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Address Delivered Before the Bar Association of Riverside County Entitled "Will These Decisions Stand?"

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ADDRESS DELIVERED BY JESSE W. CARTER,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF CALIFORNIA,
BEFORE THE BAR ASSOCIATION OF RIVERSIDE COUNTY,
RIVERSIDE, CALIFORNIA, ON SEPTEMBER 29TH, 1954,
ENTITLED "WILL THESE DECISIONS STAND?"

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On the fourth floor of the State Building in San Francisco where the Supreme Court of California has its headquarters, there is a long hallway where the photographs of all of the Justices of the Supreme Court are hung in accordance with the era in which they served. As I walk down this hallway to my office which is near the far end, I occasionally glance at these pictures and the thought comes into my mind that it will only be a matter of time until my successor will be doing the same thing -- when all that will remain as far as I am concerned, will be the picture on the wall and what I have written which has been printed in the California Reports.

Sometimes I wonder why I should continue with the struggle of
attempting to prepare opinions which will meet with the approval of a majority of my associates or write dissenting opinions when I cannot agree with the views expressed by them. At times it seems that all the great problems which have been decided by my predecessors were of small import compared to those which are presented to our Court today, and I pause and reflect upon the question of what solution would have been reached had these same problems been submitted to those who sat before me on the Court. As I view the kaleidoscope of the past, many of those who have preceded me pass in review. I see Hastings, Field, Terry, Wallace, McFarland, Beattie, Angelotti, Shaw, Wilbur and many others sitting where I now sit. All of these men were faced with the current problems of the day and the reported decisions reveal the care with which they met and disposed of the questions confronting them. During various periods there were strong differences of opinion between members of the Court on fundamental principles and I sometimes speculate on what changes might have taken place in our political, economic and social
structure had the views of the minority, rather than those of the
majority, prevailed. As we read the reported decisions in the
light of present day conditions, we have a clearer concept of
what would have been the wisest course to pursue at that time and
I wonder at times why that course was not pursued by a majority
of that long ago court.

We know from a reading of the California Reports that
many decisions which seemed to have a sound basis when they were
rendered were later overruled or so modified or distinguished
that they ceased to have any authoritative value, and so I have
decided to speak to you tonight relative to some of the recent
decisions of the Supreme Court of California and to offer the
bold prediction that these decisions will not stand the test of
time.

The cases which I shall discuss, have, I believe, when
viewed dispassionately, some very ridiculous aspects, not only
so far as the law is concerned, but so far as the logical
consequences are concerned. With all due apologies to my good
friend, Erle Stanley Gardner, the cases which I intend to talk
about tonight could have, and should have, the type of title
used by him in his mystery novels

The first of these cases, Pickens v. Johnson (42 Cal.
2d 399) should really be called the "CASE OF THE REAPPEARING
JUDGE." In that case it appeared J. O. Moncur was elected in
1944 as judge of the Superior Court of Plumas County for the
full term of six years which he served until the last day of his
term when he retired pursuant to the provisions of the Judge's
Retirement Act (Stats. 1937, p. 2204). After his term expired,
Judge Moncur was assigned to sit in the Superior Court of
Sacramento County by the chairman of the Judicial Council, and
presided at the trial of that case. Section 6 of the Retirement
Act provides that "Justices and judges retired under the
provisions of this act, so long as they are entitled by its
provisions to receive a retirement allowance, shall be judicial
officers of the State, but shall not exercise any of the
powers of a justice or judge except while under assignment to a
court as hereinafter provided. Any such retired justice or judge may, with his own consent, be assigned by the Chairman of the Judicial Council in a court of like jurisdiction as, or higher jurisdiction than, that court from which he has retired; and while so assigned shall have all the powers of a justice or judge thereof. If assigned to sit in a court, he shall be paid while sitting therein in addition to his retirement allowances the difference, if any, between his retirement allowance and the compensation of a judge of the court to which he is assigned." At one time this section was amended to provide that the counsel for all concerned must stipulate that the retired judge could act, but that provision was later omitted by another amendment. One of the parties contended that this section was unconstitutional and that any judgment rendered by Judge Moncur while so sitting was void.

A majority of the Supreme Court, relying upon section 22a of Article IV of the Constitution, declined to hold that section 6 of the Retirement Act was unconstitutional. Section 22a,
so far as here pertinent, provides that "The Legislature shall have power to provide for the payment of retirement salaries to employees of the State who shall qualify therefor by service in the work of the State as provided by law. The Legislature shall have power to fix and from time to time change the requirements and conditions for a retirement which shall include a minimum period of service, a minimum attained age and minimum contribution of funds by such employees and such other conditions as the Legislature may prescribe. . . ."

Using the section just quoted, the majority of the Supreme Court reasoned that the Legislature could validly provide that a retired judge, as a condition to retirement, must consider himself available for assignment as a judge when called for judicial service by the chairman of the Judicial Council. It was concluded that he was a de jure judge in a de jure judicial office; that his assignment was valid; that section 6 of the Retirement Act was constitutional and that nothing more need be said concerning the matter.
Naturally, I dissented. I pointed out that

Constitution provides that judges of the superior court shall be elected by the voters of that particular county (Art. VI, sec. 6); that in the event of a vacancy in the office, the Governor may appoint a person to hold office until the commencement of the term of a person elected to hold that office; that the term of office is six years (Art. VI, sec. 8). I also pointed out that under these provisions it has been held that a purported judicial act done by a judge after his term of office has expired has no force or effect (Martello v. Superior Court, 202 Cal. 400; Connolly v. Ashworth, 98 Cal. 205; Mace v. O'Reilley, 70 Cal. 231; Broder v. Conklin, 98 Cal. 360; People v. Ruef, 14 Cal.App. 576); that the Legislature cannot extend the term of a judge fixed by the Constitution (People v. Campbell, 138 Cal. 11; People v. Markham, 104 Cal. 232); nor confer upon him judicial power after his term has expired, where the Constitution fixes his term of office and mode of selection (Hallam v. Tillinghast, 19 Wash. 20, 52 P. 329).
There are vital differences between the duties of lawyers and judges. When a lawyer is elected or appointed to a judicial position, he is automatically retired from membership in the State Bar of California and his payment of dues thereto is suspended during the time he remains on the Bench. A lawyer is an advocate, a partisan, a confidential advisor of his clients. A judge is non-partisan — he is required to weigh and consider the evidence, the law, and render fair and impartial decisions. Different codes of ethics apply; certain constitutional provisions apply to judges or justices. When a judge retires or is defeated when running for reelection, he is again a lawyer subject to the State Bar Act; he may again have clients; he is again an advocate and a partisan if he so desires.

Under the majority holding in the Pickens case, we have a lawyer subject to the State Bar Act who, despite all constitutional mandates to the contrary, may assume judicial duties, may thwart the will of the People by acting as a judge
although not validly reelected by them, may have duties as a lawyer to perform for certain clients, and judicial duties to perform for lawyers who may in his private lawyer's life, be his opposition. Such a judge has not been elected by the voters; he has not been appointed by the Governor; he has been assigned by the chairman of the Judicial Council because a majority of the Supreme Court has held that the Legislature may interfere with the functioning of the judicial department of this state in clear violation of the express constitutional mandate providing for a separation of powers -- into the executive, judicial and legislative branches of the government.

Money received as retirement compensation is because of past services rendered and it was not contemplated that it should also be received because services might be required in the future. When a man retires, the usual meaning placed on that retirement is that he wants to have leisure time in which to enjoy that which he has earned in the past. A majority of the Court, however, have now held by a strained, unreasonable, and wholly unwarranted,
construction of section 22a of Article IV of the Constitution of this state that the Legislature may provide that his compensation is partially based on his implied agreement to be subject to call, or assignment, by the chairman of the Judicial Council. While the present act provides for his consent to such assignment, it is obvious that the Legislature may eliminate this requirement.

The logical consequence of the holding is that a retired judge may not know from one day to the next whether he is a lawyer or a judicial officer of the state. What happens when a retired judge, once more a lawyer, subject to the State Bar Act and payment of dues thereunder, is assigned to a judicial position? Are his State Bar dues refunded to him? What happens to his clients if he is actively engaged in the practice of law? with whom is his loyalty -- his clients or lawyers who appear before him? Is he subject to both judicial and attorney's Codes of Ethics and which prevails in the event of a conflict?

The effect of the majority holding in the Pickens case is that retired judges or justices even though their respective
terms of office have expired are still judicial officers of the state. This is clearly contrary to the holding of the Supreme Court of California in the so-called Hardy case (State Bar of California v. Superior Court, 203 Cal. 323). In that case you will recall Judge Carlos Hardy accepted a love offering of $2,500 from Aimee Semple MacPherson while he was superior judge of Los Angeles County. Mrs. MacPherson said it was for legal advice given her, and the State Bar sought to discipline Judge Hardy who claimed that he was not subject to the jurisdiction of the State Bar because he was not engaged in the practice of law, and the Supreme Court of California upheld his position. So then we have the unique situation of a judge whose term has expired and who is entitled to retirement pay and also entitled to practice law being a judicial officer of the state and subject to assignment by the chairman of the Judicial Council to sit in any superior court or court of higher jurisdiction in the state. What serious consequences may flow from conflicts which may arise out of situations of this character are impossible to
foresee, but they may be devious and far-reaching and have a serious detrimental effect upon the administration of justice in this state. Notwithstanding the holding in the Pickens case that a retired judge or justice whose term of office has expired is a judicial officer of the state, the Supreme Court of California recently held that when a superior judge is injured in the course of his duty the county which elected him is liable for the benefits to which he is entitled under the Workmen's Compensation Act. Can we not visualize a retired judge from one of the mountain counties being assigned to sit in Los Angeles and while there under assignment being killed or seriously injured and either he or his dependents entitled to benefits under the Workmen's Compensation Act. Where will the burden fall? Your guess is as good as mine. Thus ends the "CASE OF THE REAPPEARING JUDGE"!

Next we have the "CASE OF THE UNPRIVILEGED CITIZEN."

In Price against the Atchison, Topeka and Santa Fe (42 Cal.2d 577) we were concerned with a plaintiff injured on two different
occasions while employed by the defendant railroad company in interstate commerce. Both accidents occurred in New Mexico.

Defendant pleaded as a special defense the doctrine of forum non conveniens and moved under that doctrine to dismiss the action. The trial court granted defendant's motion and entered judgment of dismissal of plaintiff's causes of action. The plaintiff appealed. A majority of the Supreme Court of California affirmed the judgment of dismissal on two different grounds. It discussed the inconvenience and expense to the defendant of presenting its defense to plaintiff's action in the Los Angeles court; and it discussed the great burden upon the courts and people of this state in hearing and determining cases of this character. We had held in Leet v. Union Pacific (25 Cal.2d 605) that the doctrine of forum non conveniens was no justification for a state court to refuse jurisdiction of an action under the Federal Employers' Liability Act; that it was conclusive that the state court must take jurisdiction having no choice in the matter. Our decision was based upon the holding of the Supreme
Court of the United States in Miles v. Illinois Central R. R. Co., (315 U.S. 698). The majority, however, relied upon the later case of Southern R. Co. v. Mayfield (340 U.S. 1) decided by the Supreme Court of the United States in 1950, which held that the Miles case did not limit the power of the state to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the state for reasons of local policy denies resort to its courts and enforces its policy impartially so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges and Immunities Clause of the Constitution. Our Court held that the argument that the doctrine should not apply because of the fact that an action filed by a nonresident citizen might be barred by the statutes of limitation was without merit. The majority said: "If plaintiff chooses without justification to bring his action under circumstances warranting application of the doctrine it is a deliberate risk assumed by him and he must be prepared to meet any losses
sustained as a result"; that he could have obviated this
difficulty by filing in a federal district court where the action
would be subject to transfer rather than dismissal.

Again, I dissented. I pointed out that a statute, or
court-made rule of law which would permit a trial court to dismiss
an action brought by a citizen of another state upon a cause of
action arising out of this state would be invalid as violative
of the privileges and immunities clause of the federal
Constitution unless it was applied equally against citizens of
this state. I also pointed out that Pope v. Atlantic Coast Line
R. Co., (345 U.S. 379) decided by the United States Supreme Court
in 1953 casts considerable doubt upon the holding in the Mayfield
case relied upon by the majority. The Pope case held that the
statute (28 U.S.C.A., § 1404(a)) authorizing a federal district
court to transfer a federal employers' liability action to another
federal court on the ground of convenience did not confer power
to enjoin on a state court. If by reason of the liability act
which gives a right to the injured person to sue in the state
courts, one state court cannot enjoin another, a state forum should not be empowered to dismiss for inconvenience.

I feel that another reason existed for refusing to apply the inconvenience doctrine and that was that we had repeatedly held that a court has a mandatory duty to consider and determine on the merits all cases over which it has jurisdiction (Gering v. Superior Court, 37 Cal.2d 29; Robinson v. Superior Court, 35 Cal.2d 379; Turesky v. Superior Court, 97 Cal.App.2d 838; City of San Diego v. Andrews, 195 Cal. 111) and that the court does and should exercise jurisdiction in transitory causes of action arising elsewhere (McKee v. Dodd, 152 Cal. 637; Ryan v. North Alaska Salmon Co., 153 Cal. 438). We have specifically stated (Miller v. Municipal Court, 22 Cal. 2d 818), following a decision by the Supreme Court of the United States, that inconvenience affords no reason for declining jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication.
The majority holding does for the railroad companies what they have not been able to get Congress or the Legislature to do for them. Chief Justice Warren when Governor of this state, vetoed two bills which sought to introduce in this state the doctrine of forum non conveniens. He said in his veto message: "If we are to whittle away in this manner the benefits conferred by the Federal Employers' Liability Act, it would soon lose its national uniformity and could at least substantially weaken the purposes for which the act was originally designated.

At all events if any of the provisions of the act result in a denial of justice to either plaintiffs or defendants, the situation could be remedied nationwide by a simple act of Congress." The holding of our Court is not limited to Federal Employers' Liability Act cases but to transitory out-of-state causes of action, even when brought by a citizen of this state.

So far as the consequences of the majority holding are concerned, it puts upon the plaintiff the risk of choosing the right forum. According to the majority, this is immaterial.
I say it is harsh indeed. A plaintiff is forced to speculate not only on how the trial court may decide the question but also what the views of an appellate court may be. Suppose a case where the location of the witnesses is equally divided between the state of the chosen forum and another or other factors are equally balanced. The plaintiff has no means of predicting the court's decision. He is left at the mercy of the defendant and in reality must have his prior approval of a particular court. Plaintiff having the right to have a particular court exercise its jurisdiction, and that court having jurisdiction, should be able to have the dismissal denied in any case where the statute of limitations will have run by the time that issue was finally determined.

The question presented was one of great magnitude. It involved considerations of public policy of great importance not only to those who might wish to prosecute out-of-state causes of action in our courts, but to our courts as well, considering the impact upon our court procedure of numerous motions to dismiss.
such actions in trial courts, and a review by our appellate

courts of rulings on such motions, is bound to create perplexing
problems. It seemed to me that if the doctrine of forum non
conveniens was to be adopted in this state, it should have been
by legislation where ample safeguards could have been provided
to protect those plaintiffs who in good faith and after proper
advice, sought redress in our courts for out-of-state causes of
action. Had such a statute been enacted, it would undoubtedly
have embraced rules of procedure to guide the courts in the
application of the doctrine.

I should point out to you that this is the first holding
of its kind in this state although many Federal Employers'
Liability cases have been decided here as well as other out-of-
state causes of action. Heretofore it had been held that the
courts must exercise their undoubted jurisdiction in all cases
indiscriminately.

The next two cases might very well be called the
"CASES OF THE DISAPPOINTED WIVES." In Zaragosa v. Craven
(33 Cal.2d 315) a wife was held barred from recovering for her personal injuries because of her husband's contributory negligence in the accident where she was injured by the defendant's negligence. The conclusion was said to follow, logically, from the community property laws of this state which give to the husband the management and control of the community. To permit the wife to recover for her personal injuries was said to be a permission to the husband to profit from his own wrong. I pointed out in a dissenting opinion that the community property laws in California provide that all property acquired by the spouses during marriage other than that acquired by gift, devise or descent, was property belonging to the community. I said that the wife brought her body to the marriage and that it was her personal property and that she was certainly entitled to retain control over it and to recover damages for its loss, or injury as the result of another's negligence where she was not at fault. I quoted extensively from William de Funiak's Principles of Community Property. Mr. de Funiak, an acknowledged authority on
the principles of community property, said that except for gifts clearly made to the marital community, community property only consists of that which is acquired by onerous title, that is, by labor or industry of the spouses, or which is acquired in exchange for community property, which, of course, was acquired itself by onerous title. I pointed out that since the right of action for injury to the person is intended to repair or make whole the injury, so far as is possible in such a case, the compensation partakes of the same character as that which has been injured or suffered loss.

Suppose the case of a wife who loses a leg, or an arm, in an automobile accident in which her husband, as driver of the vehicle, was contributorily negligent. She is without any right to recover because of her husband's conduct even though the other party involved may have been grossly negligent. Now suppose a case where either a husband, or wife, loses a leg or an arm and there is no contributory negligence involved. Under the present community property theory the recovery belongs to
the community. So far as the husband is concerned, the theory does not have the possibility of working hardship and inequity as it does where the wife is concerned because it is he who has the management and control of the community which includes any compensation for injury to the person of either spouse. The bodies of the spouses having been brought to the marriage as the separate property of each, and of necessity remaining such, should necessarily be the separate property of the spouse injured.

After the Zaragosa case had been decided by the Supreme Court of California, the Supreme Court of New Mexico had before it a similar case. It, however, held that the cause of action for the personal injury to the wife, and for the resultant pain and suffering, belonged to the wife and that the judgment and its proceeds were her separate property. It was said "She brought her body to the marriage and on its dissolution is entitled to take it away; she is similarly entitled to compensation from one who has wrongfully violated her right to personal security." In speaking of the Zaragosa
decision, the Supreme Court of New Mexico said, that if anyone
had ever said a kind word for the majority decision, it had
escaped their notice! It was also pointed out that under the
majority holding of the California court in the Zaragosa case,
if the wife were riding a horse she had brought to the marriage
and some driver of a motor vehicle negligently struck her and
the horse, throwing both into a fence, breaking the leg of each,
the cause of action for the damage to the horse would belong to
the wife, but that for the injury to her would belong to the
community over which the husband had the management and control.
It was concluded that "We decline to adopt such a rule in New
Mexico."

Nevada also holds that compensation for a personal
injury belongs to the person injured. (Fredrickson & Watson
Const. Co. v. Boyd, 102 P.2d 627.)

In 1951 the California Legislature enacted section 171c
of the Civil Code for the obvious purpose of changing the rule
announced in the Zaragosa case, and while it is not altogether
as clear as might be desired, it was a step in the right
direction. This new section has never been before the Supreme
Court of California for construction so it is too soon to
predict whether the legislative intention has been made clear.

Kesler v. Pabst (43 A.C. 256) was another case where
the wife's cause of action was barred because of the contributory
negligence of the husband. The jury was instructed that her
husband's contributory negligence would be imputed to her and
bar her recovery. Subsequent to the accident, the husband had,
by written instrument, relinquished any interest in her cause of
action which he might have to her. It was held by the majority
that this purported relinquishment would not prevent the
negligent husband from profiting by his own wrong. This
conclusion was reached upon the theory that by his act of
relinquishment, the husband had sought to exercise control over
his interest in the community cause of action; that the right to
dispose of property was a major interest of the owner and that
to permit him to do so in such a situation would create an
enforceable right in his donee which had not theretofore existed.

I again dissented. I pointed out that in an earlier case decided by the Supreme Court, Flores v. Brown, (39 Cal.2d 622,) the Court had permitted the wife to recover, despite her husband's contributory negligence, where the husband had been killed in the accident which injured the wife. I called to the Court's attention the undeniable fact that the cause of action for personal injuries arises at the time of the accident; and that the marriage in the Flores case had not been dissolved by death prior to the time the cause of action arose. If the cause of action in the Flores case was community property, then any recovery therefor was also community. In the Flores case, however, the Court allowed the widow to recover, saying that to allow her to recover for her personal injuries will in no way enrich Mr. Flores or those who might take through him. Under this reasoning Mrs. Flores would not have recovered had her husband lived, but through his death he enabled his widow to
receive a benefit she would not otherwise have had because of his contributory negligence. By his death, he created in her an enforceable right that did not theretofore exist and in fact profited by his own wrong. In the Flores case, the relinquishment was achieved by death after the cause of action arose; in the Kesler case, it was relinquished by written instrument after the cause of action arose.

The obvious question arises: What will happen when a husband and wife, prior to any accident, relinquish to each other their respective rights and interests in any cause of action which might possibly arise in the future? What will the Supreme Court of California do then, ladies and gentlemen? Will we still have the "CASE OF THE DISAPPOINTED WIVES"?

At one time in this state, lawyers could, with reasonable certainty, advise their clients who were having domestic difficulty, how to provide for a division of their community property and for support and maintenance of the spouse, and expect that after the court had approved the
agreement of the parties the terms and provisions thereof would be settled for all time.

Recently, the Supreme Court had before it at the same time the cases of Dexter v. Dexter (42 Cal.2d 36); Fox v. Fox (42 Cal.2d 49); and Flynn v. Flynn (42 Cal.2d 55). In deciding those cases, it would have been possible for the Court to clarify, once and for all, the confusion existing in the property settlement and support and maintenance field. A majority of the Supreme Court did not see fit, however, to take advantage of the opportunity so presented and the three decisions rendered by it have added untold confusion.

Very briefly, and without doing justice to the subject, those three cases hold that the court-approved agreements made by the parties for the division of their community property and for support and maintenance, even though incorporated into the decrees of divorce, may, years later, be again looked at by the same, or another, trial court for it to determine, with the assistance of extrinsic evidence if need be, whether or not the
parties really meant to provide for alimony, rather than support, or whether monthly payments in lieu of a lump sum payment in settlement of community property rights really were intended to be alimony and therefore subject to the continued power of the court to modify them upon application therefor. This, naturally, leads to further scrutiny by the appellate courts which may, if they feel so advised, reverse or affirm the conclusion reached in the trial court. All of which logically results in endless litigation of a matter which should have been settled, finally and conclusively, when the agreement was first approved and incorporated in the divorce decrees.

The Legislature has, in several sections of the Civil Code (158, 159, 175) provided that spouses may contract with each other. In the absence of fraud or overreaching there is no reason why such contracts may not be given the dignity accorded other contracts. I believe that once the parties have entered into an agreement, whether it purports to divide the property, or to provide for support and maintenance payments
without a division of the property, when found by the court to be
fair and equitable, the subject should be forever closed and the
parties bound by the terms of their agreement. Incorporation in
the decree only has the effect of making the remedy on the
judgment and not on the agreement which has become merged therein.
In the event the agreement is not incorporated in the decree, the
remedy is on the agreement which should have the same binding
effect as other contracts.

It is my hope that either the present Supreme Court,
or a later Court, will feel it necessary to straighten out the
law on this subject to the end that lawyers may once again know
how to advise their clients who wish to have their property
rights on separation or divorce conclusively settled in
accordance with their own desires on the subject. It may be
that the Legislature could add more detailed provisions on the
matter of marital contracts so that the courts would not feel
so free to ignore the plain intent expressed in the sections
now present in the Code.
I am sure most of you judges and members of the Bar here tonight who have been following the reported decisions of the Supreme Court are aware of the trend in recent years of the Supreme Court to usurp the functions of triers of fact and redefine both the issues of fact and issues of law. In many of these cases the issues of fact have been determined by a jury, passed upon by the trial court on a motion for a new trial, affirmed by the District Court of Appeal and reversed by the Supreme Court with from one to three justices dissenting. I have vigorously opposed this trend because I believe that under our system of jurisprudence fact finding powers are reposed exclusively in the trial court, where the judge and jury have an opportunity to hear the witnesses testify, observe their demeanor on the stand and gain impressions that can only be gained from personal observation and through the auditory sense. These impressions cannot be recorded in a typewritten or printed record. Moreover, the Constitution and statutes of this state confer upon an appellate court power to review questions of law.
alone and whenever an appellate court weighs the evidence and passes upon the credibility of witnesses it is usurping the function of the trial court.

In a recent case decided by the Supreme Court of California on July 2nd, 1954, I made the following statement in my dissenting opinion:

"I think it is time that this court should speak more frankly in cases of this character and honestly state the basis for its refusal to recognize the well settled and traditional rule with respect to the question of when there is an issue of fact to be determined. In the case at bar it is obvious that the majority of this court has weighed the evidence and come to the conclusion that it is insufficient to support a finding of undue influence. In so doing the majority has violated the Constitution of this state in depriving the litigants in this case of their right to a trial by jury. The majority has done this by substituting its view as to the weight of the evidence for that of the jury, the trial judge, the three members of the
District Court of Appeal and two members of this court. There is no question in my mind but that the majority decision in this case is based solely upon the view that it and not the jury or the trial judge should determine factual issues in cases of this character. This view is in direct conflict with the Constitution and statutes of this state, and in my opinion a judge of this court who concurs in such a decision is violating his oath of office." (Estate of Welch, 43 A.C. 173.)

While it is my privilege, it is not my pleasure, to write dissenting opinions. I would much prefer to concur with the majority or have them concur in opinions prepared by me. The preparation of a dissent requires extra effort -- it is an additional burden and one that I choose to avoid whenever possible. But I believe it to be my solemn duty when the majority departs from settled rules of law in rendering its decision, to call attention to the error in a dissenting opinion in the hope that the error may be corrected by a subsequent decision or by the Legislature. A dissenting opinion may also
be helpful in cases which are subject to review by the Supreme Court of the United States which, in the last few years, has held in accord with some of my dissents and reversed the Supreme Court of California.

I do not claim that I have always been right in my view of the law as expressed in my dissenting opinions. I may have been wrong many times, but I feel it my duty to the people of California to give them the benefit of my opinion on all major issues which come before the Supreme Court. This I have attempted to do. I claim no credit -- seek no acclaim or recognition for what I have done or may do in the future. It is my job as I see it, and as long as I have the physical and mental capacity, I shall continue to perform that duty.