

Justice Douglas Injured Again

PORTLAND, Ore., July 18 (AP)—A horse again has upset Supreme Court Justice William O. Douglas' mountain climbing plans.

Last year a horse rolled on him, putting him in a hospital for weeks.

Today he reported that a horse kicked him in the shin last week while at his Wallowa mountain summer home. He had planned to climb Mount St. Helens this week end, but the leg is a bit lame.

[NO DATE]

Supreme Court of the United States

Memorandum

_____, 194__
Fred

Good - fine work
the way you shut
that fellow up.

He thinks he's at the
Alfalpa Club

Bob

C. J.

[NO DATE]

Supreme Court of the United States
Washington, D. C.

Dear Chief

Thanks for the "Moon Gold"
sorghum - a product that my part of the
country can not offer. It makes great
ginger bread.

Sincerely

Bob

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
ROBERT H. JACKSON

October 26, 1946.

No. 522 - Silverman v. Osborne Register Co.

My dear Mr. Chief Justice:

I think No. 522, Silverman v. Osborne Register Co. deserves consideration by the conference. While it may be desirable to deny it, I think it should be discussed and I ask to have it restored for this purpose.

R.H.J.

Supreme Court of the United States
Washington, D. C.

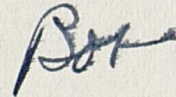
CHAMBERS OF
ROBERT H. JACKSON

April 14, 1947.

My dear Mr. Chief Justice:

I regret that I have two appointments in New York tomorrow which will make it impossible to be present at the conference. I am leaving my vote in the undecided cases with Mr. Justice Reed.

Sincerely yours,

A handwritten signature in dark ink, appearing to be "R. H. Jackson", written in a cursive style.

Supreme Court of the United States
Washington, D. C.

May 14, 1948.

The Chief Justice.

Dear Mr. Chief Justice:

Please note that I take no part in
the following cases:

386 Misc. - Hubert Krautwurst
390 Misc. - Rieke v. U. S.
407 Misc. - Heinz W. Blume 4-24-48 *acced*
411 Misc. - Josef Kiwitt
430 Misc. - Waldemar Hoven
437 Misc. - Heinz Hellenbroich
438 Misc. - Bernhard Piorkowski
446 Misc. - Erwin Goss
455 Misc. - Ludwig Firmenich
456 Misc. - Jakob Valentin Seiler
457 Misc. - Karl Hunsicker
463 Misc. - Richard Fritz Cirke
478 Misc. - Herbert Kunze
512 Misc. - Bersin v. Truman

Robert H. Jackson.

Supreme Court of the United States

Memorandum

_____, 194__

Chief -

in 470

Clark v U.S.A.

will you please
note that I take
no part.

RHD

Supreme Court of the United States

Memorandum

-----, 194---

Chief-

I have to be
absent the most of today
and probably the
first half of tomorrow.

I saw by the press that
Laughlin is coming
here for his 14th
stay in the case we have

Supreme Court of the United States

Memorandum

-----, 194--

Thrice rejected. You
have full authority to
vote me, if need be, to
deny this - (and also
his next term) application.

R.H.J.

Chief Justice



DEPARTMENT OF STATE
WASHINGTON

In reply refer to
S/S-PR 093.60F2/9-3047

October 15, 1947

My dear Mr. Chief Justice:

I am enclosing a copy of a note from the Czechoslovak Embassy at Washington transmitting the decoration and diploma of the Order of the White Lion, conferred by the Government of Czechoslovakia upon Mrs. Elsie Douglas.

It is understood that Mrs. Douglas is secretary to Mr. Justice Robert H. Jackson and as such would be prohibited by provisions of the Constitution and statutes of the United States from accepting the award without the consent of the Congress. The decoration and diploma in question will therefore be held in the custody of the Department of State until such time as Mrs. Douglas may be in a position legally to receive the award.

Sincerely yours,

For the Secretary of State:

Norman Armour
Norman Armour
Assistant Secretary

Enclosure:

From the Czechoslovak
Embassy, September 30,
1947.

The Chief Justice,
The Supreme Court.

copy to Justice Jackson
10/24/47



FORM M-120

4-18-47

DEPARTMENT OF STATE

ENCLOSURE

COMMUNICATION ADDRESSED TO
the Chief Justice

OFFICE }
DIVISION }

S/S-PR

093.60F2/9-3047

FILE NO.

4
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DEPARTMENT OF STATE

1947 OCT 1 PM 3 44

DC/M
FACILITIES BRANCH

The Czechoslovak Ambassador presents his compliments to His Excellency, the Secretary of State, and with reference to the Department of State's note No. 093.60F2/5-1947 dated May 28, 1947 has the honor to inform His Excellency that the President of the Czechoslovak Republic, Dr. Edvard Beneš has awarded the medal of the Czechoslovak Order of the White Lion to Mrs. Elsie Douglas, secretary to Mr. Justice, Robert H. Jackson, and to transmit herewith the insignia of the decoration together with a diploma to be held in the custody of the Department of State for Mrs. Douglas until she is legally entitled to receive it. An acknowledgement of receipt is also enclosed and the Ambassador will highly appreciate having it returned after Mrs. Douglas' signature has been affixed.

Enclosures 3.

Czechoslovak Embassy,
Washington, D. C.
September 30, 1947.

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Supreme Court of the United States
Washington, D. C.

May 14, 1948.

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HAMBERS OF THE
CHIEF JUSTICE

The Chief Justice.

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463 Misc. - Richard Fritz Cirke
478 Misc. - Herbert Kunze
512 Misc. - Bersin v. Truman

Robert H. Jackson.

file

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

SUPREME COURT BUILDING
WASHINGTON 13, D. C.

HENRY P. CHANDLER
DIRECTOR

ELMORE WHITEHURST
ASSISTANT DIRECTOR

July 8, 1948

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JUL 13 9 28 AM '48

CHAMBERS OF THE
CHIEF JUSTICE

WILL SHAFROTH
CHIEF OF THE DIVISION OF
PROCEDURAL STUDIES AND STATISTICS

Dear Mr. Chief Justice:

I am attaching a copy of
Justice Jackson's address to the American Law
Institute, in which I am sure you will be in-
terested.

Yours sincerely,

Will Shafroth
Will Shafroth

Honorable Fred M. Vinson
Chief Justice
Supreme Court of United States
Washington, D. C.

ADDRESS

BY

MR. JUSTICE ROBERT H. JACKSON
Associate Justice, Supreme Court of the United States

AT

THE AMERICAN LAW INSTITUTE
Mayflower Hotel
Washington, D. C.

Thursday, May 20, 1948

Mr. President and Fellow Members of the American Law
Institute:

It is an honor to greet this body of lawyers and a pleasure to see old personal friends as you gather for a work session in the Nation's Capital. It is altogether appropriate, of course, that a member of the Supreme Court participate in the welcoming rites. You represent the legal profession in a great undertaking to restate the law; I am sure it has not escaped your attention that the institution of which I am a member is actively engaged in the same enterprise. The consideration that you show me on this occasion I take to be an example of the fine sportsmanship which should prevail among competitors.

I was told by your president that "too elaborate an address is unnecessary." Your president is a master of the art of dressing up his desire for brevity in the cloak of forbearance for the speaker. But I shall say a few of the things that are on my mind, in spite of the admonition.

Some of us who began attending these sessions close to a quarter of a century ago look back on those days with a certain nostalgia. Perhaps we were all a little naive; perhaps I was more naive than the others. But as I remember it now, what may be called the "climate of opinion" at those earlier gatherings was quite different than it is today. The labor on restatement of the law was commenced on the assumption that the body of private law as embodied in court decisions was reasonably settled and fairly stable—at least, that most of it would hold good while the restatement was being formulated. Of course, we knew that from time to time particular decisions would be overruled and that some rules of law would and ought to be changed by legislation. But we did not anticipate any fundamental change in the attitude of courts to the law itself, or toward its development with traditional regard for its continuity which is a characteristic of the common law method.

A few days ago, however, Lord MacMillan, known pleasantly to many of us, in lecturing on "Law and Custom" at St. Andrews University said something that may awaken a response in you. It was this:

"The lover of our ancient laws and institutions, which we have inherited from our fathers, cannot but look on with some dismay at the process which we see daily in operation around us whereby the customary common law of the land, which has served us so well in the past, is being more and more superseded by a system of laws which have no regard for

the usages and customs of the people, but are dictated by 'ideological theories.'

"There will soon be little of the common law left either in England or in Scotland, and the Statute-book and the vast volumes of statutory rules and orders will take its place. The work of our courts is more and more concerned with the interpretation of often unintelligible legislation, and less and less concerned with the discussion and development of legal principles. Advocacy has consequently lost much of its intellectual interest and scope."

When I read that, I could not help but think of our own Mr. Justice Cardozo, whose reverence for the common law and common law methods was so poignantly expressed in his address at our third annual meeting almost 25 years ago. On that occasion he compared the common law to a magical coat described by one of Swift's characters—a coat which, it was said, would grow in the same proportions as the body of the wearer. Mr. Justice Cardozo said with some feeling that the common law had done just that—and that it was "still a good coat"—"far too good to be thrown away."

It is not easy from where I sit to judge whether Lord MacMillan's present fears or Judge Cardozo's earlier hopes represent current conditions in this country as a whole. The Supreme Court, except incidentally and not too successfully, was never an expounder of the common law. By *Erie Railroad v. Tompkins*, 304 U. S. 64, and related cases, and by its practice of declining to review

state law questions in diversity cases, the Supreme Court has closed its own door to independent speculation as to common law principles. What, therefore, appears to me as a decline in the place of the common law in our scheme of things may be a Washington disturbance which does not reach state courts or other federal courts. But I suspect it is a part of a more or less world-wide impatience with the gradual and deliberate pace of growth under the judicial process.

The titanic struggle for power now being waged between nations and between classes within the nations is as much one to change legal systems as to change political or economic systems. This involves far more than changing rules of property to achieve greater socialization, far more than imposing a Continental system of judicial procedure, far more than setting up a secret political police force. It goes to the very nature of the court itself and would alter the foundation on which our Western civilization has built its legal systems.

The concept which dominates all Communist teaching has been stated by Soviet authority in these simple words: "The Court has been, and still remains, as it ought to be according to its nature,—namely, one of the organs of governmental power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests."

The most striking feature of this concept is its primitive mingling in the court of the two functions that Western civilization years ago divided between the courts and the legislature. This is not surprising, for it comes to us

from a country whose legal institutions are at least 300 years behind the Western world in legal development and which has had little experience with representative legislatures. It comes from a people whom the Renaissance, the Reformation and the great democratic awakening that followed our own and the French Revolution, have never touched. Their history has no Magna Charta, no Bill of Rights. Their heroes include no Lord Chief Justice Coke to remind the Czar that he rules "under God and the law," no Jefferson, no Montesque. Lenin, Stalin and their compatriots stepped into a system of customary law deeply influenced by centuries of absolutism, and their view of the function of a court, instead of being an advance over ours, is simply an adherence to an old authoritarian practice.

Of course, we democratic peoples recognize that the policy of the law is, and should be, made by what you may call a "ruling class." Under our own system, legislation is shaped by a majority of the representatives of majorities of electors in the various constituencies. Our concept of the court presupposes its acceptance of decisions on policy by the legislative majorities that from time to time prevail, except where an overriding policy is set forth in the Constitution.

But when a ruling majority has put its commands in statutory form, we have considered that the interpretation of their fair meaning and their application to individual cases should be made by judges as independent of politics as humanly possible and not serving the inter-

ests of the class for whom, or a majority by whom, legislation is enacted.

The danger of the competition between our Western and the Eastern concept of courts is that the latter is so much easier to apply. To carry out the Soviet conception requires a judge only to know which side he is on. But to observe the democratic separation of functions so as to leave policy making to the political bodies and make the function of interpretation a professional matter, requires training, constant intellectual effort, deliberation and detachment. And it is guided and aided by the experience of generations of common law judges found in the precedents.

But as the courts are obligated by the principles of our representative government to independence in construing the language of statutes, so they owe a similar obligation of fidelity to the legislative bodies in applying their policies. If the separation of functions is to be observed, it is necessary that the utmost clarity prevail in the communication of the legislative will as to policy. I read from time to time of laws enacted by Congress of which it is said it will require several years to learn how the courts will apply them and what meaning courts will give to them. Then, too, I occasionally learn of a statute that means one thing one year and another the next. This seems to be accepted as necessary and usual, but it really indicates that there is something wrong in the process by which law is communicated in this country. It will not do to blame all of this confusion on bad

draftsmanship, appropriate as that criticism may be at times. It will not do to blame it all on the English language for its inexactness and lack of precision.

The unfortunate fact is that neither Congress in the choice of language it will use, nor the Courts in the meanings they will ascribe to Congress, have really effective guidance from consistently accepted principles of interpretation. Of course, a complete and automatic code of interpretation is not possible. But in its one hundred and fifty years of interpreting federal statutes, the Supreme Court has been less willing to commit itself to considered guides to interpretation than have many of the State Courts. Neither has Congress undertaken to formulate any comprehensive rules on this subject. For the individual Justice to be left so much at large presents opportunity and temptation to adopt interpretations that fit his predilections as to what he would like the statute to mean if he were a legislator. Indeed, sometimes there is not much else to guide him.

The subject is too large and complicated for comprehensive treatment on this occasion. It involves inconsistent practices on such vexing problems as these: When will re-enactment of a statute carry adoption of previous administrative regulations or court decision? When will consideration of a statute without changing it mean Congressional approval of prior judicial interpretation? Statutes that impose criminal and civil penalties or create liabilities, or all of these, are sometimes said to be construed strictly, sometimes liberally, and sometimes a mid-

dle course is taken. Should there be a prescribed, uniform approach to such statutes and, if so, what should it be? What attitudes should be taken toward statutes that contravene common-law doctrine in a federal system where there is no general federal common law? How far will we go to construe a law so as to avoid raising a constitutional question? How shall our construction differ in the case of what lately is called "humanitarian legislation" from other enactments, which by contrast must be regarded as "inhumanitarian,"—the tax laws perhaps,—and how shall we as judges distinguish the one from the other?

I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession. The British courts, with their long accumulation of experience, consider Parliamentary proceedings too treacherous a ground for interpretation of statutes and refuse to go back of an Act itself to search for unenacted meanings. They thus follow Mr. Justice Holmes' statement, made, however, before he joined the Supreme Court, that "We do not inquire what the *legislature* meant, we ask only what the *statute* means."

And, after all, should a statute mean to a court what was in the minds but not put into the words of men behind it, or should it mean what its language reasonably conveys to those who are expected to obey it?

The Constitution evidently intended Congress itself to reduce the conflicting and tentative views of its members to an agreed formula. It was expected to speak its will with considerable formality, after deliberation assured by three readings in each House. Its exact language requires Executive approval, or enough support to override a veto. How far, then, should this formal text and context be qualified or amplified by expressions of one or several Congressmen in reports or debates which did not find place in the enactment itself?

There is a tendency to decrease the measure of the ambiguity which originally justified resort to legislative history. But even if the ambiguity is genuine and substantial, do we find more solid ground by going back of it? It is a poor cause that cannot find some plausible support in legislative history, which often includes tentative rather than final views of legislators or leaves misinterpretation unanswered lest more definite statements imperil the chance of passage.

The custom of remaking statutes to fit their histories has gone so far that a formal Act, read three times and voted on by Congress and approved by the President, is no longer a safe basis on which a lawyer may advise his client, or a lower court decide a case. This has very practical consequences to the profession. The lawyer must consult all of the committee reports on the Bill, and on all its antecedents, and all that its supporters and opponents said in debate, and then predict what

part of the conflicting views will likely appeal to a majority of the Court. Only the lawyers of the Capital or the most prosperous offices in the large cities can have all the necessary legislative material available. The average law office cannot afford to collect, house and index all this material. Its use by the Court puts knowledge of the law practically out of reach of all except the Government and a few law offices.

But perhaps the most unfortunate consequence of resort to legislative history is that it introduces the policy controversies that generated the Act into the deliberations of the Court itself.

There is no greater aid to law enforcement, and to the judicial process generally, than clear understanding of what the law requires. This, no doubt, is what led Mr. Justice Cardozo to describe your restatement project as a "high enterprise." Confusion or conflict in comprehending the meaning of the law, while sometimes inevitable, should be reduced by every possible device. When Congress has in mind one thing, and its enactments are given different meanings in the courts, it results in repealers and amendments, sometimes retroactive and in confusion, litigation and controversies that weaken and discredit not only the judicial process but the law in general, and government itself. Yet, as matters stand today, I do not see how Congress can know, even roughly, the effect that will ultimately be given to any language it may use. And I do not see how the bar can, with any

large measure of confidence, advise clients in complicated business transactions what their liabilities or duties are.

Though it would not dispel all the doubts which are inherent in the situation, it would help give objectivity to the process of interpretation and assurance to drafting of statutes, if we could have general acceptance by the Bench as well as the Bar of a few basic principles of statutory construction. Perhaps the Institute could devise a disinterested restatement that would commend itself as an acceptable standard for enactment by Congress, or for application by the courts.

Perhaps the situation requires an approach such as was adopted in devising the Federal Rules. Do not misunderstand me—I am not now naive enough to think that if any such course were agreed upon nothing would be left to what Mr. Justice Cardozo called those “tentative gropings, those cautious experiments, those provisional hypotheses, that are part of the judicial process.” I know that such full agreement is beyond the power of even this distinguished group of lawyers. And I suspect that, even if that millennium did arrive, we judges would perhaps slowly, but ever so surely, demonstrate that either because of its legislative history or despite it, “millennium” in fact, or in juridical contemplation at least, means much less than a thousand years.

Nevertheless, the problem confronts judges, and particularly Federal judges, every day; and it is worthy of any effort you might deem proper to make its eventual solution more likely and more immediate.

But I must not further offend against your president's injunction against an elaborate speech.

It is a fine thing that we have these meetings of our profession. Here we can haul each other over the coals and focus attention on trends of ill omen for the profession. And not least important is the fact that we can liquidate our conflicts and worries in social sessions. There, in those more mellow moments, we may continue discussion of this, or of less baffling subjects.

CHAMBERS OF THE
CHIEF JUSTICE

Supreme Court of the United States
Washington, D.C.

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December 13, 1948.
CHAMBERS OF THE
CHIEF JUSTICE

The Chief Justice.

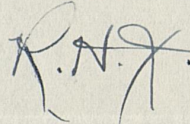
My dear Mr. Chief Justice:

At Saturday's conference there were two cases in which I did not vote, not having hard argument and not having had time to read the briefs.

In No. 65, Chicago, Milwaukee, etc. v. Acme Freight my vote is to REVERSE.

In No. 59, Marzani v. United States, my vote is to AFFIRM. I agree with Judge Hand, in United States v. Gottfried, 165 F. 2d, 360, and this Court apparently agreed with him in denying certiorari and rehearing, that the statute of limitations extended the time in this case, which disposes of all except trivial questions on which I would affirm.

Sincerely yours,



SUPREME COURT OF THE UNITED STATES

No. 118.—OCTOBER TERM, 1949.

Capitol Greyhound Lines, Penn-
sylvania Greyhound Lines,
Inc., and Red Star Motor
Coaches, Inc., Appellants,

v.

Arthur H. Brice, Commissioner
of Motor Vehicles, State of
Maryland.

Appeal from the Court
of Appeals of the
State of Maryland.

[October —, 1949.]

MR. JUSTICE JACKSON, dissenting.

This appeal challenges a new type of taxing statute by which a State undertakes to tax the conduct of interstate commerce. The statute provides that every motor vehicle driven or moved upon a highway within the State must be registered and have a certificate of title and then grants certain exemptions, including one for non-residents. The non-resident does not become entitled to an exemption, however, if he is "engaged in the business of transporting persons or property for hire, wholly or partly upon or over the public highways of the State, over fixed routes, or between fixed termini." The tax is made applicable to any vehicle in interstate transportation, even if no intrastate business is done and no matter how few miles the vehicle travels over the highways of the State. The tax is not measured by either the use of the highways or the revenues attributable to commerce within the State; instead, it is a tax of 2% on the fair market value of the vehicle when titled.

No previous decision of this Court approves this type of statute, and the questions which it raises under the Commerce Clause of the Constitution are at least debat-

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CHAMBERS OF THE
CHIEF JUSTICE

2 GREYHOUND LINES *v.* COMMISSIONER.

able, however we may ultimately decide them. Though the appellant's jurisdictional statement has been on file for upwards of three months, the State has filed no response or contention that a substantial question is not presented. The judgment appealed from is one which reverses the judgment of another state court, which sustained appellant's contention that the statute violates the Federal Constitution. Both courts carefully examined decisions of this Court and arrived at opposing conclusions as to the validity of the tax. Such disagreement does not suggest a question lacking in importance or substance. I think we should note probable jurisdiction and hear argument on the merits.

118

To: The Chief Justice

From: JACKSON, J.

Circulated: 10/6/49

Recirculated: _____

To: *The Chief Justice* 10/6

From: JACKSON, J. 10/14

Circulated: -----

Recirculated: -----

SUPREME COURT OF THE UNITED STATES

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OCT 7 12 56 PM '49

CHAMBERS OF THE
CHIEF JUSTICE

*I've been glad to join you in
you also think this case ~~is~~
ought to be
heard.*

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1949

United States of America, ex rel.	)	
Ellen Knauff, Petitioner,	)	
	)	
v.	)	On Application for Stay.
	)	
J. Howard McGrath, Attorney General	)	
and Edward J. Shaughnessy, as	)	
District Director of the Immigra-	)	
tion and Naturalization Service	)	
for the New York District, and	)	
to whomsoever may have the cus-	)	
tody of the body of Ellen Knauff.	)	

(May 17, 1950)

By Mr. Justice Jackson,

As Circuit Justice for the Second Circuit, it is my almost invariable practice to refuse stays which the Court of Appeals or its judges have denied. This because they are closer to the facts, have heard the merits fully argued, and because I have confidence that they would grant stays in worthy cases. This rare departure from practice may call for a word of explanation.

The decision of the Court of Appeals denying petitioner relief on habeas corpus was handed down yesterday and, about four o'clock yesterday afternoon, stay was denied. The court suggested to counsel that he could apply "at Washington" for a stay and counsel announced a purpose to do so. Immediately, however, the Department of Justice notified petitioner to be ready to be shipped on a commercial plane leaving New York this morning at eleven o'clock. This scarcely gave counsel time to prepare an application for stay here and no time for me to hold a hearing on it. As the case comes to me, I am informed that preparations are complete at the airport to deport her in a matter of minutes.

Bundling this woman onto an airplane to get her out of this country within hours after the decision of the Court of Appeals, if accomplished, would have two consequences. First, it probably would defeat this Court's jurisdiction to consider

her petition for review. Second, it would circumvent any action by Congress -- which the Department has vigorously opposed -- to cancel her exclusion, already unanimously taken by the House of Representatives. In this connection, the Department of Justice was given hearing by a subcommittee of the Judiciary Committee of the House of Representatives. After considering the objections of the Department of Justice, the Committee nevertheless reported favorably on the bill and the House of Representatives, with rare unanimity, decided the exclusion order should be cancelled. That bill, together with a like measure introduced in the Senate, is now before the Senate Judiciary Committee for consideration. There appears also to have been an agreement by the Department with the Congress to withhold action under such circumstances, but I have been unable in the time allowed to ascertain its text.

If the Department had at any time shown even probable grounds to believe that presence of this woman a few days more in this country might jeopardize national security, even infinitesimally, I should refuse the stay. But the Department of Justice has not only had opportunity, it has been importuned to show courts or Congress any reason for its exclusion order.

Not only is the petitioner unable to learn what the specific charges against her are, but neither can the courts which are asked to play at least a consenting part in her exclusion, nor the Congress, which is in the midst of an effort to stop it. It overtaxes credulity to believe that it would jeopardize the security of the United States to impart to coordinate branches of the Government some inkling of the charges against this woman.

That the purpose of this haste to rush her out of the country is to defeat any effort to have this Court review her present habeas corpus proceeding, appears from statements

apparently made to the press by the Government's counsel in the Court of Appeals. We are not ordinarily satisfied with newspaper evidence, but the speed of events has left no time for verification. The statements of several reputable newspapers are in substantial accord: After the court suggested that petitioner's counsel could apply at Washington for a stay and he said he would do so, the Government attorney answered, as quoted in an Associated Press dispatch appearing in the Baltimore Sun, "She may not be here then." The New York Herald Tribune attributes to him the statement that she may be deported by the time action is taken and that the case would then be academic. The New York Times quotes him as later stating he would advise the Department of Justice that "There are no legal impediments at this time which would prevent her immediate deportation." This leaves no doubt that the purpose is to defeat the jurisdiction of this Court as well as the determination of Congress.

It may well be that this removal eventually will be sustained. But to consummate it while the right to do so is still in litigation cannot be permitted, and to attempt to do so after a bill to forbid it has already passed one House by unanimous vote and while it is pending in the other is alleged to be a most unusual departure from administrative practice. Nothing has been produced to show why this particular petitioner should be so discriminated against. To stand between the individual and arbitrary action by the Government is the highest function of this Court.

It is not for me to now reach any conclusion as to the merits of the decision below. But to grant writs to protect the Court's jurisdiction to inquire into the matter is one of the most usual functions of an individual Justice. Because the Government's action since decision by the Court

of Appeals would have the effect of foreclosing petitioner's right to be heard in this Court, I grant the stay.

May 17, 1950

(S) ROBERT H. JACKSON
Associate Justice, Supreme Court of the
United States.

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
ROBERT H. JACKSON

August 31, 1950.

The Chief Justice.

Dear Fred:

NOTED
AUG 31 1950
E.M.V.
Apropos of my proposed luncheon on September 19th for foreign and American lawyers, since my talk with you concerning the action taken by the Conference about use of the building I have talked with Hugo, Stanley and Tom - the only members presently available. They are unanimous in their understanding that the action of the Conference related only to loan of the facilities to organizations and in no way was intended to restrict an individual Justice in entertaining here. They all approve my proposal and promise to attend. I think this avoids any possible misunderstanding about the matter and I am counting on you to be present.

Sincerely yours,

Rob

RECEIVED
AUG 31 4 39 PM '50
CHAMBERS OF THE
CHIEF JUSTICE

Supreme Court of the United States

Memorandum

-----, 194---

Also if you mix
race horses,
antiques and houses
with oil the
way F. F. bring them
in under a
copyright case,
Do you copyright

Supreme Court of the United States
Memorandum

-----, 194---

a race horse
in Ky?

Bob

Cheng Kuei

BOHEMIAN GROVE

Monte Rio
California



File

Dear Fred

This is the story in the
press here that I referred to on the
phone. It does not seem to have
been carried much in the East.

This is a great spot for
recreation and escape from Washington
heat.

Best wishes

Bob

January 24, 1950

Dear Bob:

In regard to autographing the sets of stamps to be sold, as requested in the letter from your "fellow Alabamian," Mr. Lee Harrington, it seems to me that we would be starting something that could give us lots of trouble. My natural feeling is one of great interest in the March of Dimes, but I don't see how we can stop there. I believe that we ought not to start it.

Sincerely,

F. M. V.

Mr. Justice Jackson

September 12, 1950

Dear Bob:

I will be happy to join you at the
luncheon which you are giving on the
19th. Thank you for inviting me.

Sincerely,

[[Signed] Fred

Mr. Justice Jackson

Supreme Court of the United States
Washington, D. C.

My dear Chief:

I am inviting some of the distinguished foreign and American judges and lawyers attending the meeting of the Canadian and American Bar Associations to be my guests at luncheon at the Court on Tuesday, September 19, at 12:30 p.m. I hope you can arrange to be present for this informal, unofficial and somewhat international interlude.

With the hope that you can help make this a pleasant occasion by your presence, I am

Cordially yours,

Bot

The Chief Justice

21

SUPREME COURT OF THE UNITED STATES

John B. Williamson, Jacob Stachel, Robert G. Thomp- son, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall, Petitioners,	}	On Application for Bail.
v.		
The United States of America.		

[September 25, 1950.]

Opinion by MR. JUSTICE JACKSON, as Circuit Justice of the Second Circuit:

These Communist Party leaders were convicted of conspiring to advocate and teach the violent overthrow of the United States Government and to organize the Communist Party for that purpose.¹ They were not charged with any attempt nor with any overt act toward that end other than those incident to such organization and teaching.

Defendants appealed and, after denial of bail by the trial court, applied to the Court of Appeals for its allowance. Government counsel conceded that the appeal presented a substantial question and upon that concession defendants were enlarged upon bond.²

After the Court of Appeals affirmed the convictions,³ defendants expressed an intention to petition the Su-

¹ The prosecution was under the Smith Act, 54 Stat. 670, 671; 18 U. S. C. § 2385.

² The November 2, 1949 order of the Court of Appeals, allowing bail, recites, "The prosecution having upon argument conceded that the appeal herein raises a 'substantial question,' (Rule 46 (a) (2) of the Rules of Criminal Procedure), it is ordered"

³ *United States v. Dennis et al.*, 183 F. 2d 201.

2 WILLIAMSON ET AL. v. UNITED STATES.

preme Court to review their cases. The prosecution asked that bail be revoked and defendants remanded to jail. Two grounds were advanced: first, that no substantial question as to the validity of the conviction survived the affirmance, and second, that defendants, while at large, *have pursued* and *will continue to pursue* a course of conduct and activity dangerous to the public welfare, safety and national security of the United States. The Court of Appeals did not summarily terminate bail but a majority of the judges extended it for thirty days, expressly to enable application to the Circuit Justice for further extension. Chief Judge Hand, who had written the principal opinion affirming the convictions, said he regarded the case as "involving substantial questions and therefore entitling the defendants to remain on bail pending certiorari."

To remain at large, under bond, after conviction and until the courts complete the process of settling substantial questions which underlie the determination of guilt cannot be demanded as a matter of right. It rests in sound judicial discretion.⁴ Only in a rare case will I

⁴ Rule 46 (a) (2) of the Federal Rules of Criminal Procedure provides: "Right to bail upon review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail."

Defendants contend that, where a substantial question exists, bail is a matter of right. They rely upon a decision by the Court of Appeals, Ninth Circuit, in *Bridges v. United States*, — F. 2d —, August 24, 1950, upon an opinion by MR. JUSTICE DOUGLAS allowing bail to "Tokyo Rose" convicted of treason, *D'Aquino v. United States*, 180 F. 2d 271, and upon several older cases decided before the current rule was promulgated.

I cannot accept this view that presence of a substantial question makes bail mandatory and, in order not to mislead the judges of my

override a clear and direct decision by the Court of Appeals that bail ought to be granted or denied. But here one judge favored its allowance, and the action of his two associates in granting a thirty-day extension implied the

Circuit, set forth my reasons for thinking the Rule permits bail only in circumstances warranted by sound judicial discretion.

The unpublished history of the rule in the files of this Court shows that the Advisory Committee submitted it to this Court with this language in the first line, "Bail *shall* be allowed . . ." (Italics supplied.) By letter of December 21, 1944, Chief Justice Stone returned the proposed rules, stating that the word "shall" should be changed to "may." It is apparent that the language of the rule was not casual or loose and that the basis for claiming bail as a matter of right was deliberately eliminated. Although Rule 46 was a restatement of the existing law, the third sentence is new. In a note attached to an early draft, the following comment was made: "The discretionary power to admit to bail pending appeal is made explicit in the new closing sentence," citing *Rossi v. United States*, 11 F. 2d 264 (C. A. 8th Cir., 1926).

Further, it is to be noted that "may" is used three times in the rule, once in each of the three sentences. I should hardly suspect that this Court used the word with inconsistent meanings—twice to mean "must" and once to mean "may." The only consistent meaning is that "may" means just that; the judge is empowered to use his own best judgment as to whether a defendant should be free on bail.

But the exercise of this discretion is very limited, as the cases prior to *Bridges* and *D'Aquino* point out. The existence of a substantial question is an absolute prerequisite to bail, and in the usual case that is the only issue involved. And the courts, quite understandably, have been liberal (sometimes I think too liberal) in the decision of this question because they felt that, if the conviction were to be reversed, appellant should not have been jailed in the interim.

Whatever the rule of the Circuit Justices and the Courts of Appeals of other Circuits, the rule I shall observe and presume to have been observed in the Second Circuit is that existence of a substantial question is a prerequisite to bail after conviction; the question should be substantial in the sense of fairly doubtful and in the sense also that it is not trivial or merely technical but has substantial importance to the merits; finding this, bail remains an appeal to the discretion of the court.

continuing power to grant bail, which is dependent on persistence of a substantial question and indicated that they did not regard the defendants as presenting a very immediate public danger.⁵

I cannot accept the Government's first contention that no substantial question survives for Supreme Court review. If, as the prosecution conceded, the convictions once were clouded by a substantial constitutional question, it has not completely disappeared, even though the Court of Appeals has now given its own carefully considered answer. An intermediate court, however respected its members or persuasive its opinion, makes no final answer or at least no answer of uniform authority throughout the United States to a constitutional issue. Certainly had the Court of Appeals reached a contrary conclusion, the Government would not have accepted it as final. It is one thing to maintain that the Court of Appeals has given the right answer to a substantial question, but it is another thing to contend that there is no question which merits answer by the only Court invested with ultimate and nation-wide authority in the matter. I regard the case as one in which substantial questions are open to review by the Supreme Court, and in which I am therefore empowered to grant bail, as ordinarily would be done.

The Government's alternative contention is that defendants, by misbehavior after conviction, have forfeited their claim to bail.⁶ Grave public danger is said to result

⁵ The majority said, "The motion of the United States to revoke bail is granted as of thirty days from the filing of this order, with leave granted to the appellants during such 30 days to apply to the Circuit Justice for bail pending certiorari." The order was filed August 28, 1950.

⁶ I think the rule clearly contemplates consideration of such matters, because, as it expressly provides, "The court or the judge or the justice allowing bail may at any time revoke the order admitting the defendant to bail." Of course there are cases where, after allowance, decision of the contested question will remove it from

from what they may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes.⁷ Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.

Turning then to past, but post-conviction, activities said to be dangerous, I find them to consist entirely of making speeches and writing articles or editorials, chiefly for the Communist Party organ the *Daily Worker*. They do not contain any advocacy of violent overthrow of the Government and can only be said to be inciting, as all opposition speaking or writing that undermines confidence and increases discontent may be said to be incitement. These, however, are severely critical of the policy of the United States toward Korea and favorable to the Soviet position. Some are crudely intemperate, contain falsehoods obvious to the informed, and all are plainly designed to embroil different elements of our society and embarrass those who are presently conducting the Government. But the very essence of constitutional

the category of substantial. But power to revoke is not confined to such cases. I think any changed or newly discovered circumstance that affects the justice of the confinement may be considered.

⁷ There are ways of dealing with certain threats to commit crime. In these cases the law only imprisons in default of furnishing an undertaking, but the person held is released if he furnishes the required undertaking to abide the court's order and "keep the peace." New York Code of Criminal Procedure, §§ 84-99; assimilated into Federal Law, 36 Stat. 1163, 18 U. S. C. § 3043.

freedom of press and of speech is to allow more liberty than the good citizen will take. The test of its vitality is whether we will suffer and protect much that we think false, mischievous and bad, both in taste and intent.

It is not contended that these utterances, in themselves, are criminal.⁸ The Communist Party has not been outlawed either by legislation, nor by these convictions, and its right to publish the *Daily Worker* is not questioned. Nor were defendants indicted under that part of the statute which prohibits publication of matter intended to cause overthrow and destruction of government. Since the paper may lawfully be issued, certainly its publishers or contributors may comment critically on the Government's conduct of foreign affairs. If the Government cannot get at these utterances by direct prosecution, it is hard to see how courts can justifiably reach and stop them by indirection. I think courts should not utilize their discretionary powers to coerce men to forego conduct as to which the Bill of Rights leaves them free. Indirect punishment of free press or free speech is as evil as direct punishment of it. Judge Cardozo wisely warned of "the tendency of a principle to expand itself to the limit of its logic."⁹ If the courts embark upon the practice of granting or withholding discretionary privileges or procedural advantages because of expressions or attitudes of a political nature, it is not difficult to see that within the limits of its logic the precedent could be carried to extremities to suppress or disadvantage political opposition which I am sure the Department itself would deplore.

It is said, however, that freedoms of speech or press cannot be invoked by defendants because their speeches and publications constitute a repetition of their offenses

⁸ The Smith Act purports to authorize prosecution of publication with intent to cause overthrow of the Government. Section 2 (a) (2), 64 Stat. 671. These defendants were not indicted under this section and there has been no direct finding that the *Daily Worker* is published in violation of law.

⁹ Cardozo, *Nature of the Judicial Process*, p. 51.

and a continuation of the conspiracy of which they have been convicted. If all that convicted these defendants was such utterances as have followed their conviction, there would indeed be doubt about its validity, for I am unable to find in them any word of advocacy of violence either to overthrow the Government or of forcible resistance to its policy. If that inference can be drawn from these utterances, it can equally well be drawn from many other opposition speeches by non-Communists. Another difficulty with the Government's position, pointed out by Judge Hand in the hearing below, is that while a substantial question exists as to whether they have been lawfully convicted it is equally doubtful whether repetition, if it be such, is a crime.

My task would be simple if a judge were free to order persons imprisoned because he thinks their opinions are obnoxious, their motives evil and that free society would be bettered by their absence. The plea of admitted Communist leaders for liberties and rights here, which they deny to all persons wherever they have seized power, is so hypocritical that it can fairly and dispassionately be judged only with effort.

But the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists. If in anger or disgust with these defendants we throw out the bundle, we also cast aside protection for the liberties of more worthy critics who may be in opposition to the government of some future day.

If, however, I were to be wrong on all of these abstract or theoretical matters of principle, there is a very practical aspect of this application which must not be overlooked or underestimated—that is the disastrous effect on the reputation of American justice if I should now send these men to jail and the full Court later decide that their conviction is invalid. All experience with litigation teaches that existence of a substantial question about a conviction implies a more than negligible risk of re-

versal. Indeed this experience lies back of our rule permitting and practice of allowing bail where such questions exist, to avoid the hazard of unjustifiably imprisoning persons with consequent reproach to our system of justice. If that is prudent judicial practice in the ordinary case, how much more important to avoid every chance of handing to the Communist world such an ideological weapon as it would have if this country should imprison this handful of Communist leaders on a conviction that our own highest Court would confess to be illegal. Risks, of course, are involved in either granting or refusing bail. I am not naive enough to underestimate the trouble-making propensities of the defendants. But, with the Department of Justice alert to the dangers, the worst they can accomplish in the short time it will take to end the litigation is preferable to the possibility of national embarrassment from a celebrated case of unjustified imprisonment of Communist leaders. Under no circumstances must we permit their symbolization of an evil force in the world to be hallowed and glorified by any semblance of martyrdom. The way to avoid that risk is not to jail these men until it is finally decided that they should stay jailed.

Their bail as fixed by the Court of Appeals is therefore continued until the Supreme Court of the United States shall deny their petition for certiorari or, if it be granted, shall render judgment upon their cause.

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
ROBERT H. JACKSON

File
October 18, 1950

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CHAMBERS OF THE
CHIEF JUSTICE

MEMORANDUM TO THE CHIEF JUSTICE.

I have just received notice of a revised schedule of the Court under which we will be hearing argument on December 1st instead of being in recess.

Relying on the schedule circulated earlier, I had agreed to preside at a moot court hearing for the Association of the Bar of the City of New York on the evening December 1st. The date was fixed after consultation with me, when I assured them that I could be present. The arrangement has been publicized among the different schools that are to participate.

I remember the unfortunate results of another trip which I made to New York, absenting myself from the bench, and resolved that I would never do it again. I think, however, I should keep this engagement and that the calendar should be so arranged that cases likely to require my vote will not be argued on that day.

R.H.J.

January 10, 1951

RECEIVED

MEMORANDUM FOR THE CONFERENCE:

JAN 10 12 08 PM '51

CHIEF JUSTICE
MEMBERS OF THE

If our cancellation of the next argument session means, as appears from the schedule circulated, that there will be no announcement of decisions on certiorari petitions or jurisdictional statements until February 26th, I think we should reconsider our action.

To hold all jurisdictional statements and certiorari applications until February 26th means that in the cases granted the records must be perfected and printed, the petitioner's brief and the answer to it, and perhaps petitioner's reply, must be prepared in less than two months to get in at the last argument session, April 23d. I am fearful that if we do what the schedule indicates, we will run into complications because of the delay and come up to our final sessions in a jam.

Should we not have a conference, perhaps on February 3d, and announce action on certiorari petitions and jurisdictional statements?

R.H.J.

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
ROBERT H. JACKSON

June 13, 1947.

The Chief Justice.

My dear Mr. Chief Justice:

As I will not be at the conference tomorrow, I am advising you of the status of my cases:

No. 847 - U. S. v. Munsey Trust Co.

I have not received returns from a majority of the Court and it will not be ready to come down on Monday.

Nos. 133, Misc. and 687 - Ex Parte Fahey and Fahey v. Mallonee.

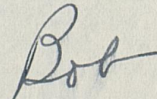
I have received no further returns since last Saturday when I was asked to hold these cases for further consideration. Presumably, they will not come down on Monday.

Nos. 377, 452 - Fay and Bove v. People of New York.

The opinion in these cases will not be ready for circulation until very late this afternoon. I have been informed that there will be a dissent in it and, of course, even if enough returns are in, I would not put the opinion down until the dissent is circulated.

My votes on certiorari and miscellaneous matters I will leave with Mr. Justice Reed.

Sincerely yours,



4143 - Jackson Dissent
To: The Chief Justice
From: JACKSON, J.
Circulated: 10/5/51
Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 143.—OCTOBER TERM, 1951.

Verna Leib Sutton, Petitioner,	{	On Petition for Certio-
v.		rari to the United
R. Wells Leib.		States Court of Ap- peals for the Seventh Circuit.

[October —, 1951.]

Memorandum by MR. JUSTICE JACKSON, dissenting.

This is a marital muddle involving, not the customary triangle, but a pentagon of individuals, and, in addition, the courts of three States of the Union. If this Court cannot unravel it, it must be that it is beyond the stage where anything can be done. But if it is not the kind of case we should attempt to decide, I do not know what we are here for.

That petitioner was once Mrs. Leib is not disputed. That much we do know. But in Illinois she divorced Leib, and secured an award of alimony which was to cease when she remarried. No one has attacked the validity of *that* divorce—yet. Some time after her divorce from Leib, she undertook to marry one Henzel in Reno, Nevada, the marriage taking place shortly after he had secured, in Reno, a so-called *ex parte* divorce from a wife who resided in New York. The constitutional recognition of that divorce and, consequently, the validity of the Leib-Henzel marriage are very much in question, for after Henzel and his Reno-acquired wife returned to New York, his Reno-divorced wife started separate maintenance proceedings against him. She contended that the Nevada divorce was bad on jurisdictional grounds. The New York courts agreed, held the Nevada divorce invalid, and awarded her the separate maintenance she sought. With that turn of events, petitioner asked the

New York courts to annul her Nevada marriage to Henzel. Since they had held the divorce proceedings which proceeded that marriage bad, they, of course, complied. So, as of the date of her New York annulment of her Nevada marriage to Henzel, petitioner had never been married to Henzel, at least as far as New York was concerned, and, again at least as far as New York was concerned, she had therefore not surrendered her right to alimony under the Illinois divorce decree from Leib. After the annulment, she married Mr. Sutton, who is not personally involved in the litigation but who must be a somewhat bewildered bystander.

Also, after the annulment, petitioner brought this action in the federal courts in Illinois to recover from Leib the alimony payments due under her Illinois divorce from him for the period when she had thought she was Mrs. Henzel but the New York courts said she really wasn't. The Court of Appeals for the Seventh Circuit has said that she is not entitled to the alimony because she really was Mrs. Henzel during that period, taking the position that the Full Faith and Credit Clause of the Constitution requires it to recognize the validity in Nevada of Henzel's divorce and his marriage to petitioner, the New York annulment notwithstanding.

The conflict between three states is obvious. Nevada courts have issued their certificate of divorce on which petitioner and Henzel married. New York courts have issued theirs that this marriage is no good, and, relying on that, petitioner has remarried. Now comes the federal court in Illinois to the effect that New York is wrong on constitutional grounds.

The men concerned here must be confused. Nevada told Mr. Henzel that he was free of wife No. 1 and could take on No. 2. But then New York told him he was still married to No. 1, and afterwards told him he was never married to No. 2 and hence free of any obligations to her.

Now the Seventh Circuit tells him he is still stuck with No. 2, who meanwhile has found another nearer her heart's desire. Mr. Sutton, on the other hand, finds that in New York he is married to the petitioner while in Illinois, and perhaps in Nevada, his wife is a bigamist and their marriage is void. No one can tell how the other forty-five states and the District of Columbia would act about the thing. It may be unsafe for them to get outside of New York State, even to visit the Nation's Capital. In the several states of the Seventh Circuit she is Mrs. Henzel but in New York she is Mrs. Sutton. Perhaps the only safe thing for the petitioner and Henzel to do is scurry around to the remaining states that have not yet been drawn into the squabble and get declaratory judgments settling to whom each is regarded as married in each jurisdiction.

The petitioner, Mrs. Sutton (or is it Henzel?) may not quite understand it all either. She wants husband No. 3 (at least we think she does) and alimony from No. 1. Illinois denies her the alimony because, as far as it is concerned, she is still the wife of No. 2, to whom New York says she was never married. Who she is married to depends on where she is. In New York she is married to No. 3, in Chicago to No. 2, and in Reno (says Chicago) she is married to No. 2.

Each of these conflicting results is the holding of a responsible and conscientious court on which any citizen ought to be able to rely. Each has studied the decisions of this Court and thinks it is faithfully following them. If they are right, if this sort of result is what we have intended from the decisions on the Full Faith and Credit Clause, we are right, of course, to refuse any review and leave the law in this mess. If there is something wrong with this picture, I do not see how we can sit in our ivory tower and refuse review.

147 - Jackson
To: The Chief Justice
From: JACKSON, J.
Circulated: 10/5/51
Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 147.—OCTOBER TERM, 1951.

John J. Muth, Petitioner, v. Aetna Oil Co., Johnston Drill- ing Co., Inc., Fred J. Heck, et al.	}	On Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit.
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[October —, 1951.]

Memorandum by MR. JUSTICE JACKSON, dissenting.

This case can be decided by a federal court only if there is diversity of citizenship of the parties. That I have always supposed to mean that the plaintiff must allege and prove the diversity on which he relies to confer federal jurisdiction and, even if it is not questioned or even is conceded, the Court on its own motion will satisfy any doubts it may have in order that it may not be led to assume jurisdiction by inadvertence or collusion.

The opinion of the Court of Appeals in this case says:

" . . . The purpose of making Boland a defendant is not clear, but we suspect it was to preserve diversity jurisdiction. It certainly appears that his interests were not hostile to those of Muth. Boland failed to answer and a default was taken as to him. In the state of the record, we are unable to discern whether Boland was a citizen of Illinois, as alleged, or of Indiana. However, no jurisdictional issue is pressed here and we give the question no further consideration."

I fear this precedent by a respected court may contribute to a relaxation of the vigilance of federal judges against taking cases that ought to be left to state court determination. This Court has no more important func-

tion than to see that the recorded precedents as to jurisdictional requirements in diversity cases do not encourage their neglect.

I would vacate the judgment and return the cause to the court below for determination of the jurisdictional question.

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CHAMBERS OF THE
CHIEF JUSTICE

October 9, 1951

Memorandum to the Conference.

On Monday, October 22, I expect to have as a guest Mr. Justice Schjelderup, of the Supreme Court of Norway. I would like to ask all of my colleagues to lunch with him at the conclusion of our session that day.

Mr. Justice Schjelderup has been a close student of American affairs, and particularly of this Court. He was placed under arrest during the Nazi occupation, along with other members of his Court.

Will you please note the date and let me know if it will be convenient to accept this invitation?


Robert H. Jackson

*Notify
J. Edgar
C. J. up
mark stamp*



Speech

of

The Honorable Robert H. Jackson



Fortieth Anniversary Dinner

THE ALFALFA CLUB

SATURDAY, JANUARY 31, 1953
Washington, D. C.

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FOREWORD

The Alfalfa Club of Washington for forty years has been entertaining itself and its guests at its annual dinner by becoming a mock national convention of the Alfalfa Party to nominate a candidate for President of the United States. The nomination is followed by an acceptance speech from the nominee spoofing the administration, the opposition and Washington affairs in general.

At the January 31, 1953 dinner, Robert H. Jackson was placed in nomination by Senator Robert A. Taft, who moved that nominations be immediately closed, no debate permitted and no point of order be entertained. The chair declared the motion carried. Senator Harry F. Byrd and a large committee then escorted the nominee to the platform and he was introduced. In accepting the nomination, the candidate made the speech that is reproduced on the following pages.

Mr. Chairman and Gentlemen of the Convention:

I accept your nomination at once, lest any hesitation on my part have a sobering effect on my audience.

My campaign manager, Senator Byrd, composed this distinguished committee to have a member from each faction and section of the Alfalfa Party. He reports that we are now split into only nine irreconcilable factions. He assures me that that makes us the most united political party in the country.

I am deeply in debt to Senator Taft for turning his support to me at the opening of the convention instead of after it. Of course, I invited him to have breakfast with me - before the convention instead of after it. The results show what Senator Taft can do with a convention - that has no committee on credentials.

For all its noise, this recent election settled only one little issue that really interests Alfalfans. That was, which crowd would get to this banquet in limousines and which would have to take the street car. However they arrive, both old parties are trying to infiltrate our party. We are strictly neutral as between Democrats and Republicans, because at our festivities we can see no difference in their capacities.

Fellow Delegates, our party must prepare itself for a new era. We have seen the end of the horse-and-buggy days and we behold the first administration to be completely motorized. Each spring our people will be offered an administration of a new model. The new administration's first decision of world-wide importance was to banish the high hat! Far be it from me to question anyone's motives, but you know that there just isn't headroom for a top hat in a General Motors car. They had to give up one or the other.

Truth compels me to say that our noble party has finally made a good nomination. For years, you have been nominating candidates, such as Jimmy Byrnes, John Lord O'Brian, General Edgerton, Ben McKelway, and other intelligentsia, just because they were supposed to be witty. Tonight you have turned to wisdom. My campaign will not be a laughing matter. Your nominee tonight is not one who would rather be bright than be President.

Of the long line of sparkling wits who have been nominated before me, only one ever got into possession of the White House. That was General Edgerton. And what was his record? We have to admit that as soon as he got in he began selling the White House brick by brick. After all, that is more democratic than to sell it in one parcel. Yet, my friends, Edgerton, the Alfalfan, is the only occupant of 1600 Pennsylvania Avenue in our memory to leave the White House in better condition than he found it. But now he insists that I must run on his record. He says that is according to precedent. He even wants to go Whistle-Stopping for me.

Gentlemen, like other candidates, I would rather run on promises than on records. But if we are forced to disclose my record, it will show that I have supported some of the best legislation that has been enacted - by the Supreme Court. We have been so successful in rewriting the Constitution that the clergy has followed our example and rewritten the Scriptures. There is a difference in technique. The clergy changed a few words and kept the old meanings, while we have changed a few meanings and kept the old words.

For our platform, we will not go back to Jefferson or Lincoln. I admit those fellows had a lot of my ideas. But they believed in eternal principles. Our times require temporary ones. There is a faction in Alfalfa that thinks this is the time for us to stand pat. They argue that by standing still a clock will be exactly right twice in every twenty-four hours. Senator Byrd says that is way above the twenty-year average. But the Alfalfa Party must distinguish itself from all others. If we simply stood still, people would confuse us with the Republicans, while if we ran off in all directions we would be mistaken for Democrats.

In order to succeed, our campaign must bring the voters to think what your candidate is thinking. This is difficult. The people will wonder what the candidate will do if he is elected. He will be worrying about what he can do if he is not elected. So I have decided to appeal to the people as a man of prudence and foresight and prove it by not resigning my present job until I am elected to a better one.

You will have no complaint that my speeches are above your heads. My extemporaneous ones are already written. I take a forthright and fearless stand on all issues - that are not in controversy. I suffer no self-evident point to pass unargued. Controversial questions I discuss only in the aloof and impartial language of the judicial opinion. That makes my position invulnerable, because it is incomprehensible.

Of course, I promise to change everything. Everybody wants some change. Out our way even the babies cry for a change. Alfalfa may be a small party, but never have so few promised so much to so many.

Do not be alarmed, Fellow Alfalfans, if you hear whispered attacks on my Americanism. I know that stories are being planted that I believe in the Fourth Dimension. I don't even know what it is, unless it is where the Fourth Estate gets its political news.

But, Fellow Workers, our best defense is an attack. I expect disclosures about figures high in the councils of both opposing parties. We have great hope in what a Senator heard from a stranger on a train, who got it from a hostess in a night club, who heard an intoxicated customer telling it to the cigarette girl. He said that they say that an old group of leaders in both parties are known to be -- I hate to mention it -- extroverts! What an issue rumor makes for us. We shall win in a land-

slide on the proposition that we will tolerate no extroverts in government.

Several distinguished Senators present have asked my views on patronage. I assure them that not one of my Cabinet or sub-Cabinet positions has been pledged - more than twice. To handle our Point Four program on the French Riviera, I have appointed that famous hostess, Aunt Clara. I shall popularize the census reports and enliven the next quizzing of our population by turning that job over to Dr. Kinsey. Apart from these two appointments, on merit, the rest are at the disposal of Bob Fleming, Corcoran Thom, and Winthrop Aldrich, my special committee on campaign funds. If these jobs do not produce enough contributions, Alfalfa will have some Jackson Day Dinners that will feature a live Jackson.

On foreign affairs, I deem it expedient to say only that soon after election I shall make a personal trip to see for myself what has gone wrong between the United States and Texas.

As is customary, I come out for sound economics, reduced taxation and greater government-spending. Past administrations have let our economy drift into chaos. I shall plan it. Other candidates make extravagant and conflicting promises to labor, farmers and industry. I have one promise for everybody: I will make whatever goods or services you sell go up, and whatever goods or services you buy come down. That is simple, and as workable as any other party platform.

During my preconvention campaign, I found that credit is tight. Under government regulations you cannot borrow money at a bank unless you are in such good shape you don't need it. The real pinch in the banking situation is due to the shortage of willing and acceptable indorsers. Why not set up a commission of Alfalfans to extend tribute to the deserving accommodation indorsements by the Government? This will cost the Treasury nothing - until the notes come due. Senator Byrd points out that it is long-standing practice to make obligations come due in a later administration.

Fellow Alfalfans, if you can put me over for one term, I will have the country in such shape that neither opposition party will be able to draft a candidate to take it over. My predecessors almost accomplished this; remember how hard it was for either party to get a candidate this time. The slogan for our second campaign will be one Senator Taft planned to use this time: "Bail out with Bob!"

I now come to a touchy subject, and I quote - "the mess in Washington." I shall prevent corruption by appointing none to office but veteran Alfalfans. Like the good patriots of other parties, Alfalfans stand ready to sell their stocks and serve their country wherever they can first serve themselves. From the flushed faces in front of me right now, I can choose the best set of tax collectors that money can buy. Alfalfan appointees to the Treasury will leave it as clean as a hound's tooth.

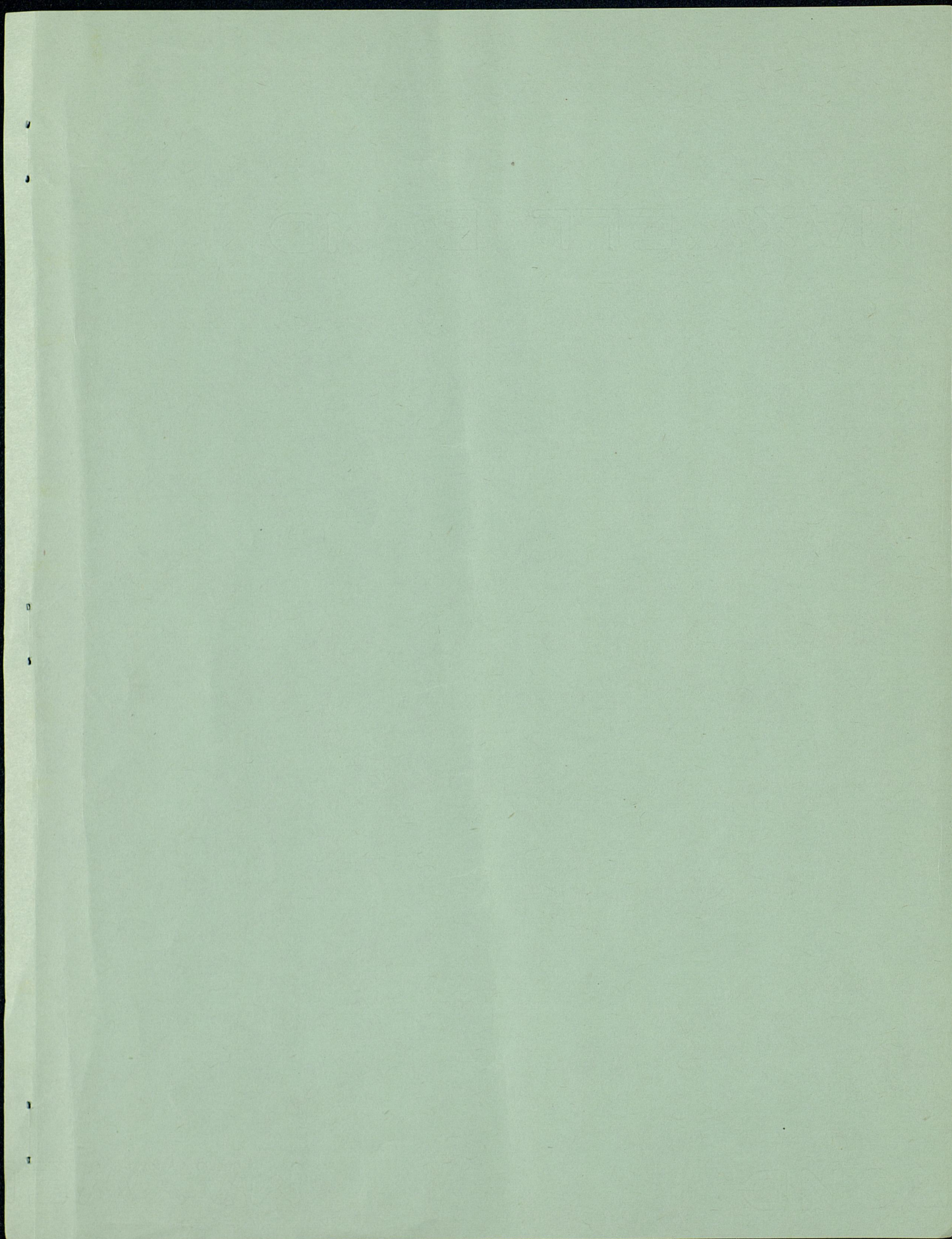
If any scandal is charged during my administration, I shall ask Edgar Hoover to get the answer to a single question: "Is the accused one of our boys?" That will decide for me whether to prosecute the case or just refer it to my Attorney General.

My Fellow Revellers, I have laid bare to you my deep and abiding convictions. But, of course, if they do not attract votes, they will be changed.

We must prepare to fight for our place in the sun. Our Republican opponents have proved themselves masters of the art of stealing the show. Their showmanship reminds me of a country newspaper critic after a road show of Uncle Tom's Cabin, who wrote, "It would have been a perfect performance if some of the cast had given a little better support to the dog."

Both of our rival parties are well-heeled and hopeful. The Democrats keep up courage by reciting a proverb said to have been deciphered from one of the ancient tombs of Egypt: "Who openeth a jackpot may not always rake it down." Meanwhile, the Republicans carry on with a supreme self-confidence. It has not been equalled in America since the early settlers of Connecticut proclaimed that their Colony would be governed by the laws of God - until they found time to make better ones.

Fellow Alfalfans, before we stagger on towards victory, I have one sober word. Every loyal Alfalfan joins in wishing the Administration of our rivals now in power the highest possible degree of success. But I leave with them this warning: For some years the American people have not known how to get rid of the Democrats without electing the Republicans. Next, they will want to know how to get rid of the Republicans without bringing the Democrats back. The answer to the people's prayer will be the noble and futile Alfalfa Party!



February 13, 1953

Mr. Justice Jackson is having some friends in for a reception in the large conference room this afternoon from 5:00 to 7:00. He would like very much to have you attend if possible.

*notify
me at 5*

April 22, 1953

Dear Bob:

I have your note relative to the conflict between your dental appointments and the argument scheduled for the session beginning April 27th.

I have arranged to put the Bridges and allied cases over to the second week and, if necessary, two of the other combined cases can go over also. This should take care of your situation.

Sincerely,

(Signed) Fred

Mr. Justice Jackson.

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
ROBERT H. JACKSON

February 13, 1951

Dear Chief:

This being my birthday, I have received contributions from the neighbors, enough so that at about five o'clock I intend to pull a cork and cut a cake. I should be happy if you and the members of the conference that are now closeted with you would step in and join me, and will ask if you will be good enough to convey the invitation to them.

Sincerely,

Bob

Supreme Court of the United States
Washington, D. C.

RECEIVED
APR 15 1953
CHIEF JUSTICE

The Chief Justice.

My dear Chief:

I have just received the list of cases for argument during the week beginning April 27. It appears that there will be twenty-four hours of argument, at least. This, allowing for time for admissions and opinions, runs the argument into the second week.

Relying on the schedule circulated some time ago for one week's argument, I have made appointments for several solid days of dental work with my dentist in New York. If I cancel, it is impossible to get other dates without a long delay, particularly in view of the fact that I have several days' work that must be done consecutively.

I do not expect to sit in Bridges v. United States and the allied cases involving the same question. I think I should sit in No. 617, District of Columbia v. Thompson Co.

I am calling the situation to your attention, for it may be desirable to shift this listing in view of the fact that I will not be here for the second week.

Sincerely yours,

R. H. J.

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
ROBERT H. JACKSON

April 27, 1953

The Chief Justice.

Dear Chief:

I have obtained a stay of execution. I am just advised that my surgeon this afternoon sustained a slight injury which will prevent him from operating tomorrow, though he expects to be able to resume in a day or so.

Meanwhile, I do not see much point to my attempting to resume on the bench for an uncertain interval when I am sure to be absent at the Conference, but I will do so if you think best.

Sincerely yours,

Bob

*For the C.J. - the way we fight rep north -
Bob Jackson*

**FALSTAFF'S DESCENDANTS IN PENNSYLVANIA
COURTS**

By

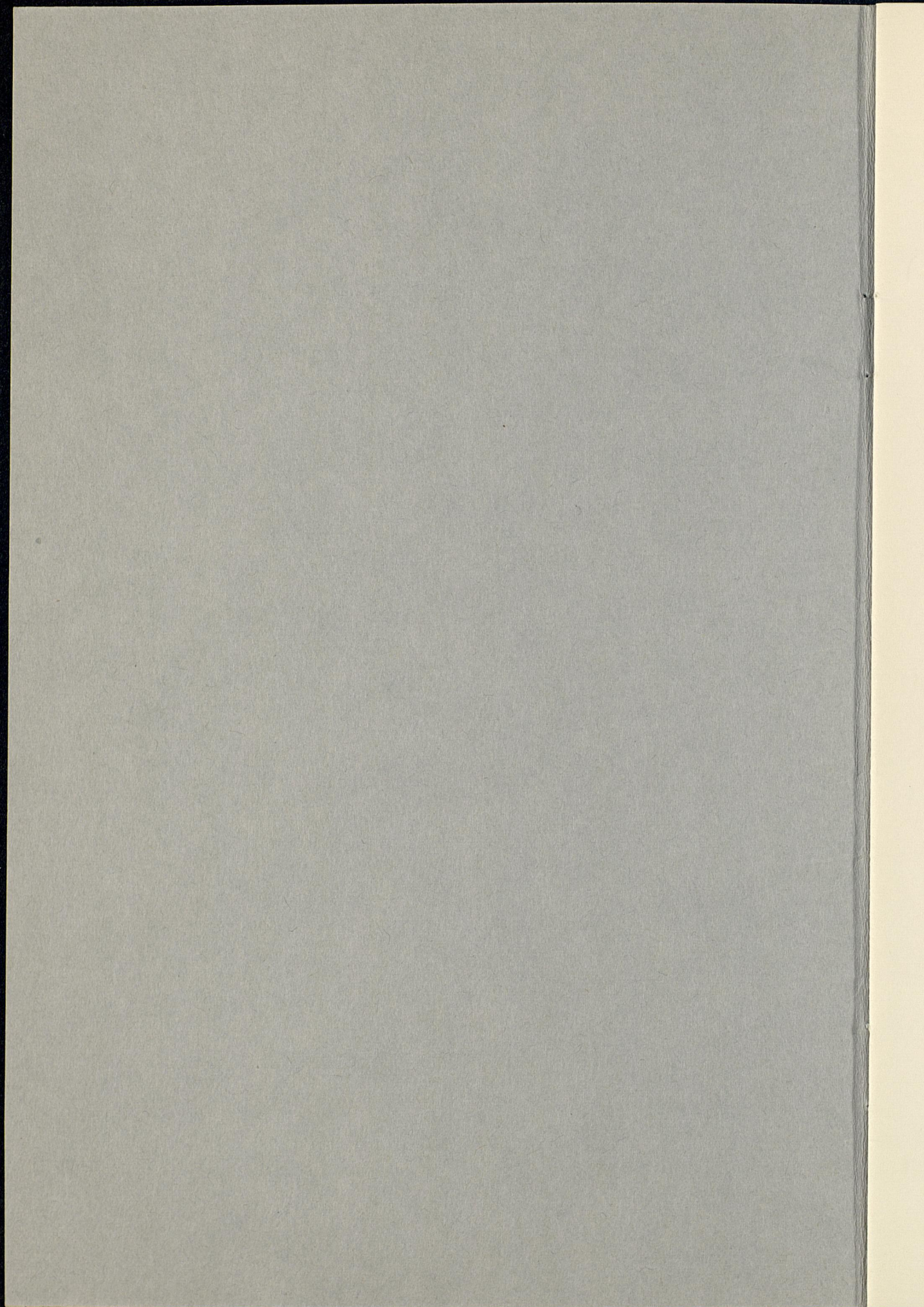
ROBERT H. JACKSON

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FALSTAFF'S DESCENDANTS IN PENNSYLVANIA COURTS

Robert H. Jackson

Old lawyers' tales united education with entertainment for students and young lawyers in days when they made their way to the bar through apprenticeship in law offices. The mills in county seats ground slowly before the first World War, and attorneys waiting for their cases to be reached or for juries to report would gather in the judge's chamber or in the more stimulating atmosphere of the tavern and talk—always about lawyers and lawsuits. The legal lore of the locality and the strategy by which its famous cases had been won or lost were thus transmitted to the oncoming generation. It was a casual substitute for the dining customs of the English Inns of Court in maintaining the *esprit de corps* of the profession. One such tale that I think is worth recording concerns litigation that descended through generations of a most uncommon family, and for over a half-century occupied the legal profession in my native Warren County in northwestern Pennsylvania. It has the quality, by no means indispensable to an old lawyer's story, of being supported by the record.¹

I.

Warren, Pennsylvania, in 1836 was a settlement of about sixty families, whose cabins and rough houses nestled in the narrow valley

1. The legal aspects of the story, which give little hint of its underlying drama, are interred in the following records of the Pennsylvania Supreme Court: *Sager v. Galloway*, 113 Pa. 500, 6 Atl. 209 (1886); *Sager v. Cobham*, 6 Atl. 212 (1886); *Sager v. Lindsey*, 118 Pa. 25, 13 Atl. 211 (1888); *Sager v. Mead*, 164 Pa. 125, 30 Atl. 284 (1894); *Sager v. Mead*, 171 Pa. 349, 33 Atl. 355 (1895); *Salvation Army v. Lawson*, 293 Pa. 459, 143 Atl. 113 (1928). Many of the cast I have known personally, and all were familiar by reputation. I am indebted to J. H. Alexander, of Warren, for access to the paper books involved in the last, or at least the latest, of these litigations.

where Connewango Creek joins the Allegheny River. The community was stirred that spring by the arrival of George A. Cobham and his family. They were not ordinary pioneers hardened by the struggle to draw an existence from land and forest. Cobham had the ingratiating manners of an English gentleman educated for the law. His lady had a grace and gentility strange to the raw life of the frontier. With them, and assumed to be children of the couple, were two robust boys, George A. and Henry Oldcastle Cobham, and a baby girl.

From the beginning the Cobhams were a friendly family but also one of mystery and of reserve which did not encourage prying into their affairs. Cobham did not settle in the little town. Instead, he bought an isolated cabin a few miles up the mountainside whose owner could not keep up payments for land that would respond only grudgingly to husbandry. The villagers thought it was an eccentric and impractical choice for a man with a family. Yet, the site had undeniable charm, which clings to it still, as it looks toward the sunset and down upon the wooded valleys where the winding creek and river meet. The Cobhams all came to love it with an intensity typical of the British landlord. Cobham named his cabin and its little clearing "Cobham Park," a vanity that amused the unromantic settlers who began to call the proprietor "Lord Cobham," a title which mingled respect and derision.

It took a half-century of family litigations, which were the chief legacy left by Cobham, to fully disclose the weird background of this eccentric man and his family. While the title imputed to him was fictitious, he had indeed come of a family that included nobles, martyrs, barristers and rich merchants.² Cobham was directly descended from Sir John Oldcastle, who held the title of Baron Cobham.³ Oldcastle

2. HENRY OLDCASTLE COBHAM, *OURSELVES, A SAD TALE, SADLY TOLD AND SADLY ENDED*. Under this melancholy title Henry recorded in blank verse the annals of his family. It was published by the Publishing House of the United Evangelical Church, Harrisburg, Pa., and privately circulated. For a copy I am indebted to Mr. and Mrs. Hugh Jamison, present owners of Cobham Park.

3. BURKE'S *PEERAGE* 438 (99th ed. 1949), traces the Cobham barony. Henry de Cobham in 1211 gave to King John one thousand marks for his favor. When the third Baron Cobham died in 1407, his granddaughter Joan became Baroness Cobham in her own right. Sir John Oldcastle, her fourth husband, was summoned to Parliament as a baron, apparently in her right. After his execution for heresy and treason, she married again. Her only issue to survive her was a daughter, Joan, who likewise became Baroness Cobham in her own right. She married Sir Thomas Brooke, a member of Parliament, and the barony then remained with their descendants for several generations. Henry Brooke, the eleventh Baron Cobham, was attainted for treason in 1603 and his honor forfeited. The right to the barony during several generations was subject to the attainder. In 1912, the Committee on Privileges of the House of Lords declared that, but for the attainder, Dr. Reginald Gervase Alexander, a distinguished physician, was a co-heir to the barony of Cobham. In 1916, Parliament removed the effects of the attainder of 1603. However, Dr. Alexander died before this action, so the barony of Cobham was called out of abeyance in favor of his son as the fifteenth Baron Cobham. He died unmarried

enjoyed a notorious youth as the intimate of "Merry Prince Hal" and shared the follies of him who became King Henry V. Invested with the Crown, Henry changed his habits and his company and, as age cooled the Oldcastle blood, the Baron became a convert to the Lollard movement which initiated the Protestant Reformation. He was so prominent in that schism as to incur the wrath of the Roman Archbishop Arundel, who convoked a Prelate's Court which tried and convicted Oldcastle as a heretic. In desperation, the victim added treason to heresy, and on December 14, 1417 he was suspended in chains and burned alive in St. Giles Field.

Oldcastle was the inspiration and the model for Falstaff, who romps and riots so merrily with Prince Hal throughout Shakespeare's *Henry IV, Part I*. The part was first played under the Oldcastle name, but his descendants objected and the author rechristened the character with the pseudonym Falstaff. The great dramatist, in *Henry IV, Part II*, portrays an unhappy, but not the true, end of Oldcastle, when the Prince raised to King, with the overrighteousness often seen in the reformed, denounces "the tutor and the feeder of my riots" and banishes him on pain of death "not to come near our person by ten mile." Whether, and by how much, Falstaff exaggerates the levity and lewdness of Oldcastle we do not know, but historians are in accord with the poet that Oldcastle presented a picturesque degree of conviviality, financial untrustworthiness and visionary vanity, along with a somewhat belated but fanatical religious fervor.⁴ The qualities, in

in 1933 and was succeeded in the peerage by his brother, Robert Disney Leith Alexander, the sixteenth and present Baron Cobham. It thus appears that during the lives of all of the Cobhams with whom we are concerned, the barony was in abeyance and under the effects of the attainder. It does not appear that they would have been entitled to receive it in any event. They were unquestionably of Oldcastle blood, although of the Cobham name, but the peerage was not Oldcastle's and they do not appear to be descended from the wife whose title it was.

4. The rise and fall of the "inimitable Falstaff" of the drama and Shakespeare's adoption of that felicitous name after objections to the portrayal of Oldcastle by name is set forth in the introductions in HUDSON, SHAKESPEARE'S *HENRY IV, PART FIRST AND PART SECOND AND HENRY THE FIFTH* (1880). Despite the bard's promise in the Epilogue to the latter to "continue the story, with Sir John in it," *HENRY V* does not mention him, a breach of promise which Hudson in his Introduction explains on the ground that "Sir John's dramatic office and mission were clearly at an end when his connection with Prince Henry was broken off." That there may have been other reasons for ceasing to lampoon a character recognizable at the time as Oldcastle appears possible if we turn from drama to history.

OXFORD DICTIONARY OF NATIONAL BIOGRAPHY devotes over seven and one-half pages to Sir John Oldcastle, styled Lord Cobham (died 1417) who "came of a family of consideration." Oldcastle, through his friendship with the Prince, obtained many opportunities for service to the Crown and won real military distinction, and appears to have become officially attached to the household of the Prince.

Lady Cobham was his third wife. She brought with her the barony and Cobham Manor and Cowling Castle near Rochester. Perhaps in consequence of the marriage Oldcastle was summoned to Parliament in October, 1409, as a baron and similar writs, sometimes regarded as creating a new barony for him under the name Lord Cobham, issued down to the Parliament of March, 1413.

vestigial form, lingered in our Lord Cobham, and the Oldcastle name and tradition were a source of pride and reflected eminence to the whole Cobham family.

The Warren Lord Cobham had an older brother, Henry Oldcastle Cobham, a Liverpool barrister who died in 1825, leaving a young and beautiful widow, Catherine, a small son, Henry Oldcastle, and an after-born son, George A. Cobham. They went to live with the father's aging maiden Aunt Alice, who had a considerable fortune derived from the merchants in the family.

Our Lord Cobham was then a handsome, worldly, impetuous young man, likewise educated for the bar. He fell in love with Catherine and rescued her from widowhood by matrimony. This marriage with his brother's widow, however chivalrous, was one denounced in *Leviticus*, condemned by canon law, and then prohibited by the law of England.

However, Elizabethan dramatists pictured him, "my old lad of the castle," as the supposed companion of Henry V's early follies and as the "aged counsellor to youthful sin." But the NATIONAL BIOGRAPHY points out that until the controversies of his time were passed "a calm judgment of Oldcastle was hardly to be expected" and that the fierceness of the hatreds he aroused survived in literature.

From the history we learn the nature of these controversies in which Oldcastle had supporters as well as enemies. Oldcastle became a convert to the Lollard movement and his position and earnestness made him a formidable leader of them. A convocation at St. Paul's in 1413 heard evidence of his heresy and laid the matter before the King, who tried to persuade him to renounce his views. "Oldcastle was proof against the royal arguments" in a final stormy interview at Windsor and Henry authorized Archbishop Arundel to proceed against him. Oldcastle defied the Archbishop's summons and was excommunicated. After some time, he was arrested under a royal writ and brought before a court consisting of Arundel and two other Bishops, who offered him absolution by submission. He refused defiantly and Arundel declared him a heretic and handed him over to the secular arm for punishment.

The King, anxious to save Oldcastle if possible, allowed him a respite of forty days to recant. Instead, he escaped from the Tower and put himself at the head of a conspiracy against the King. An uprising of his followers was put down and he was eventually captured after a desperate resistance. He was brought before Parliament on December 14, 1417, and summarily condemned as a traitor and heretic. He was taken to St. Giles Fields where he was "hung and burnt hanging." From this record it is "generally supposed that he was suspended horizontally in chains and burnt alive, but the statements of the authorities are consistent with his having been hung first and afterwards burnt." 14 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 980, 985 (1938).

The DICTIONARY OF NATIONAL BIOGRAPHY also shows that eminence and tragedy accompanied this peerage in the Shakespearean era. The seventh Lord Cobham was a favorite of Elizabeth and entertained her twice at Cobham Hall. His daughter married Sir Robert Cecil. His son Henry succeeded to the barony. But the death of Queen Elizabeth ended his prosperity. Cobham became involved in intrigues and controversies with Sir Walter Raleigh and was sent to the Tower, tried and convicted of treason. James I intervened at the last moment and Cobham was taken back to the Tower alive, where he remained until 1617. Temporarily released for reasons of health, he was stricken and died in poverty. He left no issue. In 1645, Charles I conferred the barony on Sir John Brooke, a second cousin, who likewise died without issue in 1651. 4 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 610 (1938).

Aunt Alice, however, favored, or at least accepted, the marriage and wanted to provide for this family. Upon the marriage, and perhaps in consideration of it, by a document whose precise form is neither clear nor important now she conveyed considerable property to trustees of whom Cobham was one. They were to pay the income to Catherine during her life and thereafter to George Cobham if he survived her. The principal in part was to go to the two sons of the bride, who also were nephews of the bridegroom, and in part to whomsoever Cobham should designate by his will.

The young couple was carefree, perhaps made twice happy by enjoyment of forbidden fruit. They moved into Fearn's Hall, one of the estates in trust, entertained lavishly, and George was soon over his ears in debt. His individual personal property was levied upon but did not satisfy the debts. So, for a time, he was imprisoned for debt in Lancaster Castle.

From then on, Cobham was deeply involved in legal proceedings. Our only information as to their nature is that their object was to enable creditors to reach the Aunt's gift. However, Cobham's beneficial interest was only a contingent right to income, subject to the prior right of the youthful and robust Catherine to receive the income so long as she lived. So, with the persistence of their kind, creditors launched some form of attack against the validity of her interest. The trust for her, they claimed, was in consideration of her marriage to George, and that marriage was an illegal one. Therefore, they alleged, her life estate was invalid. What the Chancellor or the Ecclesiastical Court would have done with the case, Cobham did not wait to learn. Getting wind of the creditors' intentions, he fled to France, taking his wife and her two sons, thus evading service of the writ. That, so it appears, stalled the proceedings and kept the trust property safely beyond reach of creditors.⁵

But, though they found refuge in France, this English family did not find contentment there. They wanted always to be English. Cobham read the story of young America,⁶ and it seemed to him to invite people such as they to start life anew. There they could dwell

5. It is an interesting coincidence that the current holder of the Cobham title has been adjudicated a bankrupt by the High Court of Justice in England. On behalf of his creditors, the trustee engaged in litigation in the New York courts to reach his beneficial interests in income from a trust set up in this country by his American wife. *Fincham v. Income From Certain Trust Funds*, 193 N.Y. Misc. 363, 81 N.Y.S.2d 356 (Sup. Ct. 1948).

6. Henry Oldcastle Cobham's book, *supra* note 2, attributes the decision to the books by Basil Hall. These three volumes, entitled *TRAVELS IN AMERICA*, were published in Edinburgh in 1829. Works of genuine merit and fascination, they easily may be accepted as the influence in favor of America. Nothing in them, however, and nothing that I have found accounts for the selection of Warren.

among people of English speech and customs, and neither the law nor popular sentiment would stigmatize their marriage. Pioneers, too, were usually debtors, and even if they learned that the Cobhams departed from England between sunset and sunrise, and just ahead of the sheriff, they would not think too ill of them for it. So they risked a turbulent ocean voyage to New York, a weary westward journey over Clinton's new Erie Canal, and a long stage coach trek, to reach at Warren the privacy and peace they sought, and for over thirty years they dwelt there in apparent happiness and comfort.

In time, Cobham built in "Cobham Park" a large two-story house, its living rooms being separated by sliding partitions so all could be thrown into one great hall on festive occasions. The neighbors promptly dubbed it "Cobham's Castle," a name that sticks to it yet, despite many transformations. Its furnishings included items then rare in that region. He added a large barn and laid out a race track. He extended his holdings to some eleven hundred acres, of which less than two hundred were tillable and not over half of that was really cultivated. The rest was fittingly called "the wild lands"—mountainous, rocky, and timbered, home of the bear, the deer, and dens of rattlesnakes.

In his hilltop castle, Cobham led the life of an English country squire. Although dignified, he was convivial—some thought too much so for his own good. His lady was gracious and hospitable. Two more daughters were born to the couple, and as they grew to womanhood the home was the scene of frequent good times and gay parties. If anxieties or discords disturbed the "Castle," they were decently screened from inquisitive commoners. The boys grew to shy, industrious and rather austere youth. They attended Allegheny College in a nearby county. Henry Oldcastle learned and practiced surveying. George A. enlisted and distinguished himself in the Civil War, winning the rank of Brigadier General. He was killed in the Battle of Peach Tree Creek, Georgia, in 1864, leaving an after-born son, Fred Cobham, destined to play a stellar role in the litigious drama of later years. Cobham survived his wife by some years and his last days were lordly even in misery, for he was tortured with gout, an ailment above the station of his neighbors. In the fall of 1870 he died.

For years it had been apparent that Lord Cobham spent far more than his visible income. Rumor said he received funds from abroad, but the source of the remittances was not known. Only after his death was it learned that little, if any, of the money which had gone into Cobham Park and on which the family had lived so well was Cobham's own. The English remittances had come into his hands as trustee

for his wife or her sons. Doubtless Catherine had assented to his use of her portion. But rents due the minor stepsons had also been used by him. Upon the death of Catherine, rights to income had devolved upon Lord Cobham and might be subject to his British debts, which appear to have been kept alive to his perpetual harassment. He besought Henry to act quickly, before his mother's death became known in England, and to use his English inheritance to buy up the British claims. Henry yielded, went to England and sold properties to satisfy the old man's debts, but his solicitors wisely took assignment of them to Henry, rather than releases.

And so, in 1870 when he quit this earth, Lord Cobham left as heirs three daughters—Georgena, Elizabeth and Alice. He also left Henry Oldcastle Cobham, who was nephew by blood, foster son by marriage, never legally adopted, and who also was a creditor in a large amount. There also survived his wife's grandson, Fred, a son of his nephew-stepson Gen. George Cobham, who had some moral if not legal claims against an irresponsible and delinquent trustee.

II.

Within a fortnight of his death, Lord Cobham made a strange and ill-fated will. Cobham Park and the personal property thereon were left in perpetual trust to be a "common home" for Henry Oldcastle and the three daughters, where they should "live together in love and affection and harmony, and have a home and a refuge from the cares and vicissitudes incident to human nature." They could sell no interest in it to each other or to any outsider.

When the last of that generation of tenants should pass away, Cobham Park, undivided, should descend to the eldest son of the eldest daughter, Georgena, but if she had none, then to the eldest son of the next daughter Elizabeth; but if none survived, then to the eldest son of the daughter Alice; and if all these failed, then to the eldest son of Henry, whose progeny was thus last in line. But if no such sons survived, then the estate should go to eldest daughters in the same order. If none of these survived, Cobham Park was to pass to certain English relatives, among them a nephew, John Cobham, contingent, however, upon their removing to Warren and making their home on the premises.

If all of these family benefactions failed, Cobham's fancy was to have free rein. The trustees were to "convert my house into a seat of learning," establish a school and dormitory, and build a church in which "service shall be performed according to the established

Church of England." "In order that the establishment may become one of eminence, my trustees shall engage professors and teachers of Latin, Greek, music, arithmetic, drawing, painting and dancing." And he ordered that "one day in every year shall be a solemn service in the Church, accompanied with a frugal dinner at my dwelling house, to which the gentlemen of Warren shall be invited, where a suitable remembrance of me, my dear wife and family shall be made, and in the evening of such day there shall be a ball to be held at my house . . . at which cards, music, the games of backgammon and chess, and dancing shall be permitted, used and exercised which are not contrary to God's Word, but agreeable thereto." If the convivial old lord could not be a ghost at a banquet, at least he would not become a ghost without one.

This will satisfied no one but the testator—the only respect in which it was not unique. Fred, the son of the soldier nephew, was its forgotten man, being unmentioned. So he washed his hands of the family and for half a century he disappeared from the Cobham annals only to make a late but dramatic re-entry. The three daughters, as sole heirs, would take the entire estate outright, if only the will with its vexatious trusts could be put out of the way. So Elizabeth filed a *caveat* against its probate and it seemed fairly vulnerable to contest.

But there were strong reasons why she would not be allowed easily to set the will aside. Henry Oldcastle Cobham must defend it, for, not being an heir at law, he must hold his legacy under the will or take nothing at all. He was in the strategic position of being an executor and trustee, along with an esteemed lawyer, Rassalas Brown, formerly President-Judge. Henry also held another ace—the British creditors' claims against his uncle—enough, if sustained, to wipe out the estate.

In their bewilderment, the whole family agreed to lay their problems and individual interests in the rugged and honest hands of lawyer Samuel P. Johnson. He was qualified by probate court experience to unravel the Cobham tangle, for he had just resumed private practice after serving ten years as President-Judge, refusing a renomination that was equivalent to election. He found that Cobham's personal property consisted of about forty dollars in the bank and some oddly assorted personal effects, furnishings of the Castle, and farm equipment. He also found debts, not counting Henry's claims, that exceeded the value of this personal property. This suggested a solution: Let the court order the Cobham real estate to be sold to pay debts, in which case the buyer would obtain good title free from the onerous trusts. The family could bid in the property, since they would not be

likely to have competition for a property so little suited to general needs, and they could then divide it among themselves as they saw fit. So, all agreed that the will should not be offered for probate but an administrator would petition for sale of the real estate to pay debts. The three girls and Henry designated the president of a local bank to bid in the property for enough to satisfy all debts, except the claims of Henry, which he appears to have waived for purposes of the settlement. Arbitrators were also named to divide the real property into four parcels, as nearly as possible equal in value, and the three girls and Henry agreed to draw lots to determine which should have first, second, third, and last choice of the parcels thus freed from the old man's fantastic trusts.

This plan was executed by the County's leading lawyers with scrupulous regard for all legal formalities. The executors renounced, and Wilton Lindsey, lately Superintendent of Schools and destined one day to be President-Judge, was appointed administrator. The court, to be satisfied that property was not adequate to pay the debts, named prominent citizens to inventory and appraise it, headed by Charles N. Noyes, a promising young lawyer later also to become President-Judge. Lawyer Johnson set out a schedule of claims which, without Henry's, considerably exceeded the appraised value of the personal property. On that showing the court ordered Lord Cobham's real estate sold to the highest bidder. The Cobhams' agent offered \$4,275, less than \$4 per acre, and there was no other bid. The arbitrators partitioned it into parcels and the four Cobhams drew lots for order of choice. Henry came out last in the drawings, as he had in the will. Lord Cobham's daughters proceeded to choose all the smaller parcels of land, upon which buildings stood. All that was left for Henry was the big parcel of "wild lands," hundreds of acres of them, to be sure, but mountainous, unimproved and untillable. Henry had gambled and lost. It seemed that fate always dealt him losing hands.

Suddenly the fickle Goddess of Chance redeemed herself with Henry Oldcastle Cobham and reversed the advantages of the family settlement in most dramatic fashion. About 1876, oil was discovered in the vicinity of Henry Cobham's wild lands, "oil fever" struck the region, and lands, no matter how wild, soared in value. Elizabeth, with her depreciating buildings and small plot of land, saw Henry enriched because of the great acreage of "wild lands" that she had helped to force upon him. The rest of her life was fanatically devoted to an amazing series of litigations to undo the Cobham family settlement.

The stage was unconsciously set for her actions by the trustfulness of those whom she would pursue. In 1875, for obscure reasons, probably to do with titles or properties in England, the same parties who had withheld Lord Cobham's will from probate all joined in probating it without then naming any executor, administrator or trustee. They thus put the will beyond contest and introduced into the County records a title document which would have made a quite different disposition of the lands than had actually taken place. No one seems to have foreseen the advantage that the litigious Elizabeth would obtain from a will to which she once objected and which might not have withstood a contest.

By 1885, Elizabeth was married to John Sager and, as guardian of her infant son, began two lawsuits, one against Henry Oldcastle Cobham and the other against John Galloway, an oil prospector who had leased some of the "wild lands" from Henry and struck oil. She sought to enjoin them from removing the oil on the allegation that by virtue of the will of Lord Cobham her son owned a remainder in those lands. He was the eldest son of the eldest daughter, Georgena having died childless. When the trial court dismissed Elizabeth's complaint, she appealed, and the Supreme Court of Pennsylvania held against her on the ground that, under the will, her infant son at that time had no more than a contingent interest and would not have a vested interest sufficient to support an action for waste unless and until he reached the age of twenty-one.⁷ Strangely enough, this action was litigated on both sides and decided by both courts on the construction of the will, which seemed to presuppose that it, rather than the Cobhams' court sale, governed the title.

Nor was this Elizabeth's only maneuver. To pay her share of the fees and expenses of settling her father's estate, she had given the administrator a mortgage on her parcel. She now refused to pay on it and he sought to foreclose. Elizabeth defended upon the claim, among others, that because of the will the court never obtained jurisdiction to appoint an administrator. Again Elizabeth lost, and again she appealed. The Supreme Court of Pennsylvania, while ordering retrial of some aspects of the case, held that she could not collaterally impeach the administration proceedings.⁸

One would expect these attacks to warn the rest of the family that she was up to mischief. But, in 1889, no one objected when she asked the Orphans Court to appoint trustees under Lord Cobham's

7. *Sager v. Galloway*, 113 Pa. 500, 6 Atl. 209 (1886); *Sager v. Cobham*, 6 Atl. 212 (1886).

8. *Sager v. Lindsey*, 118 Pa. 25, 13 Atl. 211 (1888).

will, giving as a reason the necessity for investing someone with authority to collect certain assets in England. On the contrary, all stood aside and allowed her to gain control of the trusteeship through appointment of herself, Orren C. Allen, her lawyer, and Ezra Hazeltine, her close friend.

In 1891, Elizabeth and her fellow trustees struck at the titles obtained through the Orphans Court sale by both Henry and her sister, Alice. They alleged in ejectment actions that the sale was induced by fraud on the court, that in truth "Lord Cobham" left personal property adequate to pay all debts and that the whole proceeding to sell the lands was a plot to free the property of the trust and so to deprive any grandchildren of their remainders. Any grandchildren then appearing likely to benefit were her own children, so her motherly instincts helped arouse her fiduciary conscience about the evil of a settlement she herself had made.

Elizabeth was in a position of advantage. The probated will, no longer contestable, afforded a foundation in the record for the trustees' claim of title against those of purchasers at the Orphans sale. Moreover, appointment of herself and her friends as trustees made it possible for her to launch her attack on behalf of beneficiaries who were not parties to the agreements and proceedings now said to be fraudulent. Thus, Elizabeth hoped to escape the legal consequences, if not embarrassment, from the fact that she was a party to the fraud she charged and for twenty years had enjoyed the fruits of it.

The ejectment case, against Alice, came to trial at the September 1891 Term. No civil suit ever so aroused the County. Members of its most-talked-of family were charging each other with fraud—fraud that could have been accomplished only by complicity of its most respected judges, leaders of the County Bar and men influential in public life. They were alive, however, and certain to defend themselves from the witness stand and to face cross-examination by Elizabeth's lawyers—who included her fellow trustee, Orrin C. Allen, later a State Senator, the solid and respected David I. Ball, and George Higgins, long the County's District Attorney and a courtroom lawyer quick on his feet. The defense was in the hands of two young men, Watson D. Hinkley and William E. Rice, each destined later to become President-Judge. Mortimer H. Elliott, a powerful advocate who greatly influenced the judicial evolution of the law of oil and gas and became general solicitor for the Standard Oil Company, was there to protect the interests of the companies that were claimed to have taken illegally untold quantities of oil from the lands. The feud in the Cobham family had divided the bar and the community, and the local judge

had disqualified himself. Of course, the curious were up early the morning of the trial, the courtroom and corridors were filled, and many debated the issue in the courtyard as they watched the arrival of participants.

Judge Olmstead, from another Circuit, specially designated to preside, convened the court. A jury was drawn and those fortunate enough to have seats bent to catch every word as public washing of linen by the local aristocracy began.

Then the spectacle collapsed. Judge Olmstead ruled that Elizabeth's oral testimony was not admissible to upset a record title. He noted that after this "great lapse of time to hold that this whole transaction can be opened at this period and we go back and undo what the Orphans Court did" could not be permitted. "If such things could be done," said he, "there would be no security of titles." Hence, he directed a verdict against Elizabeth and her co-trustees.

But some lawyers thought otherwise. After all, they argued, equity is so hostile to fraud that its presence vitiates any transaction. The determined Elizabeth would find out and so appealed to the Supreme Court of Pennsylvania. It gave her the victory. The Supreme Court held that such a fraud, if proved as alleged, would invalidate the Orphans Court sale, and therefore, ordered a new trial to hear the evidence and decide whether in fact there had been fraud.⁹

Elizabeth's high court triumph after her summary defeat heightened public interest as a retrial began. Judge Mayer, from another Circuit, was designated to preside. He allowed Elizabeth's counsel the widest latitude. But, as so often is the case, allegations are one thing; proof is something else. The support for her sensational charges was lame. Her husband was her best witness and none too good at that. It was said there was some hay on the premises unaccounted for, but he did not know how many tons or what it was worth. There was also a claim that the inventory omitted about a hundred sheep. But it appeared that they were in the keeping of one of Lord Cobham's neighbors on shares. Most of them had predeceased Lord Cobham and the administrator had collected for the rest. Question was raised about some notes and receivables, but these the accounting showed had been collected. Lindsey, the administrator, was present and satisfactorily explained every item Elizabeth's counsel mentioned. It is significant to note here that every person who from personal knowledge could impeach the inventory if it were false or faulty was available to Elizabeth on this trial. Present in court were all the attorneys who handled the settlement, the appraisers who had valued the property,

9. *Sager v. Mead*, 164 Pa. 125, 30 Atl. 284 (1894).

and Henry, who was a party to all of the transactions. Witnesses there were as to any possible question that could be raised about the settlement and sale. But the case ended in anticlimax, its failure being so complete that the judge, despite the high court's reversal of the former decision, again directed a verdict against Elizabeth and her trustees.

Elizabeth took an appeal and for a fourth time gave her name to a leading case in the Supreme Court of Pennsylvania. But now the judges had Elizabeth's evidence instead of her allegations, and they unanimously declared that the evidence of fraud was "flimsy and worthless" and that her attempt to upset the Orphans Court sale on it was "preposterous." The judges pointed out that Elizabeth was a party to the settlement, and under it accepted land which she still possessed. "It would be a scandal upon the administration of justice" to permit her to impugn the title. It concluded:

" . . . therefore, in any aspect, the case of these plaintiffs is destitute of merit. There was no actual fraud in the original agreement, the orphans court sale was valid and effective proceeding to divest all title under the will . . . and the laches in the institution of any proceeding to invalidate the title acquired by the orphans court sale is such that it cannot now be entertained."

And it took a parting shot at Elizabeth: "She cannot be permitted to assert her own fraud and obtain a judicial decree founded thereon."¹⁰

Meanwhile, her ejectment case against Henry had come to trial, on substantially the same evidence, and the judge submitted that case to the jury. These laymen were no more convinced than the Supreme Court. They promptly brought in a verdict against Elizabeth.

The community was generally satisfied that both the high court and the jury had rightly judged the Cobham lawsuits. Few could understand why Elizabeth had brought, or such intelligent and reputable lawyers had taken, a case so wanting in merit. The spectacle was satisfactorily ended and could be forgotten.

One by one the embattled Cobhams of that generation passed away. Many of the lawyers, too, went to their last judgment. Henry Oldcastle Cobham and his wife survived. In the eyes of the neighborhood Henry was a worthy citizen, industrious, generous and of good will. He was a reserved and cultured gentleman, devoted to writing, reading and communing with nature from the boulders that surrounded his home. High in the "wild lands" overlooking the river

10. *Sager v. Mead*, 171 Pa. 349, 33 Atl. 355 (1895).

he had made a clearing and built a substantial but not pretentious brick house. "Stoneylonesome" he called it and so it was, for their children met early deaths. The couple was lonely and found consolation in religion.

Having a valuable property but no heirs, Henry and his wife gave Stoneylonesome and the "wild lands" to the Salvation Army, upon condition that it be used as a home for old people. However, they reserved the use of the house and a small annuity, considerably less than the property yielded in oil royalties, for the life of the survivor. This proved to be Henry, and, on his death in August 1915, the Salvation Army took complete possession.

Peace had settled upon the Cobham lands; the old controversy was no more. The title to the property was secure, more secure than most parcels in the Commonwealth, for it was certified by the Supreme Court—at least, that is what the lawyers said.

III.

One day in 1922, while the house was vacant, a woman of middle age appeared at Stoneylonesome and, meeting with no resistance, moved in and asserted that she owned it. She was Blanche Lawson, only living child of the much-defeated Elizabeth Cobham Sager, who had been dead over a quarter of a century. If the will of Lord Cobham had prevailed, Blanche would own all of his real estate—and to take it she was resolved.

The Salvation Army, baffled by what appeared to be the fantasy of an inscrutable woman, went to lawyer David I. Ball. It so happened that he was one of the only survivors of the legal battle, thirty years before, over these same premises. He had been counsel for Blanche Lawson's mother when she assailed the same title with so little success. He thought Blanche must be slightly deranged, as he commenced an action to eject her expecting it would be undefended; for no lawyer, when he learned the history of the case, would dispute the title.

To his surprise, able and astute counsel did defend Blanche's ownership of the premises, with a claim that she took it by devise under the will of Lord Cobham. The Orphans Court sale, Blanche repeated, was induced by fraud; her grandfather did leave personal property enough to pay his debts, but it was concealed and never reported as part of his estate. The sale was therefore invalid; the will as later probated was her source of title. These were the very grounds of her mother's claim, which the Supreme Court, after full trial, so

emphatically rejected. Such an absurd pretension after all those years exasperated the aging lawyer Ball, and he sought the counsel of J. H. Alexander and William S. Clark, two of the County's leading lawyers, who were continuing the old law firm which a generation before vindicated the Orphans Court title. The oil companies, too, were again threatened and were represented by John E. Mullin, experienced in oil and gas litigation.

True it was that the claims of Blanche were stale and discredited by former litigations. But she had not been a party to those earlier actions—was not even of age when they occurred. And the Supreme Court had also held that a grandchild of Lord Cobham had no right of possession or action while the older generation of legatees were alive, and Henry died only about seven years before. It seemed that again in 1922, as thirty years before, the case could not be dismissed on legal points but must be met on the facts, perhaps to be decided by a jury. Even so, how could Blanche in 1922 get any evidence of fraud in the transactions of 1870 that her mother, who took part in them, did not know of and produce in 1890? It was preposterous to believe she could have anything more than the Supreme Court already had declared "flimsy and worthless." Only a veteran in trial work realizes how worrisome is the case in which one is unable to see what there is to worry about. Her lawyers must be convinced they had something—but they were not saying what it was. Boldly seizing possession of the premises was not a woman's caprice; it was a well-planned lawyer's maneuver to shift to the Salvation Army, as plaintiff, the burden of proof which before had been on Elizabeth. It, as plaintiff out of possession, must satisfy the jury that it had the better title. To tear down its claim, Blanche had a numerous and confident battery of counsel: elderly and respected Homer Muse, shrewd and enterprising George Munn, with experienced Maj. C. E. Bordwell as trial counsel, and Mortimer Graham, of the Erie law firm whose senior partner had been the judge who forty years before appointed Blanche's mother a trustee, just, as she said, to collect some funds from England.

This lawsuit attracted little interest from the public. Lord Cobham was forgotten and the case was regarded as useless thrashing over of old straw. But, as the adversaries squared away for trial, the legal profession saw in it most important and interesting questions. Judge Heck, from an adjoining Circuit, was specially designated to preside. The portraits of a long array of President-Judges looked down upon the trial of issues which those judges believed they had long since settled. Counsel for the Salvation Army took up its burden and quickly proved a perfect paper title and rested their case with an outward show

of confidence. One indispensable link of their title was the Orphans Court proceedings to sell the real estate to satisfy Cobham's debts. If that was vulnerable to attack, they were in trouble.

Counsel for Blanche called to the witness stand a well-groomed, easy-mannered man of sixty-six years. The courtroom became tense and alert when he identified himself as Fred P. Cobham, son of Gen. George A. Cobham, that nephew-stepson of Lord Cobham who died for the Union cause at Peach Tree Creek. The witness had been a boy of about eleven years when "Lord Cobham" died and, because of reasons or influences no one understood, was not mentioned in his will. So the youngster took no part in the Cobham litigation, kept up no intimacy with the family, and lived most of his life away from the scenes of their struggles.

Cobham told of Cobham Park as he remembered it and related rambling bits of family history. Then counsel showed him, from court records, the inventory of Lord Cobham's estate and asked bluntly if he knew whether other personal property was on the place at the time of "Lord" Cobham's death. His answer was a firm and unequivocal "Yes." "What was it?" "Jewels, family jewels, that were not taken into consideration—heirlooms." He proceeded to relate amazing incidents which had never been brought to light in previous litigations.

In 1880, ten years after Lord Cobham's death and as many years before the first cry of fraud was heard in court, John Cobham, the English nephew who will be remembered as a contingent legatee, came to America and employed S. T. Allen, of the Allen and Sons law firm, to investigate the handling of the Cobham estate. Allen held a series of conferences at which the children of Lord Cobham explained his affairs to their inquisitive cousin. This witness, then a youth, was considering law as a profession, and, at lawyer Allen's request, attended these conferences as a sort of secretary and meticulously recorded the conversations. When it was all over, Allen told him he better keep his notes, for they might have some effect on the property. He produced a sheaf of these notes, made over forty years before. They bore every indication of authenticity. And this is what they disclosed.

The daughters and Henry Cobham freely admitted to John Cobham that considerable personal property—enough to pay all of Cobham's debts—was concealed from the administrator, because they wanted to force the sale of the real estate. There was farm equipment, which they sold and whose proceeds, amounting to about \$3,000, they divided. John Cobham then asked what had become of all the heirloom jewelry which he knew the family brought to America. The daughters and Henry admitted that this was still in their possession

and had not been returned as part of the estate. They agreed to bring it to the next meeting.

At a conference the following Monday, February 16, 1880, Henry Cobham produced a document by which he and the daughters had agreed upon a secret out-of-court division of the personal estate among themselves. It was a copybook in which they made and signed their private inventory and appraisal, quite different from the one filed with the Orphans Court. It bore the signatures of all those who acquired the real property through the Orphans Court sale. The witness had kept the document, which he now handed over. It seemed genuine and the court admitted it in evidence. It itemized a quantity of jewelry and recited "value stated is what Tiffany Jewelers in New York City told father it was in 1868." Among other items was a gold band ring marked, "Elijah Cobham 1730." The value of the heirlooms totaled \$3,553. The instrument also listed Cobham's debts, which totaled \$1,266.73, including funeral and burial expense.

Henry Cobham was persuaded to bring to the following conference an old iron "strong box" containing the jewelry. With acquiescence of the daughters, he told John Cobham to select what he would accept in settlement of his claims. When he set aside a diamond necklace and some other items, including the gold band ring, Henry protested that his selections were worth \$3,500, but after some bickering a settlement in jewels was agreed upon and a satisfied British cousin went home. Before sailing, however, he presented to the witness, perhaps in appreciation of his secretarial service, the gold band ring. Yes, he still had it. He handed a well-worn band to the court in which was still visible the engraving, "Elijah Cobham 1730." Who was Elijah Cobham? "He was a slave trader in the Indian market." He had been one of the builders of the Cobham fortune. "You may cross-examine," counsel for Blanche condescendingly said to counsel for the Salvation Army.

Few more difficult and hazardous tasks could confront a lawyer. The testimony was so circumstantial and so well-documented that it seemed invulnerable to cross-examination. Yet, it was so damaging that the only apparent line of attack must be ventured. This was that the witness claimed to have been in possession of this vital evidence since 1880, and knew of the litigations about 1891 involving the same issues. When it was so important, why did he not disclose it? His answer was, "Don't know why I should get in bed with them. I had no great love for them—tried to beat me out of everything." So he had never made his story available to the litigious elder Cobhams. But Mrs. Lawson, like himself, of a later generation, had no part in

"beating him," so he told his story to her. His manner was frank and his explanation not improbable. Nothing was available at that time to discredit or contradict him and, if ever there was a contrary version, the passage of the years had put it beyond mortal proof. Judge Heck sent the case to the jury, which promptly returned a verdict for Blanche, nullifying the Salvation Army's title derived from the Orphans Court sale and validated by the Supreme Court's decision.

There were many legal moves which need not detain us long. Judge Heck granted a new trial. The evidence was repeated and again the jury found for Blanche. Judge Rossiter, of Erie, presiding specially at the latter trial, denied the Salvation Army's motion for judgment notwithstanding the verdict. He said: "We can come to no other conclusion than that the verdict on the evidence is correct, although we have been unable to arrive at any satisfactory conclusion as to how it happened that men of such high character and standing as Judge Lindsey, Judge Noyes, Judge Johnson and others were parties to what, under the evidence in this case, was such an apparent fraud, unless it was that they were mistaken in the ultimate legal effect of what they did." Judgment sustaining Blanche and in effect ousting the Salvation Army stood.

And so the Salvation Army appealed to the Pennsylvania Supreme Court to sustain again in 1928 a title it had declared good in 1895. The issue was not an easy one to present or decide. Whatever the merits of the particular case, it was a startling threat to the security of land titles. Yet, it was hard to deny that Cobham's testimony justified the verdict. Had the Orphans Court been informed of the events related by Cobham, it surely would not have ordered the sale. The concealment, on its face, seemed to be a fraud.

But, in spite of its apparent conclusiveness, Cobham's story raised some serious questions which might have been answered if the events had been related in the 1890 litigation when parties and witnesses were alive who could explain them. Even if Fred Cobham had refused or was not available to testify, Elizabeth and her lawyer both took part in these events and could have testified to their occurrence. They were not easily forgotten transactions. Yet, Elizabeth had tried repeated lawsuits without mention of this evidence, which, if unexplained, would have won for her. If the whole family in 1870 consciously entered into a scheme to deceive the court—perhaps their own attorneys—and to defraud their own offspring, why did they so readily confess it all in 1880 to an English cousin whose chance of proving it against them was slight? And what was his standing or claim, anyway, that the family should try to pacify him with jewels? He was

not an heir and was only a legatee under the will upon contingencies that had not occurred. That Fred Cobham had told the truth, so far as he knew it, was taken for granted, but did he know the whole truth? Were the jewels ever the individual property of the irresponsible and debt-ridden Lord Cobham? Were they not more likely the separate property of Catherine, gifts, perhaps, from her aunt, or from her first husband, and found in Cobham's possession only because he never bothered to settle his wife's estate? His ownership was inferred from mere possession, but his title seems never otherwise to have been established.

If the Supreme Court pondered these doubts, it avoided deciding them. It assumed that a conspiracy to defraud was proven. But, even so, it held that the Salvation Army was a purchaser for value, because it agreed to pay Henry and his wife annuities for life, and it was without notice of the fraud. Hence, it refused to "subvert the decrees of the orphans' court after more than fifty years, and subsequent to the deaths of all the parties who knew the facts."¹¹

This reasoning settled one thing. Blanche must get out of Stoney-lonesome and leave it to the Salvation Army. Like many a decision, it settled a lawsuit without settling the law. Was it to be inferred that if the property were still in the hands of Henry, or his heir or devisee, the title could be overturned on such a record? If he had given it to the Salvation Army with no strings attached, would title have been set aside? The idea that the promise to return a small annuity was consideration which made the charity a purchaser for value seemed somewhat unrealistic in view of the value and yield of the grant. If Henry's title had an infirmity because based on deception of the Orphans Court, should it become validated by a wholly fortuitous method of conveyancing? These were questions long debated at the local bar. But it was recognized that the court faced a dilemma not likely ever to be repeated and was entitled to some latitude in finding a way out.

A half-century of strife, few decades of which did not witness some new and ingenious litigation, had finally cleared the Cobham lands from the cloud of these visionary trusts. The law snatched Stoney-lonesome from Lord Cobham's granddaughter when it had seemed within her grasp. His dream that the lands should stay with those of his blood was broken.

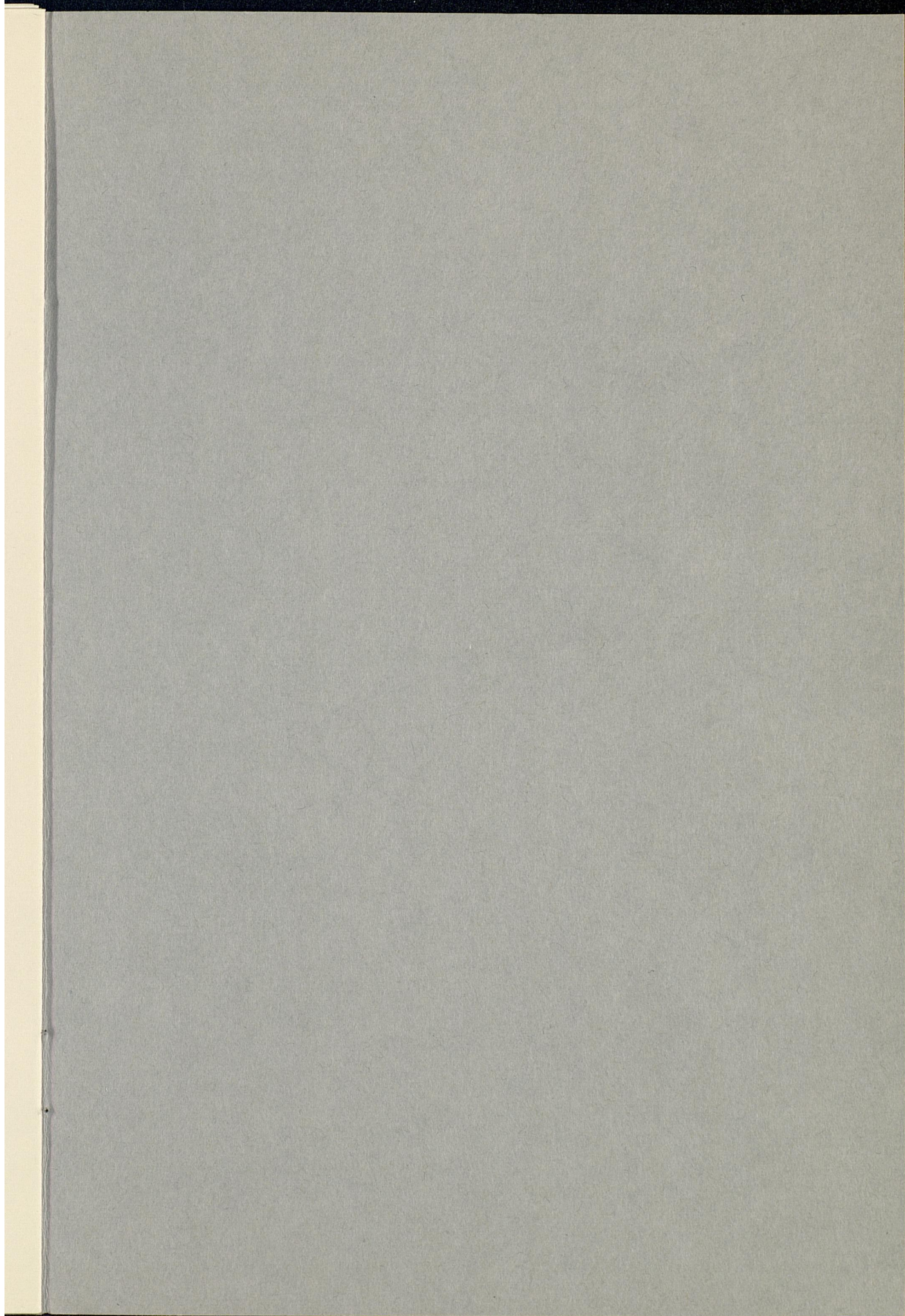
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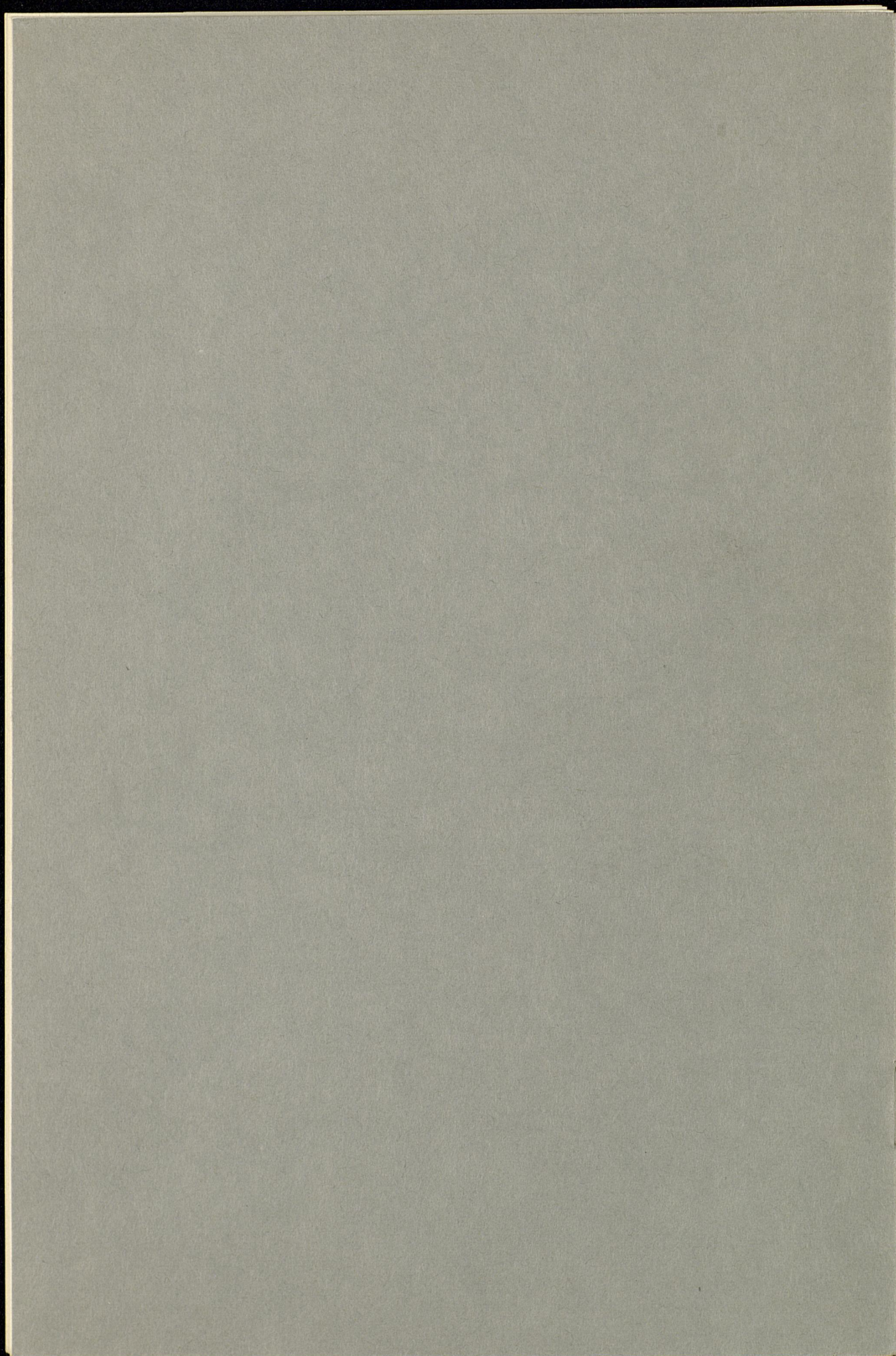
But Lord Cobham was not the last daydreamer of his quixotic breed. Henry, in spite of his experiences with his stepfather's illusions

11. *Salvation Army v. Lawson*, 293 Pa. 459, 143 Atl. 113 (1928).

of grandeur, was also a castle builder. Stoneylonesome, as a perpetually endowed home for the aged to commemorate Henry's life and works, also proved visionary, impractical and vainglorious. The house was isolated, inaccessible and ill-adapted to the purpose.

So again the Cobham grand design was but an illusion. Again the Orphans Court was besought to extricate Cobham lands from Cobham fantasy. In 1944, the Salvation Army petitioned the court to sell the surface rights to the Stoneylonesome property. It declared that it was not practically possible to establish on the site the home for the aged that Henry Cobham had projected. But it recited that it had been able to find, on acceptable terms, a willing purchaser. Once more the Orphans Court decreed a sale of Cobham property. The purchaser was, of all persons, Blanche Lawson.





*For the C.J. - the way we fight up North -
Bob Jackson*

**FALSTAFF'S DESCENDANTS IN PENNSYLVANIA
COURTS**

By

ROBERT H. JACKSON

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FALSTAFF'S DESCENDANTS IN PENNSYLVANIA COURTS

Robert H. Jackson

Old lawyers' tales united education with entertainment for students and young lawyers in days when they made their way to the bar through apprenticeship in law offices. The mills in county seats ground slowly before the first World War, and attorneys waiting for their cases to be reached or for juries to report would gather in the judge's chamber or in the more stimulating atmosphere of the tavern and talk—always about lawyers and lawsuits. The legal lore of the locality and the strategy by which its famous cases had been won or lost were thus transmitted to the oncoming generation. It was a casual substitute for the dining customs of the English Inns of Court in maintaining the *esprit de corps* of the profession. One such tale that I think is worth recording concerns litigation that descended through generations of a most uncommon family, and for over a half-century occupied the legal profession in my native Warren County in northwestern Pennsylvania. It has the quality, by no means indispensable to an old lawyer's story, of being supported by the record.¹

I.

Warren, Pennsylvania, in 1836 was a settlement of about sixty families, whose cabins and rough houses nestled in the narrow valley

1. The legal aspects of the story, which give little hint of its underlying drama, are interred in the following records of the Pennsylvania Supreme Court: *Sager v. Galloway*, 113 Pa. 500, 6 Atl. 209 (1886); *Sager v. Cobham*, 6 Atl. 212 (1886); *Sager v. Lindsey*, 118 Pa. 25, 13 Atl. 211 (1888); *Sager v. Mead*, 164 Pa. 125, 30 Atl. 284 (1894); *Sager v. Mead*, 171 Pa. 349, 33 Atl. 355 (1895); *Salvation Army v. Lawson*, 293 Pa. 459, 143 Atl. 113 (1928). Many of the cast I have known personally, and all were familiar by reputation. I am indebted to J. H. Alexander, of Warren, for access to the paper books involved in the last, or at least the latest, of these litigations.

where Connewango Creek joins the Allegheny River. The community was stirred that spring by the arrival of George A. Cobham and his family. They were not ordinary pioneers hardened by the struggle to draw an existence from land and forest. Cobham had the ingratiating manners of an English gentleman educated for the law. His lady had a grace and gentility strange to the raw life of the frontier. With them, and assumed to be children of the couple, were two robust boys, George A. and Henry Oldcastle Cobham, and a baby girl.

From the beginning the Cobhams were a friendly family but also one of mystery and of reserve which did not encourage prying into their affairs. Cobham did not settle in the little town. Instead, he bought an isolated cabin a few miles up the mountainside whose owner could not keep up payments for land that would respond only grudgingly to husbandry. The villagers thought it was an eccentric and impractical choice for a man with a family. Yet, the site had undeniable charm, which clings to it still, as it looks toward the sunset and down upon the wooded valleys where the winding creek and river meet. The Cobhams all came to love it with an intensity typical of the British landlord. Cobham named his cabin and its little clearing "Cobham Park," a vanity that amused the unromantic settlers who began to call the proprietor "Lord Cobham," a title which mingled respect and derision.

It took a half-century of family litigations, which were the chief legacy left by Cobham, to fully disclose the weird background of this eccentric man and his family. While the title imputed to him was fictitious, he had indeed come of a family that included nobles, martyrs, barristers and rich merchants.² Cobham was directly descended from Sir John Oldcastle, who held the title of Baron Cobham.³ Oldcastle

2. HENRY OLDCASTLE COBHAM, OURSELVES, A SAD TALE, SADLY TOLD AND SADLY ENDED. Under this melancholy title Henry recorded in blank verse the annals of his family. It was published by the Publishing House of the United Evangelical Church, Harrisburg, Pa., and privately circulated. For a copy I am indebted to Mr. and Mrs. Hugh Jamison, present owners of Cobham Park.

3. BURKE'S PEERAGE 438 (99th ed. 1949), traces the Cobham barony. Henry de Cobham in 1211 gave to King John one thousand marks for his favor. When the third Baron Cobham died in 1407, his granddaughter Joan became Baroness Cobham in her own right. Sir John Oldcastle, her fourth husband, was summoned to Parliament as a baron, apparently in her right. After his execution for heresy and treason, she married again. Her only issue to survive her was a daughter, Joan, who likewise became Baroness Cobham in her own right. She married Sir Thomas Brooke, a member of Parliament, and the barony then remained with their descendants for several generations. Henry Brooke, the eleventh Baron Cobham, was attainted for treason in 1603 and his honor forfeited. The right to the barony during several generations was subject to the attainder. In 1912, the Committee on Privileges of the House of Lords declared that, but for the attainder, Dr. Reginald Gervase Alexander, a distinguished physician, was a co-heir to the barony of Cobham. In 1916, Parliament removed the effects of the attainder of 1603. However, Dr. Alexander died before this action, so the barony of Cobham was called out of abeyance in favor of his son as the fifteenth Baron Cobham. He died unmarried.

enjoyed a notorious youth as the intimate of "Merry Prince Hal" and shared the follies of him who became King Henry V. Invested with the Crown, Henry changed his habits and his company and, as age cooled the Oldcastle blood, the Baron became a convert to the Lollard movement which initiated the Protestant Reformation. He was so prominent in that schism as to incur the wrath of the Roman Archbishop Arundel, who convoked a Prelate's Court which tried and convicted Oldcastle as a heretic. In desperation, the victim added treason to heresy, and on December 14, 1417 he was suspended in chains and burned alive in St. Giles Field.

Oldcastle was the inspiration and the model for Falstaff, who romps and riots so merrily with Prince Hal throughout Shakespeare's *Henry IV, Part I*. The part was first played under the Oldcastle name, but his descendants objected and the author rechristened the character with the pseudonym Falstaff. The great dramatist, in *Henry IV, Part II*, portrays an unhappy, but not the true, end of Oldcastle, when the Prince raised to King, with the overrighteousness often seen in the reformed, denounces "the tutor and the feeder of my riots" and banishes him on pain of death "not to come near our person by ten mile." Whether, and by how much, Falstaff exaggerates the levity and lewdness of Oldcastle we do not know, but historians are in accord with the poet that Oldcastle presented a picturesque degree of conviviality, financial untrustworthiness and visionary vanity, along with a somewhat belated but fanatical religious fervor.⁴ The qualities, in

in 1933 and was succeeded in the peerage by his brother, Robert Disney Leith Alexander, the sixteenth and present Baron Cobham. It thus appears that during the lives of all of the Cobhams with whom we are concerned, the barony was in abeyance and under the effects of the attainder. It does not appear that they would have been entitled to receive it in any event. They were unquestionably of Oldcastle blood, although of the Cobham name, but the peerage was not Oldcastle's and they do not appear to be descended from the wife whose title it was.

4. The rise and fall of the "inimitable Falstaff" of the drama and Shakespeare's adoption of that felicitous name after objections to the portrayal of Oldcastle by name is set forth in the introductions in HUDSON, *SHAKESPEARE'S HENRY IV, PART FIRST AND PART SECOND AND HENRY THE FIFTH* (1880). Despite the bard's promise in the Epilogue to the latter to "continue the story, with Sir John in it," HENRY V does not mention him, a breach of promise which Hudson in his Introduction explains on the ground that "Sir John's dramatic office and mission were clearly at an end when his connection with Prince Henry was broken off." That there may have been other reasons for ceasing to lampoon a character recognizable at the time as Oldcastle appears possible if we turn from drama to history.

OXFORD DICTIONARY OF NATIONAL BIOGRAPHY devotes over seven and one-half pages to Sir John Oldcastle, styled Lord Cobham (died 1417) who "came of a family of consideration." Oldcastle, through his friendship with the Prince, obtained many opportunities for service to the Crown and won real military distinction, and appears to have become officially attached to the household of the Prince.

Lady Cobham was his third wife. She brought with her the barony and Cobham Manor and Cowling Castle near Rochester. Perhaps in consequence of the marriage Oldcastle was summoned to Parliament in October, 1409, as a baron and similar writs, sometimes regarded as creating a new barony for him under the name Lord Cobham, issued down to the Parliament of March, 1413.

vestigial form, lingered in our Lord Cobham, and the Oldcastle name and tradition were a source of pride and reflected eminence to the whole Cobham family.

The Warren Lord Cobham had an older brother, Henry Oldcastle Cobham, a Liverpool barrister who died in 1825, leaving a young and beautiful widow, Catherine, a small son, Henry Oldcastle, and an after-born son, George A. Cobham. They went to live with the father's aging maiden Aunt Alice, who had a considerable fortune derived from the merchants in the family.

Our Lord Cobham was then a handsome, worldly, impetuous young man, likewise educated for the bar. He fell in love with Catherine and rescued her from widowhood by matrimony. This marriage with his brother's widow, however chivalrous, was one denounced in *Leviticus*, condemned by canon law, and then prohibited by the law of England.

However, Elizabethan dramatists pictured him, "my old lad of the castle," as the supposed companion of Henry V's early follies and as the "aged counsellor to youthful sin." But the NATIONAL BIOGRAPHY points out that until the controversies of his time were passed "a calm judgment of Oldcastle was hardly to be expected" and that the fierceness of the hatreds he aroused survived in literature.

From the history we learn the nature of these controversies in which Oldcastle had supporters as well as enemies. Oldcastle became a convert to the Lollard movement and his position and earnestness made him a formidable leader of them. A convocation at St. Paul's in 1413 heard evidence of his heresy and laid the matter before the King, who tried to persuade him to renounce his views. "Oldcastle was proof against the royal arguments" in a final stormy interview at Windsor and Henry authorized Archbishop Arundel to proceed against him. Oldcastle defied the Archbishop's summons and was excommunicated. After some time, he was arrested under a royal writ and brought before a court consisting of Arundel and two other Bishops, who offered him absolution by submission. He refused defiantly and Arundel declared him a heretic and handed him over to the secular arm for punishment.

The King, anxious to save Oldcastle if possible, allowed him a respite of forty days to recant. Instead, he escaped from the Tower and put himself at the head of a conspiracy against the King. An uprising of his followers was put down and he was eventually captured after a desperate resistance. He was brought before Parliament on December 14, 1417, and summarily condemned as a traitor and heretic. He was taken to St. Giles Fields where he was "hung and burnt hanging." From this record it is "generally supposed that he was suspended horizontally in chains and burnt alive, but the statements of the authorities are consistent with his having been hung first and afterwards burnt." 14 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 980, 985 (1938).

The DICTIONARY OF NATIONAL BIOGRAPHY also shows that eminence and tragedy accompanied this peerage in the Shakespearean era. The seventh Lord Cobham was a favorite of Elizabeth and entertained her twice at Cobham Hall. His daughter married Sir Robert Cecil. His son Henry succeeded to the barony. But the death of Queen Elizabeth ended his prosperity. Cobham became involved in intrigues and controversies with Sir Walter Raleigh and was sent to the Tower, tried and convicted of treason. James I intervened at the last moment and Cobham was taken back to the Tower alive, where he remained until 1617. Temporarily released for reasons of health, he was stricken and died in poverty. He left no issue. In 1645, Charles I conferred the barony on Sir John Brooke, a second cousin, who likewise died without issue in 1651. 4 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 610 (1938).

Aunt Alice, however, favored, or at least accepted, the marriage and wanted to provide for this family. Upon the marriage, and perhaps in consideration of it, by a document whose precise form is neither clear nor important now she conveyed considerable property to trustees of whom Cobham was one. They were to pay the income to Catherine during her life and thereafter to George Cobham if he survived her. The principal in part was to go to the two sons of the bride, who also were nephews of the bridegroom, and in part to whom ever Cobham should designate by his will.

The young couple was carefree, perhaps made twice happy by enjoyment of forbidden fruit. They moved into Fearn Hall, one of the estates in trust, entertained lavishly, and George was soon over his ears in debt. His individual personal property was levied upon but did not satisfy the debts. So, for a time, he was imprisoned for debt in Lancaster Castle.

From then on, Cobham was deeply involved in legal proceedings. Our only information as to their nature is that their object was to enable creditors to reach the Aunt's gift. However, Cobham's beneficial interest was only a contingent right to income, subject to the prior right of the youthful and robust Catherine to receive the income so long as she lived. So, with the persistence of their kind, creditors launched some form of attack against the validity of her interest. The trust for her, they claimed, was in consideration of her marriage to George, and that marriage was an illegal one. Therefore, they alleged, her life estate was invalid. What the Chancellor or the Ecclesiastical Court would have done with the case, Cobham did not wait to learn. Getting wind of the creditors' intentions, he fled to France, taking his wife and her two sons, thus evading service of the writ. That, so it appears, stalled the proceedings and kept the trust property safely beyond reach of creditors.⁵

But, though they found refuge in France, this English family did not find contentment there. They wanted always to be English. Cobham read the story of young America,⁶ and it seemed to him to invite people such as they to start life anew. There they could dwell

5. It is an interesting coincidence that the current holder of the Cobham title has been adjudicated a bankrupt by the High Court of Justice in England. On behalf of his creditors, the trustee engaged in litigation in the New York courts to reach his beneficial interests in income from a trust set up in this country by his American wife. *Fincham v. Income From Certain Trust Funds*, 193 N.Y. Misc. 363, 81 N.Y.S.2d 356 (Sup. Ct. 1948).

6. Henry Oldcastle Cobham's book, *supra* note 2, attributes the decision to the books by Basil Hall. These three volumes, entitled *TRAVELS IN AMERICA*, were published in Edinburgh in 1829. Works of genuine merit and fascination, they easily may be accepted as the influence in favor of America. Nothing in them, however, and nothing that I have found accounts for the selection of Warren.

among people of English speech and customs, and neither the law nor popular sentiment would stigmatize their marriage. Pioneers, too, were usually debtors, and even if they learned that the Cobhams departed from England between sunset and sunrise, and just ahead of the sheriff, they would not think too ill of them for it. So they risked a turbulent ocean voyage to New York, a weary westward journey over Clinton's new Erie Canal, and a long stage coach trek, to reach at Warren the privacy and peace they sought, and for over thirty years they dwelt there in apparent happiness and comfort.

In time, Cobham built in "Cobham Park" a large two-story house, its living rooms being separated by sliding partitions so all could be thrown into one great hall on festive occasions. The neighbors promptly dubbed it "Cobham's Castle," a name that sticks to it yet, despite many transformations. Its furnishings included items then rare in that region. He added a large barn and laid out a race track. He extended his holdings to some eleven hundred acres, of which less than two hundred were tillable and not over half of that was really cultivated. The rest was fittingly called "the wild lands"—mountainous, rocky, and timbered, home of the bear, the deer, and dens of rattlesnakes.

In his hilltop castle, Cobham led the life of an English country squire. Although dignified, he was convivial—some thought too much so for his own good. His lady was gracious and hospitable. Two more daughters were born to the couple, and as they grew to womanhood the home was the scene of frequent good times and gay parties. If anxieties or discords disturbed the "Castle," they were decently screened from inquisitive commoners. The boys grew to shy, industrious and rather austere youth. They attended Allegheny College in a nearby county. Henry Oldcastle learned and practiced surveying. George A. enlisted and distinguished himself in the Civil War, winning the rank of Brigadier General. He was killed in the Battle of Peach Tree Creek, Georgia, in 1864, leaving an after-born son, Fred Cobham, destined to play a stellar role in the litigious drama of later years. Cobham survived his wife by some years and his last days were lordly even in misery, for he was tortured with gout, an ailment above the station of his neighbors. In the fall of 1870 he died.

For years it had been apparent that Lord Cobham spent far more than his visible income. Rumor said he received funds from abroad, but the source of the remittances was not known. Only after his death was it learned that little, if any, of the money which had gone into Cobham Park and on which the family had lived so well was Cobham's own. The English remittances had come into his hands as trustee

for his wife or her sons. Doubtless Catherine had assented to his use of her portion. But rents due the minor stepsons had also been used by him. Upon the death of Catherine, rights to income had devolved upon Lord Cobham and might be subject to his British debts, which appear to have been kept alive to his perpetual harassment. He besought Henry to act quickly, before his mother's death became known in England, and to use his English inheritance to buy up the British claims. Henry yielded, went to England and sold properties to satisfy the old man's debts, but his solicitors wisely took assignment of them to Henry, rather than releases.

And so, in 1870 when he quit this earth, Lord Cobham left as heirs three daughters—Georgena, Elizabeth and Alice. He also left Henry Oldcastle Cobham, who was nephew by blood, foster son by marriage, never legally adopted, and who also was a creditor in a large amount. There also survived his wife's grandson, Fred, a son of his nephew-stepson Gen. George Cobham, who had some moral if not legal claims against an irresponsible and delinquent trustee.

II.

Within a fortnight of his death, Lord Cobham made a strange and ill-fated will. Cobham Park and the personal property thereon were left in perpetual trust to be a "common home" for Henry Oldcastle and the three daughters, where they should "live together in love and affection and harmony, and have a home and a refuge from the cares and vicissitudes incident to human nature." They could sell no interest in it to each other or to any outsider.

When the last of that generation of tenants should pass away, Cobham Park, undivided, should descend to the eldest son of the eldest daughter, Georgena, but if she had none, then to the eldest son of the next daughter Elizabeth; but if none survived, then to the eldest son of the daughter Alice; and if all these failed, then to the eldest son of Henry, whose progeny was thus last in line. But if no such sons survived, then the estate should go to eldest daughters in the same order. If none of these survived, Cobham Park was to pass to certain English relatives, among them a nephew, John Cobham, contingent, however, upon their removing to Warren and making their home on the premises.

If all of these family benefactions failed, Cobham's fancy was to have free rein. The trustees were to "convert my house into a seat of learning," establish a school and dormitory, and build a church in which "service shall be performed according to the established

Church of England." "In order that the establishment may become one of eminence, my trustees shall engage professors and teachers of Latin, Greek, music, arithmetic, drawing, painting and dancing." And he ordered that "one day in every year shall be a solemn service in the Church, accompanied with a frugal dinner at my dwelling house, to which the gentlemen of Warren shall be invited, where a suitable remembrance of me, my dear wife and family shall be made, and in the evening of such day there shall be a ball to be held at my house . . . at which cards, music, the games of backgammon and chess, and dancing shall be permitted, used and exercised which are not contrary to God's Word, but agreeable thereto." If the convivial old lord could not be a ghost at a banquet, at least he would not become a ghost without one.

This will satisfied no one but the testator—the only respect in which it was not unique. Fred, the son of the soldier nephew, was its forgotten man, being unmentioned. So he washed his hands of the family and for half a century he disappeared from the Cobham annals only to make a late but dramatic re-entry. The three daughters, as sole heirs, would take the entire estate outright, if only the will with its vexatious trusts could be put out of the way. So Elizabeth filed a *caveat* against its probate and it seemed fairly vulnerable to contest.

But there were strong reasons why she would not be allowed easily to set the will aside. Henry Oldcastle Cobham must defend it, for, not being an heir at law, he must hold his legacy under the will or take nothing at all. He was in the strategic position of being an executor and trustee, along with an esteemed lawyer, Rassalas Brown, formerly President-Judge. Henry also held another ace—the British creditors' claims against his uncle—enough, if sustained, to wipe out the estate.

In their bewilderment, the whole family agreed to lay their problems and individual interests in the rugged and honest hands of lawyer Samuel P. Johnson. He was qualified by probate court experience to unravel the Cobham tangle, for he had just resumed private practice after serving ten years as President-Judge, refusing a renomination that was equivalent to election. He found that Cobham's personal property consisted of about forty dollars in the bank and some oddly assorted personal effects, furnishings of the Castle, and farm equipment. He also found debts, not counting Henry's claims, that exceeded the value of this personal property. This suggested a solution: Let the court order the Cobham real estate to be sold to pay debts, in which case the buyer would obtain good title free from the onerous trusts. The family could bid in the property, since they would not be

likely to have competition for a property so little suited to general needs, and they could then divide it among themselves as they saw fit. So, all agreed that the will should not be offered for probate but an administrator would petition for sale of the real estate to pay debts. The three girls and Henry designated the president of a local bank to bid in the property for enough to satisfy all debts, except the claims of Henry, which he appears to have waived for purposes of the settlement. Arbitrators were also named to divide the real property into four parcels, as nearly as possible equal in value, and the three girls and Henry agreed to draw lots to determine which should have first, second, third, and last choice of the parcels thus freed from the old man's fantastic trusts.

This plan was executed by the County's leading lawyers with scrupulous regard for all legal formalities. The executors renounced, and Wilton Lindsey, lately Superintendent of Schools and destined one day to be President-Judge, was appointed administrator. The court, to be satisfied that property was not adequate to pay the debts, named prominent citizens to inventory and appraise it, headed by Charles N. Noyes, a promising young lawyer later also to become President-Judge. Lawyer Johnson set out a schedule of claims which, without Henry's, considerably exceeded the appraised value of the personal property. On that showing the court ordered Lord Cobham's real estate sold to the highest bidder. The Cobhams' agent offered \$4,275, less than \$4 per acre, and there was no other bid. The arbitrators partitioned it into parcels and the four Cobhams drew lots for order of choice. Henry came out last in the drawings, as he had in the will. Lord Cobham's daughters proceeded to choose all the smaller parcels of land, upon which buildings stood. All that was left for Henry was the big parcel of "wild lands," hundreds of acres of them, to be sure, but mountainous, unimproved and untillable. Henry had gambled and lost. It seemed that fate always dealt him losing hands.

Suddenly the fickle Goddess of Chance redeemed herself with Henry Oldcastle Cobham and reversed the advantages of the family settlement in most dramatic fashion. About 1876, oil was discovered in the vicinity of Henry Cobham's wild lands, "oil fever" struck the region, and lands, no matter how wild, soared in value. Elizabeth, with her depreciating buildings and small plot of land, saw Henry enriched because of the great acreage of "wild lands" that she had helped to force upon him. The rest of her life was fanatically devoted to an amazing series of litigations to undo the Cobham family settlement.

The stage was unconsciously set for her actions by the trustfulness of those whom she would pursue. In 1875, for obscure reasons, probably to do with titles or properties in England, the same parties who had withheld Lord Cobham's will from probate all joined in probating it without then naming any executor, administrator or trustee. They thus put the will beyond contest and introduced into the County records a title document which would have made a quite different disposition of the lands than had actually taken place. No one seems to have foreseen the advantage that the litigious Elizabeth would obtain from a will to which she once objected and which might not have withstood a contest.

By 1885, Elizabeth was married to John Sager and, as guardian of her infant son, began two lawsuits, one against Henry Oldcastle Cobham and the other against John Galloway, an oil prospector who had leased some of the "wild lands" from Henry and struck oil. She sought to enjoin them from removing the oil on the allegation that by virtue of the will of Lord Cobham her son owned a remainder in those lands. He was the eldest son of the eldest daughter, Georgena having died childless. When the trial court dismissed Elizabeth's complaint, she appealed, and the Supreme Court of Pennsylvania held against her on the ground that, under the will, her infant son at that time had no more than a contingent interest and would not have a vested interest sufficient to support an action for waste unless and until he reached the age of twenty-one.⁷ Strangely enough, this action was litigated on both sides and decided by both courts on the construction of the will, which seemed to presuppose that it, rather than the Cobhams' court sale, governed the title.

Nor was this Elizabeth's only maneuver. To pay her share of the fees and expenses of settling her father's estate, she had given the administrator a mortgage on her parcel. She now refused to pay on it and he sought to foreclose. Elizabeth defended upon the claim, among others, that because of the will the court never obtained jurisdiction to appoint an administrator. Again Elizabeth lost, and again she appealed. The Supreme Court of Pennsylvania, while ordering retrial of some aspects of the case, held that she could not collaterally impeach the administration proceedings.⁸

One would expect these attacks to warn the rest of the family that she was up to mischief. But, in 1889, no one objected when she asked the Orphans Court to appoint trustees under Lord Cobham's

7. *Sager v. Galloway*, 113 Pa. 500, 6 Atl. 209 (1886); *Sager v. Cobham*, 6 Atl. 212 (1886).

8. *Sager v. Lindsey*, 118 Pa. 25, 13 Atl. 211 (1888).

will, giving as a reason the necessity for investing someone with authority to collect certain assets in England. On the contrary, all stood aside and allowed her to gain control of the trusteeship through appointment of herself, Orrin C. Allen, her lawyer, and Ezra Hazeltine, her close friend.

In 1891, Elizabeth and her fellow trustees struck at the titles obtained through the Orphans Court sale by both Henry and her sister, Alice. They alleged in ejectment actions that the sale was induced by fraud on the court, that in truth "Lord Cobham" left personal property adequate to pay all debts and that the whole proceeding to sell the lands was a plot to free the property of the trust and so to deprive any grandchildren of their remainders. Any grandchildren then appearing likely to benefit were her own children, so her motherly instincts helped arouse her fiduciary conscience about the evil of a settlement she herself had made.

Elizabeth was in a position of advantage. The probated will, no longer contestable, afforded a foundation in the record for the trustees' claim of title against those of purchasers at the Orphans sale. Moreover, appointment of herself and her friends as trustees made it possible for her to launch her attack on behalf of beneficiaries who were not parties to the agreements and proceedings now said to be fraudulent. Thus, Elizabeth hoped to escape the legal consequences, if not embarrassment, from the fact that she was a party to the fraud she charged and for twenty years had enjoyed the fruits of it.

The ejectment case, against Alice, came to trial at the September 1891 Term. No civil suit ever so aroused the County. Members of its most-talked-of family were charging each other with fraud—fraud that could have been accomplished only by complicity of its most respected judges, leaders of the County Bar and men influential in public life. They were alive, however, and certain to defend themselves from the witness stand and to face cross-examination by Elizabeth's lawyers—who included her fellow trustee, Orrin C. Allen, later a State Senator, the solid and respected David I. Ball, and George Higgins, long the County's District Attorney and a courtroom lawyer quick on his feet. The defense was in the hands of two young men, Watson D. Hinkley and William E. Rice, each destined later to become President-Judge. Mortimer H. Elliott, a powerful advocate who greatly influenced the judicial evolution of the law of oil and gas and became general solicitor for the Standard Oil Company, was there to protect the interests of the companies that were claimed to have taken illegally untold quantities of oil from the lands. The feud in the Cobham family had divided the bar and the community, and the local judge

had disqualified himself. Of course, the curious were up early the morning of the trial, the courtroom and corridors were filled, and many debated the issue in the courtyard as they watched the arrival of participants.

Judge Olmstead, from another Circuit, specially designated to preside, convened the court. A jury was drawn and those fortunate enough to have seats bent to catch every word as public washing of linen by the local aristocracy began.

Then the spectacle collapsed. Judge Olmstead ruled that Elizabeth's oral testimony was not admissible to upset a record title. He noted that after this "great lapse of time to hold that this whole transaction can be opened at this period and we go back and undo what the Orphans Court did" could not be permitted. "If such things could be done," said he, "there would be no security of titles." Hence, he directed a verdict against Elizabeth and her co-trustees.

But some lawyers thought otherwise. After all, they argued, equity is so hostile to fraud that its presence vitiates any transaction. The determined Elizabeth would find out and so appealed to the Supreme Court of Pennsylvania. It gave her the victory. The Supreme Court held that such a fraud, if proved as alleged, would invalidate the Orphans Court sale, and therefore, ordered a new trial to hear the evidence and decide whether in fact there had been fraud.⁹

Elizabeth's high court triumph after her summary defeat heightened public interest as a retrial began. Judge Mayer, from another Circuit, was designated to preside. He allowed Elizabeth's counsel the widest latitude. But, as so often is the case, allegations are one thing; proof is something else. The support for her sensational charges was lame. Her husband was her best witness and none too good at that. It was said there was some hay on the premises unaccounted for, but he did not know how many tons or what it was worth. There was also a claim that the inventory omitted about a hundred sheep. But it appeared that they were in the keeping of one of Lord Cobham's neighbors on shares. Most of them had predeceased Lord Cobham and the administrator had collected for the rest. Question was raised about some notes and receivables, but these the accounting showed had been collected. Lindsey, the administrator, was present and satisfactorily explained every item Elizabeth's counsel mentioned. It is significant to note here that every person who from personal knowledge could impeach the inventory if it were false or faulty was available to Elizabeth on this trial. Present in court were all the attorneys who handled the settlement, the appraisers who had valued the property,

9. *Sager v. Mead*, 164 Pa. 125, 30 Atl. 284 (1894).

and Henry, who was a party to all of the transactions. Witnesses there were as to any possible question that could be raised about the settlement and sale. But the case ended in anticlimax, its failure being so complete that the judge, despite the high court's reversal of the former decision, again directed a verdict against Elizabeth and her trustees.

Elizabeth took an appeal and for a fourth time gave her name to a leading case in the Supreme Court of Pennsylvania. But now the judges had Elizabeth's evidence instead of her allegations, and they unanimously declared that the evidence of fraud was "flimsy and worthless" and that her attempt to upset the Orphans Court sale on it was "preposterous." The judges pointed out that Elizabeth was a party to the settlement, and under it accepted land which she still possessed. "It would be a scandal upon the administration of justice" to permit her to impugn the title. It concluded:

" . . . therefore, in any aspect, the case of these plaintiffs is destitute of merit. There was no actual fraud in the original agreement, the orphans court sale was valid and effective proceeding to divest all title under the will . . . and the laches in the institution of any proceeding to invalidate the title acquired by the orphans court sale is such that it cannot now be entertained."

And it took a parting shot at Elizabeth: "She cannot be permitted to assert her own fraud and obtain a judicial decree founded thereon."¹⁰

Meanwhile, her ejectment case against Henry had come to trial, on substantially the same evidence, and the judge submitted that case to the jury. These laymen were no more convinced than the Supreme Court. They promptly brought in a verdict against Elizabeth.

The community was generally satisfied that both the high court and the jury had rightly judged the Cobham lawsuits. Few could understand why Elizabeth had brought, or such intelligent and reputable lawyers had taken, a case so wanting in merit. The spectacle was satisfactorily ended and could be forgotten.

One by one the embattled Cobhams of that generation passed away. Many of the lawyers, too, went to their last judgment. Henry Oldcastle Cobham and his wife survived. In the eyes of the neighborhood Henry was a worthy citizen, industrious, generous and of good will. He was a reserved and cultured gentleman, devoted to writing, reading and communing with nature from the boulders that surrounded his home. High in the "wild lands" overlooking the river

10. *Sager v. Mead*, 171 Pa. 349, 33 Atl. 355 (1895).

he had made a clearing and built a substantial but not pretentious brick house. "Stoneylonesome" he called it and so it was, for their children met early deaths. The couple was lonely and found consolation in religion.

Having a valuable property but no heirs, Henry and his wife gave Stoneylonesome and the "wild lands" to the Salvation Army, upon condition that it be used as a home for old people. However, they reserved the use of the house and a small annuity, considerably less than the property yielded in oil royalties, for the life of the survivor. This proved to be Henry, and, on his death in August 1915, the Salvation Army took complete possession.

Peace had settled upon the Cobham lands; the old controversy was no more. The title to the property was secure, more secure than most parcels in the Commonwealth, for it was certified by the Supreme Court—at least, that is what the lawyers said.

III.

One day in 1922, while the house was vacant, a woman of middle age appeared at Stoneylonesome and, meeting with no resistance, moved in and asserted that she owned it. She was Blanche Lawson, only living child of the much-defeated Elizabeth Cobham Sager, who had been dead over a quarter of a century. If the will of Lord Cobham had prevailed, Blanche would own all of his real estate—and to take it she was resolved.

The Salvation Army, baffled by what appeared to be the fantasy of an inscrutable woman, went to lawyer David I. Ball. It so happened that he was one of the only survivors of the legal battle, thirty years before, over these same premises. He had been counsel for Blanche Lawson's mother when she assailed the same title with so little success. He thought Blanche must be slightly deranged, as he commenced an action to eject her expecting it would be undefended; for no lawyer, when he learned the history of the case, would dispute the title.

To his surprise, able and astute counsel did defend Blanche's ownership of the premises, with a claim that she took it by devise under the will of Lord Cobham. The Orphans Court sale, Blanche repeated, was induced by fraud; her grandfather did leave personal property enough to pay his debts, but it was concealed and never reported as part of his estate. The sale was therefore invalid; the will as later probated was her source of title. These were the very grounds of her mother's claim, which the Supreme Court, after full trial, so

emphatically rejected. Such an absurd pretension after all those years exasperated the aging lawyer Ball, and he sought the counsel of J. H. Alexander and William S. Clark, two of the County's leading lawyers, who were continuing the old law firm which a generation before vindicated the Orphans Court title. The oil companies, too, were again threatened and were represented by John E. Mullin, experienced in oil and gas litigation.

True it was that the claims of Blanche were stale and discredited by former litigations. But she had not been a party to those earlier actions—was not even of age when they occurred. And the Supreme Court had also held that a grandchild of Lord Cobham had no right of possession or action while the older generation of legatees were alive, and Henry died only about seven years before. It seemed that again in 1922, as thirty years before, the case could not be dismissed on legal points but must be met on the facts, perhaps to be decided by a jury. Even so, how could Blanche in 1922 get any evidence of fraud in the transactions of 1870 that her mother, who took part in them, did not know of and produce in 1890? It was preposterous to believe she could have anything more than the Supreme Court already had declared "flimsy and worthless." Only a veteran in trial work realizes how worrisome is the case in which one is unable to see what there is to worry about. Her lawyers must be convinced they had something—but they were not saying what it was. Boldly seizing possession of the premises was not a woman's caprice; it was a well-planned lawyer's maneuver to shift to the Salvation Army, as plaintiff, the burden of proof which before had been on Elizabeth. It, as plaintiff out of possession, must satisfy the jury that it had the better title. To tear down its claim, Blanche had a numerous and confident battery of counsel: elderly and respected Homer Muse, shrewd and enterprising George Munn, with experienced Maj. C. E. Bordwell as trial counsel, and Mortimer Graham, of the Erie law firm whose senior partner had been the judge who forty years before appointed Blanche's mother a trustee, just, as she said, to collect some funds from England.

This lawsuit attracted little interest from the public. Lord Cobham was forgotten and the case was regarded as useless thrashing over of old straw. But, as the adversaries squared away for trial, the legal profession saw in it most important and interesting questions. Judge Heck, from an adjoining Circuit, was specially designated to preside. The portraits of a long array of President-Judges looked down upon the trial of issues which those judges believed they had long since settled. Counsel for the Salvation Army took up its burden and quickly proved a perfect paper title and rested their case with an outward show

of confidence. One indispensable link of their title was the Orphans Court proceedings to sell the real estate to satisfy Cobham's debts. If that was vulnerable to attack, they were in trouble.

Counsel for Blanche called to the witness stand a well-groomed, easy-mannered man of sixty-six years. The courtroom became tense and alert when he identified himself as Fred P. Cobham, son of Gen. George A. Cobham, that nephew-stepson of Lord Cobham who died for the Union cause at Peach Tree Creek. The witness had been a boy of about eleven years when "Lord Cobham" died and, because of reasons or influences no one understood, was not mentioned in his will. So the youngster took no part in the Cobham litigation, kept up no intimacy with the family, and lived most of his life away from the scenes of their struggles.

Cobham told of Cobham Park as he remembered it and related rambling bits of family history. Then counsel showed him, from court records, the inventory of Lord Cobham's estate and asked bluntly if he knew whether other personal property was on the place at the time of "Lord" Cobham's death. His answer was a firm and unequivocal "Yes." "What was it?" "Jewels, family jewels, that were not taken into consideration—heirlooms." He proceeded to relate amazing incidents which had never been brought to light in previous litigations.

In 1880, ten years after Lord Cobham's death and as many years before the first cry of fraud was heard in court, John Cobham, the English nephew who will be remembered as a contingent legatee, came to America and employed S. T. Allen, of the Allen and Sons law firm, to investigate the handling of the Cobham estate. Allen held a series of conferences at which the children of Lord Cobham explained his affairs to their inquisitive cousin. This witness, then a youth, was considering law as a profession, and, at lawyer Allen's request, attended these conferences as a sort of secretary and meticulously recorded the conversations. When it was all over, Allen told him he better keep his notes, for they might have some effect on the property. He produced a sheaf of these notes, made over forty years before. They bore every indication of authenticity. And this is what they disclosed.

The daughters and Henry Cobham freely admitted to John Cobham that considerable personal property—enough to pay all of Cobham's debts—was concealed from the administrator, because they wanted to force the sale of the real estate. There was farm equipment, which they sold and whose proceeds, amounting to about \$3,000, they divided. John Cobham then asked what had become of all the heirloom jewelry which he knew the family brought to America. The daughters and Henry admitted that this was still in their possession

and had not been returned as part of the estate. They agreed to bring it to the next meeting.

At a conference the following Monday, February 16, 1880, Henry Cobham produced a document by which he and the daughters had agreed upon a secret out-of-court division of the personal estate among themselves. It was a copybook in which they made and signed their private inventory and appraisal, quite different from the one filed with the Orphans Court. It bore the signatures of all those who acquired the real property through the Orphans Court sale. The witness had kept the document, which he now handed over. It seemed genuine and the court admitted it in evidence. It itemized a quantity of jewelry and recited "value stated is what Tiffany Jewelers in New York City told father it was in 1868." Among other items was a gold band ring marked, "Elijah Cobham 1730." The value of the heirlooms totaled \$3,553. The instrument also listed Cobham's debts, which totaled \$1,266.73, including funeral and burial expense.

Henry Cobham was persuaded to bring to the following conference an old iron "strong box" containing the jewelry. With acquiescence of the daughters, he told John Cobham to select what he would accept in settlement of his claims. When he set aside a diamond necklace and some other items, including the gold band ring, Henry protested that his selections were worth \$3,500, but after some bickering a settlement in jewels was agreed upon and a satisfied British cousin went home. Before sailing, however, he presented to the witness, perhaps in appreciation of his secretarial service, the gold band ring. Yes, he still had it. He handed a well-worn band to the court in which was still visible the engraving, "Elijah Cobham 1730." Who was Elijah Cobham? "He was a slave trader in the Indian market." He had been one of the builders of the Cobham fortune. "You may cross-examine," counsel for Blanche condescendingly said to counsel for the Salvation Army.

Few more difficult and hazardous tasks could confront a lawyer. The testimony was so circumstantial and so well-documented that it seemed invulnerable to cross-examination. Yet, it was so damaging that the only apparent line of attack must be ventured. This was that the witness claimed to have been in possession of this vital evidence since 1880, and knew of the litigations about 1891 involving the same issues. When it was so important, why did he not disclose it? His answer was, "Don't know why I should get in bed with them. I had no great love for them—tried to beat me out of everything." So he had never made his story available to the litigious elder Cobhams. But Mrs. Lawson, like himself, of a later generation, had no part in

"beating him," so he told his story to her. His manner was frank and his explanation not improbable. Nothing was available at that time to discredit or contradict him and, if ever there was a contrary version, the passage of the years had put it beyond mortal proof. Judge Heck sent the case to the jury, which promptly returned a verdict for Blanche, nullifying the Salvation Army's title derived from the Orphans Court sale and validated by the Supreme Court's decision.

There were many legal moves which need not detain us long. Judge Heck granted a new trial. The evidence was repeated and again the jury found for Blanche. Judge Rossiter, of Erie, presiding specially at the latter trial, denied the Salvation Army's motion for judgment notwithstanding the verdict. He said: "We can come to no other conclusion than that the verdict on the evidence is correct, although we have been unable to arrive at any satisfactory conclusion as to how it happened that men of such high character and standing as Judge Lindsey, Judge Noyes, Judge Johnson and others were parties to what, under the evidence in this case, was such an apparent fraud, unless it was that they were mistaken in the ultimate legal effect of what they did." Judgment sustaining Blanche and in effect ousting the Salvation Army stood.

And so the Salvation Army appealed to the Pennsylvania Supreme Court to sustain again in 1928 a title it had declared good in 1895. The issue was not an easy one to present or decide. Whatever the merits of the particular case, it was a startling threat to the security of land titles. Yet, it was hard to deny that Cobham's testimony justified the verdict. Had the Orphans Court been informed of the events related by Cobham, it surely would not have ordered the sale. The concealment, on its face, seemed to be a fraud.

But, in spite of its apparent conclusiveness, Cobham's story raised some serious questions which might have been answered if the events had been related in the 1890 litigation when parties and witnesses were alive who could explain them. Even if Fred Cobham had refused or was not available to testify, Elizabeth and her lawyer both took part in these events and could have testified to their occurrence. They were not easily forgotten transactions. Yet, Elizabeth had tried repeated lawsuits without mention of this evidence, which, if unexplained, would have won for her. If the whole family in 1870 consciously entered into a scheme to deceive the court—perhaps their own attorneys—and to defraud their own offspring, why did they so readily confess it all in 1880 to an English cousin whose chance of proving it against them was slight? And what was his standing or claim, anyway, that the family should try to pacify him with jewels? He was

not an heir and was only a legatee under the will upon contingencies that had not occurred. That Fred Cobham had told the truth, so far as he knew it, was taken for granted, but did he know the whole truth? Were the jewels ever the individual property of the irresponsible and debt-ridden Lord Cobham? Were they not more likely the separate property of Catherine, gifts, perhaps, from her aunt, or from her first husband, and found in Cobham's possession only because he never bothered to settle his wife's estate? His ownership was inferred from mere possession, but his title seems never otherwise to have been established.

If the Supreme Court pondered these doubts, it avoided deciding them. It assumed that a conspiracy to defraud was proven. But, even so, it held that the Salvation Army was a purchaser for value, because it agreed to pay Henry and his wife annuities for life, and it was without notice of the fraud. Hence, it refused to "subvert the decrees of the orphans' court after more than fifty years, and subsequent to the deaths of all the parties who knew the facts."¹¹

This reasoning settled one thing. Blanche must get out of Stoney-lonesome and leave it to the Salvation Army. Like many a decision, it settled a lawsuit without settling the law. Was it to be inferred that if the property were still in the hands of Henry, or his heir or devisee, the title could be overturned on such a record? If he had given it to the Salvation Army with no strings attached, would title have been set aside? The idea that the promise to return a small annuity was consideration which made the charity a purchaser for value seemed somewhat unrealistic in view of the value and yield of the grant. If Henry's title had an infirmity because based on deception of the Orphans Court, should it become validated by a wholly fortuitous method of conveyancing? These were questions long debated at the local bar. But it was recognized that the court faced a dilemma not likely ever to be repeated and was entitled to some latitude in finding a way out.

A half-century of strife, few decades of which did not witness some new and ingenious litigation, had finally cleared the Cobham lands from the cloud of these visionary trusts. The law snatched Stoney-lonesome from Lord Cobham's granddaughter when it had seemed within her grasp. His dream that the lands should stay with those of his blood was broken.

IV.

But Lord Cobham was not the last daydreamer of his quixotic breed. Henry, in spite of his experiences with his stepfather's illusions

11. *Salvation Army v. Lawson*, 293 Pa. 459, 143 Atl. 113 (1928).

of grandeur, was also a castle builder. Stoneylonesome, as a perpetually endowed home for the aged to commemorate Henry's life and works, also proved visionary, impractical and vainglorious. The house was isolated, inaccessible and ill-adapted to the purpose.

So again the Cobham grand design was but an illusion. Again the Orphans Court was besought to extricate Cobham lands from Cobham fantasy. In 1944, the Salvation Army petitioned the court to sell the surface rights to the Stoneylonesome property. It declared that it was not practically possible to establish on the site the home for the aged that Henry Cobham had projected. But it recited that it had been able to find, on acceptable terms, a willing purchaser. Once more the Orphans Court decreed a sale of Cobham property. The purchaser was, of all persons, Blanche Lawson.

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
ROBERT H. JACKSON

May 9, 1953

My dear Fred:

Thanks for your comforting
note. I hope to be back soon, and
they say there is a chance that it
will improve my disposition.

With all good wishes,

Sincerely yours,

Bob

The Chief Justice
The Supreme Court
Washington

*C. J.'s letter to Justice Jackson
written in longhand*

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
ROBERT H. JACKSON

October 6, 1951

The Chief Justice.

No. 201 O.T. 1950 - Sacher v. United States.

Dear Chief:

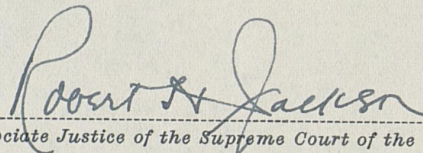
Unless there is some reason for haste in this case which is not apparent to me, I would like to ask to have it held, on the petition for rehearing, until the next conference.

R.H.J.

Supreme Court of the United States
Washington, D. C.

June Seventh, 19 50

JOHN FAIRCHILD CUSHMAN is hereby designated and
appointed to serve as my senior Law Clerk
from the seventeenth day of July, 19 50
at a salary of \$ 5,610.00, per annum.



Associate Justice of the Supreme Court of the United States.

Approved:

(Signed) Fred M. Vinson

Chief Justice of the United States.

BUSCHMAN, HOWARD C.

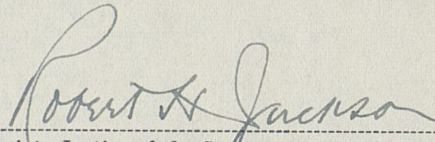
FOR ORDER DATED MAY 1, 1950, AND APPROVED BY CHIEF JUSTICE
5/9/50, RAISING BUSCHMAN'S SALARY - see

MARSHALL - PERSONNEL

Supreme Court of the United States
Washington, D. C.

June 1, 1948

JAMES MILTON MARSH is hereby designated and
appointed to serve as my Law Clerk
from the first day of July, 1948
at a salary of \$5,254.26, per annum.



Associate Justice of the Supreme Court of the United States.

Approved:

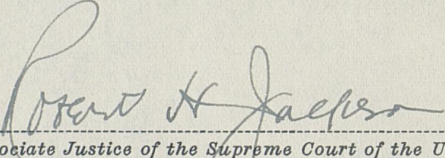
(Signed) Fred M. Vinson

Chief Justice of the United States.

Supreme Court of the United States
Washington, D. C.

June 1, 1948

..... Elsie Louise Douglas is hereby designated and
appointed to serve as my Secretary
from the first day of July, 1948
at a salary of \$5,116.32, per annum.


.....
Associate Justice of the Supreme Court of the United States.

Approved:

(Signed) Fred M. Vinson
.....
Chief Justice of the United States.

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
ROBERT H. JACKSON

June 18, 1947.

The Chief Justice.

My dear Mr. Chief Justice:

I desire to designate and appoint JAMES MILTON MARSH of Pennsylvania to serve as my law clerk from the first day of July, 1947 at a salary of \$5,116.32 per annum. The reasons why I think he is entitled to a senior law clerk rating rather than a junior rating consist of experience he has had in addition to his graduation in law from Temple University School of Law and his having successfully passed the bar examinations of the Commonwealth of Pennsylvania.

Mr. Marsh is 34 years of age, is married and has two children. He enlisted November 27, 1940 and attained the rank of Chief Warrant Officer in the Signal Corps. Previous to this, he had two years' experience with the Home Owners Loan Corporation as county manager and three years as an accountant with the General Motors system. In the Army he has had experience with legal writing and administration, and with cost analysis and renegotiation. I consider that his experience in these matters qualifies him for senior clerkship and request your approval on that basis.

Sincerely yours,

*Approved and
Returned 6/19/47-*

Robert H. Jackson
ROBERT H. JACKSON

C - SF - Justice Jackson -
General

THE WHITE HOUSE
WASHINGTON

11 June 1946

MEMORANDUM FOR

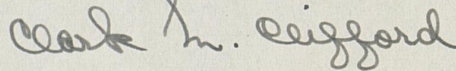
SECRETARY VINSON

I enclose herewith the following:

1. Unclassified telegram from Mr. Justice Jackson to the President dated June 8, War Nr P73.
2. Confidential telegram from the President to Mr. Justice Jackson on June 8, Nr WH447.
(It will be noted that this telegram was sent from the White House at 7:17 P.M. June 8 and received by Mr. Justice Jackson at 2:15 A.M. June 9, (our time) which is 9:15 A.M. June 9 (Nurnberg time).
3. Unclassified telegram from Mr. Justice Jackson to the President on June 11, unnumbered.

These copies are for your file.

Very respectfully,



CLARK M. CLIFFORD
Captain, U.S. Naval Reserve
Naval Aide to the President

SIGNAL CENTER
THE WHITE HOUSE

C
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Y

URGENT

URGENT

8 June 1946

From: Office of U.S. Chief of Consel, Nurnberg, signed Jackson

To : The President of the United States

Nr : War Nr P73 Filed 071025B

UNCLASSIFIED

TO PRESIDENT TRUMAN ONLY FROM JUSTICE JACKSON

First, I congratulate you upon having named as Chief Justice an honest, forthright and trustworthy man, one under whom I shall be glad to work. I regret that I cannot end this telegram at this point.

Second, news which reaches me here is both little and late but it is evident that this matter has been so handled during my absence, unintentionally on your part I am sure, as to create a problem for me. The impression has been created that appointment of me was considered but that opposition by Justice Black prevented it. As you know, I have never approached you directly or indirectly in reference to this office and have no knowledge of whether you ever had the slightest thought of naming me. Ordinarily it would have done me no harm to have been passed unnoticed. But the reports reaching me come to this: that Mr. Justice Black threatened to resign should you promote me to Chief Justice and thereupon you agreed not to do so. These events were at once given wide publicity either by the White House or by Mr. Justice Black.

I would be loath to believe that you'd concede to any man a veto over court appointments. Every Justice, every aspirant, every judge on lower courts, and every litigant before the court, is now given the impression that a judge may be denied promotion if he incurs the displeasure of Mr. Justice Black on grounds however trivial.

Page two

The alternative impression sought to be created is that something sinister has been revealed to you which made me unfit for Chief Justice. If that were true, I am also unfit for Associate Justice. This publicity has penetrated here and also makes me an ineffective representative abroad.

I could not volunteer information on this subject earlier without giving the impression of being a petitioner for the appointment. But I really thought that you would think it due to me, during a much criticized absence, on a mission undertaken at your request, to inquire from me at least by telephone as to the truth of the insinuations. I thought too that you would feel the necessity of investigating the facts from all parties affected in a matter of such importance to the court and the country. Since the appointment has been made I am now free to disclose the facts to you without being subject to the suspicion of petitioning for appointment.

Some of the facts I should ordinarily hold in the highest confidence but the confidence has been broken by others and I shall discuss only the case which has been publicized in the press from self evident sources.

Apparently you have been told that a so-called feud exists between certain members of the court. The implication of the stories I have seen is that the so-called feud is merely personal in nature. The Jewel Ridge case controversy (326 U.S. 161) in the Supreme Court is more than a mere personal controversy. A columnist writing in the Washington Star on May 16 for instance portrayed my opinion in the denial of a motion for rehearing in this case as a petty and "gratuitous insult" to Mr. Justice Black. It happens that the Jewel Ridge case was the focus of the disagreement which is fundamental within the court. But the controversy within the court over that case is more than a mere personal vendetta. It affects the reputation of the court as a disinterested, non political tribunal. Hence, the disclosures of the Star columnist, evidently by sources within the court, were less significant than facts it failed to mention which I feel compelled to supply.

Page three

The Jewel Ridge coal decision in itself was a somewhat startling one. The United Mine Workers reversed the position it had previously taken that the Fair Labor Standards Act had no effect on the coal miners' collectively bargained contracts. It employed counsel to argue its new contention to the Supreme Court who had taken a contrary position about its application to coal miners contracts before the Supreme Court the previous term to win a case for the iron miners. He was Mr. Justice Black's former law partner. Mr. Justice Black reversed the position he had taken in managing the bill as a Senator. The court by a bare majority of 5 to 4 reversed the position it had taken in other cases. These facts are set forth in the dissenting opinion which I wrote at the request of Chief Justice Stone and in which he and Justices Roberts and Frankfurter joined.

Professor Dodd, a leading scholar of labor law and a critic certainly not unfriendly to labor, writes of the majority decision as follows in the February 1946 issue of the Harvard Law Review: "It is difficult to believe that a majority of the members of the court would have held the agreements invalid if the case had come before them prior to the date of the Union's change of front. So wanton an interference with collective bargaining would scarcely have commended itself to Justices for whom the right of workers to bargain collectively is one of the essential freedoms of an industrial society." Those friendly disposed to the winning side in both cases view the victory in this light even without reference to other grounds of criticism.

But the winning parties were represented before the court by Crampton Harris who is Mr. Justice Black's former law partner. Mr. Harris had also been employed by Justice Black, when he was a Senator, to defend him and his committee against litigation resulting from the seizure of certain telegrams in the course of a Senate investigation.

The Jewel Ridge case originated in Virginia while Harris resides in Alabama. I would say nothing against his professional qualifications but it is difficult

to believe that he was brought that distance because of his expertness in this particular law for he had just taken a position before the court which he had to repudiate in his argument of this case.

The Chief Justice was in dissent in the Jewel Ridge case and under those circumstances, the case fell to the senior Justice concurring, who was Mr. Justice Black. Mr. Justice Black chose Mr. Justice Murphy to write the majority opinion and while Mr. Justice Murphy was preparing his opinion, a strike of the mine workers and negotiations with the operators were proceeding. It was proposed to hand down the decision, in favor of the miners, without waiting for the opinion and dissent. The obvious reason behind this proposal was to announce the decision in time to influence the contract negotiations during the coal strike. Chief Justice Stone protested such proposed irregular treatment vigorously. I do not believe Mr. Justice Murphy favored it. In all events it was abandoned. The negotiations for a new mining contract came to a close before the decision and opinions were handed down, but the whole atmosphere of this case, following the Tennessee case, created uneasiness in my mind.

Nor can the decisive influence of Mr. Justice Black on the result be understood without taking account of a similar situation in Tennessee coal against Muscoda local. Here too his ex-law partner was the successful attorney, here too Mr. Justice Black chose Mr. Justice Murphy to write the opinion, and here the opinion became that of the court solely by Mr. Justice Black's vote. Two Justices, including myself, who agreed that the miners should win on the merits, could not accept the reasoning of that opinion. Certain language in this opinion was invoked in the later case as a "Precedent" to make the result of the Jewel Ridge case appear consistent with former decisions.

The defeated parties in the Jewel Ridge case applied to the court for a rehearing and asked that Justice Black be excluded from participation because of his relation to the attorney for the successful parties. As there is no power

in the court to disqualify a duly commissioned Justice, all members were agreed that the petition for rehearing must be denied. The only question was whether we would deny it upon the legal ground that the court was without power to pass on the question of qualifications, or whether it would be merely announced as "denied" which would leave the grounds undisclosed and, of course, capable of interpretation as an approval of the questioned conduct.

It was at this point that the controversy "disclosed" by the Star's columnist occurred. Justice Black insisted on a mere denial. This would not draw attention to his participation or to the other circumstances. If his action was later questioned, the denial would be construed as a vindication by the court on the facts. None of us knew then, and I do not know now anything of the relations between the Justice and his former law partner except that they had continued to be cordial. But in view of the course of the cases neither I nor any of the other justices who had dissented cared to lend our names to a bland and unqualified approval. I prepared an opinion, in substance the one finally published under my name. The Chief Justice suggested a shorter one to the same effect, which I was willing to accept. Mr. Justice Roberts was out of the city and did not attend the final sessions.

At the conference, I said that the petition should be denied on the legal ground that each member is responsible for his own decision whether to sit or decline to sit in any particular case. I did not say that it was wrong of Mr. Justice Black to sit. But I did say that the question was for him to decide and that responsibility for approving his decision should not be by inference put on the court, which lacked knowledge of all the facts, but which could not be unaware of the appearances. I pointed out that to imply approval of his sitting would put the court in a most inconsistent position. At that very moment the court was disabled from hearing an important case because Chief Justice Stone was declining to sit on the grounds that the case was being presented by his former law partners, although

he had not been associated with them for many years (North American Company against S.E.C. and S.E.C. against Engineers Public Service Company). I said that in view of the dissimilarity of practice, I thought the court should make clear that disqualification for such reasons was a matter on which the court could not act and which each justice must determine for himself.

Mr. Justice Black became very angry and said that if I wrote any opinion which discussed the subject at Alabama it would mean a "declaration of war". I told Justice Black in language that was admittedly sharp, but no sharper than I would use again, that I would not stand for any more of his bullying, and that whatever I would otherwise do I would now have to write my opinion to keep self respect in the face of his threats. The Chief Justice told me that at his age he did not want to be in the "war" which was threatened and would keep his silence. Mr. Justice Roberts was absent and not consulted. I filed my opinion, with Mr. Justice Frankfurter's concurrence, as the record shows.

That opinion can hardly be called a "gratuitous insult" for the fact is that Mr. Justice Black put his associates in a position where they must speak, or by silence approve with no knowledge of all the facts, his course in the case. He insisted that I cast a vote in such form that it would be construed as approval of his conduct and threatened me with "war" if I did not comply. I refused to buy my peace with him at that cost.

Mr. Justice Black has apparently made good his threat of "war". He followed it by threatening the President if he dares to make a court appointment which is not to his liking. The most objectionable feature of the inspired Star article is the statement attributed to you through the device of an anonymous Senator that I too have threatened to resign. That you know is utterly false. In the first place, it would not impress me as becoming in a Justice to threaten the President about a pending court appointment any more than it would be proper for a President to make threats to a court about a pending case. And nothing

Page seven

has happened which makes it in the least embarrassing for me to face any of my brethren, either in their present position or any other to which they might have been promoted. I have refrained from public answer to misrepresentations and insinuations. I had hoped these facts would never have to be made public, for they might hurt the reputation of the court for disinterestedness in its decision of cases. But it can hardly be expected that threats, now proved so successful, will not be resorted to again. Protection of my own name lies in disclosing the facts heretofore suppressed. I must meet the situation forthrightly and over my own signature.

Mr. President, I have some understanding of your dilemma and much sympathy with you in the pressure under which you must work and I am no stranger to the difficulties of the executive in dealing with the court whose inner differences are generally shrouded in mystery. I hold no resentment and think your appointment of Secretary Vinson may well be the best solution. I do not consider resigning from the court. Neither shall I, unless you wish me to do so, resign this job, but will do the best I can to finish it. But I cannot discharge my duties as Chief Justice Vinson's associate if I allow the impression either that an associate "has something on me" which is disqualifying in your eye, or that my opinion in the Jewel Ridge case was a "gratuitous insult" to an associate.

Unless you can suggest some better method of making my position clear to the public and to the bar of the country or unless you think it preferable that I release this cable myself from here, I am compelled to ask you to release it. Of course if Justice Black has given you anything in writing it too should be released.

Respectfully yours,

/s/ ROBERT H. JACKSON

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URGENT

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URGENT

CLEAR TEXT MESSAGE

11 June 1946

From: Robert H. Jackson, Chief of Counsel, Nurnberg, Germany

To : The President of the United States

Nr : Unnumbered 111250B (5:50 A.M. E.S.T.)

UNCLASSIFIED

My dear Mr. President:

I have your reassuring telegram and was confident that you had not been a party to creating this situation. It is a sinister condition however if wholly fabricated threats and innuendoes have been fed out to the public. I regret that I could not accept your conclusion that this matter should not be made public. I think no good can come from further suppression of the facts that are favorable to me since part of the facts have been peddled. I have forwarded to the Judiciary Committee chairmen, a statement confined strictly to answering the one case which had already been given out as the inside cause of the feud. I have tried to handle it so as to cause no embarrassment to you or to Vinson. The participation in a public controversy is most distasteful but however regrettable publicity may appear at the moment, it is far better that this matter be cleaned up now than left to break in some form after Vinson takes over, or to embarrass him by smouldering in the secrecy of the conference room. It ends here if they want it to. If not, I am in the disgraceful brawl to the finish. You have my resignation as Chief of Counsel in this international trial for acceptance at any moment I become embarrassing to you but I will not run out on it unless you relieve me.

Signed Robert H. Jackson

Recd 111328Z (8:28 A.M.EST) HED

CONFIDENTIAL

8 June 1946

FROM: THE PRESIDENT OF THE UNITED STATES

TO : JUSTICE ROBERT H. JACKSON, CHIEF-COUNSEL, NURNBERG, GERMANY

NR : WH 447

FILED 082340Z

I HAVE YOUR TELEGRAM OF THIS DATE AND APPRECIATE YOUR COMMENTS WITH REFERENCE TO THE APPOINTMENT OF SECRETARY VINSON AS CHIEF JUSTICE.

I AM AFRAID YOU HAVE BEEN GROSSLY MISINFORMED. I HAVE NOT DISCUSSED THE QUESTION OF THE APPOINTMENT OF A NEW CHIEF JUSTICE WITH ANY MEMBER OF THE COURT. I RECEIVED NO INFORMATION FROM ANYONE THAT EVEN INSINUATED THAT YOU WERE UNFIT FOR PROMOTION. THERE MAY HAVE BEEN SOME NEWSPAPER COMMENT REGARDING DIFFERENCES EXISTING WITHIN THE COURT, BUT I TOOK NO NOTICE OF THEM NOR DID THEY ENTER INTO MY DECISION IN ANY WAY. I DID NOT SEE THE ARTICLE IN THE STAR YOU REFER TO NOR HAD I EVER HEARD OF IT BEFORE.

JUSTICE BLACK HAS GIVEN ME NO INFORMATION EITHER ORALLY OR IN WRITING ON THIS SUBJECT.

THE REPUTATION AND THE POSITION OF THE COURT ARE OF PARAMOUNT INTEREST TO ME AND NO PURPOSE CAN BE SERVED BY MAKING THIS CONTROVERSY PUBLIC.

YOU ARE DOING A SPLENDID JOB AND PERFORMING AN OUTSTANDING SERVICE IN YOUR PRESENT WORK. PLEASE KNOW THAT I APPRECIATE THE DIFFICULTIES WITH WHICH YOU ARE FACED AND I COMMEND YOU FOR YOUR EXHAUSTING EFFORTS.

Sent from White House 7:17 P.M. June 8. VERY SINCERELY YOURS,

HARRY S. TRUMAN

Received by Justice Jackson

*at 0215 June 9 (our time) which
is 0915 June 9 (Nurnberg time).*

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