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Dr. Osler and the Supreme Court
World's Largest Law Office
Cases of Interest
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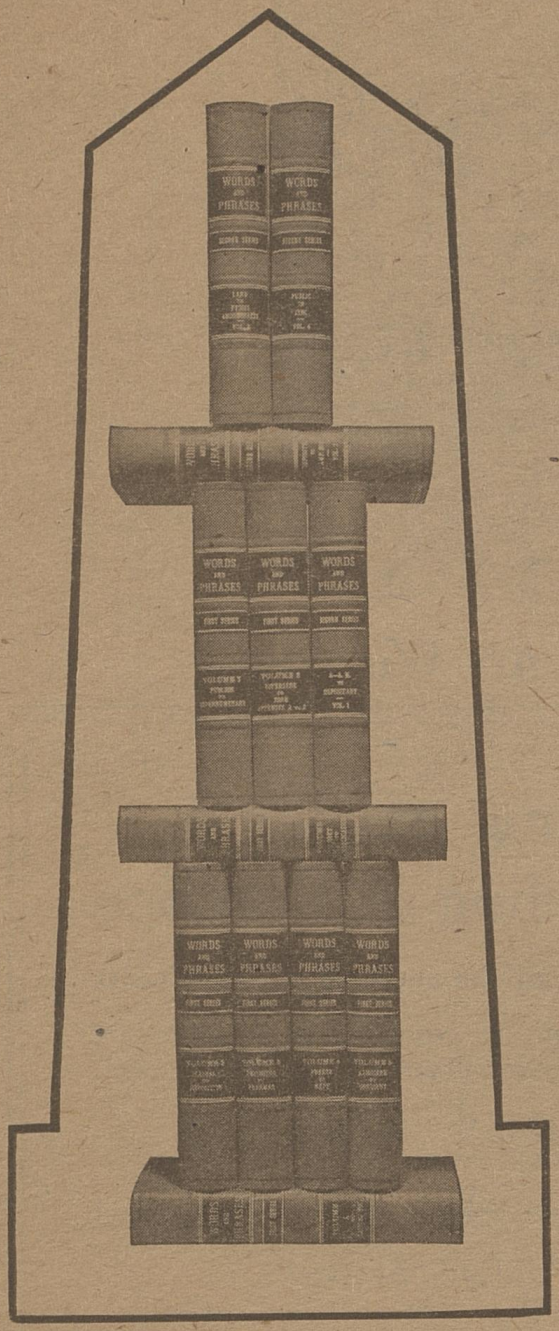

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West Publishing Co's Docket

F. G. Stutz, Editor

VOL. 3 ST. PAUL, FEB.-MARCH, 1922 NO. 13

Comment

By Members of the Publishers' Editorial Staff

Appellation Jazz

Whoever hooked the monickers on the different members of the Weare family who figured in the case of Glassock v. Weare, 234 Southwestern Reporter, 216, certainly showed a marked partiality for the tenth letter of the alphabet. Look them over: Jared, Jerome, Jahaza, Jaakim, Jaffa, Jacova, Jabus, and Jaza.

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Judicial Interpretation of "Shimmy"

"At best, the 'shimmy,' wherever rendered, is not a refined or elevating dance. Slightly exaggerated, it easily becomes a suggestive and indecent performance."—Judge Saunders, of the Supreme Court of Appeals of Virginia, in Pope v. Commonwealth, 109 Southeastern Reporter, 429.

☼ ☼ ☼

Sanctity of Precedents

"There is no superstitious sanctity attaching to a precedent. It is proper that precedents should not be lightly changed, or without sufficient cause. But they should not be adhered to when an opinion has clearly misconstrued a statute or is otherwise palpably erroneous. This court has never held that it was infallible, nor has any other court. We have repeatedly overruled our own decisions, and a large pamphlet was issued some years ago, containing a list of such cases, and a similar compilation now would be two or three times as large. The same is true of the United States Supreme Court and all other courts. Men and nations may—

'Rise on stepping-stones
Of their dead selves to higher things.'

"Courts can only maintain their authority by correcting their errors to accord with justice and the advance and progress of each age. They must

slough off that which is obsolete, and correct whatever is erroneous or contrary to the enlightenment and sense of justice of the age and to the spirit of new legislation."—Chief Justice Walter Clark, in State v. Falkner, 108 Southeastern Reporter, 756.

☼ ☼ ☼

He Wasn't Sure

The following cross-examination recalls Mark Twain's statement, on reading a newspaper report of his death, that the report was "greatly exaggerated": "Q. You went to Arizona on account of tuberculosis? A. Yes, sir. Q. You are not afflicted with that now, are you? A. The doctor gave me a week to live after I got there. Q. You didn't die, did you? A. I don't think so."—Quoted from Judge Tolman's opinion in the Supreme Court of Washington, in Welker v. Wallace, 200 Pacific Reporter, 561.

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The Profession's High Standara

Not alone is it sufficient to preserve the high standard of the legal profession, that each individual member act in a manner above reproach. He should, in addition, bring to the attention of the proper authorities any breaches of the ethics of the profession that come to his attention. Judge Teller, of the Supreme Court of Colorado, in People v. Class, 201 Pacific Reporter, 883, said in discussing the question: "It is the privilege, if not the duty, of every attorney to call to the attention of this court any act of a licensed attorney which may fairly be considered to disqualify him. Calling attention to breaches of professional duty should be encouraged, rather than denounced, and it is only by the exercise of constant vigilance on the part of the members of the bar that the profession may be kept up to that high standard which should characterize it."

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Judges' Salaries ana Allowances

A judge occupies an honorable position. The honor of it is more acceptable to him than to his creditors. It is of little value in meeting the high cost of living. In these times small salaries, with or without the honor of position, are between the upper and nether millstones, being ground always into shorts. Even legislators once in a while see this truth. So did the South Dakota Legislature, in providing $150 as a monthly allowance for expenses of the Supreme Court judges, receiving salaries of $3,000 per annum. Some critics were ungenerous enough to claim that such an allowance was a payment of additional "compensation," or a "perquisite" or "emolument" of the office, and violative of the Constitution fixing the judges' compensation and making it unlawful for them to receive any such additions. The allowance was made in a lump sum to enable the judges to meet the expense of moving to the state capital and of living at a place other than their legal residence. The Supreme Court being interested, a special substitute court was appointed to hear and determine the question in an original proceeding by the Attorney General to prohibit the state auditor from drawing warrants for such expenses. The allowance was sustained in State v. Reeves, 184 Northwestern Reporter, 993. The court, in the course of its opinion, ar-

gues that such allowance is not an emolument or additional compensation within the meaning of the Constitution, as that is something positively and directly conferred on the holder of an office, and not something inseparably and incidentally used by him in the discharge of his duty. The question whether the amount of $150 is excessive is dependent on the standard of living of the judges and was for the Legislature to determine. Expense allowances to judges of the lower court and many state officers were also considered in this opinion.

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Taxation of Seat in Stock Exchange

Taxation often presents a threefold problem. The taxpayer, the collector, and the courts have their own difficulties to meet in regard to it. In the following case the court had a novel question to answer. A membership or "seat" in the New York Stock Exchange was purchased for $60,000 by a resident of the state of Ohio. Its ownership enabled him to conduct from his office in Ohio a lucrative business through other members in New York. It had a market value for the purpose of sale, though transferable only with the approval of a committee, and was subject to disposal on the member's death by the committee. The Supreme Court in Anderson v. Durr, 42 Supreme Court Reporter, 15, holds that such a membership is a valuable property right, intangible in its nature, but of so substantial a character as to be subject to state taxation in Ohio. Such taxation does not deny to the owner due process of law, though the membership privileges exercisable locally in New York enabled that state also to tax them; it does not deny the equal protection of the law to the owner, though other brokers in New York are not taxed on the privilege of doing business in New York Stock Exchange Securities; and it does not impose a burden on interstate commerce, though the member conducted his business from his Ohio office through other members in New York, as property employed in interstate commerce may be subjected to ordinary property taxation. This decision gives a negative answer to the question, "Does the law shield the rich from too great taxation?"

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Shylock a True Cosmopolitan

"It may be true that the Shylock that Shakespeare immortalized was a Jew, but the character pictured by the master's pen in the Merchant of Venice has been found in all ages, among all races, and in all businesses. Unfortunately, no race has a monopoly of him—no age that does not produce too many of him. Thus it is, when one is selfish, covetous, grasping, when he derives a hard and one-sided bargain, he is not infrequently referred to as a Shylock."—From the opinion of Judge Evan A. Evans, United States Circuit Judge, on motion for new trial in United States v. Heitler, 274 Federal Reporter, 401.

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Did He Give the Fish a Bath?

It would be expected that an action would not hold for "pollution of stream," and the court reversed a conviction. Neptune v. State, 200 Pacific, 1008.

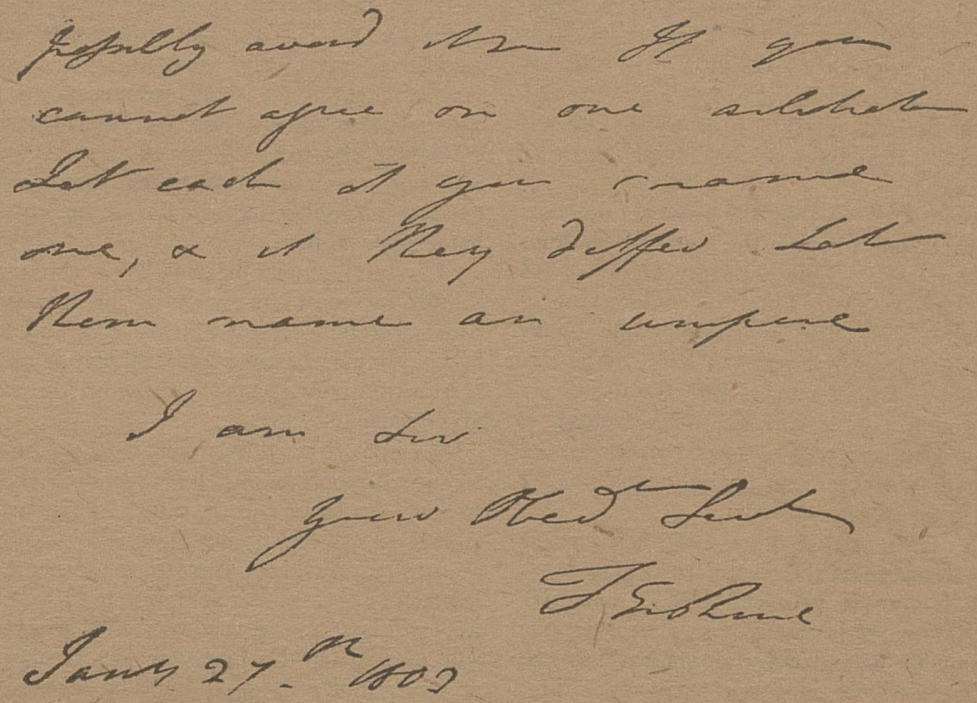
The Original Letter was forwarded by me to the Arbitration Society A Mitchell

Advice from Lord Erskine

Sir

I advise you by all means to submit your Difference to arbitration a Barrister is always the best arbitrator & if your opponent objects to it Depend upon it He thinks himself in the wrong — But if such a reference is objected to refer it to any Honest intelligent man, who if the Doubts upon any point can be advised at no expence with money I always have considered every man as a Lunatic or Knave who goes to Law when He can

[The original of this letter is from the collection of
Arthur A. Michell, Esq., of the New York City Bar.]



Sir --- I advise you by all means to submit your difference to arbitration. A barrister is always the best arbitrator, and if your opponent objects to it, depend upon it, he thinks himself in the wrong. But, if such a reference is objected to, refer it to any honest indifferent man, who, if he doubts upon any point, can be advised at no expense worth naming. I have always considered every man as a lunatic or worse who goes to law when he can possibly avoid it. If you cannot agree on one arbitrator, let each of you name one, and if they differ let them name an umpire. I am sir, your obed't servant, T. Erskine.

Procedure in Income Tax Cases Before the Bureau of Internal Revenue

By Walter E. Barton, of the Washington, D. C., Bar

Taxpayers of the country are being called upon to settle their income tax liability for past taxable years with the Bureau of Internal Revenue in Washington. In this article I shall discuss briefly the procedure applicable to such cases. Due to the limited space, only the important phases of it can be included.

Section 250 (b) of the new act imposes upon the Commissioner the duty of examining the return. This authority is delegated to the Income Tax Unit. The Commissioner is also authorized to examine the books of the taxpayer by section 1308. The examination of the return and the books is usually made quite a while after the tax is paid. The correctness or incorrectness of the amount of tax shown to be due on the return is thereby established.

It is necessary that the assessment be made within four years after the return is filed, except for years prior to 1921, in which case the period is five years; however, the time may be extended by agreement between the Commissioner and the taxpayer. This rule is further modified in the case of a false or fraudulent return with intent to evade the tax, or of failure to file return. Under these circumstances, there is no statute of limitations against assessment. Section 1312 provides that the Commissioner and the taxpayer may agree that an assessment shall be final. This is binding upon both parties, except upon a showing of fraud or misrepresentation of fact materially affecting the assessment as made.

After the completion of the office audit of the return, supported by a field examination, if any, the Bureau writes a letter (known as the A–2 letter) to the taxpayer, advising that the audit discloses an over- or under-assessment, as the case may be. Section 250 (d) provides that the taxpayer shall be given 30 days' notice by registered mail within which to file an appeal and show cause why the tax or deficiency should not be paid. No notice need be given when delay would jeopardize collection of the amount due.

Since the enactment of the new revenue law, the A–2 letter has been sent under registered mail, and constitutes the statutory notice. It is therefore necessary that an appeal be taken within the 30-day period; otherwise, the tax will go on the assessment roll, and no claim in abatement may be filed to suspend collection of the same, as will hereinafter appear.

The preliminary hearing is a conference in the Income Tax Unit. The taxpayer's case must be presented in writing and verified, although he may also present it orally. Representatives of taxpayers must file power of attorney.

An appeal may be taken to the Committee on Appeals and Review from the decision of the Income Tax Unit. Prior to the enactment of the present law, the taking of an appeal did not operate to suspend assessment. Now the assumption is that the tax will not be placed on the assessment roll until after the taxpayer has been given an opportunity to appeal to the Committee, inasmuch as there is no method of abating the amount assessed as was the case under former acts. The decision of the Committee is transmitted to the attorney of the taxpayer when made, but the file is returned to the Income Tax Unit for audit in accordance with this decision. In due course, the taxpayer receives another letter giving him the result of this audit.

Assuming that the taxpayer has been notified and given an opportunity to be heard in accordance with section 250 (d), he must pay the tax within 10 days after notice and demand by the collector, and no claim in abatement may be filed to suspend the collection thereof. Presumably section 250 (e), which provides that a claim in abatement may be filed in case the provisions of section 250 (d) are not complied with, is intended to take care of cases where the A–2 letter was mailed before the law became effective.

After the tax is paid, if the taxpayer intends to contest it, he should file claim for credit or claim for refund. Such claims must be filed within five years after the return for the year in question was due. However, no limitation exists in cases where the Commissioner, in determining invested capital for any year, allows additional depreciation for prior years, and such allowance results in an overpayment of taxes for such former years.

During this procedure, all rights should be preserved for suit. No question may be raised by suit which was not presented before suit to the Commissioner of Internal Revenue.[1] The filing of a claim for refund or claim for credit is a necessary prerequisite to suit.[2] All questions which it is proposed to raise by suit should be the foundation of such claims. The tax must be paid under protest.[3]

Cases should be prepared as carefully for presentation before the Bureau of Internal Revenue as they are for court. In doing so, rulings of the various offices of the Bureau, as well as court decisions, should be thoroughly studied. If this is done, the taxpayer in most cases gets what he is justly entitled to.

[1] Kemper Military School v. Crutchley, 274 Fed. 125.

[2] Section 3226, R. S. (U. S. Comp. St. § 5949).

[3] Cheeseborough v. U. S., 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432; U. S. v. N. Y. & Cuban Mail Steamship Co., 200 U. S. 488, 26 Sup. Ct. 327, 50 L. Ed. 569, and many others.

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Instructions to Juries

Rules Governing the Giving or Refusal of Instructions*

The word "instructions," as used to describe the directions given by the judge to the jury on the trial of a civil or criminal case, has a tendency to mislead, in that it seems to imply some degree of subordination on the part of the body instructed to that instructing. The word may, perhaps, suggest the relation of principal and agent—a principal who evolves from his own breast rules of conduct for an agent who owes his existence solely to the act of the principal. The analogy is not a true one.

The jury is in no sense the agent of the judge. They both derive their origin from the same high source, and the judge, in laying down rules to guide the jury in their deliberations, merely acts as the mouthpiece of the law for the purpose of marking out a definite and clearly ascertained path by which the ends of justice are attained. That this is so becomes more apparent when it is seen that even in those actions at law in which the judge acts without the aid of a jury, a party has a right to demand that the principles of law applicable to the facts found by the court shall be declared by it as distinctly as in instructions to a jury, and that such declarations should, as in cases tried before a jury, avoid comment upon the weight and probative effect of the evidence.

The province of instructions to juries may be said to be to state and apply the law to the facts in a particular case, so that it may readily be understood by the mind untrained in the law. Accordingly the purpose of such instructions should be to present the issues of the case in the most intelligible form, notice the claims of the parties, suggest so far as necessary the principles of evidence and their application, and define for the jury and direct their attention to the legal principles which govern the facts proved or presumed in the case, and, where the evidence is of such a character as may easily lead to the raising of a false issue, the court should guard against such an issue by appropriate instructions. It has been said, however, that the principal benefit to be derived from a charge to the jury is not a state-

*From the introductory chapter of "Randall's Instructions to Juries."

ment of the law, but the elimination of irrelevant matters.

At the very threshold of a discussion of instructions to juries lies the problem of defining the respective provinces of court and jury, since in every instruction to the jury which is not a mere abstract statement of the law there must necessarily be present in the mind of the court the question how far it can, or should, go without surrendering its own prerogatives or invading those of the jury. The problem, of course, is largely to prevent the jury from being reduced to a mere ministerial agent of the court. While laws have been enacted from time to time confirming and strengthening the status of the jury as a part of our judicial machinery, and courts recognize theoretically that the jury performs functions equal in importance to their own, yet when they come to instruct the jury they frequently fail to visualize that the province of the jury, although not so tangible as an acre of land or a geographical subdivision, has certain definite frontiers which are to be defended.

The fundamental conception of the jury system is a simple one: Two tribunals sitting side by side in the adjustment of human rights and relations, one supreme in the realm of fact, and the other absolute in the realm of law; the composite decision of law and fact being rendered by the jury after being duly instructed in the law by the court. However, it must be admitted that we have here a very delicate piece of mechanism. Embarrassment is pretty certain to arise when one equal is called upon to instruct a coequal as to their respective rights and duties. Human nature being what it is, there is a tendency for the one to be accorded dominance and the other to acquire subserviency.

Moreover, in pointing out to the jury the matters they are to pass upon, the boundaries between fact and law must be plainly indicated. Yet it is not always easy, even for the trial judge, to fix such boundaries, and not every judge has the power of lucid expression necessary to avoid misapprehension by the juror, or, if the judge has such power, he frequently has not the disposition or opportunity to use it in the hurry of the courtroom. Then, too, the trial judge trained, not only in the law, but in the ability to grasp quickly the meaning of facts, often finds it difficult not to anticipate the conclusions of the jury. It ought not to be a matter of surprise, therefore, that in the trial of cases before a jury instructions, intended to guard against error, become themselves a prolific source of error, and there is often involved much of vexation, annoyance, and hope deferred, which might, perhaps, have been avoided, if the trial had been before a single tribunal.

But, whatever the defects of the jury system are, it will in all human probability endure as long as our present form of government. It is too broadly buttressed upon political, sociological, and historical reasons to be overthrown by mere considerations of efficiency. When our society is more perfectly organized, perhaps the juror will come to the performance of his duties with an equipment which will enable the court merely to lay down general principles, leaving to the jury their concrete application. Until that time arrives it will be the duty of the profession to eliminate waste and friction by a study of the precedents in the decisions of the courts of last resort, of which there are now a vast number, and which discuss the relations of court and jury from almost every conceivable angle.

It has been sought, from these decisions, to construct a chart of the fundamental principles which should guide the court in giving instructions, so far as their formulation is affected by the necessity of preserving unimpaired the supremacy of court and jury in their respective spheres.

Under the common law it is competent for the trial judge to give his opinion upon the facts, as well as upon the law, so long as he leaves it to the jury to find a verdict according to their opinions, and in the federal courts, where the common law prevails, it is the settled doctrine, both in civil and in criminal cases, that it is not reversible error for the judge to express his own opinion on the facts, if the rules of law are correctly laid down and all matters of fact are ultimately submitted to the jury. In some of the state courts, also, this practice still obtains, in criminal as well as in civil cases.

As indicated by the foregoing statement, such an expression of opinion will be erroneous, even at common law, unless accompanied by an instruction that the jury are not bound by the opinions of the court, or at least unless the jury are given clearly to

understand in some part of the charge, that they are the exclusive judges of the facts. The greatest caution should be used in the exercise of such power of comment, that the jury may be left free and untrammeled in the determination of questions of fact submitted to them. It follows that the manner of expression by the court of its opinions must not be such as to be likely to prevent the jury from acting upon an opposite opinion. Moreover, the expression of such an opinion is only permissible when it is based upon the evidence in the case.

The general rule is that the court is not obliged to exercise such power of comment, and that it may, in its discretion, decline to express an opinion on a matter of fact submitted to the jury. In some jurisdictions, however, both in civil and criminal cases, it is held that sometimes it may be the duty of the trial judge, within the limitations of the above rule, to tell the jury how the evidence strikes his mind.

Because of the fact that judicial utterances concerning the evidence are apt to be given great moral weight by the jury, sometimes leading them to shirk responsibility by adopting the opinion of the judge and because of the fact that judges have not infrequently evinced partisanship, molding verdicts to their will, the power of the court to comment on the evidence or to charge on the facts has, in the great majority of the states, at various times and in varying degrees, been abridged by constitutional or statutory limitations.

Whatever may be said of the policy of the old common-law rule, it is simple and easy of application. That the barrier set up for the courts by the modern rule has been difficult to observe is attested by the multitude of cases in which its interpretation has been a matter of dispute.

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Dr. Osler and the Supreme Court

Some years ago Dr. Osler created a near panic, among those of us who thought we were just reaching the age of discretion, by announcing that after a certain age a man's usefulness began to decline and that it was time to think of putting him permanently on the shelf. If this version of the matter has not already been exploded, the finishing touches may be put to it by applying it to the present United States Supreme Court. The following table of the Judges of that court shows the dates of their birth, the dates of their appointment and their present ages:

Holmes	1841	1902	80
McKenna	1843	1898	78
Day	1849	1903	72
Brandeis	1856	1916	65
Taft	1857	1921	64
Clarke	1857	1916	64
Pitney	1858	1912	63
Van Devanter	1859	1910	62
McReynolds	1862	1914	59

This makes an aggregate sum of 607 years for the nine Justices, or an average of about 67½ years.

In this connection a review of the work of this court for the past year, as set forth by the Editor of the American Bar Association Journal, will be of particular interest:

At the last term 608 cases were disposed of, 218 full opinions were handed down and 390 "memorandum" opinions. Of these 608 cases, dissent was recorded in 42. Dissenting opinions were filed in 14 and dissent noted without opinion in 25. In 3 of the 42 cases dissenting justices concurred in the judgment of the court and the dissent was directed at the course of reasoning adopted in the majority opinion.

Those who have studied these cases in which dissents were recorded will, it is believed, agree that no uncertainty as to the fixed and fundamental principles of the law was evidenced, but that in most cases the difference was as to which principle of law was applicable to the peculiar facts of the case. This is the reason why it is so difficult, in reading the prevailing and dissenting opinions, to put one's finger on the error in either. Usually both are right so far as the law is concerned.

The court has made a gain on its undisposed-of cases, as appears from the follow-

ing table furnished by the courtesy of Mr. C. E. Stewart, the Chief Clerk of the Department of Justice:

	Appellate Docket	Original Docket	Total
Cases pending from previous term.....	386	24	410
Cases docketed October, 1920, term.....	555	10	565
Total	941	34	975
Cases disposed of at the term	598	10	608
Cases remaining undisposed of	343	24	367

Of the 598 appellate cases disposed of, only 92 were reversed; 139 were affirmed, 83 dismissed, 230 petitions for certiorari denied, 47 settled by the parties, and 7 certified questions answered.

During and since the years of our participation in the World War, problems arising from that war have necessarily demanded the attention of our highest tribunal. Some of the opinions delivered in cases involving the war powers of the nation will rank in history as among the most notable contributions to our body of constitutional law. Without some of them, our power to carry on effective war would have been gravely impaired.

New problems will arise—the problems of reconstruction and of a social justice which shall end the existing war between classes and interests. The more important of these problems are sooner or later brought before our court of last resort, and history justifies the confident assertion that in the pronouncements of that court will be found most effective aid to the solution of such problems.

A study of selected decisions of the Supreme Court of the United States will repay the busiest lawyer for the time devoted to such study and is well worth while for any layman.

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World's Biggest Law Office

The office of the United States Attorney for the Southern District of New York is "the biggest law office in the world," according to its present incumbent, Colonel William Hayward, in an interview in the New York Times.

The volume of legal business handled by the local United States Attorney's office is without parallel either in the United States or in foreign countries. At present the total number of civil and criminal cases on the docket is 12,000.

Of this number, about 2,800 are civil cases, which involve all together $110,000,000, and of these 2,800 about 1,200 are admiralty cases growing out of the activities of the United States Shipping Board during the war, representing an aggregate of $40,000,000 in claims. Cases exclusive of those of the Shipping Board represent a total of $70,000,000.

It is obligatory for the United States District Attorney to represent the government in matters of litigation and to serve as counsel in friendly legal matters, such as the examination of titles, further explained Colonel Hayward, who added:

"A check for $2,750,000 passed across my desk just a few days ago when the government acquired title to the Roman Catholic Orphan Asylum at Kingsbridge, which is to be converted into a hospital for the treatment of disabled veterans of the World War."

Cases growing out of violations of the Food and Drug Act must be handled by the United States District Attorney, who must also represent the Department of Agriculture in its litigation, who must take care of cases growing out of the limitation of quotas under the Immigration Act, and of income tax, luxury and excess profit tax cases, both civil and criminal. The variety of cases for which the United States must assume responsibility has been further increased by the prohibition laws.

In September and October, this office handled 607 prohibition cases. In 506 of these cases the defendants were forced to

What Courts Are Cited Most?

The question often arises in the lawyer's mind as to what courts his own court of last resort relies on in the absence of local authorities, or for supplementing local authorities.

Accurate statistics can be secured by making a count of the cases cited as shown in the late volumes of reports.

We have just made a new count of these citations, covering the period from January, 1919, to October, 1921, a little more than two and one-half years.

These figures refute the idea that certain appellate courts find sufficient precedents in their own prior decisions and do not rely on outside authorities.

It is not true even in the case of the older jurisdictions, such as Massachusetts and New York, which are popularly supposed to be sufficient unto themselves in the matter of judicial precedents, for the count shows Massachusetts cited outside authorities, exclusive of English reports, nearly 1,800 times, and the New York Court of Appeals over 2,000 times.

The following table shows the number of times the decisions of the courts listed were cited by the appellate courts of the various states:

United States Supreme Court	16,231
Massachusetts	5,256
New York Court of Appeals	4,222
Illinois	3,995
California (Supreme Ct.)	3,713
Missouri (Supreme Ct.)	2,809
Pennsylvania	2,642
Michigan	2,578
Indiana (Supreme Ct.)	2,559
Iowa	2,523
New Jersey	2,332
Wisconsin	2,294
Minnesota	2,155
Kentucky	1,940
Texas (Supreme Ct.)	1,895
Kansas	1,855

For the lawyer who studies these figures with a view to putting into his library the reports which will be most valuable to him the solution is an obvious one.

First, he must have his own state reports, for figures show that every state court cites its own decisions more frequently than those of any other state.

Second, he should have the decisions of the United States Supreme Court.

Third, he can get the decisions of Massachusetts, New York, and Illinois, the three states most frequently cited, all reported in one Reporter, namely the Northeastern Reporter.

---------- INQUIRY ----------

West Publishing Co., St. Paul, Minn.

Please send me further information in regard to the Supreme Court Reporter and the Northeastern Reporter.

Name .....

Address .....

plead guilty. There were 29 trials by jury and in 13 cases convictions were obtained, with one disagreement and 15 acquittals. Seventy-two cases were nol. prossed because of the removal from this jurisdiction of witnesses or because they left the government service.

To handle this tremendous volume of business Colonel Hayward is provided with a staff of 41 members, of whom 38 are Assistant United States Attorneys and 3 Special Assistant United States Attorneys.

The office of the County District Attorney and of the Corporation Counsel are the only others that compare with the office of the United States Attorney in respect to the volume of legal business handled. But the County District Attorney handles only criminal cases, and the Corporation Counsel handles only civil cases, whereas the United States Attorney handles both.

Whatever success has been achieved by the office of the United States Attorney since he became its head on June 4 last, is credited by Colonel Hayward to the skill and energy of the assistants he has appointed. The staff includes two women, Miss Susan Brandeis, daughter of United States Supreme Court Justice Louis D. Brandeis, and Miss Mary R. Towle. Miss Brandeis who has rendered valuable assistance in the preparation of briefs in the prosecutions under the Sherman Anti-Trust Law of the alleged combines in the building industry, is described as one of the most efficient members of his staff. Colonel Hayward is equally generous in his praise of Miss Towle, who has demonstrated her ability to handle civil cases, which she frequently tries in court.

Likewise he said that additional United States District Judges would have to be provided for in this district, if the courts were ever to clear their calendars. The cases pending on June 30 in the Southern District of New York were 13,176, as against 5,282 for the Northern District of California, the next largest. With four Judges, this meant an average of 3,294 for each Judge, until the elevation of Judge Mayer, when the three remaining Judges had their quotas increased 1,098, to a total of 4,392. If the bill now before Congress providing for two additional Judges is enacted, the cases the Judges must handle will be reduced to 2,588. But we ought to have ten instead of four Judges, if we are going to clear these calendars and keep them cleared.

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A Legal Drama

The following lines from The Green Bag were written by W. R. Smith, of the Santa Fé Law Department, declining an invitation to a Shakespearean play at Kansas City:

I hope you'll not complain if I
  Decline, with thanks, your kind "invite."
Let me explain the reason why
  I'll not attend the play to-night.

A tragedy, you say, they'll act,
  With stirring scenes of love and war;
The same effect I'll get in fact,
  And yet not go one-half so far.

I'll take me down from off the shelf
  The General Statutes of the state,
And revel, then, all by myself,
  In plays of men who legislate.

With Tarquin strides I'll walk the floor,
  Declaiming from the Civil Code,
Reciting loudly, o'er and o'er,
  The tragic laws of fence and road.

I'll shiver at the felon's fate,
  And read the words so free from doubt,
Which make him labor for the state
  For years—or till he's pardoned out.

'Tis strange no actor of this age
  (At least, so far as I'm advised)
Has set these Statutes for the stage,
  And had their sections dramatized.

The dramatist must not suppose
  That in this solemn compilation
He'll find rich jokes and fun, for those
  Show only in its application.

—Topeka, Kan., Capital.

Recent Text-Books

The following works, published by different law publishers, are selected because they cover important topics and cite the latest cases as evidenced by Reporter System citations. The prices are subject to revision made by the publishers, and the books are bound in buckram unless otherwise indicated.

Abstracts—Warvelle—1921	$10.00	[ ]
Automobiles—Berry—3d Ed.—1921—Flexible Binding	$15.00	[ ]
Automobiles—Huddy—1922—Flexible Binding	$15.00	[ ]
Bankruptcy—Black—2 vols.—1922—(In one Book)	$20.00	[ ]
Banks and Banking—Magee—3d Ed.—1921	$12.00	[ ]
Blue Sky Laws—Elliott—1922—Flexible Binding	$7.50	[ ]
Carriers (Interstate and Intrastate)—Watkins—2 vols.—1920	$18.00	[ ]
Contracts—Page—7 vols.—1919-1920	$60.00	[ ]
Contracts—Williston—5 vols.—1920-1921	$50.00	[ ]
Corporations (Cyclopedia of Corporation Law and Forms)—Fletcher—10 vols.—1917-1919, and Supplement—1 vol.—1921	$100.00	[ ]
Corporations, Municipal, Negligence of—White—1920	$10.00	[ ]
Criminal Procedure (With Forms)—Wharton—10th Ed.—4 vols.—1918	$32.50	[ ]
Dictionary—Bouvier's Law Dictionary and Concise Encyclopedia—3 vols.—1914	$22.50	[ ]
Equity—Pomeroy—6 vols.—1918-1919	$50.00	[ ]
Equity—Story—14th Ed.—3 vols.—1918	$22.50	[ ]
Evidence (Trial)—Abbott—3 vols.—1918	$25.00	[ ]
Federal Equity Rules—Hopkins—1921—Flexible Binding	$3.50	[ ]
Federal Practice—Foster—6th Ed.—4 vols.—(Vols. 1 to 3 now ready)	$40.00	[ ]
Federal Procedure (Forms)—Loveland—3 vols.—1920—Leather Back, Cloth Sides	$25.00	[ ]
Federal Criminal Law and Procedure (With Forms)—Zoline—3 vols.—1920	$30.00	[ ]
Form Book (Legal and Business Forms)—Tiffany—1915	$8.50	[ ]
Forms of Pleading & Practice under the Code—Winslow—2d Ed.—3 vols.—1915	$22.50	[ ]
Insurance (Briefs)—Cooley—5 vols.—1905 and 1919 Suppl.—2 vols.	$48.00	[ ]
Juries (Instructions)—Randall—5 vols.—1922—(Vol. 1 now ready)	$50.00	[ ]
Marriage, Divorce, Separation and Domestic Relations—Schouler—6th Ed.—3 vols.—1920	$30.00	[ ]
Negligence (Municipal Corporations)—White—1920	$10.00	[ ]
Notary's Manual—John—3d Ed.—1922	$5.00	[ ]
Oil Rights (With Forms)—Morrison—1920—Flexible Binding	$10.00	[ ]
Oil and Gas—Thornton—2 vols.—1918	$15.00	[ ]
Railroads (Steam and Electric)—Elliott—3d Ed.—6 vols.—1921-1922	$50.00	[ ]
Receivers—Tardy's Smith—2 vols.—1920	$18.00	[ ]
Rescission and Cancellation—Black—2 vols.—1916	$18.00	[ ]
Taxation—Black on Income and other Federal Taxes—1919 Edition with 1921 Supplement (Buckram), and Pamphlet Supplement 1922	$8.50	[ ]
Trust Estates as Business Companies—Sears—2d Ed.—1921	$10.00	[ ]
Trusts and Trustees—Bogert—1921	$4.50	[ ]
Wills (Commentaries)—Alexander—3 vols.—1918	$25.00	[ ]
Wills—Executors and Administrators—Schouler—5th Ed.—2 vols.—1915	$15.00	[ ]
Workmen's Compensation—Honnold—2 vols.—1917 with 1918 Suppl.	$15.00	[ ]

WEST PUBLISHING COMPANY, St. Paul, Minnesota.

You may send me, delivery prepaid, the books which I have marked with a cross (X).

Name _____ *Address* _____

Cases of Interest

Profits from Sale of Corporate Bonds not "Income" within Sixteenth Amendment

This is the time of year when we are kept awake o'night, subtracting, multiplying, striking a common denominator, and vainly attempting to reduce a surd, in order to determine our income tax. Suddenly, as if inspired, the thought strikes us that the correct solution of this mystery will result from a geometrical progression multiplied by the cube root of the size of our hat. Eureka! It's solved. But be it remembered that we are spared by a decision of District Judge Thomas in Brewster v. Walsh, 268 Federal Reporter, 207, the agony of computing the tax on profit derived from the sale of corporate bonds.

From the stipulated facts in the above case it appears that the plaintiff was not engaged in the business of buying and selling stocks or bonds, but that he occasionally purchased such securities as an investment, and occasionally sold them in order to change the character of his investments. On two sales a large profit was made, and on this profit an income tax was assessed under the law of 1916 (39 Stat. 756). This action was instituted to recover the tax paid. The contention of the plaintiff was that the law was unconstitutional in so far as it taxed incomes derived from the increased value of investments derived from sale. It must be remembered that the Sixteenth Amendment provides "that Congress shall have power to lay and collect taxes on incomes," and that the Income Tax Law of 1916 provides for a tax "on sales, or dealings in property whether real or personal." The question is then, "Is profit from the sale of bonds income within the Sixteenth Amendment?"

Judge Thomas answers in the negative, sustaining his answer by citing cases holding that, as between life tenant and remainderman, an increase in value, when realized on the sale of an investment, is an accretion to the capital and not income. He fortifies these citations by quoting from Eisner v. Macomber, 40 Sup. Ct. 196, that "enrichment through increase in value of capital investment is not income in any proper meaning of the term."

Judge Thomas concludes his opinion with this quotation:

"The word 'incomes' in the Sixteenth Amendment should not and cannot be so construed as to include property other than income, even if such property is described as income by an act of Congress, as such a construction permits the Congress to nullify the provisions of the second section of article 1 of the Constitution, that direct taxes shall be apportioned."

☼

Power to Regulate Intrastate Rates under Transportation Act

The New York Central Railroad Company is limited, both by its charter and section 57 of the Railroad Law of New York (Consol. Laws, c. 49), to a rate of two cents a mile for way passengers between Albany and Buffalo. The road was operated by the government during the war, and was then granted an increase to three cents a mile. After termination of federal control, the company claimed the right to a higher rate of fare under the Transportation Act (41 Stat. 456) than the rate allowed by the New York law. The Public Service Commission, Second Division, after a hearing, directed restoration of the two-cent rate after September 1, 1920. The company refused to obey this order, and proceedings were commenced to enforce the commission's mandate.

From an order of the Appellate Division, 193 Appellate Division, 615, 185 New York Supplement, 267, which reversed an order of the Special Term (112 Miscellaneous Reports, 617, 183 New York Supplement, 799), which last-named court denied the commission's right to enforce its order, the railroad appealed to the New York Court of Appeals, which affirmed, with modification, the order of the Appellate Division, in Public Service Commission v. New York Central Railroad Company, 129 Northeast-

ern Reporter, 455. Judge Andrews sums up the opinion of the court by the following statement:

"Therefore the New York Central Railroad Company might continue existing rates until some change was required by the state or federal authorities or pursuant to authority of law, or, as we construe the language as it affects New York, by the action of the Interstate Commerce Commission, or the Public Service Commission, within the limits of their respective powers, or by the action of some body having jurisdiction over the railroad and the subject-matter of rates. Such action, however, has now been taken.

"As we have said, the obligation of the defendant to carry way passengers for two cents a mile has not been destroyed. It was temporarily suspended. It was always subject to this possibility under the war power, if it became necessary. But when the suspension ceases it revives with all its original force. The suspension does cease, in the language of the statute, when the three-cent rate is 'changed by state authority.' That authority over intrastate rates is the Public Service Commission. Any charge made by a public service corporation in excess of that allowed by law is prohibited. And if the commissioners shall, after a hearing, be of the opinion that any fare demanded is in violation of any provisions of law, it may determine the proper fare to be thereafter charged. This is precisely what the commission has done."

☼

Death in Army From Exploding Shell is An "Accident"

An action was brought to recover on a policy on the life of Jack Stewart Allison. The policy provided that, in the event of the death of the insured resulting from bodily injuries sustained and effected directly through external, violent, and accidental means, exclusively and independent of all other causes, the company shall pay, in addition to the amount otherwise due, the sum of $5,000. The policy contained no provision whereby the liability of the insurer was affected by the insured becoming a soldier. The uncontroverted evidence was to the effect that the insured was killed while leading his platoon in the Argonne-Meuse battle by being struck on the head with an exploding shell. Whether this was a German or Allied shell could not be determined.

The Circuit Court of Appeals, Fifth Circuit, in State Life Insurance Company v. Allison, 269 Federal Reporter, 93, holds that death arising under such circumstances is an accident, within the meaning of the policy. The opinion by Circuit Judge Walker sustains this ruling by the following argument:

"Experience convincingly teaches that the hazards incident to many lawful employments other than war are such that it is to be expected that some of those engaged therein will be injured or killed. If an accident policy contains no provision excepting such hazards, and by chance, without the insured's design, consent, or co-operation, he is injured or killed as a result of a hazard incident to his occupation, his injury or death properly may be said to have been caused by accidental means.

"While it was to be expected that some of the soldiers engaged in the military operation in which the insured was engaged when he was killed would be injured or killed, it is not to be denied that it was by chance that Lieut. Allison's person was in the path of the piece of shrapnel which caused his death. He would not have been injured or killed by that missile but for the accidental or fortuitous circumstance that his person happened to be in its path. It was chance which determined that he was the soldier who was the victim of that stray missile.

"Though the means whereby a personal injury or death is caused were put into operation with the design or intention of killing or injuring one or more persons, if chance determines what particular person or persons are injured or killed, in consequence of the use of those means as to a person so injured or killed, without his fault, consent, or co-operation, such means are to be regarded as accidental within the meaning of the provision in question. * * * It cannot well be said that the wounding or killing of any particular soldier belonging to a force going into battle is so far a natural and to be expected consequence of his so being exposed to danger as to prevent a casualty happening to him properly being regarded as within the category of accidents."

"Off the Record"

"Honi soit qui mal y pense"

Mis-mated

Further evidence that "there's nothing in a name" appears from the divorce docket of the Clay County, Missouri, Circuit Court:

Acuff v. Acuff.
Breedlove v. Breedlove.

Francis G. Hale.

☼

Does Plaintiff Yet Have Title?

Journal entry: "Plaintiff * * * is now the owner and holder of said land by virtue of mean conveyances."

Can a *good* title rest on *mean* conveyances? M. A. Cox.

☼

Cery Vonfusing!

How easy it is to be mistaken as to what another says, and how prone we are to hear and understand from our own point of view, is illustrated by a personal experience of my own.

One summer's afternoon, years ago, I was sitting on the shady side of a country law office reading a law book. A doctor came along and asked me what I was reading, to which I replied, "Wharton on Torts." He frowned slightly, but said nothing, and shortly walked into a nearby drug store and said to the usual bunch of bystanders:

"What do you suppose that young lawyer in the next building is reading—'Torton on Warts.'"

The good doctor knew nothing about torts, but did know something about warts, and in the similarity of sound got all mixed up.

O. M. Quackenbush.

☼

Thoughtful

A woman asked a lawyer to draw her will, and the answers she gave to the lawyer's questions indicated to him that she was partly deaf, so the lawyer, repeating his question, shouted, "What do you wish to leave to your husband?" She became excited when she understood the question, and replied, "What, him, why $5, to put crepe on his hat." H. A. H.

As the Higher Authority Saw it

Citing Russell v. State (Ala.) 87 South. 226:

"The question propounded to witness George Cotton as shown by the record was *unintelligible;* but, aside from this objection, there was no error in sustaining the objection, as the question *clearly* called for illegal and incompetent testimony."

Hollis T. Pope.

☼

Very Suggestive

I call your attention to the case of Hastings by Swindle, 226 S. W. 71, decided by the Missouri Court of Appeals, in which the defendant, Swindle, was charged with fraud in the sale of land. Albert R. Smith.

Down in Missouri

St. Louis Circuit Court

44628 Samuel Fitter v. Katherine Fitter; divorce.

[Is Samuel seeking a "fitter fit"?]

41983 Connelly v. Moonshine; depos for deft filed.

[What are the chances for "liquidation"?] L. M. Hall.

☼

Hard on Both

In the early days in Missouri, when a judicial circuit covered many counties, the circuit judge, traveling on horseback, was often prevented by high water and other causes

from reaching the court at the opening of the term. For this emergency a statute was enacted (still on the books) authorizing the lawyers present to elect a special judge to hold the term of court. Col. Jeff Jones, a noted character of Calaway county, was selected a special judge under this statute. When Col. Jeff mounted the bench, a newly elected sheriff opened the court in a loud voice with the following appropriate announcement: "O yes; O yes; the Circuit Court of Calaway county is now in session, the Hon. Jeff Jones presiding; God save the state of Missouri." T. B. W.

☼

Not So Obvious, After All

Obviously.—The poorer the lawyer the fewer his trials.—[Sept.-Oct. Docket.]

Rather incorrect, I'd say. It seems to me that the trials of a poor lawyer must be many. V. T.

☼

Up to the Printer

I am herewith inclosing you a copy of "Notice of Final Settlement," which was actually published in one of the Connersville papers. This was caused by an error of the printer in getting a part of an obituary notice in the final notice of another estate.

Will M. Sparks.

Notice of Final Settlement.

In the Matter of the Estate of Henry Seffren, Deceased. In the Fayette Circuit Court, March Term, 1921.

Notice is hereby given that Peter J. Seffren, administrator of the estate of Henry Seffren, deceased, has presented and filed his account and vouchers in final settlement of said estate, and that the same will come up for examination and action of said circuit court on the 16th day of March, 1921, the same being the ninth judicial day of the March term, 1921, of said court, at which time all

He bore his burdens well,
Passed silently to yonder shore
Where angels bright do dwell,
We'll miss him here on earth below,
There'll be a vacant place;
But at the gates of heaven I know.
We'll meet him face to face.

heirs, creditors and legatees of said estate are required to appear in said court and show cause, if any, thereby why said account, vouchers and distribution should not be approved.

Witness the clerk and seal of said Fayette circuit court, at Connersville, Ind., this 19th day of February, 1921.

Ambrose Elliott, Clerk Fayette Circuit Court.

Recent British Happenings

London, March 21.—J. Austen Chamberlain today was unanimously elected leader of the unionist party, succeeding Andrew Bonar Law, who resigned.

Chamberlain was expected to resign immediately as chancellor of the exchequer. He was appointed to the leadership only on condition that the vote be unanimous.

Bonar Law resigned the leadership and with it his cabinet position as keeper of the "privy seat." It was expected that if Chamberlain resigns he will be awarded a seat similar to that held by Bonar Law.

—Pasadena Post.

☼

Moonshine or Soothing Syrup, or a New Alibi

(From Butte, Mont., Newspaper)

The baby was ill and needed moonshine. This was the testimony of Pat Kerrigan in the federal court yesterday, when he was arraigned on a charge of moonshining. The authorities accepted Kerrigan's view and he was acquitted on a directed verdict on motion of the United States district attorney, made after the court had stricken two counts from the information and had instructed the jurors that if they really believed Pat was distilling for the baby they should acquit him.

Kerrigan, without a lawyer, went on the stand and told the court and jury all about it. "I made the still," he said, "and a good job it was, too, if I do say it. I made the mash and everything. It was for the baby. He simply had to have it."

"The officers were lucky," Kerrigan continued, "if they came five minutes sooner they wouldn't have caught me. I had just set the still on the fire. It wasn't quite ready when they came in."

There was no effort at concealment in Kerrigan's testimony. He was not only willing, but apparently anxious to give all the facts, going into minute details on every point.

The court, in charging the jury, said that according to the testimony, Kerrigan's still had not yet begun to drip, therefore he hadn't manufactured any moonshine. That, said the court, disposed of the charge that he was distilling without registering. Likewise it disposed of the charge that he was distilling without paying the tax. Finally, the court con-

tinued, if the jury believed that Pat wasn't trying to make whisky to sell, but merely to relieve a sick baby, they should acquit him.

At this point United States Attorney Shelton moved for a directed verdict of acquittal. The motion was granted and Pat was discharged.

☼

It Wouldn't Work

A late Michigan case is entitled Woodwork v. Woodwork, an action in divorce, found in 213 Mich. 370, 181 N. W. 975. Would suggest that these parties did not dovetail. A. P. Cady.

☼

Motes v. Motes, 229 S. W. 342.

Nineteen hundred years have rolled by, and they are still trying to pick the motes out of one another's eyes. E. W.

☼

Legal Technicalities

In dictating orders for the City Court of the City of New York, it has long been the custom to refer to the courthouse as the Brownstone Building, and the other day, while dictating an order, in the presence of an inquisitive client:

"Held in the Brownstone Building,"

the client inquired seriously:

"Must you state the color of the building?"

My stenographer answered, "Yes." His curiosity was satisfied. B. E. K.

☼

Bad Enough, Either Way

Referring to stenographic errors, I have the following:

Some years ago, when I was a member of another firm, my partner dictated a warranty deed, and, after naming the grantors, who were several in number, he added the following statement:

"The above named grantors being all the heirs of John Geiger, deceased."

The deed came out:

"The above named grantors being all the errors of John Geiger, deceased."

The gentleman then redictated the deed, calling special attention to the fact that it

was not errors he was curing, and it came out thus:

"The above named grantors being all the hairs of John Geiger, deceased."

J. F. Kirby.

☼

Another One "Plays by Ear"

I recently dictated to my stenographer the following sentence, explanatory of why a local merchant could not meet his bills:

"We have had four successive crop failures in this part of North Dakota."

The intelligent stenog got it:

"We have had four successful crop failures in this part of North Dakota."

It's the truth; but we are going to beat our luck this year. Horace Bagley.

☼

May be the "Eats" were Good

An invitation to a "party" was received, addressed to a firm of young lawyers and requiring an answer in verse. The following is the answer:

Whereas, on this April day,
We, the undersigned, agree to convey,
For and in consideration of your kindness of heart,
Ourselves, to the party of the second part,
And to assist thereat, in making merry,
Witness our hands and seals.
——erry & ——erry."

Berry & Wheeler.

☼

Are the "Word Signs" Similar, Hortense?

Recently, while drafting a claim for a mechanic's lien, I dictated the following:

"Patrick Doe, etc., makes and files this his claim for a mechanic's lien, and thereupon and thereby respectfully represents: That said claim for lien is founded upon a demand by said Patrick Doe against one Mary A. Smith."

Upon reading the typewritten petition, I found that the oracle of the keys had made the following interpolation:

"That said claim for lien is found dead upon a demand," etc.

I gently pointed out the error to her royal highness, only to receive the following bland inquiry:

"Well, what's wrong with it?"

I. H.