

Bad Omens

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It was a bad omen. When four attorneys and a judge all agree on a resolution, nothing good can come of it. It disturbs the natural order of things. It disrupts some cosmic flow. It rips the fabric of some natural law. But I was naïve and thought that, for once, the adversarial system had risen above itself and reason had prevailed. No losers, but only winners. No discord, but harmony. Our clients' anger and frustration would evaporate in the realization that there was an answer without suffering a loss. But John Melvern knew better.

Melvorn was 72 and came into the office two or three times a week, mostly to talk to his old clients and gossip about the law. He was bent over with osteoporosis, causing his head and neck to cant at a forty-five degree angle. When he gazed at you his eyes rose to the top of the oculus. However bent his frame, he had a dignity that was reflected in the way he dressed. His white hair and military crew cut were unintentionally fashionable; his silk bow ties and sport coats and slacks gave the appearance of relaxed authority. As a young attorney I turned to him for advice, especially about clients. Law school taught nothing of clients. Contracts, torts, due process and crimes were drilled into us but clients—the one common thread that made the practice of law—were an after thought. But John Melvern was wise in the ways of clients. He would unconsciously smooth his silk bow tie with his left hand and smile as if he held some hidden secret. “Don’t just listen to their words. Look at what they need. Find out what they want. They won’t tell you,” he cautioned, “because they don’t know themselves.”

Of course, I knew what Walter Trane wanted. He was up front. It was obvious. It was textbook law any first year law student would understand. He had an easement problem. There was nothing subjective or emotional about it, and I could fix it.

Walter was a man in his mid-fifties, tall and erect, with a full head of hair just turning gray. He had an open, pleasant face and a mild self-deprecating sense of humor. A dispute with his neighbor brought him to our firm. Walter Trane and Jake Bessy had been the best of friends for fifteen years and the worst of enemies for the last eight. During the “Good Years,” their two families had spent vacations together, sometimes at the Bessy cabin near Lake Tahoe and sometimes at a family ranch that belonged to the Tranes. Their children grew up together and when the Bessy’s youngest son, Billy, contracted meningitis, Walter and Millie, his wife, sat for long hours with Jake and Sue Bessy at the hospital until Billy was out of danger.

But it all changed. Walter and Jake's friendship turned into implacable hatred. The cause was never clear but the *fact* was real. At the initial interview Walter was angry. "I don't know what has gotten into the head of that damned old man. He hasn't been right in his head for years. Stubborn old man. Cantankerous bastard. And his kid, Billy, isn't any better. He's never been right."

"The illness?" I asked, referring to the meningitis.

"Naw, I think it's genetic."

The bone of contention was an easement that ran in front of the Bessy home and led to the public street. The Bessy and Trane properties were the result of "four by fouring," a means of subdividing property into four parcels in order to avoid compliance with the Subdivision Map Act. Long since prohibited, an owner of land could divide his property into four parcels and legally sell them off without complying with local requirements for roads and public services. In this instance, the subdivider had created two easements that formed an "L," the shorter leg of which crossed in front of the Bessy's front porch to a street. The longer leg bordered Walter's front yard. Within the last few years, new homes and new streets were built at the far end of the long leg of the easement, connecting it for the first time to a public road. Jake Bessy fenced off the easement that ran across the front of his house, forcing Walter to take the long way around. Walter was furious. "I got a right to that road," he said. "He's got no right to fence it off. It's in my deed."

A quick check with the title company confirmed that Walter Trane had an express grant of easement for road purposes across the Bessy property. The case was simple. Walter's easement was a property right. "I want you to file suit. I want you to get that crazy old man," Walter said after we confirmed the existence of the easement. "I don't care what it costs or how long it takes. He's been ruinin' my life for years."

"Over an easement?" I asked. It didn't seem possible that fencing off the easement could cause such ire. Walter's jaw muscles twitched with anger. "No. Not just the easement. It's that dumb kid of his, Billy. He's nineteen and got nothing better to do then race his truck down the gravel road in front of my house and do wheelies. He kicks up dust and throws rocks around ruining my garden."

I wrote a letter to Jake Bessy and, after not hearing from him, filed suit. I assumed nothing would happen; Bessy would take the complaint to an attorney who would review the facts and tell him to save his money and open up the easement. At the most we would get a default judgment. I was wrong.

A small two-man firm represented the Bessy's as part of a cooperative agreement with his union. They were doing it for free. John Melvern's tongue clicked loudly as he listened to the facts of the case. His eyes looked up from his bent frame and he said, "Better prepare for a fight."

"They've got no case, no defense. I'm sure that when the other attorneys think about it they will know that it is hopeless."

John gave me one of his damnable smiles that hinted of hard-won lessons. "But it's free. It's not costing Bessy a dime," he replied.

"So?"

John leaned forward in his chair and placed his two hands on the top of my desk. "So, the greatest engine for dispute resolution known to Western Civilization is the attorney's fee." He spoke with such reverence, as if he was describing the Constitution or the Magna Carta. I was shocked. He continued. "Judges, the threat of juries, well-researched briefs, none of them hold a candle to the attorney's fee. It's only when a client realizes the justice he wants is costing him money will he listen to reason. The worst justice is free justice. It clogs the system. But send a litigant an attorney's bill and he will consider settlement. And I tell you, ninety-five percent of our cases should be settled. It's the best resolution. So if it's free, put on your armor and prepare for a fight because they have nothing to lose, except the case."

John's comment disturbed me. Still, I was convinced that reason would prevail. After some interrogatories and a few phone calls, I knew the junior associate representing Bessy was less than enthusiastic. A hearing for a preliminary injunction was scheduled for the next morning. That evening I heard the doubt in his voice. "Surely Mr. Trane doesn't have to go over the front of Bessy's Property," he said. "He has another alternative."

"Yes, he does, but he has a right, a recorded easement. Jake Bessy can't just dispossess him of a property right."

"I know, I know but there is a larger issue here."

"Like the Bessy kid doing wheelies in front of Walter's roses?" (I admit that it wasn't one of my better arguments but sometime you take on the prejudices of your client.)

"He has to get into his driveway."

"Yes, but he doesn't have to do it in front of Walter's home. The driveway is on the edge of his property."

There was a long silence, so long that I thought the associate had hung up. Finally he spoke, slowly at first, as if pulling the words from a stack of ideas. "You know, there may be a solution to all this."

"I know there is," I replied quickly. "Just have Jake Bessy take down the fence and open up the easement."

"No. No, I mean a real solution," said the associate. "Bear with me a minute. My client's rub is that he doesn't want someone driving across his front yard. You gotta admit that no one really wants that if there is another alternative." I didn't reply. "And your client's beef is that Billy Bessy drives his truck on the gravel road in front of his home."

"He does wheelies," I said.

"Wheelies or whatever, they bother Mr. Trane. But there is a solution. Allow Jake Bessy to close off the easement, and then Bessy will deed whatever

interest he has in the portion of the gravel road in front of the Trane property to Mr. Trane.”

“And?”

“And Walter Trane can then fence off that portion and keep Billy or anyone else out from in front of his house. Billy can still get to his driveway but he won’t be able to do wheelies in front of the Trane home. In fact, Walter Trane could plant trees in the abandoned roadway and in a few years never see the Bessy home again.”

I was stunned. It made perfect sense. Jake Bessy would lose the right to a portion of the gravel road in front of Walter’s home and Walter would lose his easement in front of Bessy’s home. They would both suffer a loss but gain peace in the bargain. Each would be inconvenienced, but it would result in a final resolution. “Do you think it would work?” I asked tentatively.

“I don’t see why not. It’s too late to talk to Mr. Bessy tonight, but I can present it to the judge in the morning. What do you think?”

“I like it,” I said, as I warmed to the idea. “I like it a lot.”

I was elated. It was a simple and obvious solution. Walter Trane and Jake Bessy would be forever separated. The bones of contention between them would be removed and their mutual anger, while not quelled, would not be enflamed. There was no time to discuss it with John, but he would meet me in the morning in Department 28.

Next morning I almost looked forward to Judge Montari. Judge Lewis Montari sat in Department 28 and was gruff and stern. He had been a former prosecutor and later a civil litigator and readily grasped the real issues before his court. Tall, with white hair and heavy jowls, he scared me. But this morning was different. We had a solution, a resolution that harmonized the parties’ interests. John Melvern was in the courtroom with Walter and Millie Trane. I pulled John aside. “I think we have a resolution,” I said with enthusiasm. John’s eyebrows jerked up as if hit by an electric shock.

“Really?”

I told him about the discussion with the associate the night before. I outlined how each side would get something but each side would also give up something. “You’ve always told me,” I reminded him, “that the basis of a good settlement is shared pain.”

John Melvern involuntarily smoothed his bow tie with his left hand as he thought it over. Just then the two attorneys for Jake Bessy arrived with their client. The associate, stiff and excited in his new suit, followed his senior partner, a man in his late thirties with the swagger of a P.I. attorney. They approached us and smiled, shaking our hands. “Don’t looked so damned agreeable,” growled John, “not in front of our clients.” Jake Bessy sat in the back of the empty courtroom glaring at Walter Trane. Walter returned the stare. We all suddenly grew sober. “Let’s go see the judge,” said Melvern.

We notified the clerk and he ushered us into Montari's chambers. Judge Montari was sitting at his desk reading the briefs we had each filed in the case. He looked up over his half glasses. "Hello, John," he said, and then remembering the rest of us, "Gentlemen. It's been a long time, John. I thought you retired."

"Well, I did, judge, but the law keeps me coming back."

"Too bad," replied Judge Montari. "I've got eighteen months to go and I won't be back, I can tell you."

"Not even as a rent-a-judge? Give yourself some time, judge. You're still a young man. You'll get restless."

A faint smile crossed his face but then he turned to the briefs. "You gentlemen have got yourselves a hairball here," he remarked. Then, looking up over his glasses at our opponents, he asked, "Is it true that there is an expressly granted easement, a recorded deed?"

"Yes, judge, but—" the senior attorney said.

Judge Montari cut the older attorney off before he could finish, "If I recall correctly, the fact that Mr. . . . Mr.—"

"Trane," I added.

"Thank you," Judge Montari replied, glaring at me. "The fact that Mr. Trane has an alternative route is irrelevant unless we are talking about an easement by necessity. But we aren't talking about an easement by necessity, are we?"

The young associate shifted nervously, "It doesn't matter any longer, judge. We think we have come to a solution."

Judge Montari's expression changed. "You have?"

The associate pulled out a map and outlined his plan. Judge Montari leaned over the map following the associate's lecture as if looking for logical flaws. He sat back in his chair and suddenly smiled. "I must say, that is rather ingenious." Turning to John Melvern, he asked, "John, will your client accept this?"

John craned his neck and looked up at Judge Montari. "Don't know, judge. It's the young man's client," he said, referring to me. "I'm here just for the moral support."

"One of the benefits of retirement?"

John smoothed his bow tie. "You might say that."

Judge Montari turned back to the rest of us. "But you all agree to this? Even you John—whether or not the plaintiff is your client?" We all nodded in agreement. "It seems fair, and it cuts the Gordian Knot. It's a clean piece of work."

For Judge Montari to acknowledge the plan as a clean piece of work was itself a high honor. I felt a little envious of my counterpart for having devised it. We all shuffled out of chambers and headed to our respective clients still seated at opposite ends of the courtroom. I could not contain my satisfaction.

I was smiling. Logic and reason would prevail to give each of the litigants something that they needed. In the end the law would work to remove an irritant, a flaw in the weave of the social fabric, and each would come out a winner and none would lose.

I approached Walter Trane. His arms were crossed tightly against his chest and his eyes were ablaze. “See him over there?” he began, jerking his head in the direction of Jake Bessy. “See him? He thinks he is going to win, the damned fool.”

I soon learned that it is not good to contradict your client’s expectations. I had the buoyant hope that my explanation of the resolution would bring joy and a sense of intellectual peace to Walter Trane, but I was wrong. As I outlined the proposed settlement, he looked at me like Caesar to Brutus. “You’ve sold out! You’ve capitulated to that, that . . . and their attorneys.”

His words hit me like the insults of a law school professor. “I did not,” I assured him. “It’s only a recommendation, a proposal. Nothing more. I just thought that—”

Walter interrupted me. “You just thought it was a quick way of getting out of this case?” His suspicion was palpable.

“No, of course not, Walter. I just thought that it sounded like a fair resolution—fair between you and the Bessys.”

Walter turned his head and glared at the Bessys. “I don’t want fair. I want my easement, that’s what I want.”

I trudged back into Judge Montari’s chambers. John Melvern was waiting and saw the look on my face. He said nothing but there was knowing tragedy in his eyes. I explained to the judge that my client would not accept the settlement. It was some small relief that the other side was as unlucky, too. The associate hung his head. “He wants justice. He says he’s been waiting years for justice.”

“For justice?” asked Judge Montari for clarification. “Your respective clients want justice?” We both nodded in agreement. Judge Montari sighed, closed the file and looked up at John Melvern. “Do you have anything to add, John?”

John straightened his bent figure and looked at Judge Montari. “Justice breaks your heart, judge. Too much justice is sometimes a bad thing.”

“Well, gentlemen,” said Judge Montari to us collectively. “Your clients are about to get their justice and I hope they’re satisfied.”

Court convened and we made our arguments. Judge Montari found that Walter Trane had a recorded easement and that there was no justification for closing it off. Our client was vindicated but I was dispirited. A few days later John Melvern ambled into the office and looked at his messages. He came into my office and handed me a note. “Seems Walter Trane is still having trouble with the Bessy kid kicking up dust and irritating his roses. He wants you to do something about it.”

I reluctantly took the note and put it on the pile of other messages that awaited my attention. "I don't get it, John," I said. "I just don't get it. We had the perfect solution. Perfect. And neither one could see it. And now I've got this," I said, referring to the note.

John smiled slightly. "You made a mistake, you see. You didn't get what Walter really wanted." I was puzzled. He continued. "You didn't grasp his real agenda. He doesn't care about the easement, not really. What's a gravel road compared to a new street? No. All he wanted was to fight Jake Bessy and to continue to fight him. That note proves it. Those two old men will continue fighting each other until one of them dies. They like it and they hate it. You and I are only tools to allow them to do it." John paused and smoothed his bow tie. "It's a damnable thing but you can't win in these situations, you only lose. But, its better this way than taking it out in some other manner."

At that moment Trial by Ordeal sounded perfectly rational to me. Let them at it. Give them each a mace and armor and let them fight it out in sweaty combat. May the best man win! I was, after all, only a tool for future fights, a hammer or a shield. I thought bitterly of the settlement, of Judge Montari, and the associate in his new suit, and of John Melvern. I realized that harmony and symmetry were the enemies of settlements. I cringed at the neat package. I grew philosophical. When lawyers and judges agree, it's a bad omen.

I picked up the scrap of paper with Walter Trane's phone number, looked at it, and tossed it on a pile at the corner of my desk. "I'll call him tomorrow."

Tim Cahill is a lawyer in Sacramento, California. He has been writing for over twenty years. Two of his plays, "The Seduction of Thomas Sorrell" and "Going to Tibet," have been produced and published. His short fiction, "Purple Prowler" was published in *California Business Lawyer*.