# American Legal History – Russell

**Joseph C. Hutcheson, Jr., "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision", 14 *Cornell Law Quarterly* 274-88 (April, 1929).**

Many years ago, at the conclusion of a particularly difficult case both in point of law and of fact, tried to a court without a jury, the judge, a man of great learning and ability, announced from the Bench that since the narrow and prejudiced modern view of the obligations of a judge in the decision of causes prevented his resort to the judgment aleatory by the use of his "little, small dice" he would take the case under advisement, and, brooding over it, wait for his lunch.

To me, a young, indeed a very young lawyer, picked, while yet the dew was on me and I had just begun to sprout, from the classic gardens of a University, where I had been trained to regard the law as a system of rules and precedents, of categories and concepts, and the judge had been spoken of as an administrator, austere, remote, "his intellect a cold logic engine," who, in that rarified atmosphere in which he lived coldly and logically determined the relation of the facts of a particular case to some of these precedents, it appeared that the judge was making a jest, and a very poor one, at that.

I had been trained to expect inexactitude from juries, but from the judge quite the reverse. I exalted in the law its tendency to formulize. I had a slot machine mind. I searched out categories and concepts and, having found them, worshiped them.

I paid homage to the law's supposed logical rigidity and exactitude. A logomachist, I believed in and practiced logomancy. I felt a sense of real pain when some legal concept in which I had put my faith as permanent, constructive and all-embracing opened like a broken net, allowing my fish to fall back into the legal sea. Paraphrasing Huxley, I believed that the great tragedy of the law was the slaying of a beautiful concept by an ugly fact. Always I looked for perfect formulas, fact proof, concepts so general, so flexible, that in their terms the jural

relations of mankind could be stated, and I rejected most vigorously the suggestion that there was, or should be anything fortuitous or by chance in the law. Like Jurgen I had been to the Master Philologist and with words he had conquered me.

I had studied the law in fragments and segments, in sections and compartments, and in my mind each compartment was nicely and logically arranged so that every case presented to me only the problem of arranging and re-arranging its facts until I could slip it into the compartment to which it belonged. The relation of landlord and tenant, of principal and agent, of bailor and bailee, of master and servant, these and a hundred others controlled my thinking and directed its processes.

Perceiving the law as a thing full grown, I believe that all of its processes were embraced in established categories, and I rejected most vigorously the suggestion that it still had life and growth, and if anyone had suggested that the judge had a right to feel, or hunch out a new category into which to place relations under his investigation, I should have repudiated the suggestion as unscientific and unsound, while as to the judge who dared to do it, I should have cried "Away with him! Away with him!". . .

I knew, of course, that some judges did follow "hunches,"--"guesses" I indignantly called them. I knew my Rabelais, and had laughed over without catching the true philosophy of old Judge Bridlegoose's trial, and roughly, in my youthful, scornful way, I recognized four kinds of judgments; first the cogitative, of and by reflection and logomancy; second, aleatory, of and by the dice; third, intuitive, of and by feeling or "hunching;" and fourth, asinine, of and by an ass; and in that same youthful scornful way I regarded the last three as only variants of each other, the results of processes all alien to good judges. . . .

[Now, however,] after eleven years on the Bench following eighteen at the Bar, I, being well advised by observation and experience of what I am about to set down, have thought it both wise and decorous to now boldly affirm that "having well and exactly seen, surveyed, overlooked, reviewed, recognized, read and read over again, turned and tossed about, seriously perused and examined the preparitories, productions, evidences, proofs, allegations, depositions, cross speeches, contradictions . . . and other such like confects and spiceries, both at the one and the other side, as a good judge ought to do, I posit on the end of the table in my

closet all the pokes and bags of the defendants--that being done I thereafter lay down upon the other end of the same table the bags and satchels of the plaintiff."

Thereafter I proceed "to understand and resolve the obscurities of these various and seeming contrary passages in the law, which are laid claim to by the suitors and pleading parties," even just as Judge Bridlegoose did, with one difference only. "That when the matter is more plain, clear and liquid, that is to say, when there are fewer bags," and he would have used his "other large, great dice, fair and goodly ones," I decided the case more or less offhand any by rule of thumb. While when the case is difficult or involved, and turns upon a hairsbreadth of law or of fact, that is to say, "when there are many bags on the one side and on the other and Judge Bridlegoose would have used his "little small dice," I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch--that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.

And more, "lest I be stoned in the street" for this admission, let me hasten to say to my brothers of the Bench and of the Bar," my practice is therein the same with that of your other worships.

For let me premise here, that in feeling or "hunching" out his decisions, the judge acts not differently from but precisely as the lawyers do in working on their cases, with only this exception; that the lawyer, having a predetermined destination in view,--to win his suit for his client--looks for and regards only those hunches which keep him in the path that he has chosen, while the judge, being merely on his way with a roving commission to find the just solution, will follow his hunch wherever it leads him, and when, following it, he meets the right solution face to face he can cease his labors and blithely say to his troubled mind--"Trip no farther, pretty sweeting, journeys end in lovers meeting, as every wise man’s son doth know."

Further, at the outset, I must premise that I speak now of the judgment or decision, the solution itself, as opposed to the apologia for that decision; the decree, as opposed to the logomachy, the effusion of the judge by which that decree is

explained or excused. I speak of the judgment pronounced, as opposed to the rationalization by the judge on that pronouncement. . . .

If these views are even partly sound, and if to great advocacy and great judging the imaginative, the intuitional faculty is essential, should there not be some change in the methods of the study and of the teaching of the law in our great law schools? Should there not go along with the plain and severely logical study of jural relations study and reflection upon, and an endeavor to discover and develop, those processes of the mind by which such decisions are reached, these processes and faculties which, lifting the mind above the mass of constructing matter whether of confused fact or precedent that stands in the way of just decision, enable it by a kind of apocalyptic vision to "trace the hidden equities of divine reward, and to catch sight through the darkness, of the fateful threads of woven fire which connect error with its retribution?"

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