyed. Granrud's promise was invalid under a section of the California statute of frauds relating to agreements to make provisions in wills but the Nevada statute of frauds had no corresponding section.

After clearing away a considerable amount of underbrush, the opinion begins its discussion of the crucial issue by conceding "that California's interest in protecting estates being probated here from false claims based on alleged oral contracts to make wills is constitutionally sufficient to justify the Legislature's making our statute of frauds applicable to all such contracts sought to be enforced against such estates."<sup>7</sup> The question thus was the "scope" of the California statute, which must be determined "in the light of applicable principles of the law of conflict of laws."<sup>8</sup>

There follows a longish argument to support the proposition that "[i]f Granrud was a resident of Nevada at the time the contract was made, the California statute of frauds, in the absence of a plain legislative direction to the contrary, could not reasonably be interpreted as applying to the contract even though Granrud subsequently moved to California and died here."<sup>9</sup> However, there was nothing to show where Granrud was domiciled in 1954 and since he had a bank account in California and died as a California resident less than two years later, he may have been one when the contract was made.<sup>10</sup> "Even if he was, the result should be the same."<sup>11</sup> After analyzing Nevada's and California's interests and conceding that if Granrud had indeed been a Californian at the time of contracting, plaintiffs "may have been alerted to the possibility that the California statute of frauds might apply," the opinion argues that since California "would have no interest in applying its own statute of frauds unless Granrud remained here until his death, plaintiffs were not bound to know that California's statute might ultimately be invoked against them"—Roger must have chuckled over that one—and that "[u]nless they could rely on their own law, they would have to look to the laws of all of the jurisdictions to which

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7. *Id.* at 594, 360 P.2d at 909, 12 Cal. Rptr. at 269.

8. *Id.*

9. *Id.*

10. *Id.* at 595, 360 P.2d at 910, 12 Cal. Rptr. at 270.

11. *Id.*

Granrud might move regardless of where he was domiciled when the contract was made"<sup>12</sup>—a look that would have been not only time consuming but generally fruitless. The California statute was thus not intended to apply even if Granrud was a California resident when the contract was made, and the court could happily sustain Nevada's interest in the enforcement of a contract made in Nevada, relating to Nevada real estate, and involving at least some Nevada residents, without subordinating any legitimate interest of California's.

The opinion is written so powerfully that the reader can hardly conceive of the possibility of a different result. Yet one can be discerned. The policy supporting the requirement of a writing in disputes over promises to make a will is very strong; at least the California Legislature could have thought it so. In many states the plaintiffs would have been unable to make a case quite apart from the statute of frauds because of "dead-man" statutes.<sup>13</sup> The plaintiffs in *Bernkrant* were held to have escaped the effect of California's dead-man statute solely because of the quirk that they did "not seek a money judgment payable out of the assets of the estate but only a determination that their obligations [had] been discharged."<sup>14</sup> Perhaps the legislature would have enlarged the dead-man statute to bar testimony in all suits to enforce promises to make wills, as the policy behind the statute would seem to dictate, if it had not believed that adequate protection against such claims had been given by the California statute of frauds. People of ordinary intelligence should know that they may have trouble in enforcing a promise to make a provision in a will and that they had better have some written evidence of it. In light of these considerations would it have been all that unreasonable to think that the California Legislature meant to shield its residents from claims based on their oral promises to make provisions in wills, even promises made outside the state, when these were asserted in California courts?

None of this is meant to say that the *Bernkrant* decision was wrong—indeed the above argument would prove only that there was a conflict. Rather it is a tribute to Justice Traynor's skill in making his result appear ineluctable. Judge Learned Hand advised younger colleagues that once they had come to a decision after full consideration, they should keep any lingering doubts in their heads and not put them in their opinions. Justice Traynor followed that course brilliantly in *Bernkrant* and in many other opinions.

Limits of both space and time preclude any attempt here to sum-

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12. *Id.* at 596, 360 P.2d at 910, 12 Cal. Rptr. at 270.

13. 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 578, 578a (Chadbourn rev. 1979).

14. 55 Cal. 2d at 592, 360 P.2d at 908, 12 Cal. Rptr. at 268.

marize Justice Traynor's contributions to various fields of law, even to torts where he was a principal architect of strict liability for defective products<sup>15</sup> and underminer of charitable and sovereign immunities.<sup>16</sup> With the Supreme Court of the United States giving further consideration to the exclusionary rule in search and seizure cases as this is written,<sup>17</sup> the moment is scarcely ideal for comment on *People v. Cahan*,<sup>18</sup> beyond noting the reference to it in *Mapp v. Ohio*,<sup>19</sup> and applauding its fair and comprehensive statement of the pros and cons. I shall mention rather one of my favorite Traynor decisions, *Bernhard v. Bank of America National Trust & Savings Association*,<sup>20</sup> where, early in his judicial career, he persuaded a unanimous court to reject the mutuality requirement for collateral estoppel and overrule three of its prior decisions in the process. As is well known, the principle of *Bernhard* has been adopted by the Supreme Court,<sup>21</sup> has been extended from "defensive" to certain "offensive" uses,<sup>22</sup> and is recognized, with appropriate qualifications, in the second *Restatement of Judgments*.<sup>23</sup> It must have been gratifying to the author of *Bernhard* to see this powerful tool for avoiding duplicative litigation, developed in his early years, receive such a degree of acceptance throughout the land.

We take leave of Roger Traynor with sadness and yet with pride in his achievements and satisfaction in having had the privilege of his friendship. He was like a great oak—sturdy, unbending, growing high and casting its branches wide. He left the fabric of the law immensely stronger and richer than he found it. He was a man of kindness and

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15. The history is traced in G. WHITE, *supra* note 3, at 197-207. White characterizes the concurrence in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (en banc) (Traynor, J., concurring), as "Traynor's most famous opinion"—"one of those moments in the history of Torts when a judge is given an opportunity to assemble some emerging ideas and apply them to an actual case in a manner that results in significant doctrinal change." G. WHITE, *supra* note 3, at 197, I would substitute "takes" for "is given."

16. *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951) (en banc); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (en banc).

17. *Illinois v. Gates*, No. 81-430 (U.S. 1982).

18. 44 Cal. 2d 434, 282 P.2d 905 (1955) (en banc).

19. 367 U.S. 643, 651-52 (1961).

20. 19 Cal. 2d 807, 122 P.2d 892 (1942) (en banc).

21. *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971), *largely overruling* *Triplett v. Lowell*, 297 U.S. 638 (1936). The citations in Justice White's opinion, 402 U.S. at 325-26 nn.13-14, show the tremendous impact of the *Bernhard* opinion in federal and state courts.

22. *Zdanok v. Glidden Co.*, 327 F.2d 944, 955-56 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). As explained in *Blonder-Tongue*, 402 U.S. at 329-30, defensive use allows "a defendant in a second suit to invoke an estoppel against a plaintiff who lost on the same claim in an earlier suit"—the problem at issue in *Bernhard*, whereas offensive use allows a plaintiff in a second suit to use "a judgment obtained by a different plaintiff in a prior suit against the same defendant" on essentially the same claim. The Supreme Court later approved offensive use with certain limitations. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-33 (1979).

23. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

good humor but also of enormous dignity. We shall not soon see his like.