

June 1997

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Recommended Citation

Edward S. Godfrey, *A Tribute to Merle W. Loper*, 49 Me. L. Rev. 277 (1997).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol49/iss2/6>

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A TRIBUTE TO MERLE W. LOPER

*Edward S. Godfrey**

As we rally from the death of a good friend, we are often troubled by memories that spring up unbidden and reawaken our feelings of sorrow and loss. In an institution of learning, especially a close-knit one like the Maine law school, such memories recur with some frequency to the teachers who have lost a colleague as well as a friend. A resource of knowledge and insight and inspiration, once available for the common enterprise, is now gone, and events have a way of reminding the survivors rather often of that grievous fact.

Next fall I expect to have trouble with recurrent memories when I set about preparing to teach classes in trusts and estates. Professor Merle Loper knew a lot about that subject. Beginning in the summer of 1976, he served for several years as consultant to the Maine commission on revision of the probate law. The project required careful study of the patchwork of then existing Maine laws and procedures for the transmission of property on death or incapacity, in order to supplant them with a more rational and up-to-date and better integrated system. The commission's study and recommendations, embodied in the 662-page report that Merle prepared, supported the enactment in 1979 of the Maine Probate Code, a major reform, which the state can be proud to have as part of its law. After the Code was enacted, Merle worked closely with Dean L. Kinvin Wroth in the preparation of a new set of probate rules for the Maine Supreme Judicial Court, to become effective when the Code itself went into effect, on January 1, 1981.

When I resumed teaching trusts and estates in 1987 after many years away from the subject, I had frequent occasion to seek enlightenment from Merle on the reasons underlying various decisions by his commission or by the legislature in adopting, revising, or rejecting particular provisions of the Uniform Probate Code, which had served as the model for the Maine statute. Merle was most generous with his time, and we had many helpful discussions. He was easy to talk to about such matters: well informed, careful in judgment, his sense of humor always on tap.

I had learned over the twenty-five years of our friendship that he was equally ready, willing, and able to discuss poetry and drama. One instance of his interest in literature has come back to me with some poignancy. In 1989, I was composing some remarks that were to be part of the celebration of the career of a certain retiring judge when I ran across a passage in the well-known tribute to Justice Holmes that Learned Hand had delivered on the unveiling of

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Holmes's portrait at Harvard in 1930.¹ At the end of his tribute, Hand asked, "Who could as well have said what I have tried to say?" and then quoted a translation from the ancient Greek of one of the poetic epitaphs of Theodoridas. Hand seemed thereby to proffer the epitaph as a metaphor for Holmes's outlook on the human condition. Here is the epitaph, in the translation Hand used:

"A shipwrecked sailor buried on this coast
Bids thee take sail.
Full many a gallant ship, when we were lost,
Weathered the gale."²

Mulling over whether the same epitaph would be appropriate for my own piece on the retiring judge, I consulted with Professor Loper, as a connoisseur of poetry, about what Hand might have had in mind in using it in his encomium for Holmes. We agreed finally that the verses simply celebrate the dauntlessness of the human spirit—the life force that keeps people striving despite adversity. (Holmes was an enthusiast for hard work well done.) The drowned sailor is to be admired as he ungrudgingly bids us not to lose heart or give up trying to achieve our goals out of fear of failure or death. When I muttered something to the effect that Holmes might have subscribed to that proposition even when goals were less than respectable as long as the workmanship was good, I remember how quickly Merle pointed out that the ships were described in the epitaph as "gallant." A "gallant" ship, he thought, would not engage in piracy, for instance, or carry contraband. So I backed off my reductive speculation: those ships bidden to "take sail" were engaged in good and useful traffic, and there was no occasion to worry whether Holmes's enthusiasm for good workmanship might lead him to applaud activities that would be better terminated.

The same generous spirit with which Merle interpreted the ancient epitaph infused his entire outlook on life. In his professional work, though he dealt with legal issues realistically, he did not approach them in a cynical spirit. The thoughtful, dispassionate way in which he analyzed legal problems is exemplified by his last law review article, entitled *Free Expression and Judicial Speech: A General Framework from One American Perspective*,³ published last year in the University of New Brunswick Law Journal. That balanced and sensitive essay should be required reading for all judges.

On the personal side, when he lost his beloved wife, he did not sink into bitter apathy as many men would have. He rallied, steadfastly resumed his work at the law school and for the Maine high court, and continued to follow his interest in the arts. It takes great

1. Learned Hand, *Mr. Justice Holmes*, 43 HARV. L. REV. 857 (1930).

2. *Id.* at 862.

3. Merle W. Loper, *Free Expression and Judicial Speech: A General Framework from One American Perspective*, 45 U.N.B. L.J. 105 (1996).

strength to absorb a loss such as he had endured and still view the world in a kindly and generous way.

We have lost a colleague of great ability, good will, and courage.

