



ADVANCE SHEET– SPECIAL ISSUE

President's Letter

The Library's decision to continue in operation throughout the virus crisis with its doors closed appears to have been vindicated in two different respects.

While the Library has always enjoyed significant use by individual and small-firm practitioners, remote resort to its collections via scanning and internet transmission is now increasingly resorted to by members of larger firms working from home and cut off from their offices, law books, and databases.

Since necessity is the mother of invention, the Library also now seeks to carry on its educational activities in new ways. We will shortly be instituting a series of Zoom events, beginning with a previously scheduled talk on impeachment by Dean Ronald Weich of the University of Baltimore law school on April 30, followed by a later illustrated talk on the history of the federal court in Maryland by our board member John Connolly of the Zuckerman Spaeder firm. A talk by former Baltimore City State's Attorney Gregg Bernstein will be scheduled for later in the Spring.

A description of how to use Zoom technology, originally prepared by Samuel Hopkins for the use of the 14 West Hamilton Street Club is reproduced with his permission later in this magazine.

We have also undertaken to publish the Advance Sheet not quarterly, as heretofore, but fortnightly, with more substantial historical and literary material drawn from our collections and elsewhere, including from a collection of several hundred law club speeches secured for us by the late Judge James Schneider. Contributions from readers are actively solicited. Our last issue contained an article by the journalist Dorothy Thompson on the political divisions of the 1930s and the court-packing controversy and an interview with the all-but-forgotten Mikhail Gorbachev on the virus crisis.

This issue contains further tributes to Judge Schneider as well as a speech commemorating Chief Justice Taney delivered by Dean Acheson before the Maryland State Bar Association in 1936 in the run-up to the court-packing controversy and, in a lighter vein, a speech by the late H. H. Walker Lewis on the prohibition-era Battle of Franklin Farms also delivered before the Maryland State Bar Association in 1960.

Walker Lewis, like Acheson, was a defender of the over-all record of Chief Justice Taney though condemning, like Acheson, the infamous decision in the Dred Scott case. His biography *Without Fear or Favor*, like Charles Warren's two-volume History of the Supreme Court and Dean Acheson's speech, cautions against efforts at world-saving by justices of the Supreme Court. Dred Scott, in the contemporary language of the New York Times (October 14, 1864), "did not come from a corrupt or malignant heart, [but] from a sincere desire to compose, rather than exacerbate, sectional discord. But yet it was nonetheless an act of supreme folly." It was, in Charles Warren's words, "a body blow to Stephen Douglas' theory of popular sovereignty in the Territories. It may fairly be said that Chief Justice Taney elected Abraham Lincoln to the Presidency."

The inflammatory language about blacks having no rights was, as a Republican newspaper later acknowledged, "by way of narrative relating to a period prior to the adoption of the Constitution." Taney manumitted his slaves when he inherited them, befriended them afterwards, and died a poor man. His colleague Justice Wayne, concurring in Dred Scott, declared that "the peace and harmony of the country required...settlement by judicial decision." In a later time, Justices Kennedy, O'Connor and Souter, upholding the Supreme Court's adventures in abortion rights in the Casey case in 1992, similarly "called the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." We know how that has worked out.

Acheson's renunciation of judicial vaingloriousness did not mean that he was free of ideals. If his record in the Far East before and after the Second World War may have left something to be desired, he can properly be deemed, along with his fellow foreign ministers Ernest Bevin, Robert Schuman and Carlo Sforza what Sforza elsewhere called "a maker of modern Europe." Few realize that he also was a considerable domestic reformer during his period of enforced exile from the Roosevelt administration as the chairman of the commission framing the federal Administrative Procedure Act and the chairman of the Supreme Court Rules Committee framing the Federal Rules of Civil Procedure. His ideals were perhaps best expressed in his eulogy of one judge and his letter of commiseration addressed to another:

"We are the generation which has lived during and between two wars. We have lived in the desert years of the human spirit. We have lived in the barren years of disillusionment—years when the cry was "What is truth?"—years when men with a little new-found knowledge believed that they had pried into the mainsprings of the human mind and spirit, and could make mankind work for any end by playing on its fears and appetites. These were years during which we were with the Justice and saw in action his burning faith that the verities to which men had clung through the ages were verities, that evil never could be good, that falsehood was not truth, not even if all the ingenuity of science reiterated it in waves that encircled the earth." ("Mr. Justice Brandeis," 55 Harvard Law Review 191-92 (1941))

"Almost twenty years ago when our country was facing disaster in Korea and I myself was under heavy attack, a wise colleague [George Kennan] wrote me a private note: 'In international, as in private life,' it said 'what counts most is not really what happens to someone but how he bears what happens to him.' Please go on with your work and continue to show the world the course of an honorable and just judge, which your colleagues and so much of the bar

know you to be. This is the course followed by your distinguished predecessor Judge John J. Parker to universal esteem.” Letter to Clement Haynesworth, in D. Mc Clellan and D. Acheson (eds.), *Among Friends: Personal Letters of Dean Acheson* (1980), 310-11.

We also include in this issue, for the benefit of those self-quarantined, some further links to cultural websites.

George W. Liebmann

Honorable James F. Schneider

Since 1977 the Bar Library has had the very good fortune to have had the continuous service on its Board of Directors of the Honorable James F. Schneider (1977-1993 & 2006-2020) and his wife Magistrate Susan M. Marzetta (1993-2006). Their affection and dedication to the Bar Library has been second to none. When word reached me that Judge Schneider was gravely ill, I shared the sad news with the Board. Their reaction was immediate and heartfelt. From John Connolly “I am so sorry Joe. He is a wonderful man.” James Astrachan recalled the man and his service: “Jim enjoyed a charmed legal career dedicated to public service. If I remember, assistant Baltimore City State’s Attorney, Circuit Court or Supreme Bench Master in Equity, bankruptcy judge and then chief bankruptcy judge. Always a kind soul. I am so sorry. A better man there is not.” John Henderson recalled a night when he had ran into the judge at a local restaurant “That’s terrible - he is such a nice man. I remember seeing him on a dinner date with one of his daughters. My wife and I happened to be seated next to them. They seemed so happy. Praying for him and his family.” Tong Gioia said “A true gentleman in every sense of the word. Just heartbreaking.”

A few days later, I had the sad responsibility of letting the Board know that Judge Schneider had passed on. The Honorable Michael Reed - “Judge Schneider was the kindest of gentlemen. I enjoyed talking legal history with him every time we met. I know that he led a courageous fight for a long time and that he loved life. I am sad that he has passed and will miss him.” Former Chief Judge of the Circuit Court for Baltimore City Wanda Keyes Heard - “Judge Schneider was a giant! His passing is a tremendous loss to all of us... especially his family. Let’s keep them in our prayers.” Tony Gioia – “Very sad news. I am going to miss his infectious smile and wit.” Senator Christopher West – “He was a perfectly lovely human being, truly a person fully imbued with the grace of God. It was a privilege to call him friend.” Elizabeth Julian – “So sad. What a loss. I have very fond memories that go way back to private practice and continued from there. What a fine gentleman.” Honorable Ellen L. Hollander – “I was just advised that Jim passed away last night. I am so heartsick.”

REFLECTIONS ON IMPEACHMENT

The Bar Library lecture series is back by way of **Zoom**. If you would like to join us for what should be a fascinating discussion, please e-mail me at jwbennett@barlib.org and I will forward the **Zoom Link** to you the day of the program. If technology is not your cup of tea, do not let that stop you. Directions on how to join a Zoom meeting, thanks to the generous permission of Mr. Samuel Hopkins, are set forth immediately following this notice. Stay safe and we hope to see you with us Thursday.

On **Thursday, April 30, 2020, at 7:30 p.m.**, Dean Ronald Weich of the University of Baltimore School of Law will present "**Looking Back at Impeachment from the Middle of a Pandemic.**" The moderator for the evening will be George W. Liebmann. Although Mr. Liebmann will be there to engage Dean Weich in conversation, we invite those that are watching to participate by contributing their questions as well. Zoom is an interactive platform.

Dean Weich will use the Impeachment Trial of President Donald John Trump as a jumping off point to talk about impeachment generally and how it fits into the constitutional scheme, looking at its structure and processes. In the context of the current state of affairs Dean Weich states that the focus of his presentation will be to examine "[What] I see as shortcomings in the Constitution. The pandemic becomes relevant because we now have a historically unpopular president badly stumbling in his leadership of the nation through this public health emergency. In my view, the current unhappy circumstances highlight the need for a broader understanding of Congress' impeachment power. Impeachment should be less focused on specific quasi-criminal misconduct and more cognizant of a president's general 'maladministration' of the office, to use George Mason's proposed wording."

Ronald Weich was appointed Dean of the University of Baltimore School of Law in May 2012. He serves as chief executive and chief academic officer of the Law School which was established in 1925. Immediately prior to assuming his current position, Weich was an Assistant Attorney General in the United States Department of Justice. Earlier he served as Chief Counsel to United States Senators Harry Reid and Edward M. Kennedy. From 1997 to 2004, Weich was a partner in Zuckerman Spaeder LLP. He began his legal career as an Assistant District Attorney in New York City. Weich is a graduate of Columbia University and Yale Law School.

George W. Liebmann, a Baltimore lawyer, is the author of *America's Political Inventors* (Bloomsbury, 2019) and *The Common Law Tradition: A Collective Portrait of Five Legal Scholars* (Transaction Books, 2003), among other works. He has served on the Board of Directors of the Bar Library since 1971, in the capacity of President from 1975 to 1977 and from 2006 to the present.

Time: 7:30 p.m., Thursday, April 30, 2020.

Instructions for How to Join HSC Zoom Meetings

Short Version (v. 9) -- by Sam Hopkins

If you think all you need is a link for your computer or iPad type of tablet,*** here it is (from Option 1 below)! Display this as an email or MS Word file on the screen of your computer or iPad, and just left click on this blue text:**

<https://zoom.us/j/7031301919?pwd=eHduT0FXanRnSkRnV3c0cHJYWkF6UT09>

If you want to use a smartphone, see Options 2, 3, and 4 below.

If you want to use a phone that is NOT a smartphone, see only Option 4 below.

If you have a problem, please at least first try to find the answer in the Detailed Version below. Please have a “hard copy” by your side, when you try to join. Otherwise, at least have a small piece of paper in your wallet with the following two numbers on it:

Meeting ID - 703 130 1919

Password! - 512205.

You will need these nos., if you start the join by clicking on the Zoom App icon on your smartphone or tablet or if you join with just a phone for audio only.

Then, always feel free to call Sam Hopkins for help: 410-935-8540

** "Computer" = all kinds of Windows & Mac desktop & laptop computers

*** Apple's iPad or the non-Apple equivalent, usually called a "tablet."

Detailed Version

by Sam Hopkins

Ver. 9, dated 4-19-2020

Overview and Background Information:

All but TWO small things (2 numbers) in these instructions are for “joining” any Zoom Meeting anywhere. So, please save these instructions for detailed help with any Zoom event, until I send you a new version.

The two small things are the Meeting ID and the Meeting Password. They are ONLY for joining a meeting started by me (Sam) or someone using my Zoom account.

Unless we must use another, new security option, these same numbers and instructions will let you join any future club Zoom event – since the plan is that all will use my Zoom account. So, please keep these numbers handy.

Note: Zoom made the use of passwords mandatory beginning only on April 5.

Please discard all previous instructions you have received from me (or via the club) for the April 1, 3 & later events. The first two lack the password and much editing and additional explanations and clarification. Version 7 & 8 correct or clarify still more but smaller things that I edit after requests for help that reveal the need for these changes.

You don't have to first sign up with, own, or license Zoom software to "join" a meeting, if you use a computer to join (Option #1) or if you join with a phone for only an audio connection (Options #2 & #4). Just follow the instructions below! Any needed Zoom files will be automatically downloaded to the PC, if no one has ever used this PC before to join a Zoom meeting. This will delay the joining by just a few minutes.

You only need a Zoom account to "Start" a Zoom meeting that others can then "join." Others can, however, use the account to start a meeting, if they are given the ID and password needed to "Sign In" to that account.

To join with an iPad or smartphone, you need only a free Zoom "app" for the iPhone or the equivalent for the Android smartphone.

Ask for help, if this app is not already on your iPad or smartphone and you have never downloaded an app before to your device.

Please have a print out of these instructions with you, when you are joining a meeting, even though you begin the joining by clicking on the display of these instructions in your email system. The reason is that after joining begins you will no longer see the instructions on your screen. Yes, you can switch back and forth between the Zoom meeting display and your email display. But until you are adept at this, why not just keep a hard copy of the instructions at hand.

If you are "on the go," and using only a phone to join, I suggest that you have with you at least a small piece of paper with the Meeting ID and Password numbers on it.

Please note the start time for the Zoom meeting to which you have been invited. Then, at that time use one of the 4 options below.

But you can also join early and communicate with others who have joined early, if the "personal waiting room" security feature has not been turned on for this meeting.

You may also join late, as long as another security feature has not been activated.

Warning re your PC's anti-virus program "butting in." When you start the joining this program may warn you that someone is about to take control of your webcam and ask if you wish to "BLOCK" or Allow this. Don't click on "BLOCK"!

Zoom has an ENORMOUS number of "Settings" and thereby options for customizing, complicating and simplifying the use of Zoom. So, feel free to ask me about them and/or research them on your own. I still have much more to learn.

Details for FOUR Options

The links and numbers & how to use them Step by Step

Option 1: Use a computer or iPad or other tablet*****

Your PC must have a camera, microphone and speakers to use all the features of Zoom. All laptop PC's should have all three. Call me if your PC** is missing a camera and/or mike, and I will describe some more options for you.**

If you are using an iPad or other tablet, first make sure the Zoom app is installed on it. The icon is labelled "Zoom." And this icon has a cartoonish, white image of a video camera with a blue background.

** "computer" = all kinds of Windows & Mac desktop & laptop computers

*** "tablet" = an Apple iPad or the equivalent type of Android device

Then, simply click on this link, when you are viewing this in your email or MS Word system on the PC or iPad:

<https://zoom.us/j/7031301919?pwd=eHduT0FXanRnSkRnV3c0cHJYWkF6UT09>

If no one has ever used Zoom before on your computer, you may have to wait briefly while Zoom downloads some files to your PC.

You will also be given a choice of using or NOT using the computer's audio. Please choose computer audio. Keep it simple!!!

You may then be told that "You have been put on hold by the host." If so, then just wait for the Host to let you in from the "Personal Waiting Room." This is an extra security measure that your host will use for some meetings. If no one let's you in, send a text, email or phone call to the host or anyone you believe is already in the meeting. If you are using your only phone to join the

meeting you will have to leave (i.e., hang up) before you can make the call, but you can easily rejoin thereafter.

Step by Step after you click the above link on a computer:

You will see a window labeled at the top, “Launch Application.”

Left click on “Open Link” button at bottom of this window. This will select “Zoom.

Left click on blue button labeled “Join with Video.”

Let click on blue button labeled “Join with Computer Audio.”

Please notice:

- the menu at the bottom screen that appears, when you move the cursor towards the bottom of the screen. Please read all the choices.
- Please notice the two choices at the top right corner of the screen when you move the cursor there. You need to be joined with at least one other person to have the choices of “Speaker View or Gallery View.”
- Then Please experiment with the above choices, when you have a Zoom meeting of at least two persons. Then ask me any questions you have at the next meeting or before.

Step by Step after you click the above link on an iPad:

Tap blue button labeled “Join a Meeting.”

Tap blue button labeled “Join with Video.”

Tap top of three menu choices to join audio. It is:

“Call using Internet Audio.”

Please notice the menu at top of the iPad screen and read all the choices. Please experiment with them before you join a meeting, and then ask any questions you have of me at the meeting or before.

Alternative for joining with iPad or other tablet, if you don’t have the above link to click on:

Carry the Meeting ID and Password in your wallet.

Then just use the steps described for Option 3 below, starting with tapping on the icon for the Zoom app. The steps are easy to remember. Or even if you have these instructions with you on

paper, but not viewable on your iPad, it's easier to type in the Meeting ID and Password than to type in the long link you can read off these instructions.

Additional Information:

The above link imbeds in disguise your password, so that you need not key it in. It is 512205.

Your Meeting ID is also in the above link to for the same reason. It is 703 130 1919

If the computer audio is ever not clear enough, we can help you switch to using your phone for just the audio, while you still use your computer, smartphone or tablet for the video.

To switch to your phone for the audio you will simply use an option in the Zoom menu system that is displayed after you join the meeting. The host can talk you through using it. It is very simple.

The reason for this option is that if you have a poor WiFi connection and/or bandwidth, the audio can be bad, even though the video is still okay. And then, using your phone for audio is a fix for at least this symptom of your WiFi problem.

Option 2: Use any smartphone to connect ONLY to the audio of the meeting

Note: On the smartphone you must remember to display the keypad, in order to type in numbers and hit the # key. These are steps b. and c. below.

View this email or MS Word file attachment on your smartphone.

Click on this number: +19292056099,,7031301919#

This single click will both dial a telephone no. and enter the Meeting ID. So, you can ignore any voice prompt to enter the Meeting ID. It is in the above number you clicked on. If you get impatient waiting for the next prompt, hit #.

If you get a busy signal or the voice message that "all circuits are busy," use this alternative: +13126266799,,7031301919#

The above instructions apply to it as well.

Then, you will be asked to enter your "participant no." or to hit the "pound sign."

Just hit the # key.

Warning: you will need to know how to access the "#" key on the keyboard of a Smart Phone. It takes two clicks to move from the alpha keyboard to a keyboard that displays the "#" as a separate key.

You will be asked for a Password.

Enter 512205

You may be told that “You have been put on hold by the host.” If so, then just wait for Host to let you in from the “Personal Waiting Room.” This is an extra security measure that your host will use for some meetings.

Enter *6 on to both Mute and Unmute yourself.

Option 3: Use any smartphone to connect to BOTH the audio and the video of the Zoom meeting

Download and install the Zoom App on your smartphone, if this has not already been done. The icon is labelled “Zoom.” The icon has a simple white image of a video camera with a blue background.

Start the Zoom App by tapping on the icon that now appears on one of your phone's screen displays that has all the icons

Tap on the blue button labelled “Join a Meeting.”

Change the Personal Link Name to your own, if it has not already been changed. Not mandatory. Ask for help later if you are unable to do this.

Type in the Meeting ID at top of screen where it is asked for: 703 130 1919

Click on blue button, labelled, "Join."

Enter Password. It is 512205

You may be told that “You have been put on hold by the host.” If so, then just wait for Host to let you in from the “Personal Waiting Room.” This is an extra security measure that your host will use for some meetings.

Option 4: Use any phone to connect ONLY to the audio of the meeting.

Note: On the smartphone you must remember to keep the keypad on display after clicking on the tel. no. below. You will need it to type in two more numbers and hit the # key.

On other phones, phones without screens, the keypad is, of course, always physically present.

Dial this number on the phone: 1 301 715 8592

You will be prompted to “Enter the Meeting ID/No followed by “pound.”

If you get a busy signal or all circuits are busy message, use one of the alternative phone numbers that are given for Option 4 in the Addendum below.

You will be asked for the Meeting ID

Type 703 130 1919 #

You will be asked to enter your “participant no.” or to hit the “pound sign.”

Just hit the # key.

You will be asked for a Password.

Type 512205

Then, you may be told that “You have been put on hold by the host.” If so, then just wait for this “host” (me or my co-host) to let you in from the “Personal Waiting Room.” This is an extra security measure that your host will use for some meetings.

Enter *6 on to both Mute and Unmute yourself.

Addendum: Below are alternative telephone numbers that you can use, if you have any problem with the above telephone numbers. Sometimes a telephone no. used by Zoom is busy or you will be told, after dialing, that “all circuits are busy.” Then, just use one of these alternatives below.

For Option 2:

+13126266799,,7031301919#

For Option 4:

+1 929 205 6099 US (New York)

+1 312 626 6799 US (Chicago)

+1 301 715 8592 US

+1 346 248 7799 US (Houston)

+1 669 900 6833 US (San Jose)

+1 253 215 8782 US

My thanks to Mr. Sam Hopkins for his kind permission in allowing the Bar Library to set forth his “**Instructions for How to Join HSC Zoom Meetings.**” - Joe Bennett

Cultural Websites

“See the world. It’s more fantastic than any dream.” – Ray Bradbury

Our present world might consist of large measures of the “virtual,” but it still in fact is pretty fantastic. My thanks to Mr. Liebmann for forwarding another marvelous list. I hope you enjoy.

Theatre & Cinema

Hampstead Theatre - <https://www.hampsteadtheatre.com>

The Globe Theatre -

https://globeplayer.tv/?utm_source=wordfly&utm_medium=email&utm_campaign=Theatre%26Dance%7CAprilAtHome&utm_content=version_A&sourceNumber=170

Birmingham Rep – The Importance of Being Earnest: https://www.birmingham-rep.co.uk/news/only-the-interval-live-stream-of-the-importance-of-being-earnest.html?utm_source=wordfly&utm_medium=email&utm_campaign=Theatre%26Dance%7CAprilAtHome&utm_content=version_A&sourceNumber=170

Orange Tree Theatre, Richmond - <https://www.orangetreetheatre.co.uk/>

Cirque du Soleil -

https://www.youtube.com/watch?v=nQ5eUJNXrMw&utm_source=wordfly&utm_medium=email&utm_campaign=Theatre%26Dance%7CAprilAtHome&utm_content=version_A&sourceNumber=170

The Kennedy Center - <https://www.kennedy-center.org/digitalstage/>

The National Theatre - <https://www.nationaltheatre.org.uk>

The National Theatre is switching to its YouTube channel. From April 2, under the banner of **National Theatre at Home**, every Thursday (7pm BST/2pm EST) will see a new National Theatre play released – free to watch for one week – along with bonus content including cast and creative Q&As and post-stream talks. Additionally, the National Theatre will be rolling out National Theatre Collection study resources to pupils now learning at home.

Curzon Home Cinema - <https://www.curzonhomecinema.com/>

Galleries

Ben Uri Gallery and Museum - <https://mailchi.mp/b5005faa9983/virtually-open?e=cf8c4aaf9b>

Solomon R Guggenheim Museum - <https://www.guggenheim.org/plan-your-visit/guggenheim-from-home>

The Frick Collection - <https://www.frick.org/>

Music

The Bird Opera - <http://volkerpannes.de/portfolio/bird-song-opera/> or <https://www.youtube.com/watch?v=IMXD4h5w8D8> – make sure you read the credits!

Covent Garden Opera - <https://www.roh.org.uk/>

Klezmer music - Shir Band - <https://www.shirmusic.co.uk/videos>

The Metropolitan Opera - <https://www.metopera.org/user-information/nightly-met-opera-streams>

The Metropolitan Opera offers a free Opera streaming service, with a different Opera each day, available for 24 hours from 12.30 am London time (7.30 pm New York time).

You can pause and restart the Opera as you wish over the day. The quality is better than many free operas on YouTube. The schedule lists the daily performance, though you need to remember that the schedule is a day behind in the UK due to the time difference (i.e. 2nd April is available on 3rd April in UK.) There is also a paid Opera on Demand service if you miss your favorite operas.

Musicals:

https://m.youtube.com/watch?v=Mk8y3JR0xMk:	Six
https://youtu.be/RiX-EJA8n4w:	Legally Blonde
https://youtu.be/c4jj9EiJYYk:	South Pacific by the Lincoln Centre
https://m.youtube.com/watch?feature=youtu.be&v=4Yd6iF0mCCQ:	Everyone's talking about Jamie
https://www.youtube.com/channel/UCdmPjhKMaXNNeCr1FjuMvag?utm_source=wordfly&utm_medium=email&utm_campaign=Theatre%26Dance%7CAprilAtHome&utm_content=version_A&sourceNumber=170:	Andrew Lloyd Webber shows

And finally, for exercise, opportunities for all ages and levels of fitness:

The Body Coach - <https://www.youtube.com/channel/UCAxW1XT0iEJo0TYIRfn6rYQ>

ADDRESS BY HON. DEAN G. ACHESON

ROGER BROOKE TANEY

Notes Upon Judicial Self-Restraint

Mark Antony is made to say by Shakespeare—

"The evil that men do lives after them,
The good is oft interred with their bones."

The same may be said of judicial mistakes. It is the irony of fate that for three-quarters of a century the accepted conception of Roger Brooke Taney has been based upon the occasion when, yielding to the temptation, always disastrous, to save the country, he put aside the judicial self-restraint which was his great contribution to the law and custom of the Constitution.

It is of this contribution that I wish to speak. For the giant stature which Taney assumes in the history of the Supreme Court is due chiefly to his insistence that the judge, in applying Constitutional limitations, must restrain himself and leave the maximum of freedom to those agencies of government whose actions he is called upon to weigh. And it is an appreciation of this view of the Constitutional judge's function of which we today stand in need.

When Taney came to the bench, John Marshall had already established the outlines of our federal system and the place of the Court in it. He had done so in sweeping abstractions, in tune with the lofty philosophical approach to governmental problems which was characteristic of his time. This very abstraction imparted strength to his assertions, and contributed greatly to their acceptance in a time when our government was comparatively unsettled and questions of power might turn upon the audacity of the claimant.

But Marshall's conceptions had not yet been put to the severe test of repeated, particularized application; the country had hardly passed the stage when generalizations, well nigh as broad as the Constitution itself, would suffice to dispose of immediate issues.

As far as they had gone, Marshall's conceptions did reflect, however, the dominant view of his generation that the area within which governmental action should be permitted to affect private rights was a sharply restricted one. Indeed, it was Jefferson and not Marshall who said that that government was best which governed least. Laissez-faire was not a party issue; the doctrine

had been settled by a curious combination of Adam Smith and the French Revolution. Of the principles laid down by Marshall, that which held the greatest immediate possibility for governmental restriction was contained in *Gibbons v. Ogden*.¹ For it was through the implied prohibition of the commerce clause that the State legislatures, which were for many generations to be the chief agencies for curbing property rights, might most sharply have been limited.

In any event, it was clear that with but little effort Marshall's decisions could have been turned into instruments for imposing upon the nation certain blunt and rigid conceptions of the rights of property, and, in the hands of a judge so inclined, the power assumed by Marshall might readily have been extended to the point where the Court would have been dictating the policy of legislation.

A further circumstance prevailing at the time of Taney's accession, when weighed against that just described, made the task of Chief Justice a most vital one. In 1828 Jackson came to power, on the crest of a movement which in the most technical sense was revolutionary. Marshall, Marshall's Court (the "Old Court" as Justice Story was nostalgically to call it), and the government of the nation theretofore had been the exclusive property of the upper classes. Between groups in those classes controversies had raged, sometimes bitterly, but, on the whole, there had been no sharp division of interest. However, with Jackson and Jacksonian Democracy there came times that made good people shudder. For not only was the White House trampled with the muddy boots of the vulgar,² but their voices suddenly became articulate, political office fell into their hands, and they boisterously, impudently asserted a new regime claiming all power for the common man.

The philosophy of this new movement is not clearly known to us because, perhaps, it had no real philosopher. It is not unreasonable to guess that Jackson himself was an honest old Jeffersonian, and that the agrarianism of John Taylor of Caroline suited him well.³ But it is clear that the deep passion of the whole movement was centered upon the Bank. Monopoly has always been a rabble-rousing word in our politics. Indeed the one great decision of John Marshall which was truly popular was so not because of its elaboration of the commerce power, but be-

¹ 9 Wheaton 1 (1824).

² Bowers, *Party Battles of the Jackson Period*, p. 47.

³ II Parrington, *Main Currents in American Thought*, pp. 145 ff.

cause it happened to strike down a monopoly.⁴ And with Jacksonism there came a vituperative outburst against the Bank as the ultimate of monopolies through which, it was charged, the destiny of the masses was controlled by a corrupt coterie of financiers.

While there was nothing in Jacksonism that denied the essential thesis of laissez-faire—in fact Jackson's ideal was as anarchic as Jefferson's⁵—it did look to government as the means for breaking centralized power by the simple process of withdrawing governmental support, and the support especially of the national government. And so virile was the movement that there can be little doubt that if the full implications of, let us say, the philosophy that produced the *Dartmouth College* case had been carried out, there would inevitably have been a popular collusion with the Court that could have had but one event. In any case the sprawling, vociferous masses of Jacksonism were demanding that property rights, when they took the form of privilege, should not be untrammelled.

Another factor, giving point to the previous ones mentioned, entered the situation presented by Marshall's death, although it could scarcely have been appreciated at that time. The years which Taney was to serve witnessed the most profound technological and business changes in the life of the nation. The development of steam transportation—possibly the most important single episode in American history—took place; in 1834 the first through railroad between New York and Philadelphia was opened, and twenty years later the locomotive ran uninterrupted from the Atlantic to the Mississippi. The first ocean steamship came to these shores in 1838. Immigration exceeded 100,000 a year by 1842. Gold was discovered in California in 1848, and in the same year the first general business corporation laws were enacted in New York.⁶ And, as though to cap the unruly period, in 1849 the Astor Place riot occurred, one of the first times that militia reduced a mob of demonstrators with bullets.⁷ In short, during this era the country was being transformed from the comparatively simple agrarian community that had borne Marshall and Madison to the plunging, reckless, complex industrialism that was already well flowered by the time the land

⁴ *Gibbons v. Ogden*, supra; see IV Beveridge, *Life of John Marshall*, pp. 445, 447.

⁵ II Parrington, op. cit., p. 151.

⁶ II Warren, *The Supreme Court in United States History*, pp. 408-410.

⁷ Minnigerode, *The Fabulous Forties*, c. VII.

was splashed with blood in '61. Moreover, it was during this period that the legislatures began to concern themselves with social problems. The emancipation of married women, the recognition of labor unions, prison reform, these and other measures⁸ were to reflect a broadening of legislative activities into realms and for ends that had been but slightly considered during the preceding decades.

In sum: With Taney's accession the broad juridical outlines of the federal system had been sketched in lofty terms of abstract principles. But the day of philosophers had set, and the great problem facing the Court was that of giving practical, particularized content to general conceptions. Straining at old ties, there was on the political scene a new force with new values, which in its boisterous vigor demanded a reorientation in government. At the same time economic processes were to undergo far-reaching changes that made over the continent, creating unfamiliar business interests and forms, and foretelling a scope of industrial development that could not have been dreamed of in 1789. And new legislative activity developed, to herald a day when laws would trench upon the most intimate concerns of everyday life.

To a considerable extent Taney assumed his position well equipped to meet the challenge. Not all Democrats were uncouth and untrained, despite the gossip of the drawing room. When Jefferson Davis met the young lady who was to become his wife, she exclaimed, "Would you believe it, he is refined and cultivated, and yet he is a Democrat!"⁹ And Taney, although a Democrat, had been one of the leaders of the talented Maryland Bar. Neither Robert Harper nor William Wirt had stood above him,¹⁰ and when he was first proposed for the Supreme Court, before Marshall's death, the great Chief Justice indicated favor for the appointment.¹¹ There is no reason for surprise that his views were to be set forth with a compelling force and lawyer-like technique that hold the highest place in the Reports.

Of as much importance was Taney's understanding of, and sympathy with, the aspirations of the new political forces. Indeed he had been one of Jackson's chief lieutenants and had served his party with courage and fidelity. In his resolute discharge of Jackson's program he is said to have been fully con-

⁸ II Warren, *op. cit.*, p. 309.

⁹ II Parrington, *op. cit.*, p. 146.

¹⁰ II Warren, *op. cit.*, p. 154.

¹¹ *Idem*, p. 260; Bowers, *op. cit.*, p. 440.

scious that he risked his hopes for a place on the Supreme Bench.¹² In the truest sense his was a political appointment. When his name was first presented for a place on the Court, the President was overridden by the Senate, and confirmation of his second appointment was held up by a bitter fight. That the fight was against Jacksonism¹³ was quite proper, for there was no more staunch Jacksonian.

Contrary to the dominant trend of thought theretofore, Taney was not exclusively preoccupied with the guarantee of property rights. "While the rights of private property are sacredly guarded," he said, "we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation."¹⁴ The concentration of power, the "money power" he called it, was an attempt "to destroy the spirit of freedom and manly independence in the working classes of society."¹⁵ The granting of governmental privileges should always be made upon an exclusive consideration of the interests of the community. Shortly after his confirmation as Chief Justice he wrote to President Jackson:

"The consideration upon which alone, such peculiar privileges [corporate charters] can be granted is the expectation and prospect of promoting thereby some public interest, and it follows from these principles that in every case where it is proposed to grant or renew a charter the interests or wishes of the individuals who desire to be incorporated, ought not to influence the decision of the government. The only inquiry which the constituted authorities can properly make on such an application, is whether the charter applied for, is likely to produce any real benefit to the community, and whether that benefit is sufficient to justify the grant."¹⁶

This is not to say that Taney was radical, in the modern sense, in regard to the rights of property. He wrote the opinion in *Bronson v. Kinzie*.¹⁷ But plainly he understood the aspirations that were stirring humble men, he suspected the accumulation of economic power in a few hands, and he accepted as an entirely proper function of government the restraining of privilege.

¹² Kendall, Autobiography, p. 386, cited in Bowers, op. cit., p. 306.

¹³ II Warren, op. cit., pp. 284 ff.

¹⁴ Charles River Bridge v. Warren Bridge, 11 Peters 420, 548 (1837).

¹⁵ II Warren, op. cit., pp. 310-311, quoting Taney to Jackson of Sept. 12, 1838.

¹⁶ Swisher, "Roger B. Taney," p. 367.

¹⁷ I Howard 311 (1843).

However a superb legal capacity and good intentions do not suffice to explain the peculiar and permanent contribution made by Taney to our Constitutional history. The task facing the Court in 1835 was that of making workable the juridical scheme that Marshall had formulated. The diverse economic interests that were rapidly developing, the new voices that were demanding attention on the political scene, the broad acceleration of national life—all challenged the efficacy of Constitutional government, and demanded judicial statesmanship of a high order. Taney met the test. His decisions were to elaborate in many fields a restraint and caution that served at once to modify the lines so audaciously drawn by the "Old Court" and to leave to the more elastic realm of legislative discretion the determination of much that judges before him might have arrogated to themselves as the Constitutional Guard.

It cannot be said that the new Chief Justice advanced upon decision with any articulate political theory. He applied no touchstone of doctrine to settle questions as they *should* be settled. Rather, it was his method of approach, his respect both for the opinions of other branches of government and for the possible opinions of future generations, his technique of leaving the maximum of freedom within the Constitutional imperatives which, although only partially accepted by his brethren, imparted the degree of adjustability to our Constitutional structure that has preserved it until today. The recovery of his method and spirit still offers the most happy solution of the controversy which now threatens to center about the Court.

The function of formulating the great questions of policy involved in delimiting the respective spheres of the national and state governments was not, in his view, exclusively confided to the judges. His method of approach was to leave this making of policy, so far as possible, to the trial of experience and legislative judgment, reserving judicial intervention until "the angry and irritating controversies between sovereignties,"¹⁸ arising from conflicts in legislation or executive or judicial action, called for the final arbitrament provided by the Constitution. Every opportunity, he thought, should be given to solving these problems elsewhere than in the court room. "In taking jurisdiction as the law now stands," he said in his dissent in the *Wheeling Bridge* case, "we must exercise a broad and undefinable discretion, without any certain and safe rule to guide us . . . such a dis-

¹⁸ *Ableman v. Booth*, 21 Howard 506, 521 (1859).

cretion appears to me much more appropriately to belong to the Legislature than to the Judiciary."¹⁹

This attitude was not founded in any doubt of the supremacy of the national government or the right and necessity of judicial review, or in narrow provincialism, or in tenderness for the "peculiar institution" of the South; but, rather, in the intuition of the gifted ruler as to the nature and delicacy of the power he exercised.

Taney's judicial self-restraint is most familiar in his treatment of the Commerce Clause. In his opinion in the *License Cases*, he said:

"... the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress.

"... And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

"Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power."²⁰

This view of the commerce clause contemplates a sharing of the power to determine the high question of policy whether in any situation local regulation is satisfactory or whether there is

¹⁹ 13 Howard 518, 587 (1852).

²⁰ 5 Howard 504, 579, 583 (1847).

need for a uniform rule, or a different rule or no rule. Under the Taney doctrine, if Congress is satisfied to leave a matter to the States, that is an end of it. He would permit the evolution of constitutional practice by actual experience, leaving decisions in the first instance to legislatures, rather than to the *a priori* reasoning of judges. The Court would be called upon to set aside a State law only when it came into actual conflict with a law of Congress.

The case in which Taney spoke involved a regulation by a State of the sale of liquor as applied to an interstate shipment. The particular regulation was sustained, but when the question whether a State might prevent shipments of liquor into its territory was presented to the Court much later the power was denied.²¹ Then followed thirty years of agitation for national prohibition, the tardy attempts to repair the Court's misjudgment by the Webb-Kenyon Act²² and the Reed Amendment,²³ and finally the Eighteenth Amendment. It is not unreasonable to believe that an acceptance of the Taney view would have spared us this whole painful and costly episode.

But the Court refused to follow Taney. Instead, it developed the now accepted rule that when the subject of regulation requires a uniform rule the federal government alone may legislate; in other fields the States may legislate until Congress acts; and in still others both governments may act. But the question in which class any particular subject matter belongs has been reserved exclusively for the decision of the judges.

The same attitude of self restraint is shown in Taney's treatment of the right of a foreign corporation to do business.²⁴ Mr. Justice McKinley had held on circuit that a corporation had no existence, and could not even contract, outside the State of its creation. Webster urged upon the Court the view that corporations had a constitutional right to go into any State which local government could not deny. Here, too, Taney refused to arrogate to the Court the ultimate decision of policy. Instead he held that a rule of comity would permit a corporation, in the absence of clear prohibition by a State, to do business through its agents within the State. The power to decide whether it should be excluded, or the conditions of its admission, he left to the State.

²¹ *Leisy v. Hardin*, 135 U. S. 100 (1890).

²² Act of March 1, 1913, c. 90, 37 Stat. 699. See *Clark Distilling Co. v. Western Maryland Railway Company*, 242 U. S. 311.

²³ Act of March 3, 1917, c. 162, Sec. 5, 39 Stat. 1069.

²⁴ *Bank of Augusta v. Earle*, 13 Peters 519 (1839).

His successors, less willing to forego judicial policy making, have narrowed the scope of this decision by superimposing the doctrine of unconstitutional conditions to the right to do business.²⁵

In the *Charles River Bridge* case²⁶ Taney was urged with all the eloquence of Webster to hold that privileges granted by government should carry with them all the immunities from subsequent state action which would be necessary to preserve to them the full measure of their pristine strength. The argument was appealing and the weight of Story's learning and prestige was thrown to Webster's side. But the Chief Justice refused to assume the power of prescribing the rights which a legislature ought to respect. He insisted that the courts could enforce no greater rights than had been unmistakably and definitely granted and that, where there was any ambiguity, the question should be left entirely to the discretion of the legislature. Thus a franchise to operate a bridge did not perforce carry with it immunity from future destructive competition. His reasoning in deciding that charters could not by one iota be enlarged by implication is most revealing: he could not presume the surrender of power by a sovereign State; any such view would restrain the future development of the country; and the judiciary would be plunged into a process of detailed definition and regulation of an essentially legislative character. And basic to his thought was the preservation of the essential functions of government. He wrote:

"The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations."²⁷

Again, Taney's sound intuition led him to refuse for the Court the power to determine when one State should deliver to another a fugitive from justice and to force extradition. He was willing to leave to the Governors of the State the execution of their duty under the Constitution. That they might be derelict in their duty was not a reason for the Court assuming it.

²⁵ Compare, for instance, *Doyle v. Continental Insurance Company*, 94 U. S. 535 (1876), and *Security Mutual Life Insurance Company v. Prewitt*, 202 U. S. 246 (1906) with *Terral v. Burke Construction Company*, 257 U. S. 529 (1922). See Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Col. L. Rev. 321 (1935).

²⁶ 11 Peters 419 (1837).

²⁷ *Id.* at p. 548.

" . . . when the Constitution was framed . . . [he wrote] it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State. . . .

"But if the Governor of Ohio refuses to discharge this duty there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him." ²⁸

In one of its applications, however, the Court has fully accepted the Taney restraint. *Luther v. Borden* ²⁹ arose out of the disturbance of Dorr's rebellion in Rhode Island, an attempt to establish a new constitution and government in that State. The plaintiff, a partisan of the new government party, had been arrested in his house by military officers of the old government, and brought trespass. He claimed that the officers had no authority since the new government had been established by a majority of the people and should be protected by the Constitutional guarantee of a republican form of government. Taney refused to go into the question of the legal authority of the government actually in power, declaring that the questions involved were political and beyond the sphere of the Court. The wisdom and authority of his restraint have never been doubted.³⁰ Its significance has not been fully appreciated.

For the intuition which leads judges to decline to decide what they call a political question, even though it is as much bound up with the legal issue before them as many other questions which they do decide and which laymen call political or economic, is a sound caution in approaching the founts of sovereignty. When in the latter half of the fifteenth century the Duke of York laid formal claim to the crown, demanding an answer from the lords spiritual and temporal assembled in Parliament, the lords sent for the King's justices to have their advice and counsel to find all such objections as might be laid against the claim. To which the Justices, after taking what we may be sure was the most earnest thought, replied that

²⁸ *Kentucky v. Dennison*, 24 Howard 66, 109 (1860).

²⁹ 7 Howard 1 (1849).

³⁰ Compare *Georgia v. Stanton*, 6 Wallace 50 (1867); *Taylor and Marshall v. Beckham*, 178 U. S. 548 (1900); *Pacific States Telephone & Telegraph Company v. Oregon*, 223 U. S. 118 (1912).

" . . . sith this mater was betwene the Kyng and the seid Duc of York as two parties, and also it hath not be accustomed to calle the Justices to Counseill in such maters, and in especiall the mater was so high, and touched the Kyngs high estate and regalie, which is above the lawe and passed ther lernying, wherefore they durst not enter into eny communication thereof, for it pertheyned to the Lordes of the Kyngs blode, and th' apparage of this his lond, to have communication and medle in such maters; and therefore they humble by-sought all the Lordes, to have theym utterly excused of eny avyce or Counseill, by theym to be yeven in that matier. . . ." ³¹

In the fifteenth century judges who intermeddled, even upon invitation, at the very source of sovereign power might lose their heads. In the twentieth the stake is the institution of judicial review.

We have already suggested that the views of Taney are, a century later, of more than historical interest. The Court is again, as it was in his time, the center of political controversy. In both parties, as the result of recent decisions, there is talk of amending the Constitution. Some go so far as to urge a limitation upon the powers of the Court. None of these suggestions has yet been made specific. As soon as this is attempted, the difficulties will appear. Amendments designed to achieve specific purposes will be seen to effect changes far greater than anyone desires and will merely substitute new problems and uncertainties for existing ones.

The present difficulties come from judicial policy-making not necessitated by the simple language of the Constitution, but drawn from judgments and intuitions of the judges. The remedy is not to continue an unwise practice and attempt to counteract it through the dangerous and cumbersome method of amendment, but to change the practice. And the change must be by the Court itself in the attitude with which it approaches judgment upon the validity of laws. Again we turn to Taney for authority that

³¹ Wambaugh, *Cases on Constitutional Law*, Vol. I, p. 3. Similar intuitive caution may have prompted Chief Justice Jay to decline for the Court President Washington's request for advisory opinions. (Sparks, *Writings of George Washington*, Vol. X (1836) append. XVIII) and may have contributed to the decision of such cases as *Muskrat v. United States*, 219 U. S. 346; *Frothingham v. Mellon*, 262 U. S. 447; and *New Jersey v. Sargent*, 269 U. S. 328. See Finkelstein, *Judicial Self Limitation*, 37 *Harv. L. Rev.* 338; 39 *Id.* 221.

the practice of the Court may be subjected to critical examination without conviction of heresy. "If the judgment pronounced by the court," he wrote, "be conclusive it does not follow that the reasoning or principles which it announces in coming to its conclusions are equally binding and obligatory."³²

In Taney's day the pressure of regulation came from the States. Today because of changed conditions the same pressure finds its outlet in Congressional enactments. The Congress is quite frankly using its granted power to achieve collateral results. These attempts bring a divided response from the Court. One point of view is that the Court must examine into ultimate purposes. If it finds that Congress seeks by indirection to achieve ends which judges for *a priori* reasons of federal symmetry think or have thought should be controlled solely by the States, the Court must strike down the law, whether or not State control is possible or desired. If the country does not like this, it is said, it may change the Constitution.

The inheritors of Taney's tradition may well take a different view. They may say that the answer to all these questions is not in the simple words of the Constitution. To them it is of pre-eminent importance that judges should use the utmost restraint in making policy. To them it is enough—passing for a moment the due process clauses—that Congress is seeking whatever end it may be through the medium of its granted powers. They may say with Taney, "The object and motive . . . are of no importance, and cannot influence the decision. It is a question of power."³³

True, if a conflict occurs between such a federal law and state policy however expressed, the Court must resolve it to prevent "the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force."³⁴ But one may feel a certain unreality in striking down a Congressional exercise of a granted power, in the absence of any conflict with state policy, on the ground that in purpose and effect it invades a field reserved to the States. Judicial restraint might well lead the Court to hold its hand until an actual conflict occurs. In such a case the country would be a unit in accepting the judgment of the Court which law should prevail to preserve the federal system.

³² Quoted by Swisher, *op. cit.*, p. 157.

³³ 5 Howard 583 (1847).

³⁴ 21 Howard 521 (1859).

The view that Congress will usurp the functions of local government without constant discipline by the Court, subjects the institution of judicial review to too great a strain by exposing it too frequently to the dangers from which the King's justices respectfully asked to be excused. Some encroachment there may be upon the "fearful symmetry" of the federal system which the "immortal hand" of Marshall framed in his basement court room. Some things may be done which appear unwise even in the long view. But no choice is possible which includes all good and avoids all harm. The choice of restraint, which entails sharing with Congress and the State legislatures the task of evolving a custom and practice, as well as a law, of the Constitution, not only assures that the path may be lighted by experience as well as logic but gives more promise than any other that the powers of the Court will survive for use when they are needed.

In the field of the due process clauses of the Fifth and Fourteenth Amendments there is equal need for judicial self-restraint. In cases of this sort the Court is asked to set aside national and State laws for reasons which in most instances defy statement convincing to the man in the street. The Court has shown a tendency to make this vague phrase—due process of law—a congeries of specific concepts drawn from the beliefs and ideology of some of the judges. Such a limitation upon a democracy, as militant as it was in Taney's day, cannot be reasonably expected to endure. And little is gained by the interpretation that the clause prohibits what a majority of the judges find to be arbitrary or unreasonable. Anything with which we strongly disagree seems unreasonable and arbitrary.

Again, what is needed is not a rule but a method of approach. The due process clause conceived as a method of sober appeal to better judgment has a real function and utility. But the appeal must be successful. If it fails, it is worse than useless, as the last attempt testifies.³⁵ Justice Holmes used to tell a story of going, as a young man, to Emerson with an essay he had written on Plato. After reading it, Emerson's only comment was, "my boy, when you strike at a king, you must kill him."

If the Court strikes at a law with the due process clause it must kill it. It must be able to convince the great majority of press and people by compelling analysis in terms generally accepted that

³⁵ *Morehead v. Tipoldo*, 80 L. Ed. 921, decided June 1, 1936; see Mr. Landon's telegram of June 11, 1936, to the Republican Convention, *New York Times*, June 12, 1936, p. 1; Democratic Platform, 1936, "The Constitution."

the law was arbitrary. If judges cannot convince their brethren, they might well ponder the implications of their failure. Judges, as Justice Holmes has said, "need something of Mephistopheles." They "too need education in the obvious."³⁶

Taney's great service was to teach the lesson of self-restraint. His task came to an end in a setting of unequalled tragedy. Appomatax was casting its inevitable shadow over fields drenched in blood. His son-in-law was with the forces of the Confederacy. Old, lonely, broken in body and spirit, he was hated and vilified by men whose passions were fanned by war and whose pens were dipped in gall. He died in October, 1864. Of official Washington only the President and two members of the Cabinet would attend the brief service held there. When his body was brought back to rest in his native State his spirit might well have said in the words of Wolsey:

"An old man, broken with the storms of state,
Is come to lay his weary bones among ye.
Give him a little earth for charity."

His Maryland has given him a little earth, and not in charity but honor. Indeed, he sits today before the old State House, first in Maryland's affection, his brooding figure the cynosure of awe and veneration. Beyond his homeland, prejudice and calumny have beat upon him with a blind relentlessness scarce equalled in our history. Yet, in the musty pages of the Reports, his teachings have been preserved and today those who anxiously defend our Constitutional order will do well to scan with care the records of his thought. For they disclose that high humility without which judicial power must ultimately fail.

MR. LAUCHHEIMER: Mr. President, I move that the thanks of the Association be tendered Mr. Acheson for his very interesting address.

The above motion was duly seconded, and having been put to a vote, was declared carried.

THE PRESIDENT: The thanks of the Association are due and are extended to Mr. Acheson. Now, gentlemen, what is the pleasure of the Association? As you will have noted, we have transacted absolutely none of our routine business. We can now either remain in extended session and finish up our routine business, which would consume about an hour, I take it, or we might

³⁶ Collected Legal Papers, p. 295.

call upon Mr. Hisky to make a recess motion until about three o'clock this afternoon and then finish our work. What is your pleasure?

MR. LAUCHHEIMER: I think that we should continue in session, Mr. President. We would have great difficulty, in my opinion, should we recess to meet again this afternoon. What we have before us will not take us very long, I am sure.

THE PRESIDENT: Well, if that is the pleasure of the Meeting we will proceed.

MR. CHAPMAN: Mr. President, inasmuch as we have been thinking about Chief Justice Taney, I should like to announce that Mr. Delaplaine has brought down here some pictures of the home life of the Chief Justice, and also a number of his letters, some being those which he received and some being those which he addressed to others. They are left in Mr. Delaplaine's possession because they are priceless, but at the same time, he wishes me to announce to the membership that they are open to the inspection of all those who are interested. They will be exhibited here just immediately following the meeting this morning.

THE PRESIDENT: Now, the next in the order of business this morning is the unfinished business.

MR. CHAPMAN: Mr. President, we have here the Report of the Auditing Committee stating that they have examined the records of the Treasurer. Mr. Requardt is now in the room, I believe, and has that report.

THE PRESIDENT: Yes, sir. Mr. Requardt, as Chairman of that Committee, and as a well-known auditor and Master, are you ready to make the report?

MR. JOHN M. REQUARDT: We have found everything in fine shape, Mr. President. We have the report here.

THE PRESIDENT: We trust the report is as accurate as it is informal.

(Applause.)

MR. WALKER LEWIS: I would like to express my appreciation to Arthur Machen, Jr. His father was counsel for John Philip Hill, who is the culprit in this story, and Arthur was not only nice enough to make available his father's file, but also his mother's scrapbook on the trial, and also go over the draft at considerable length and make many suggestions, and I can assure you had he not been so helpful this paper would be even worse than it is.

(Laughter.)

Now for the story of Franklin Farms.

ADDRESS BY H. H. WALKER LEWIS

THE BATTLE OF FRANKLIN FARMS

1 F. 2d 954 (1924)

In the 1920's, when this brief history opens, 3 West Franklin Street, Baltimore, was a three story town house squeezed in between the Rochambeau Apartments on its East and a solid row of nondescript brick buildings on its West. Built in about 1840, its pleasing proportions stemmed back to the classic simplicity of the Georgian period. Its oversize windows had a cheery, open look. Its massive mahogany front door and brass knocker glowed with hospitality.

In the more stately era of its birth, the location had been on the outskirts of Baltimore and at one time had been known as "Howard's Woods". Rochambeau's troops had camped there in 1782 after the great victory at Yorktown. In the early 1800's the area gained further distinction when part of the block became the site of the Roman Catholic Cathedral.

For a time there had been lawn, trees, a carriage house, and even a view of the Washington Monument. Now, 3 West Franklin Street seemed smothered by its neighbors. The only breathing space that remained was a little courtyard, dark and undistinguished. Undistinguished, that is, except for one thing, the lively imagination of Congressman John Philip Hill, whose wife had inherited the property from her mother.

John Boynton Philip Clayton Hill, later self-simplified into just John Philip Hill, was born in Annapolis, Maryland, in 1879. His place of birth, it seems, was a whim of fate. Years later when drumming up votes in the Third Congressional District, he marched into an East Baltimore home, stopped an astonished housewife in the midst of her sweeping, and declared with a grandiloquent gesture, "Madame, I might have been born in this house if my mother had not been away

visiting at the time." It is said that he managed to find more Third District homes to be almost born in than there were beds for George Washington.

In 1900 he tied for top honors at Johns Hopkins and in 1903 graduated from Harvard Law School with such eclat that he was asked to teach government at Harvard, which he did. After a year he came to Baltimore and in 1910 was appointed United States Attorney for Maryland, an office which he held until 1915, when he left with the National Guard for service on the Mexican border. He had turned his talents to many things besides law, including politics, military activities, and, last but not least, lectures on government at Johns Hopkins, Goucher, and The University of Virginia, the substance of which were published in 1916 in an excellent little book entitled "The Federal Executive".

After World War I, from which he emerged as a lieutenant colonel, politics absorbed him. In 1920 he was elected to Congress as a Republican from the normally-Democratic Third Maryland District. In this period, the most inflammatory of all political issues was prohibition. The fact that Maryland was one of the few states that rejected a local enforcement law showed the temper of a majority of its citizens. On this issue John Philip Hill could hardly have been a more loyal son of his own State. He was a wholehearted, dyed-in-the-wool, 100% anti-prohibitionist.

Prohibition was the most philanthropic political phenomenon that we have ever experienced. Its sole motivation was the alleged benefit of others. No one wanted prohibition for himself, it was always for the good of someone else.

The backbone of Prohibition was in the rural areas, but it was designed for the salvation of city people. Righteousness demanded that city dwellers be parched dry for their own good, even though farmers were to remain free to convert their apples and fruit juices into time-honored beverages.

Section 1 of the Volstead Act defined "intoxicating liquor" as any beverage containing more than $\frac{1}{2}$ of 1% alcohol, but a neat little amendment was tacked onto the punishment section stating that:

"The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home. . . ."

The avowed purpose of this amendment was to spare farmers from a pitiable plight. Representative John A. Moon, of Tennessee, pointed out that:

"If a farmer should permit a keg of sweet cider to ferment and contain more than $\frac{1}{2}$ of 1% of alcohol and did not throw it away immediately on knowledge thereof, he would have to pay fines or have to go to jail and probably lose his farm."

Farm-lovers all over Congress suddenly discovered that the making of cider from non-salable apples was essential to the national economy. And in the general spirit of thinking of the other guy, a tearful plea was made for citizens of Italian and Greek birth, "whose custom it is to make a small quantity of wine for consumption in their homes".

Thus were cider and fruit juices exempted from penalty if made in the home for domestic consumption, provided only that they were nonintoxicating in fact, whatever that might mean. Unlike other potations, they were not arbitrarily limited to $\frac{1}{2}$ of 1%. Nor did it seem likely that revenue agents would be able to get into people's homes to see if their cider and fruit juices proved intoxicating when imbibed.

Some people liked to think that this exception showed proper respect for God. After all, it was not the farmer who made fruit juice ferment. But whether or not it exemplified reverence, the exception had broad support from the agricultural areas. In fact, it has been authoritatively stated that the Volstead Act could not have been passed if it had outlawed the pious enthusiasm with which farmers salvaged their bruised apples and other fruit. On the other hand, righteous regard for the souls of city dwellers required that beer and other urban beverages be kept strictly below $\frac{1}{2}$ of 1%.

From the very first John Philip Hill's heart bled for the city dwellers. In addition, it bled for John Philip Hill, and no one was quicker than he to sense the campaign possibilities. From his first moment in Congress he became a thorn in the flesh of the Drys. He challenged Wayne B. Wheeler to debate. He kept up a stream of needling correspondence with Prohibition Commissioner Roy A. Haynes. He denounced the minions of the Anti-Saloon League. At every opportunity he pilloried the outrageous discrimination in favor of the farmers.

From a political standpoint it paid off magnificently. In January, 1923, a debate in New York with Wayne B. Wheeler, General Counsel of the Anti-Saloon League, drew not only a capacity house but also headlines. In April, a mass meeting turned out in Cumberland for his denunciation of George W. Crabbe and the local Drys. In July, more headlines heralded his attacks on Roy A. Haynes. It was heady stuff but, thus far, past was merely prologue. It was not until the autumn, that he really hit his stride.

In the format of the Baltimore *Sunpapers*, the back page customarily carries the most important local news. It is here that readers

look for hometown headlines. In fact, the true Baltimorean normally starts here, knowing that he will be rewarded with things that matter, unencumbered by items about the doings of Congress, the President, and other outsiders. For a time John Philip Hill made the back page his home.

On Wednesday, August 22, 1923, it sported a large picture of him with the following story:

"Congressman John Philip Hill today served formal and solemn notice on the Probation Commissioner and the Collector of Internal Revenue for Maryland that on or about noon, September 7, he will begin producing non-intoxicating fruit juices for use in his home. His intention is to get from the prohibition department a definition of 'non-intoxicating' as used in the Volstead Act.

"When the new regulations concerning the manufacture for home use of cider and similar fruit juices were issued; he said, 'I expect to find the definition in them. But after reading them carefully I find that 'non-intoxicating' is defined simply as 'non-intoxicating'.

"So I'm going up in the country and get some grapes and go down on Baltimore Street and get a press, and I'm going to start making grape juice. I have written the Prohibition Commissioner to ask him just when I should stop fermentation. In his answer I expect to learn after two years of inquiry just when a beverage ceases to be non-intoxicating and becomes intoxicating."

Reporters were prompt to interview local officialdom.

"Before I can do anything", said Edmund Budnitz, Director of Prohibition in Maryland, "I'll have to look up the regulations."

"The question will require elucidation", said William H. Pohler, his chief clerk.

"Politics!" sniffed George W. Crabbe, Superintendent of the Maryland Anti-Saloon League.

On Wednesday, September 5, the paper carried a back page picture of John Philip embarking on a hydrometer hunt, in the capacity of "private citizen and seeker for truth".

On Thursday, another picture showed him with baskets of Anne Arundel County grapes. "In making my grape juice", he said, "I will follow the directions of the Department of Agriculture." There was, however, a cloud on the horizon. He could find no hydrometer that would register the alcoholic content of fruit juice. The Bureau of Standards in Washington advised him to distill and measure a known

amount, but this was against the law. He had been told that an ebulliometer would do it. This was a costly instrument, however, and the Prohibition Enforcement Unit had the only one available. "What's a poor man to do?" he demanded.

On September 7, the paper reported that the great experiment to learn the truth about prohibition had begun. With his staunch ally in science, Captain W. H. Stayton of the Association against the Prohibition Amendment, Hill had waited fifteen minutes for government agents to show up and when none arrived he proceeded to squeeze his grapes, amid photographers' flashes in his cellar.

"Tomorrow" said John Philip, "I'm going to take samples of my stuff and ask the Prohibition Department for an analysis. Then after ten days I'm going to ask another test and so on until I am ordered to stop fermentation. In ninety days I'm going to bring over the Judicial Committee of the House and ask them to sample my non-intoxicating fruit juices."

On September 8, the headline read, "HILL'S GRAPES BUBBLING AND HE AWAITS RESULTS."

On September 10, Congressman Hill was reported in Southampton, Long Island. "But" said the paper, "His Spirits go Marching On."

On September 18, it was reported that samples tested by Penniman & Browne, Chemists, registered a high of 6.31%. John Philip so advised Prohibition Director Haynes and penned a further appeal:

"My grape juice is still fermenting and the alcoholic content is daily becoming greater. I therefore request an immediate answer."

Haynes and his minions purported to remain stonily aloof. But on September 27, just after an official pronouncement that the Prohibition Unit would have no part in Hill's shenanigans two agents arrived at his home with an ebulliometer. John Philip greeted them as long lost friends and enthused over their miraculous contraption. "The first ebulliometer ever seen in Maryland," it was reported. It was a device for measuring boiling point, but after John Philip had helped the agents do this with every sample in the cellar, it was discovered that they did not have the chart needed to translate boiling point into alcoholic content. The agents retired to Washington, while John Philip retired to the privacy of his parlor, already filled with representatives of the press.

On September 28, the back page headlined that Haynes was awaiting a report on Hill's wine. But it seemed that the Congressman had

already gotten inside information. There was said to be 11% in one sample and John Philip was loudly proclaiming 12% as the permissible limit. He wrote Attorney General Daugherty. He laid the matter before the Council of Governors. He placed a call for President Coolidge.

It was a woman who decided that matters had gone far enough. Mabel Walker Willebrandt, Assistant U. S. Attorney General in charge of prohibition enforcement, directed the District Attorney for Maryland to take action. At first, U. S. Attorney Amos W. W. Woodcock demurred. He and John Philip Hill had been brother officers in the Maryland National Guard, and he knew that Hill hoped for the publicity of an indictment. But orders were orders and on October 4, the *Evening Sun* reported that the matter would be submitted to the Grand Jury.

The Congressman's reaction was prompt and characteristic. The U. S. Attorney and the members of the jury received the following formal invitation:

JOHN PHILIP HILL, M. C.

Requests the Pleasure of the Presence

of

THE FEDERAL GRAND JURY

At an Informal Inspection of his Home, 3 West Franklin Street

Thursday, October 11, at ten o'clock

Refreshments

Pre-War and Otherwise

The climax came quickly. Col. Woodcock did not seek an indictment but instead obtained a court order padlocking John Philip's cellar. It was the first such proceeding known to have been taken against a private dwelling, although it was standard practice to padlock speakeasies under the nuisance provisions of the Volstead Act. In keeping with this procedure, an order for a temporary injunction was signed by U. S. District Judge Morris A. Soper.

This was on Thursday, October 11, and on that afternoon the back page of the *Evening Sun* carried a picture of John Philip Hill applying red, white, and blue seals to his cellar door, each bearing a profile of President Abraham Lincoln. The same afternoon an order came through from the War Department promoting the Congressman from Lt. Col. to Colonel in the Reserve. "This is my lucky day", he said.

The day may have been lucky, but the ensuing period was one of discouragement. For more than a month few, if any, newspapers had gone on the streets of Baltimore without John Philip Hill's name or picture on the back page. But there was reticence about matters pending before the courts and the publicity dried up. There were occasional headlines, such as, "Arthur W. Machen, Jr., President of Maryland Branch of Assn. Opposed to the Prohibition Amendment will represent Congressman Hill" and "Hill Answer Denies Volstead Law Infraction", but for a public man with his hunger for print this was a starvation diet.

Besides, the injunction proceeding seemed to have been put on ice. The Court was reluctant to be used as a stepping stone in Hill's progress towards re-election, and the District Attorney could think of hundreds of things he would rather do than try the case. It was argued that since Hill had not been arrested he should be willing to give way to those who were in jail waiting trial, and the Prohibition Unit obligingly went on nabbing offenders faster than they could be tried.

Hill's attorney, Arthur W. Machen, Jr., was one of the most astute and forceful lawyers of his day. But strain and struggle as he might, he never could get a date set for a full scale trial. Either the Court or the U. S. Attorney or both always had weighty reasons why some other time would be better.

And so the wine experiment was left, temporarily, in a stalemate. To one of John Philip Hill's temperament, this was galling. But even aside from all the publicity, he had gained at least one victory. On September 7, 1923, Roy A. Haynes, goaded beyond endurance, had answered a letter of Hill's in a way that made the front page in Baltimore and many other cities, summarized by the *Evening Sun* of September 18, in the following headlines:

HAYNES ADMITS DRY LAW DISCRIMINATES
IN FAVOR OF FARMERS.

SAYS IN REPLY TO HILL'S QUERY MEASURE WAS NEVER
INTENDED TO CHECK THEIR ALCOHOLIC RIGHTS.

VAGUENESS OF RULE INTENTIONAL TO ALLOW
MAKING WINES AND CIDER.

MUST BE FARMER TO ENJOY THIS PRIVILEGE, IS INFERENCE,
AND CITY DWELLER WHO USURPS IT IS LIABLE
TO ARREST.

This of course, is just what John Philip had been claiming all along.

Any other person might have been content to rest on his laurels at this point. But not Hill. He was all bounce and brass and he had an election coming up in November.

In June, 1924, he sailed for England to address the anti-prohibition conference in London. After his return it was apparent that the ocean voyage had exerted a benign influence. "He had", he said "decided to become a dirt farmer and raise apples in the backyard of Franklin Farms."

Under the Volstead Act, cider was in a preferred position. It was not covered by the $\frac{1}{2}$ of 1% limitation and was not illegal unless in fact intoxicating. At what point would cider be considered intoxicating? No one, of course, knew, but John Philip had by this time managed to worm out of Prohibition Commissioner Haynes that farmers were not molested if their cider stayed under 2.75%. This, of course, was only farmers. City slickers who bought apples for beverage purposes were outside the pale of the law according to Haynes.

This was all the encouragement that John Philip Hill needed. "I am delighted to be at home", he said. "It is a most auspicious time to be in Maryland. The cider season is approaching and throughout the State farmers are getting ready to press the legal juice from the Maryland apple.

"I shall go to work at once to convert the land adjoining my home in Franklin Street into a small farm and make for myself a press in accordance with the recommendations of the Department of Agriculture.

"On September 8, next, at noon, I shall press the legal juice of the Maryland apple into the cask. Of course, I shall request Federal Prohibition Commissioner Haynes to advise me at which point I must stop developments if, by chance, the apple juice shall enter upon the various stages of fermentation, since I desire to obey all laws, in accordance with the platforms of the Republican, Democratic, and Progressive Parties."

The so-called "land adjoining my home" was a small brick-paved courtyard, inhabited only by stink-wood trees and trash. Except for an entrance-way leading in from the sidewalk, it was completely enclosed on two sides by Mr. Hill's house, on a third by the frowning battlements of a seven-story apartment building, and in the back by a high brick wall.

But now, under the aegis of John Philip's green thumb, it was transformed. The stink-woods had miraculously become apple, their boughs laden with forbidden fruit tied on with string. Here and there in tubs stood smaller trees which had been apple from birth. An old fashioned cider press occupied the center of the stage and in the background loomed a freshly painted barn through whose windows

peered contented cows. It was the look of these gentle ruminants that was most arresting. Although convincingly bovine, one wore horn-rimmed spectacles and the other sported a large cigar.

Hill's agricultural miracle drew admirers like a magnet. The great Henry L. Mencken, himself no lover of prohibition, was an early visitor and inspired, if he did not write, the following tribute in the *Evening Sun*:

"Under the spreading apple tree Congressman John Philip Hill stood today and watched the birth of Franklin Farms.

"As proof of Mr. Hill's wizardry in enticing trees to grow, there stands this afternoon an orchard of seven healthy trees, their branches drooping beneath the weight of cider apples. The brick wall in the rear has become a red and white striped barn and over the door is the legend 'Franklin Farms'.

"Mr. Hill's painstaking fidelity to nature has gone even further. On either side of the barn door is a window and from each window leans a fragrant breathed cow, so lifelike that one expects a contralto 'Moo' at any moment. By some freak of nature they resemble George W. Crabbe, Superintendent of the Maryland Anti-Saloon League, and Prohibition Commissioner Roy A. Haynes. When Mr. Hill's attention was called to this he evidenced a surprise which was equaled only by his profound interest in the phenomenon."

To a casual observer, the cows seemed to have been sired by the cartoonist of the *Baltimore Sun*, but this was indignantly denied. "Nature's ways are wondrous to behold", said Mr. Hill.

On September 8, Franklin Farms was formally dedicated, amid musical renditions of "Down on the Farm" and "In the Shade of the Old Apple Tree". On September 9, farmer Hill, in overalls, started making cider. After a decent interval, on September 16, the *Evening Sun* reported:

"HILL WILL STAGE PARTY TO FORCE HAND OF HAYNES.
PLANS TO INVITE FRIENDS TO DRINK 2.75% CIDER.

"Mr. Hill estimates that tomorrow at noon his cider will contain 2.75% alcohol. He will then pasteurize it to stop fermentation and on Saturday night will invited in his friends to drink."

On Wednesday, the paper explained how Hill planned to pasteurize his cider, by immersing jugs of it in 140 degree water, and on Thursday reported:

"CONGRESSMAN WORKS ALL NIGHT TO KEEP
APPLE JUICE IN BOUNDS.

"Anybody who wants to help me force Probation Commissioner Haynes to testify for 2.75% beer and is willing to take a chance of arrest is invited to my party Saturday", Hill said.

"The cider will be labeled "2.75% cider, legal for the farmer". There will also be some beer marked, "Less than 1/2 of 1% beer, legal for the city man"."

Each day the headlines grew and by Saturday everyone in town was Hill's friend, eager to taste his cider. Sixty-five gallons disappeared in about as many minutes, along with a few swigs of near-beer and mountains of doughnuts.

In spite of rain, the turn-out had been so enormous and so highly publicized that it could not be ignored. Not by Haynes; not by Wheeler; not even by Coolidge. On Tuesday, September 23, the headlines ran:

WOODCOCK TOLD TO TAKE ACTION ON HILL PARTY.
MRS. WILLEBRANDT, ASSISTANT ATTORNEY GENERAL
ORDERS INVESTIGATION.

There was no dilly-dallying this time. On September 24, Hill was indicted by the grand jury, and on September 30, he was arraigned. He pleaded not guilty and his lawyers, Arthur W. Machen, Jr., and Shirley Carter, asked for an immediate trial, but Judge Soper wanted no campaigning in his courtroom and set the case for November 10, after the election.

Franklin Farms proved as fruitful of votes as of apples. On November 4, Hill swamped his Democratic opponent, Dr. George Heller, by almost two to one.

On Monday, November 10, the trial got underway in the very court in which for five years Hill had himself been the chief prosecuting officer. Presiding was Federal Judge Morris A. Soper who had been appointed to the U. S. District Court in 1923. Before that he had been for seven years Chief Judge of the Supreme Bench of Baltimore City; later, in 1931 he was to be elevated to the Circuit Court of Appeals for the Fourth Circuit. There has been no better beloved and more respected judge in Maryland. On the occasion of his eightieth birthday, on January 24, 1953, the *Sun* was to refer to him as the youngest octogenarian ever to adorn the State, a man so jaunty, so well-adjusted, and so lovable that it makes us all feel happy just to see him.

Judge Soper was regarded as a bulwark of Prohibition. But no one could have handled a trial with greater dignity and impartiality.

Hill had been indicted for manufacturing and possessing intoxicating wine and cider, and for maintaining a public nuisance at his home at 3 West Franklin Street. Judge Soper was to find the nuisance charge unsupported by the evidence, and even at the outset it was apparent that the crucial issue was whether Hill's wine and cider were intoxicating. On this Judge Soper held that the $\frac{1}{2}$ of 1% limitation was not applicable, and that the wine and cider were not illegal unless they were intoxicating in fact.

At the time, Judge Soper's ruling was of great legal significance. Notwithstanding the language and the background of Section 29 of the Volstead Act, the Prohibition Enforcement Unit claimed, as against city dwellers, that any beverage was legally intoxicating which contained more than $\frac{1}{2}$ of 1% of alcohol by volume. There was powerful backing for this view and it was strongly urged upon the court by U. S. Attorney Amos W. W. Woodcock and his talented assistant, James Treat Carter. The Court's ruling to the contrary was a landmark.

What then was in fact intoxicating? Hill's witnesses described prodigious feats of drinking without intoxication. Anthony Dimarco, who said he had once had the honor to be defeated for Congress by Mr. Hill, testified that he had drunk quantities of Franklin Farms cider without adverse effect.

"Perhaps you do not know when you are drunk", said Mr. Woodcock.

"Oh yes I do!" retorted Mr. Dimarco.

The Government, on the other hand, produced people who tottered at the mere mention of alcohol. One was the eminent and respected Dr. Howard A. Kelly, of Johns Hopkins fame. He testified that anything over $\frac{1}{2}$ of 1% was intoxicating. This was just what the prosecution wanted, but on cross examination Dr. Kelly said that even the minutest drop must be considered intoxicating.

In a sense, also, Dr. Kelly was trapped by his own eminence. Medical confreres who differed with him about prohibition longed to see the great man stumble and spent hours combing through his mountainous writings. With their help, Hill's attorneys led him gently out onto a limb, later described by a spectator as follows:

"Dr. Kelly", asked Shirley Carter, "have you always opposed the use of alcohol?"

"Always", said the good Doctor.

"Have you never recommended its use?"

"Certainly not! It is a poison."

"Dr. Kelly, have you contributed to the medical literature on operative gynecology?"

"Perhaps", said the Doctor, who had written more than most individuals read.

"Perhaps in this book?" said Mr. Carter, producing a medical tome of inspiring proportions. "And would you kindly read the passage which I have marked."

And there, for all to see, the great Dr. Kelly had in 1898 extolled the virtues of whiskey eggnog and recommended it for both nutrition and stimulation.

Another government witness, Dr. Harvey W. Wiley, also testified that any alcohol is intoxicating, even the least quantity. He had been Chief Chemist of the Department of Agriculture for thirty years and, in puffing up his professional qualifications for the benefit of court and jury, the District Attorney brought out that he held a degree from the University of Berlin. This was all the lead that Mr. Machen required. Soon he had Dr. Wiley reminiscing happily about beer parties as a feature of German student life. He had often drunk beer all night, he said, without missing any classes next day. And, he recalled with special pride winning a prize by walking a straight line after thirteen quarts of beer. After these revelations even the hardest of Hill's witnesses seemed to hang their heads in shame.

It was clear that the element of time had also to be considered, since the wallop of an alcoholic beverage depends on how fast you drink it. To the defense, the appropriate pace was that of a Kentucky colonel contentedly sipping a julep on his wisteria covered veranda; to the prosecution, it was a question of whether one would drown before becoming inebriated. The choice was between the parlor and the pig sty.

On this issue, Judge Soper was something less than helpful to the defense. He instructed the jury that:

"Intoxicating liquor is liquor which contains such a proportion of alcohol that it will produce intoxication when imbibed in such quantities as it is practically possible for a man to drink."

This definition would make it difficult to wink at the intoxicating qualities of 11% wine.

At times it was puzzling to know just who was being tried. Mr. Hill's admirers had presented him with a huge basket of pink and yellow chrysanthemums and he looked more like an honored guest than a prisoner in the dock. Also, his lawyers were not only corpora-

tion counsel of great eminence, serving without fee, but whenever possible, they took the offensive. They demanded the introduction of the Hill-Haynes correspondence, and they kept offering in evidence bulletins of the Department of Agriculture on the fermentation of cider, the processing of grapes, etc. The government had to struggle fiercely to have such embarrassments excluded.

Mr. Machen told the jury, "What is on trial before you is not John Philip Hill but the last vestige of American liberty."

"I object", said District Attorney Woodcock.

"Mr. Machen", said Judge Soper, "If you desire to practice in this court you must conform to the rules. This is no place to make a speech for or against prohibition. You may feel that the law robs you of your liberties, but it is not for you to say it here."

As befitted a pillar of the Church, Judge Soper approached the question of intoxication on an intellectual plane. In instructing the jury on how to gauge the power of John Philip's wine, he said:

"* * * You were shown by ocular demonstration the amount of brandy which would contain a like amount of alcohol as a quart of the cider which was manufactured by the defendant. Now the wine which we are now discussing contained, some of it, approximately four times as much alcohol as the cider. If you can visualize the amount of brandy pictorially represented by Dr. Kelly as containing as much alcohol as was in a quart of the cider, and multiply that by four times, you get an idea of the brandy equivalent of a quart of the wine which contained the highest alcoholic content. Now, then, if you believe it was practically possible for a man to drink two, three, or four quarts of that liquid, you would be able to figure out how much would be represented by an equivalent of brandy. Matters of that sort may assist you in determining this question."

Finally, the shouting and the tumult died, and at 1:47 p.m. on Wednesday, November 12, John Philip's fate was entrusted to the jury.

For a time the crowd in the courtroom lingered, expecting a prompt verdict. When the jury failed to return, the spectators drifted away and the participants grew tense. John Philip fingered a copy of "Pilgrim's Progress", which, he said, gave him great consolation. Soon he seemed to lose interest. Possibly he remembered that John Bunyan had written it while in jail.

Night came and still no verdict. It would be a close thing and for the first time, perhaps, John Philip saw yawning before him an abyss

which the excitement of the prior proceedings had tended to obscure. A conviction would almost certainly mean his expulsion from the House of Representatives.

Prohibitionists possessed more hate than humor. Hill's persistent needling and ridicule had infuriated every Dry in Congress. During the earlier wine episode there had been an organized movement to censure or impeach him for deliberate violation of the Prohibition law. It failed chiefly because his padlocking had left the issue of guilt in suspense. If he were now convicted, it was easy to foresee the result. The Drys had the votes and it was only a question of how they would go about it.

When Judge Soper went home for the night he left word that if the jury came to an agreement it should leave a sealed verdict. The night wore on without it. Finally, after seventeen hours, the jury left a paper with the clerk and went out for breakfast. Apparently, it was the tantalizing smell of bacon from a restaurant across the street that got the wheels of justice off dead center. At 10:00 a.m. the Court reassembled and the verdict was opened. It read, "Not guilty of the matters in which he stands indicted."

Congratulations poured in from all sides.

"Wish we had you in Georgia", telegraphed William E. Bush of Augusta.

"Hail to the tribune of the people", wired George Stewart Brown from New York.

"Politics, pure and simple", said Andrew J. Volstead in Granite Falls, Minnesota, while Roy A. Haynes declared himself "Unmoved", and President Coolidge made no comment.

There was even a poem for the occasion, entitled "Johnfillup's Victory", which ended:

"Twelve honest men and true the court did choose
To try Johnfillup for his jest with booze,
Twelve honest men heard learned doctors say
A single drop of wine will make you gay.

Twelve honest men discussed for weary hours
The arrant nonsense of the Volstead powers.
Twelve honest men who knew the strength of thirst,
Gave their opinion and were then dispersed.

They ruled a townsman, and a farmer, too,
Were not intoxicated by home brew,
A simple wine, of merely ten per cent,
Was just and fair and was the law's intent.

"My flat is tiny, there's no home brew space,
But if some friend will send to me a case,
An ancient beaker to the brim I'll fill
And drink the glory of Johnfillup Hill."

What passes for progress has long since reduced the house to rubble and converted Franklin Farms into a parking lot. The roar of traffic has replaced the squeak of the cider press. But to the initiated, a special aura still lingers. Such a one need only stand there in the autumn moonlight and the passing rumble will conjure up the deep-throated laugh of John Philip Hill sampling his vintage.

THE PRESIDENT: Thank you for a delightful and most interesting address.

(Adjournment followed at 10:15 p.m.)

FRIDAY MORNING SESSION

June 24, 1960

(The meeting was called to order by the President at 10:15 a.m.)

THE PRESIDENT: The meeting is called to order. Will you kindly be seated?

THE PRESIDENT: The first order of business is the report of the Auditing Committee, Mr. Herbert Myerberg, Chairman.

Mr. Myerberg?

MR. MYERBERG: Mr. President, your Committee, consisting of Vincent L. Gingerich, Alexander Gordon III, and myself, spent all day yesterday auditing the books.

We examined all the vouchers and found everything in order.

We had no criticism whatever to make of the job that Mr. Clagett had done, except that he had an inordinately large surplus which we felt ought to be distributed in some manner among the members, but he talked us out of that. He said they had to pay for this meeting and that would reduce it.

But seriously our Committee felt that Mr. Clagett should be highly commended for the very efficient and very fine way in which he has kept all these records.

He mentioned one thing that surprised us. He said that they had no permanent bookkeeping system but that all the vouchers going back to 1880 were maintained in some open files, and that among the interesting items there was one item for a keg of whiskey at a cost of one dollar fifty cents. I hope that makes some impression on us to try to keep our expenses down in the future.

(Laughter.)