

THE ART OF LAW

AND OTHER ESSAYS JURIDICAL AND LITERARY

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PREFACE, BY WAY OF CASUAL OBSERVATIONS

I

Life is, indeed, a dream. My dream is, on the whole, a pleasant one. Naturally, like all other mortals, I have my days of sorrow; but I am an incurable optimist, always looking forward to better days. In fact, I am very much like the man who, it is said, fell from the top storey of a skyscraper, and as he passed the fourth storey, was overheard muttering: "So far, so good!"

One of the things that have kept my dream from turning into a nightmare is my ever-growing interest in reading and writing. For the life of culture is as full of thrills and excitements as an athletic life. When you read something and find a confirmation of your own insights, you will feel transported as if you had found a friend who is of the same mind with you. When you write something and some competent critic approves of it, you will feel as if you had won the heart of the one whom you have been pursuing.

II

In publishing any book, especially when the book happens, as in this case, to be a collection of published papers, the author, if he is not a mere impostor, must show that the book is worth reading. At least one of the essays published in this volume will not waste the reader's time. It was first published anonymously in the *China Critic* (February 21, 1935). At that time Professor Holcombe of Harvard, an authority on political science and Far Eastern affairs, was in Nanking. He was invited to lecture at a certain club, and Dr.

Sun Fo was requested to preside at his lecture. It happened that I was staying at Dr. Sun's house, and he brought me along to attend the function. We arrived a little before time and entered into a conversation with the Professor. Quite incidentally Holcombe asked me whether I had read a recent article called "Herbert Giles in Heaven." As it was a rather frivolous thing, I thought it was below my dignity as a legislator to publish it in my name, and to disclose my authorship. So I denied that I had even seen it—one of the very few lies I have ever told. But Holcombe praised it to the skies and whole-heartedly recommended that I should read it. Ever since then I have felt very grateful to Holcombe, together with an uneasy conscience.

III

The Mind of Mr. Justice Holmes. It took me five years to finish it. I began it in the early part of 1930. A bare sketch of it was shown to Holmes himself, and he was good enough to write me, "As I told you, so far as I can judge from a rapid glance I was deeply pleased with what you had written about me and thought it showed an insight that I hardly expected from anyone." (In a letter dated June 16, 1930.) After I came back from America in the same year, I have been so busy with miscellaneous affairs, such as the practice of law and drafting of the Constitution, that I have had no time to carry out what I had originally intended to do. But I constantly returned to it whenever I had a scrap of leisure, here adding a paragraph, there introducing a footnote. By the end of 1934 I had a premonition that Holmes' end would soon come. (I do not claim to be a prophet, as he was so very old. But I had not felt it before then.) So I made haste to bring it to completion, although it might not turn out to be

the thing I had planned. After it was published in the *China Law Review* (August, 1935), my friend Dr. Robert Shêng distributed without my knowledge quite a few copies to eminent jurists of the West. My little labor is more than compensated; for I have received many letters expressing approval of the essay. I am not so proud that I could remain unmoved by the praises of those who are competent to judge. So I beg to reproduce some of them here, in order that I may not forget them when I shall grow old.

J. H. Wigmore: "Your article on Justice Holmes is not only the most understanding analysis of his mentality, but is also in itself a gem of literature, which makes all other biographical writings seem like pale imitations. That article is your imperishable masterpiece. If only it could have had a wider circulation!" (Letter dated Sept. 20, 1935.)

W. S. Holdsworth: "I have read with much interest and admiration your analysis of the mind and genius of O. W. Holmes. It is a most interesting study, and your illustrative extracts from his writings and judgments and from other sources have interested me very much. Thank you also for your approval of my estimate." (Letter dated Sept. 19, 1935.)

Edwin D. Dickinson: "Thank you most cordially for your kindness in remembering me with a copy of the *China Law Review* containing your perfectly admirable article on 'The Mind of Mr. Justice Holmes.' I have read the article with the keenest interest and I feel that I have in some way been taken on a pilgrimage to the great fountain of intellectual inspiration which the life and work of Mr. Justice Holmes provided for all of us. Can there be any doubt that he was the greatest American of his time? I would like to know how one like yourself would rank him among the men of his time in all countries." (Letter dated Sept. 24, 1935.)

Herbert Harley: "I have just received, and just read, your very remarkable appreciation of Mr. Justice Holmes, in *China Law Review* for August. I cannot refrain from expressing my sincere admiration of your article. It has afforded me great pleasure. I know of no American lawyer or philosopher who could so well have presented the dominant characteristics of our soldier judge." (Letter dated Sept. 9, 1935.)

There are many others, like Cardozo, Hudson, Allen, and Kocourek who have written me about that article.

But why should I print these extracts here? Do I want to show the readers how clever a man I am? No, a clever man would not show them. But I happen to be a fool who does not know how to hide his happiness. Furthermore, I am a sort of a gipsy who often moves about, and I am afraid some of the letters will be lost and their contents forgotten sooner or later. It is natural that I should like to deposit them in a warehouse. As a matter of fact, some of the letters of Holmes have already been lost. I remember in one of his letters, he told me that President Hoover had presented him with an album of newspaper clippings all relating to Holmes. I have ransacked all my drawers, but the letter is missing.

IV

A few of my younger friends have expressed to me their wish to write an essay on my philosophy of law. I have invariably told them that I have no philosophy, or that my philosophy is not yet ripe. The most that I can say is that they may find bricks here and there in my fragmentary writings, which they may use for their own buildings. The one essay into which I have put most of my philosophy of law happened to be written in Chinese (關於現今法學的幾個觀察 published in 東方雜誌冊週紀念特刊). But that deals mostly with what my

philosophy is not. Recently, I have to my great gratification found my definition of the Law of Nature (also in Chinese) quoted with approval in a Dictionary of Law published by the Commercial Press. Let me attempt a translation of the definition, which I am afraid is a little involved: *Natural law is that kind of law which fits the conditions of a given society, realistic, farsighted, capable of promoting culture so as to help it to rise, in the shortest possible period of time, from its present status to the next higher stage.* I owe this idea to Alexander, Morgan, and other philosophers of emergent evolution.

While I am on this subject, I think it may not be out of place to introduce here a recent correspondence between Professor W. S. Holdsworth and myself:

Oct. 30, 1935

DEAR PROFESSOR HOLDSWORTH,

Your kind letter of Sept. 19 was received a few days ago when I was in Shanghai. To have received such a letter from one whose history of English Law has become a veritable institution in the commonwealth of Jurisprudence is no small event. I thank you most heartily for this.

By coincidence I have just brought the nine volumes of your history to Nanking and have been studying it for some days. What an inexhaustible store of legal wisdom! While you always let facts speak for themselves, yet I have detected—excuse me for my audacity in using this word—the underlying philosophy of legal history. For you constantly use the word “emerge.” Somehow there has emerged in my mind after reading parts of the great work, a vision! I don’t know how to call it—a *theory of the emergent law*? In chemistry it is well known that *quantitative* increases are often accompanied by *qualitative*

changes. In psychology Prof. Wundt subsumed similar changes under "*the principle of creative resultants.*" In law, you are the first jurist to point out the emergent evolution of legal institutions and concepts.

Under separate cover I am mailing you a reprint of some selected letters of Mr. Justice Holmes. I did not intend to publish them but some friends have convinced me that it would be a crime to hide the light under a bushel. I am sure you will be interested in reading them. The reference to you (p. 294) was *in re* your *Some Lessons from our Legal History*.

I suppose you would like to know what your humble correspondent is doing. Well, at present I am no longer on the Bench, but a legislator. I am Chairman of the General Committee of the Legislative Yuan, and this will be my Nanking address.

Respectfully yours,

J. C. H. W.

ALL SOULS COLLEGE,
OXFORD,

Nov. 22, 1935.

DEAR PROFESSOR WU,

I had already sent a letter to thank you for the Holmes letters which I enjoyed reading very much. They are of very permanent value. I must now thank you for your very kind letter. It is very gratifying to an author to know how his work is appreciated by those who are especially competent to appreciate it. It is specially interesting that you have deduced from it a theory of which I was quite unconscious. I suppose the theory really underlies all history, and is

the reason why history is worth while. Moreover it distinguishes worth while history from mere anti-quarianism.

Yours sincerely,

W. S. HOLDSWORTH.

V

Another pet theory of mine, which I have not written out either in Chinese or in English, but which every student of mine knows by heart, is that Justice is a compound of Truth, Goodness, and Beauty. To be more explicit, Truth is the basis, Goodness the material and object, and Beauty the quality, of Justice.

What has Justice to do with Beauty? the reader may ask. I answer, they have nothing to do with each other, for they are the same thing. Sung Yü (宋玉) once described the beauty of a girl. "She is so beautiful that adding one cubic to her stature would make her one cubic too tall, and detracting one cubic would make her one cubic too short." Byron hits upon the same idea:

One shade the more, one ray the less,
Had half impair'd the nameless grace
Which waves in every raven tress,
Or softly lightens o'er her face.

What is beauty but a sense of fitness? And what a sense of fitness but Justice? The written law does not solve the question of justice for the judge. For instance, where the law provides that theft is punishable from five years' imprisonment to one day's detention, the judge has to fit a definite term to a particular prisoner. Ought not his ideal to be that he should mete out a punishment so just that adding one day would make the term one day too long and decreasing one day would make it one day too short?

Is it beautiful or just to punish the innocent? No.
Is it beautiful or just that some people should grow
rich beyond their needs at the expense of others? No.
Is it beautiful or just if, as Tu Fu recorded,

Meats and wines are rotting in the mansions,
And human bones are rotting outside their doors?
(*Lin Yutang's version.*)

Emphatically no! But why not? The honest answer is that there is some unfitness or disproportion in these phenomena that one can only feel but cannot describe in words. For, as Holmes so keenly put it, "General propositions do not decide concrete cases; their decision will depend upon something more subtle than any articulate major premise."

VI

As I look back to the days when I was sitting on the Bench, I cannot help desiring that I could re-live them. I tried cases, both big and small, ranging from international law to the question of the art of tailoring. Some of my decisions on big cases are reprinted here. But it is the small ones that I recall with the greatest tenderness. I beg to reproduce here an interesting report which appeared in *Shanghai Mercury* (Feb. 10, 1928) under the honorific title of "Solomon Sits in Judgment":

When Judge John C. Wu said at the Pan-Pacific tiffin held at the Union Club last Tuesday that a judge of the Provisional Court "had to be internationally-minded," he probably did not expect so soon such an excellent illustration of his meaning as that which offered itself in the course of a civil suit between two Russian women heard this morning at the Provisional Court, involving a dispute over some dresses, alleged by the plaintiff, Miss Frieda Polynetskaya, of 345

Broadway, to have been badly made by Madame Korff, of The Little Salon, 31A North Szechuen Road, on which rebate amounting to \$55 was claimed.

After one of the most spirited hearings ever heard in any local Court, lasting for the best part of two hours, during which Judge Wu once dismissed the action but allowed it to proceed when a new angle was introduced by the parties in the midst of a chorus of assent and dissent over the decision, judgment was finally handed down in a way which would have done justice to Solomon and the defendant, Madame Korff, was ordered to pay back \$6 to the complainant, being the amount of deficiency in the tailored results of Madame Korff according to Judge Wu who based his judgment on the opinion of a foreign police officer called in from outside as an independent witness to pass judgment upon one of the dresses supplied by defendant to complainant and alleged to have been badly made.

The judgment was hailed with apparent satisfaction by both parties and Judge Wu's solution of what he declared one of the most difficult cases he had ever had to deal with was, in the minds of all present, a happy judicial inspiration which turned the courtroom from one of babbling indignation into one of quietness, serene peace and mutual satisfaction. Plaintiff showed her approval of the decision by immediately paying over the \$6 plus \$2—half the Court costs ordered by Judge Wu—to Chief Inspector Shaw of the Provisional Court to be paid into the Police Poor Box. The disputants gathered up the dresses over which they had so many spirited passages-at-arms, threw each other a venomous look or two, added a few more scathing personal remarks, not on oath, and left the Court resolving not to meet again in any sort of business capacity.

SOME OF THE FACTS

This case had many remarkable aspects and will probably remain unique in the records of the Provisional Court. Miss Polynetskaya told the Court that she had had several dresses made by the defendant, Madame Korff, some of which she had supplied her own material, Madame supplying the rest. Some money had been paid on account, chits had been signed for the rest and now she wanted some of her money back as the dresses did not fit.

Madame, on the other hand, alleged that Miss Polynetskaya had a bad habit of ordering dresses, wearing them for a week or two then returning them as unsuitable. One such dress, black mourning dress ordered when plaintiff's father died, was kept, according to Madame Korff, for three months, worn frequently, and then returned as unwanted. This dress was produced in Court as evidence.

Miss Polynetskaya's mother was present in Court and took a prominent part in the proceedings. Her "Oo, Oi's" and "My God's" during Madame's testimony were loud and frequent. It was obvious that she disagreed with much that was said. On a number of occasions she evidently came to the conclusion that her vocal protests were not receiving sufficient attention from the bench and left her seat, thrust herself under the nose of Judge Wu and drowned the voices of the witnesses until ordered back to her seat by His Honour who remained commendably calm in the face of these frequent, furious attacks.

The *Shanghai Mercury* reporter arrived just in time to hear plaintiff's mother give her opinion of Madame Korff.

"She's no dressmaker," she shrilled. "She can't make anything!"

"Huh!" was Madame's only retort to this slur upon her professional ability.

PUTS ON DRESS

Judge Wu thought that the best way to decide whether one of the dresses in question was well made or not was to have the plaintiff wear it and she was given the use of the lawyers' waiting room to don the costume in which she presently appeared in Court, clad in the dainty garment, and offered herself for inspection, displaying a figure less sylph-like than rotund.

"No," she said, when Madame's assistant interjected a remark in defence to the effect that plaintiff had put on weight, "I have always been fat." A remarkable admission from a young lady.

Madame, from her seat, loudly declared—at least as loudly as Madame's pleasantly soft voice could—that plaintiff especially ordered this particular dress to be made smaller than otherwise as she wished to re-sell it.

"Oi!" exclaimed Madame Polynetskaya, clutching her temples.

Judge Wu surveyed the plaintiff in her testimony dress.

"What do you think of it?" he asked Dr. S. Wilhelm who, having concluded a case in an adjacent Court, had been attracted by these proceedings. "I can't see any trouble with it myself." Are you an expert Dr. Wilhelm?

Dr. Wilhelm replied in the negative.

Plaintiff—"Only an expert could tell what was wrong with this dress."

Judge Wu—"Can it be made better?"

Plaintiff—"Of course it can."

Defendant—"No."

Madame Polynetskaya—"Oi, oi! How she talks."

Dr. Wilhelm, keeping one eye steadily fixed upon the plaintiff and the other on the door, ventured to pass his opinion on the dress. "In my opinion," he said, "that dress fits quite well. In fact, you look quite pretty," he said to Miss Polynetskaya.

"It would fit if I were a hunchback, yes," responded the latter.

Judge Wu—"Well, I am not an expert. How about you Mr. Kotenev?" he asked of this Court official who was acting in the capacity of interpreter in order to facilitate the trial whenever witnesses seemed unable to find the correct expression for some of their thoughts. "Or how about some of the newspaper men in Court?"

Mr. Kotenev expressed his opinion that the dress "looked fashionable," but the press representatives remained neutral.

Plaintiff—"It is not the fashion, if that's what you mean." Mr. Kotenev subsided.

"I only want her to fix the dress or else give me back my material," continued plaintiff, "I am willing to show it to any tailor for his opinion."

"Yes, that's right," from Madame Polynetskaya.

Judge Wu—"But this is a small case. It is not worth calling in an expert."

The parties indulged in a loudly voiced private argument at this stage, and further remarks of His Honour could not be heard for some minutes. Finally Judge Wu was heard to ask plaintiff, "You claim that the dress could be made much better?"

Plaintiff said a whole lot of things to signify her agreement with this remark but Dr. Wilhelm, becoming a little bolder, in response to a glance from Judge Wu, expressed another opinion, saying to plaintiff, "I think the dress fits you quite well. You have no cause for complaint."

JUDGE UP AGAINST IT

Judge Wu sighed and said, "This case is harder to decide than any big case involving international law."

"Ah judge, we are not rich, we have not much money," pleaded one of the parties crowding around the judicial bench.

"Let her fix the dresses," chimed in Madame Polynetskaya, determined to have a say in all things.

Madame Korff was heard above the din to say something about plaintiff having called at her shop in a temper and broken some of her windows.

"That," hastily stated Judge Wu, "is another case altogether!"

"But I have witnesses," asserted Madame Korff.

"Yes," sneered Madame Polynetskaya, "your friends."

"Don't quarrel," said Judge Wu sternly and there was a moment's lull in the battle. Then to plaintiff, he said, "You take the dresses."

"I don't want your dresses," almost shrieked plaintiff as defendant thrust the tailored creations towards her, and recoiled as though from a snake.

Judge Wu, to defendant, "Give her those dresses." Plaintiff still refused to take them.

"It is the order of the Court that you take those dresses," insisted Judge Wu, "and in addition you will go without payment and damages also. If you are not satisfied you can appeal. Sell the dresses if you don't want them."

BENCH MOBBED

The dresses were handed over and this seemed to be the signal for a general outburst from all parties. Madame Polynetskaya was to the forefront instantly and held the ear of His Honour for several seconds

but was quickly thrust aside by Madame Korff with a polite but firm gesture and Judge Wu was treated to a brief history of business relations between Madame Korff and Miss Polynetskaya, nothing pleasant being said about the latter by Madame.

Chits, cheques, bills, and other papers suddenly appeared as if by magic following Judge Wu's pronouncement and the learned Judge discovered then that he had not disposed of the matter as easily as he had thought for there was a little matter of some outstanding accounts on some of the dresses to be settled. It soon became clear that each of the parties were in reality owners of some of the property, plaintiff having supplied the material in some cases and in other cases having paid something on account only, details which required further adjustment. Judge Wu, then, in order to settle the matter justly, called a halt to the bloodless battle being fought on the parties to their seats and the courtroom floor, ordered all plaintiff into the witness box where he examined her at length as to the manner or purchase of the various dresses.

Then he called Madame Korff to the stand and asked her how much she had charged for certain work in connection with these dresses and when Madame replied "I received \$18," he said, "In my opinion it was not worth it."

"Oh, why?" was Madame's shocked reply.

"That is my judicial opinion," retorted Judge Wu.

"But she came back for more work, she must have been satisfied," complained the defendant.

"Did you measure her body before you made the dress?" asked Judge Wu.

"Oh, absolutely."

"Then it seems clear that she wanted the dress for herself and not for sale."

MADAME IS OFFENDED

"Ah, me, I make big business in my place," commenced Madame Korff. "I make dresses \$100, \$200 for many customers. It is only that she does not want to pay me for the dresses. The dresses are alright and she wears them for one week, two weeks, or a month and brings back to me and say 'No good,' 'Don't want.'"

"They come shop, make little scandal," Madame went on while the mother of the plaintiff exclaimed "Oi, Oi" and "Nyett" and other remarks which sounded much more interesting. "I am afraid they break my shop window," Madame Korff proceeded, "and I want to take to the police."

"Yes—you—yes, I want take you to the police," came back Madame Polynetskaya. "Yes." And the mother of the complainant looked about her for—it seemed—sympathy from the crowd of spectators which filled the Court, the aisles and the doorway.

Static was introduced into the babble of voices at this stage in the shape of testimony from a Chinese witness, one of the tailors employed by the defendant who made up the dresses for plaintiff. His testimony was given in Chinese and was unintelligible to all parties present save Judge Wu who had a brief respite from the tear-away tactics of the disputants. What the tailor said was not translated and is not known.

An assistant employed by Madame Korff then took the stand and delivered her evidence in Russian. What she said is likewise unknown but at one stage in the middle of it Madame Polynetskaya caught her breath, exclaimed "My God," got up from her seat saying to her daughter, "Come on, the Court is finished. Such things she says." She remained, however.