The Man McMurray

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A UNIVERSITY PRESIDENT, himself a distinguished educator, was once discussing with me the problems, subjective and objective, intra- and extramural, ridiculous and sublime, connected with and arising out of faculty personnel. Said he, "They mostly grow out of the fact that teachers as a class have more freedom and less responsibility than any other group of supposedly adult Americans."

If that is the rule for law professors, Orrin Kip McMurray is certainly the professorial "exception that proves the rule." Liberal, level-headed, fair-minded, reasonable, and sound, throughout his long and useful life, he has known and acted on the principle that endowment of power is endowment for service, and freedom for him has been not from, but for, responsibility. Always a sound and liberal thinker and a wise counselor, LL.B., and LL.D., lawyer and teacher, his spirit has grown, strengthened, and broadened with his work and the passing years, and when, now ten years ago, I began to know him in the American Law Institute, he had already acquired and was fully endowed with an intuitive understanding of the nature of things of the highest order and an equally intuitive sense of fitness and proportion.

I came on the Council of the American Law Institute as one born out of due time and, like Agag, "stepping delicately" among those grave and reverend seniors of the common law, for I was by my own public confession a "huncher," an addict to the use of the judgment aleatory, and a believer in and promoter of "The Glorious Uncertainty of the Common Law." I therefore proposed publicly "A covenant, sincere and solemn, that in exchange for my promise that I will not use, nor will I even yearn to use, my little small dice while the large dice, the fair, great and goodly ones, which the Restatement will furnish, serve, I may have their [the members'] promise that they will make no rule forbidding, indeed, will not even look askance upon my drawing the precious little diviners from the secret table in the recesses of my closet when the great dice fail."1 And when I made that speech it was to McMurray that I looked for aid and com-

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1 Lawyer’s Law, and the Little, Small Dice, an address delivered by Judge Hutcheson at the annual meeting of the American Law Institute, Washington, D. C., May 7, 1932, published in (1932) 7 TULANE L. REV. 1, 12.
fort. For I had found that he believed as firmly, and delighted as much as I did in "The Glorious Uncertainty of the Law," and his understanding of and respect for the role in judging, teaching, and the practice of law, of intuitive insight and imaginative power had been from the first in that august assembly of "Common Law Olympians" a comfort and protection to me. Neither pedant nor smatterer, and above all no poser, he did not lay claim to a universal and meticulous knowledge of all the postulates of the law, and his role in the Council was often that of listener. But it was with vigor and effect that he raised his voice, in regard to those postulates he knew well, to point the way the law had gone and the way it still might go. Long before I knew him, his position as an authority on and an exponent of the American doctrine of precedent had become established. Arthur Goodhart, in his Essays in Jurisprudence and the Common Law,\(^2\) pays him this just tribute. The American doctrine is stated by Dean McMurray as follows:\(^3\)

"In such matters, we can only speak of averages, of tendencies. And it is, I think, safe to say that in most American jurisdictions today a more rational theory as to the binding force of precedent generally obtains than that held by the British House of Lords. The very multiplication of authority tends to impair to some extent its force, especially where the decisions in various jurisdictions are inconsistent and conflicting. The better class of modern lawyers and judges have, in part from the very copiousness of authority, come to regard precedent as their servant and not as their master, as presumptive evidence of what the law is rather than as absolutely conclusive evidence."

We usually sit together, drawn I suppose by our common belief and delight, in the "Glorious Uncertainty of Our Lady of the Law," and our common knowledge that neither Don Quixote nor Sancho Panza had the whole right of it, that law neither was nor ought to be wholly fixed nor altogether fluid, that solid men keep their feet on the ground but even solid men may look upward to the stars. Many a wordy balloon has been punctured, many a dispute brought to an end by a brief and pungent, a gentle but spirited comment from him, and many a tension lightened by his quiet chuckle and living sense of humor.

But it is not only in the actual meetings that I have enjoyed my association with him. A member with him of the Committee on Mem-

\(^2\) (1931) 63.
\(^3\) Changing Conceptions of Law (1915) 3 Calif. L. Rev. 441, 446.
bership, his dryly humorous but accurate summing up of and com-
ment on some of the applications for membership, and letters in sup-
port, and his helpful suggestions, give life and color to meetings of
the Committee which might otherwise be dull and prosy affairs.

Perhaps, however, the high point of my association with him is
the night we went together to a dinner in Washington, he dressed in
tails and a white tie, because he had brought them along, and I in a
dinner coat and a black tie, because I had not. The dinner over, and
because of the precedence his white tie and tails entitled him to, we
set out together, under his guidance, proclaimed by him as inerrant,
to walk through the wilds of Washington back to our hotel. Whether
it was because my character transcended my black tie or his fell
below his white, we will never know, but by a strange metempsycho-
sis, the guider became the guided, California yielded to Texas, and
long before we reached shelter Orrin McMurray had surrendered
leadership and the blind was leading the blind.

I am delighted that the California Law Review, to which he has
himself contributed so much, is giving him a salvo on his retirement.
I am grateful to have been allowed a part in it. Knowing him has
given me a taste for California and Californians. It has made me
know that there is something in California like there is in Texas most
congenial to the breeding, nurturing, and disciplining of men.