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William Mills Maltbie: A Study in Dissent

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Many judges, over many scores of years, have felt strongly enough about their views of the law to put aside pressing work and to write into the state reports a dissent from the majority. A dissent more or less eloquent, but how effective?

As a juridical institution, the dissent is peculiar to American jurisprudence, and in slightly different form and theory, to the jurisprudence of the rest of the English-speaking world. It is no accident that the ranks of judicial dissenters contain some of the greatest names of the American legal world. Brandeis, Holmes, Carter, Traynor, Maltbie, Musmanno, Hughes, Frankfurter, Cardozo have founded immortal reputations, to no little extent based upon the power of their dissents to persuade, instruct, and above all to change the views of their fellow judges and attorneys.

Read what a great dissenting justice, Talbot Smith of the Michigan Supreme Court, wrote concerning his convictions on the role of the dissent:

It is not incompetence which divides the justices of our highest courts, but competence and convictions. These human values which are being weighed are weighed by the judges in their individual scales. It is not a mathematical but a moral process. . . . [T]here is no doubt that a powerful dissent so weakens the majority opinion that it often collapses after a few years; and there is no doubt that the same dissent casts much uncertainty upon the prevailing opinion. . . . I feel that it is a superficial and trivial comment to say that dissents will destroy confidence in the courts, because confidence comes not from hiding cleavages in thought, and principle, but in exposing and exploring them. . . . I find from it a duty—a duty to speak, to speak, if need be, by way of dissent.¹

It is our purpose here to take up the dissents of a "strong judge," Chief Justice William M. Maltbie of the Connecticut Supreme Court of Errors; to examine them, and to trace them down the years to 1954.

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¹ Address by Talbot Smith, Laymen's League, Church of Our Father, Detroit, March 27, 1956. The literature on the judicial dissent is small. Justices Roger B. Traynor of California, Walter V. Schaefer of Illinois, Maltbie, and Talbot Smith have indicated that much could be gained by systematic scholarly study of patterns of judicial dissent. An excellent summary of materials on the dissent may be found in AUERBACH, GARRISON, HURST, & MERMEN, *THE LEGAL PROCESS* 355 (1961), which contains as well relevant excerpts from the works and speeches of Justices Schaefer, Learned Hand, Musmanno and others.

WILLIAM MILLS MALTBYE

William Mills Maltbye was born in Granby, Connecticut, on March 10, 1880. He received his undergraduate and legal education at Yale University, where he graduated as a bachelor of law in 1905. After a long and distinguished career in the legal profession, he died in 1960.

Justice Maltbye was admitted to the Connecticut Bar in 1905, and practiced in Hartford. Election to the Connecticut House of Representatives followed in 1913. He was Assistant State's Attorney for Hartford County from 1914 to 1917, and executive secretary in the governor's office from 1915 to 1917.

After a short term as a judge in Litchfield County, William Mills Maltbye was appointed to the superior court where he served from 1917 to 1925. He served as an associate justice of the Connecticut Supreme Court of Errors from 1925 to 1930. In 1930 he became chief justice and served in that capacity until compulsory retirement in 1950.

On the Connecticut Supreme Court Justice Maltbye wrote the majority decision in 824 cases, and dissented in about 60 cases. Of these dissents, 35 were accompanied by opinions. These 35 dissents and their influence on later cases form the subject matter of this discussion.

What manner of man was this great dissenter? From his decisions and dissents, this appears: he was a careful student of the law, gifted with a powerful and polished English style reminiscent of that of Benjamin N. Cardozo. He was somewhat conservative in legal as well as in political outlook, yet he was completely willing to accept a change with which he might have disagreed initially. The voice of the legislature was sacred, and any indication of judicial indifference to statute was likely to bring a stinging rebuke from him, though he may well have known that the rebuke would be ineffective. A lifetime of service as a judge made him as sensitive to the requirements of justice and simplicity in a case as to the demands of *stare decisis* and uniformity of judgment. This same lifetime of service took him from the lowest position in the regular judicial hierarchy of his native state to the position of chief justice of the supreme court of that state. His long service on the supreme court of errors gave him a rare opportunity to reconsider his earlier dissents, to attempt to convince the court anew of the soundness of his position, and even to sweep the other members of the court along with him by the sheer force which comes with seniority on the bench and a marvelously intricate knowledge of the law of a particular jurisdiction.

An analysis of his dissents, however, will serve better to show the force of the judicial current than any number of paragraphs about the man or his decisions. For the purposes of this paper, Justice Maltbye's dissents are divided into those which became law, those which influenced the law, and those which had no apparent effect on the law.

DISSENTS WHICH BECAME LAW

A rather surprising technique is demonstrated by Chief Justice Maltbye in turning an earlier dissent into law in the case of *Roessler v. Burwell*.² In *Colonial*

² 119 Conn. 289, 176 Atl. 126 (1934).

Trust Co. v. Jos. Hilton, Inc.,³ the majority of the court held that a contract which may appear complete upon its face must be interpreted in light of surrounding circumstances, especially where it is obvious that the parties understand that the contract is qualified by events to be expected in the normal course of business dealing. Justice Maltbie dissented vigorously to the effect that courts cannot substitute their opinion of the parties' intent for the terms clearly expressed in the contract.⁴ In this particular case, his dissent would appear to be the better law, but poorer justice than the position taken by the majority.

In *Roessler v. Burwell*, Chief Justice Maltbie quoted from his own dissent in *Colonial Trust* as the law of that case.

The exclusion of the questions as to the intention of the plaintiff in securing the covenant from the defendant, so far as appears, falls within the rule that it is not the intent the parties may have had; but the intent they may have expressed in their agreement that is controlling. *Colonial Trust Co. v. Hilton Inc.*, 111 Conn. 77, 83, 149 A. 513, 515.⁵

Thus, a major dissent became law because a chief justice quotes his dissent in an earlier case as the decision of the court in that case, with no apparent contradiction by the other members of his court.

In the same year, the city of Shelton attempted to protect its citizens from the dangers of raw milk by passing an ordinance making the sale of milk not pasteurized or obtained from tuberculin-tested cows illegal within the city. In an unenlightened decision on the validity of the ordinance, the supreme court ruled that since state law allowed the sale of several other types of milk, the ordinance was invalid as an attempt to limit the law-making power of the state legislature.⁶ In his common-sense dissent, Justice Maltbie pointed out that there was no conflict between statute and ordinance, and that in such a case, where the intent of the legislature was vague and ill-defined, it was at least as logical to assume that it was the intent of the legislature to protect the health of the citizens of the state as it was to assume any other intent.⁷ He added that a local ordinance in pursuit of this same end was a valid exercise of municipal power.⁸

Justice Maltbie's logic appealed more to the legislature than that of the majority; for soon after the decision the statute was changed to prevent such conflicts between state and local milk regulation.⁹ *Sorenson v. New Haven*,¹⁰ though a superior court decision seemed to establish the Maltbie dissent as the law of the state. The court pointed out that the statute had been changed after the *Shelton* case. It decided further that raw milk "may be detrimental to health," and that the statute in its amended form gave the local public health authority the power

³ 111 Conn. 77, 149 Atl. 513 (1930).

⁴ *Id.* at 83, 84, 149 Atl. at 514, 515 (dissent).

⁵ *Roessler v. Burwell*, 119 Conn. 289, 295, 176 Atl. 126, 128 (1934).

⁶ *Shelton v. City of Shelton*, 111 Conn. 433, 150 Atl. 811 (1930).

⁷ *Id.* at 452, 150 Atl. at 817, 818.

⁸ *Id.* at 452, 150 Atl. at 818.

⁹ CONN. GEN. STAT. § 22-167: "No provision of section 22-133 shall affect the authority of any town, city, or borough to enact ordinances concerning the sale or distribution, within its limits, of milk which may be detrimental to public health."

¹⁰ 4 Conn. Supp. 369 (1936).

to regulate sales of milk which may be detrimental to health.¹¹ In six years, the law had come full circle, and the Maltbie dissent *was* law.

The *Shelton* case was not the first instance in which the Connecticut legislature had done Justice Maltbie the honor of turning one of his dissents into law. Shortly before, in 1928, Associate Justice Maltbie had tried to introduce through the living decisional law a common-sense provision adopted in other states by statute.¹² He had failed in the court, but the legislature had taken up his dissent and made it into the rule to be followed in the state.¹³ The issue arose in a trust case,¹⁴ where the testatrix had provided that the residue of her estate should be divided into two equal parts, giving one outright to her nephew, and the other half in trust for the lives of two nieces, and for their benefit. A dispute arose over the distribution of income earned upon the estate during the settlement. The majority decided that since the nephew's half of the estate did not vest until after administration of the estate had been completed, he was entitled only to the fixed sum of one-half of the residue of the testatrix, exclusive of interest earned during probate. The nieces' half, held in trust, vested immediately upon the death of the aunt. Thus one-half of the income on the residue of the estate, according to the decision of the court, went to the nieces. The income earned on the nephew's half of the estate was otherwise undisposed of, and thus fell into the residue. So, the income earned on the nephew's share was to be divided, one-half to the trust for the nieces, and one-half absolutely to the nephew.¹⁵ The decision of the court probably represents the weight of authority in the United States wherever the common law has not been changed by statute.

The Maltbie dissent points out simply that a will speaks at death, and that it is his belief that beneficial ownership vests at that time, subject to the costs of administration, settlement, and other appropriate expenses.¹⁶ For him the legal intricacy which seems to hinder rather than to promote was not a speedy and just settlement. The majority formula might be a joy to the mathematically minded, but it has little to recommend it in plain common sense.¹⁷

In 1941, twenty-three years later, now Chief Justice Maltbie took up the problem in the case of *New Britain Trust Co. v. Stanley*.¹⁸ The "New York" rule was rejected.

When there is no gift, but by a direction to executors or trustees to pay or divide and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives. At any rate, the New York rule has been definitely repudiated in this state. *White v. Smith*, 87 Conn. 663, 668, 89 Atl. 272.¹⁹

¹¹ *Id.* at 373.

¹² Maltbie's willingness to see the common law grow as in the past, without legislative action, is a notable characteristic.

¹³ See text accompanying note 23 *infra*.

¹⁴ *Stanley v. Stanley*, 108 Conn. 100, 142 Atl. 851 (1928).

¹⁵ *Id.* at 114, 115, 142 Atl. at 855, 856.

¹⁶ *Id.* at 114, 142 Atl. at 855 (dissent).

¹⁷ For a full treatment of the method used by the majority of the court, see 2 PROBATE LAW AND PRACTICE OF CONNECTICUT 233 (1929).

¹⁸ 128 Conn. 386, 23 A.2d 142 (1941).

¹⁹ *Id.* at 393, 394; 23 A.2d at 145.

Nothing is overruled; no mention of the earlier *Stanley* case is made. The law favors the early vesting of estates, says Maltbie, jumping back a half-century for his precedent. An earlier case, *Mead v. Close*,²⁰ decided in 1932, had presaged this decision. In the *Mead* case, Maltbie, speaking for the whole court, states that

The law favors the vesting of estates, and, unless a contrary intent appears, gifts will be construed to take effect in point of right at the death of the testator, though their enjoyment be postponed to a future time by the interposition of a life estate or otherwise.²¹

The ground had been prepared, consciously or not, by this decision.²²

In 1949, the legislature confirmed the Maltbie opinion. The Connecticut statute, in force today, provides for the sharing of income by both residuary and non-residuary beneficiaries in the proportion which the amount of their legacies bears to the original inventories, after deducting the income on specifically devised or bequeathed property from the income to be allocated, and the value of the specifically-bequeathed or devised property from the inventory.²³

TORT LAW

Yet, it is neither in wills nor in contracts that Maltbie has become most widely known. Tort law is the area in which his name has become famous, and two closely related dissents in this area²⁴ were to be woven by the Chief Justice into the law of Connecticut. The first occasion which offered the opportunity for an outstanding tort dissent was a case involving absolute nuisance.²⁵ The atmosphere was still tinged with the classic case of *Mrs. Palsgraf*²⁶ and *Mahoney v. Beaman*.²⁷ The question of duty dogged the courts then even more than it does today. The influence of Cardozo overlay the tort field, and one of the few judges of Cardozo's stature writing at the time was Maltbie, a friend and student of Cardozo. The underlying philosophy of the two great judges in tort law was quite similar.

In the more important of the two cases,²⁸ to be overruled nine years later, the fact situation was simple. Workmen were engaged to remove iron rails from beneath a hotel. A cable was attached to one of them and then connected to a truck across the highway. While pulling the rails from beneath the hotel, the workmen allowed the cable to fall to the road, slack, each time a car passed, so that the car could drive over the rope with no untoward event. A car was parked by the side of the road, partly obscuring vision. As the defendant came driving along this highway, a workman was standing by the side of the road, near the

²⁰ 115 Conn. 443, 161 Atl. 799 (1932).

²¹ *Id.* at 445, 161 Atl. at 799.

²² See also *Bridgeport Trust Co. v. Fowler*, 102 Conn. 318, 128 Atl. 719 (1925); *Palmer v. Estate of Palmer*, 106 Me. 25, 75 Atl. 130 (1909); *Frelinghuysen v. New York Life Ins. & Trust Co.*, 31 R.I. 150, 77 Atl. 98 (1910), cited in Lofgren, *Interest on Legacies*, 4 CONN. BAR J. 298 (1930).

²³ CONN. GEN. STAT. 1949, § 2927d, CONN. GEN. STAT. 1958 § 45-192.

²⁴ *Hill v. Way*, 117 Conn. 359, 168 Atl. 1 (1933) and *Jager v. First Nat'l Bank*, 125 Conn. 670, 7 A.2d 919 (1939).

²⁵ *Hill v. Way*, *supra* note 24.

²⁶ *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

²⁷ 110 Conn. 184, 147 Atl. 762 (1929). See also notes 41-45 *infra* and accompanying text.

²⁸ *Hill v. Way*, 117 Conn. 359, 168 Atl. 1 (1933).

cable. The rope was not lowered as it should have been, and the defendant drove into the cable with some force, throwing the workman back against a sign post injuring him seriously.

In the trial which followed, the driver was exculpated and recovery was denied. The case was appealed, presenting the supreme court with a nice question of the duty of care. The cable across the road was obviously a public nuisance, likely to cause serious injury. The defendant had every right to expect the road to be in good condition, safe and open. No signs or warning signals were posted. The nuisance was created intentionally, though without intention to cause injury. What duty was owed by the driver to the creators of the nuisance? On the face of it, the situation seemed to call for the application of the absolute nuisance theory. Yet, the decision of the supreme court exacted an extraordinary duty of care from the driver. The ruling stated that the cable was a nuisance, and that the plaintiff, among others, was clearly responsible for the creation of that nuisance. Yet, the defendant was required to use the care of a reasonably prudent person, even in this situation. The defendant could not proceed negligently, though without actual notice of the presence of the plaintiff or of the possibility of injury to him, then claim no liability for injuries to the person who had created the nuisance.²⁹

The Maltbie dissent was typically clear and blunt.³⁰ The creator of a nuisance is in no better position than a trespasser on another's property. "He takes his chances," and the driver owes no duty to an obstructor in such circumstances until the driver becomes aware of the obstruction or knows its presence is reasonably to be expected. The duty question receives a simple answer: a person owes no duty to the creator of a nuisance until he has reason to know of the possibility of injury to the nuisance creator. Simple negligence is not enough. Some type of fault must also be present, if the fault on the part of nuisance creator is to be overcome.

The companion case, *Jager v. First Nat'l Bank*,³¹ has little of interest in it to the lawyer or to the student. Suffice it to say that the case involved a ramp leading to a store, poorly built, dangerous, and a clear nuisance to the public. The underlying reasoning of the decision was similar to that in the *Hill* case.

Though these two dissents set the stage, it was not until his last decade on the bench that Justice Maltbie wrote his two dissents on the duty of care into the law of Connecticut. The occasion³² was again simple: a woman had fallen on a sidewalk and injured herself seriously. A driveway had been cut across the sidewalk, in such a way that a sudden sharp drop was formed where driveway and sidewalk intersected. The construction was obviously faulty, to such an extent as to create a public nuisance and a hazard to persons walking with normal care. Chief Justice Maltbie's decision was equally direct: where the creator of a nuisance intended to bring about the conditions which in fact are found to be a nuisance, his conduct goes beyond mere lack of ordinary care, and contributory

²⁹ *Id.* at 367, 168 Atl. at 4.

³⁰ *Id.* at 367, 168 Atl. at 4 (dissent).

³¹ 125 Conn. 670, 7 A.2d 919 (1939).

³² *Beckwith v. Town of Stratford*, 129 Conn. 506, 29 A.2d 775 (1942).

negligence is not a defense. The plaintiff (injured party) may be barred from recovery only when he assumes the risk or is in extreme fault.³³ Here, Maltbie had come into his final and greatest decade. He dismisses *Hill v. Way*, not by subterfuge or legal nicety, but by blunt dismissal of the case as wrong in theory and in law.³⁴ This is Justice Maltbie at his finest, learned in the law, and conscious of his learning, shaping the law of his state to the "best reasoned" view of the law.

In *Hill v. Way*, . . . we held that the nuisance was one grounded on negligence. . . . Further consideration has led us to the conclusion that we were wrong in that ruling. The stretching of the rope taut across the road brought about a condition which was inherent in the work being done and was therefore intentional. . . . The nuisance in the *Beckwith* case was an absolute nuisance and the trial court was correct in its ruling that contributory negligence would be no defense. There is no error.³⁵

CONSTITUTIONAL LAW

Of less importance, but yet of considerable interest, is one of the minor Maltbie dissents which became part of the American jurisprudence. The dissent expressed the unrest which the Justice felt over the majority decision and his own belief that the findings in the lower court were insufficient to support a conviction on the charge. The case was a famous one in constitutional law, *Cantwell v. Connecticut*,³⁶ one of the Jehovah's Witnesses cases. A Connecticut statute³⁷ forbade soliciting contributions for a religious cause except from members of the religious organization itself, unless given permission to do so under a license to be issued by the Secretary of the Public Welfare Council at his discretion. The Secretary's discretion was rather broad. He could decide if the cause was a religious one or a bona fide charity, and could withhold permission even from these if they did not meet reasonable standards of efficiency and integrity.

In the *Cantwell* case, the evidence showed that sect members had been going from house to house, speaking and playing phonograph records which advocated their own religion and attacked Roman Catholicism quite strongly. If the householder seemed at all willing, or at least not openly and violently hostile, the Witnesses played these records, spoke to the person, tried to sell booklets and other literature, and requested contributions. The particular neighborhood involved was 90 percent Catholic, and personal violence to the Witnesses was threatened. They were arrested, tried and convicted for soliciting contributions for an alleged religious cause without a license, in violation of the statute.³⁸ Chief Justice Maltbie and Justice Brown dissented.³⁹

³³ *Id.* at 514, 29 A.2d at 778.

³⁴ *Id.* at 512-14, 29 A.2d at 778.

³⁵ *Id.* at 513, 514, 29 A.2d at 778, 779.

³⁶ 309 U.S. 626 (1939), 310 U.S. 296, *reversing*, 126 Conn. 1, 8 A.2d 533 (1939).

³⁷ CONN. GEN. STAT. 1930, § 6294, amended, CONN. GEN. STAT. § 860d (Supp. 1937).

³⁸ *Ibid.*

³⁹ *State v. Cantwell*, 126 Conn. 1, 8, 8 A.2d 533, 537 (1939): "In this opinion the other judges concurred except that Maltbie, C. J. and Brown, J., dissented from so much of it as holds that the finding was sufficient to support the conviction of the accused upon the third count under the statute penalizing the solicitation of money or other valuable thing."

The United States Supreme Court shared Justice Maltbie's uneasy feeling about the case. In *Cantwell*,⁴⁰ one of a series of cases of the thirties and forties setting the bounds of religious privilege, the highest court struck down the Connecticut statute as unconstitutional under the fourteenth amendment as a deprivation of liberty without due process.

DISSENTS WHICH INFLUENCED THE LAW

The case of *Cromwell v. Converse*⁴¹ provides another example of the influence which a justice sitting on his state's highest court for a generation may exert over the course of the law. As has been remarked many times over, almost every great judge which the Anglo-Saxon system of law has produced has held judicial office over a long span of time. Longevity may not be indispensable to greatness, but it appears to help.

In the *Cromwell* case, a discretionary trust was involved. The majority of the supreme court held, among other things, that income realized on an estate before a beneficiary's death and allocated automatically by the trustees under their original decision made some time before, goes to the beneficiary's estate, and not to the remainderman. This holds true despite the fact that the income was not paid over in the *cestui's* lifetime.⁴² The Maltbie dissent is, as always, pellucidly clear and logical.⁴³ If the trust is discretionary, nothing vests in the beneficiary until payment is actually made. Therefore, the basis of the majority opinion fails in legal logic. Maltbie expressed the opinion that it should be in the discretion of the trustees to pay income accrued up to the death of the *cestui que trust* to his estate, or to the remaindermen. In any other case, the unallocated income goes to the remaindermen.⁴⁴

In *Willis v. Hendry*,⁴⁵ the issue was not directly in point, so it is not correct to say that Chief Justice Maltbie changed the law. However, it is safe and correct to say that he influenced the future course of the law. The facts of this case are similar to the earlier one. Trustees of a discretionary trust had received income from the beneficiary's trust estate, but had not yet allocated it. The question arose as to whether the trustees might pay off certain debts and obligations incurred for the *cestui's* support during life. For the majority, Chief Justice Maltbie ruled that the trustees might exercise full discretion in this instance, and might pay off just debts from the trust estate if they thought it proper to do so.⁴⁶

These facts bring the case within the decision of *Greenwich Trust Co. v. Shively*, 110 Conn. 117, 121, 147 A. 367, rather than that of *Cromwell v. Converse*, 108 Conn. 412, 143 A. 416. . . . The case is one of a spendthrift trust with discretion in the trustee, and falls within comment "b" under § 158 of the Restatement of the Law of Trusts instead of within paragraph (2) of that section; but for the reasons stated in *Cromwell v. Converse, supra*,

⁴⁰ *Cantwell v. Connecticut*, 310 U.S. 296 (1939).

⁴¹ 108 Conn. 412, 143 Atl. 416 (1928).

⁴² *Id.* at 433, 143 Atl. at 422.

⁴³ *Id.* at 435, 143 Atl. at 424 (dissent).

⁴⁴ *Id.* at 436, 143 Atl. at 424.

⁴⁵ 127 Conn. 653, 20 A.2d 375 (1941).

⁴⁶ *Id.* at 674, 675, 20 A.2d 384, 385.

we cannot follow the broad statement in that comment, that in the case of such a trust, the executor or administrator of the beneficiary's estate is not entitled to the income.⁴⁷

Thus, this part of the *Cromwell* case is distinguished and limited, but not overruled. Yet, it seems safe to hazard a guess that a bookmaker with any knowledge of the law would not put much money on the future vitality of *Cromwell v. Converse* on the particular point here involved.⁴⁸

DISSENTS WHICH HAD NO APPARENT INFLUENCE ON THE LAW

It may seem a little strange to spend time talking about the Maltbie dissents which died. Yet, it is submitted that dissents of this very character show most the inner thoughts of a judge. The expression of horror, of contempt, of disgust contained in the dissent may tell more of the judge's actual philosophy than volumes of his majority decisions. In the majority decisions, the judge is writing for other judges as well, and usually for the full court. He writes as well for the courts which came before and for those which will follow. He is free only within narrow limits. He must write in most instances not what he believes is the law and should be the law, but rather a compromised version of the opinions of five or seven or nine judges. Only in the dissent is he free of the past course of the law. His responsibility is to the inner ideals by which he guides his life, to the society in which he lives, and to the ever-evolving common law. There are few judges who write dissents merely because they seem charmed by their own words.

Mr. Justice Maltbie's earliest dissent on the Connecticut Supreme Court of Errors shows little promise of the high stature to which he was to rise as a state court justice. In *State v. Schleifer*,⁴⁹ the defendant was found guilty of soliciting striking railroad shop men to violence. The defendant, a union organizer of the worst type, advocated beating company officials with lead pipes, sabotaging machinery with emery dust, ruining and destroying the homes of company officials, and other pleasant methods of economic warfare. Drastic violence actually did result from his urgings, and he was brought to trial in a tense atmosphere. Public feeling was running high against anarchist acts, and the red scare of the twenties was in full tide. The defendant was convicted and he appealed on the grounds that the prosecutor was unfair in referring to the accused as a traitor and slacker; in referring to a case involving the terrorist bombing of a bank, with the implication that the defendant was advocating the same sort of thing; and further, in implying that he, the prosecutor, had additional but absent witnesses who would make the case airtight.⁵⁰

The supreme court reversed the conviction and remanded for a new trial. The Maltbie dissent is legalistic and doctrinaire:

A "fair trial" to the accused does not require that every possible protection

⁴⁷ *Ibid.*

⁴⁸ For an interesting Maltbie dissent on a related issue see *Bridgeport City Trust Co. v. Beach*, 119 Conn. 131, 174 Atl. 308 (1934).

⁴⁹ 102 Conn. 708, 130 Atl. 184 (1925).

⁵⁰ *Id.* at 712, 130 Atl. 192, 193.

shall be thrown about him, but over against his right must be set the right of society to protect itself against crime and social disorder.⁵¹

It did not take the new associate justice long to outgrow this mode of thought. Just four years later *State v. Litman*⁵² came up to the highest court of the state. Here again, union difficulties were involved. Two men, workers in a dress-goods factory and apparently scab laborers or strikebreakers, were leaving their homes under guard to go to work in a taxi supplied by their employer. Before they reached the taxi, they were set upon by nine men, who proceeded to beat them with sawed-off billiard cues wrapped in newspapers and perhaps with an iron pipe as well. The nine men were indicted and convicted of assault with intent to murder. Maltbie's dissent in this case, when it reached the supreme court on appeal, was more like the natural, even-handed opinions usually associated with him. Like a logical syllogism, the dissent falls into place, compelling, and far more timeless than the opinion of the majority. In a criminal case, the state must prove every essential element necessary to make up the crime charged, beyond a reasonable doubt. The jury could find assault with intent to murder only if no other reasonable explanation existed for the facts established by the evidence. Even assuming all the facts presented by the state were established, an intent only to "beat up" labor enemies would reasonably explain the evidence. In fact, Maltbie points out, the evidence and the whole complex of the case show such an intent far more clearly than an intent to kill.⁵³

STATUTORY CONSTRUCTION

During his years on the bench, Maltbie kept up something of a running battle with other members of the court over the issue of strict versus loose interpretation of statutes. Maltbie's respect for the literal meaning of a statute contrasts strongly with the liberal, and at times slightly high-handed treatment of state legislative acts by the supreme court of errors. For instance, in preparing to read into a statute a provision that was not there, the court announced sanctimoniously:

The intent of the lawmakers is the soul of the statute, and the search for this intent we have held to be the guiding star for the court. It must prevail over the literal sense and precise letter of the language of the statute.⁵⁴

Justice Maltbie hit the judicial ceiling in his dissent, calling for a close adherence to the logical interpretation of statutes and to the legislative intent.⁵⁵

The court used this case repeatedly in future decisions, when the literal meaning of a statute threatened the equities in a case or threatened to shake up well-settled principles.⁵⁶ Even Justice Maltbie himself, rather strict interpreter though

⁵¹ *Id.* at 734, 130 Atl. 194, 195 (dissent).

⁵² 106 Conn. 345, 138 Atl. 132 (1927).

⁵³ *Id.* at 355, 138 Atl. at 135 (dissent).

⁵⁴ *Bridgeman v. City of Derby*, 104 Conn. 1, 8, 132 Atl. 25, 27 (1926).

⁵⁵ *Id.* at 16, 132 Atl. at 30.

⁵⁶ See, e.g., *Brown ex. rel. Gray v. Quintilian*, 121 Conn. 300, 304, 184 Atl. 382, 384 (1936), *Kelly v. Dewey*, 111 Conn. 281, 285, 287, 149 Atl. 840, 841, 842 (1930), *State ex rel. Stamford v. Bd. of Purchase and Supplies*, 111 Conn. 147, 161, 149 Atl. 410, 415 (1930).

he was, had recourse to this decision more than once to broaden or limit an uncomfortable statute.⁵⁷

This type of judicial juggling should surprise no one who is acquainted with the Connecticut jurisprudence. The supreme court of errors is as likely to refer to *Corpus Juris Secundem*, to the enlightened weight of authority, or to a noted text-writer as it is to its own past decisions. The superior and supreme court judges are professional judges, chosen for life, and are not involved in politics to any but a negligible extent. The senior superior court judge is selected almost automatically to fill a vacancy on the supreme court of errors. To men in this tradition, the law and the reasons for it are clearly known, and legislative direction is hardly needed except as a violent corrective to a trend of law deemed undesirable for social or political reasons.

The finest example of Maltbie's unwillingness to counter clear legislative intent is found in his dissent in *Gunther v. Board of Zoning Appeals*.⁵⁸ There the trial court had reversed the action of the Board of Zoning Appeals in granting permission for extension of a non-conforming use. A factory located in a residence zone wished to expand by making use of a nearby dwelling-house as an office. The appellate court then reversed the trial court, holding the action of the board in allowing use of the dwelling-house to be proper under the zoning ordinance. This ordinance allowed expansion of a plant to adapt "to different or improved processes of manufacture or production" even if located in a residence zone. The supreme court of errors, apparently not relishing the idea of nonconforming uses encroaching continually on residential land, reversed again, upholding the trial court, and ignoring a statute on the subject.⁵⁹

Maltbie, in his dissent, points out that the Connecticut statutes provide that a zoning board may "permit the extension of an existing commercial or industrial establishment in any district."⁶⁰ He points out that the legislative intent is obvious, and requires only a reading of the statute.

It is not for us to substitute for a clearly expressed legislative intent our idea of what would be a wiser provision . . . nor is it the function of the court to attempt to improve a legislative enactment by reading into it provisions which do not find expression in its words.⁶¹

The majority did not read the statute as Justice Maltbie did at that time, nor has it since.⁶²

A brief mention should be made of the elasticity of mind of the Chief Justice. It is by no means uncommon for him to take a solid position on one side or the other of a major issue in law, only to find him abandoning his stand a few months

⁵⁷ See, e.g., *Kuehne v. Town Council*, 136 Conn. 452, 456, 72 A.2d 474, 476 (1950); *Greenwich Trust Co. v. Tyson*, 129 Conn. 211, 222, 27 A.2d 166, 172 (1942).

⁵⁸ 136 Conn. 303, 71 A.2d 91 (1949) (dissent). See also *Arsenal School Dist. v. Hartford*, 120 Conn. 348, 180 Atl. 511, 518 (1935) (dissent), for an example of Justice Maltbie's respect for legislative will, and also for a prime example of a judge castigating a legislature for poor legislative draftsmanship.

⁵⁹ *Gunther v. Bd. of Zoning Appeals*, *supra* note 58.

⁶⁰ CONN. GEN. STAT. § 1033(1).

⁶¹ *Gunther v. Bd. of Zoning Appeals*, 136 Conn. 303, 311, 71 A.2d 95, 96 (1949).

⁶² See, e.g., *Heady v. Zoning Bd. of Appeals*, 139 Conn. 463, 94 A.2d 789 (1953); *Piccirillo v. Bd. of Appeals on Zoning*, 139 Conn. 116, 90 A.2d 647 (1952).

later, when he has become convinced that he was wrong, or that the law was evolving away from him. A good example of this appears in his later treatment of his dissent in *Fischer v. Kennedy*,⁶³ decided in 1927. There, the supreme court upheld recovery granted on a quantum meruit, in quasi-contract, relying on the principle of unjust enrichment. Justice Maltbie dissented to the effect that this idea of unjust enrichment was too vague, as was implied promise.⁶⁴ Yet, only one year later, in 1928, Maltbie speaks for the unanimous court thus:

The situation is therefore one recognized by the law as falling within the underlying principle of implied contracts, which, in the various situations which we have noted and no doubt others, places a legal obligation upon one to do that which in equity and good conscience he ought to do. *Fischer v. Kennedy*, 106 Conn. 484, 492. 138 A. 503.⁶⁵

The remaining dissents are of negligible interest with the possible exception of the warhorse among Chief Justice Maltbie's dissents, *Mahoney v. Beatman*.⁶⁶ Despite certain comments on the subject of Maltbie's dissent in this case, lauding him for his penetrating analysis of the factors making up the proximate cause concept, or for his great dissent probing the majority decision,⁶⁷ Justice Maltbie had no other purpose in dissenting in that case than to point out that the question of proximate cause was not before the court, but only that of contributory negligence. Therefore, the court was making use of a vehicle not particularly suited for a long discourse on proximate cause. Chief Justice's views on the issue were expressed later.

There is no suggestion that I think I ought to make to you other than this: In my dissent in *Mahoney v. Beatman*, 110 Conn. 184, I grumbled a good deal about the particular formula for proximate cause which was adopted in the majority opinion, but did not dissent from that particular part of the opinion. In fact, I am bound to admit that the formula then adopted has at least in our court worked out very well and, as you no doubt know, was adopted by the American Law Institute. I did dissent from the failure to reduce damages on account of such results as were fairly attributable to plaintiff's actions. I speak of this because there has been a misunderstanding of that dissent.⁶⁸

Thus have the dissents of one of the greatest state supreme court justices provided a brief picture of his mode of thought. Even more, the fate of his dissents, still being shaped, has shown that the dissenting opinions of a great judge, learned in the law, do indeed affect the jurisprudence of his state and of the United States.

⁶³ 106 Conn. 484, 497, 138 Atl. 503, 508 (1927) (dissent).

⁶⁴ *Id.* at 498, 138 Atl. 508 (dissent).

⁶⁵ *Kearns v. Andree*, 107 Conn. 181, 188, 139 Atl. 695, 698 (1928).

⁶⁶ 110 Conn. 184, 201, 147 Atl. 762, 768 (1929) (dissent).

⁶⁷ See Gregory, *Justice Maltbie's Dissent in Mahoney v. Beatman*, 24 CONN. BAR J. 78 (1950).

⁶⁸ Letter from William M. Maltbie to Mrs. Marilyn-June B. Blawie, July 30, 1954.