WILLIAM NELSON CROMWELL

1854-1948

AN AMERICAN PIONEER

in

CORPORATION, COMPARATIVE AND INTERNATIONAL LAW

By

ARTHUR H. DEAN

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To Polly

With much love and affection and many thanks for all her patience and good nature during the many hours spent on research and the writing and re-writing of this volume and for her untiring efforts in finding and gathering up all the innumerable documents and works of reference left spread on the study floor after a weekend of work.

A. H. D.

FOREWORD

By the

HONORABLE JOHN FOSTER DULLES
Secretary of State

August 27, 1956

My association with Sullivan & Cromwell began in June, 1911. I had then graduated from Princeton, Class of 1908, had spent a year at the Sorbonne in Paris and completed in two years the law course of George Washington University at Washington, D. C. I decided to try my fortune in New York, preferably with a law firm which had an international practice which would give me an opportunity to work in the field of foreign affairs. This had been a tradition in my family, which I wished to carry on.

I went to New York armed with letters of introduction from my grandfather John W. Foster to the heads of certain New York law firms whom he had come to know through his own wide experience in diplomacy and international affairs. These letters served to give me a courteous reception, but not a job. A degree from Princeton was an acceptable credential so far as concerned undergraduate work. But collegiate honors counted for little. The Sorbonne counted for nothing and George Washington Law School was unknown to New York. Law degrees from Harvard or Columbia were, at the time, the requirement for admission to the eminent law firms of New York.

I returned to Washington considerably disheartened, and counseled with my grandfather. He said that there was one prominent international lawyer whom he did not know personally but with whose former partner he had been associated in his own early law work. The lawyer he referred to was William Nelson Cromwell, and the former partner he referred to was Algernon Sydney Sullivan, in whose office in Cincinnati Mr. Foster

had "read law" in 1857, following a year of study at Harvard Law School.

So, all else having failed, my grandfather gave me a letter of introduction to Mr. Cromwell. In it he recalled his prior association with Mr. Sullivan, over 50 years before, and asked Mr. Cromwell whether, in memory of that, he would not give me a job.

I vividly recall my presentation of that letter to Mr. Cromwell, and Mr. Cromwell himself often used to recall it with some embellishments.

At that time, and indeed for the remainder of his life, Mr. Cromwell conducted his practice principally from his residence. The offices of his firm were then 49, and subsequently 48, Wall Street. An imposing suite was always kept ready there for his use. But his appearances there were rare and far between. He was usually to be found at 12 West 49th Street in a mansion of mid-Victorian character, crowded with tapestries, paintings and statuettes.

I met him in his upstairs study, where he fingered pensively the letter from Mr. Foster. He was an impressive figure with his shaggy, white locks, his florid complexion and sparkling eyes. After staring at and through me for a few minutes, while I sat nervously before him, he said, "It is not my business to hire law clerks. I leave that to my partner, Mr. Jaretzki. But there is nothing I would not do for a former associate of beloved Algernon Sullivan. So, although I am probably making a mistake, I will ask Mr. Jaretzki to give you a job."

I returned to 49 Wall Street and the job was offered me, despite the fact that the firm had already signed up its quota of law school graduates for the coming year.

I was to receive $50 a month. That salary, which now seems small, was gratefully received. Until about that time, law students had worked for nothing on the theory, no doubt correct, that what they learned was far more valuable than anything that they contributed.

In August 1911 I started to work. I had a desk in what was known as the "Bullpen". Six recruits of that and the preceding year had desks which encircled the telephone switchboard and operator, located in the center of the room. But there was not yet total acceptance of either telephones or stenographers. Some of the older partners felt that the only dignified way of communication between members of the legal profession was for them to write each other in Spencerian script, and to have the message thus expressed delivered by hand. They resented and rejected the innovations of dictation and telephone which they deemed incompatible with their sense of privacy and decorum.

Thus began an association which, with brief intermissions of public service in World Wars I and II, continued until I retired as a partner in 1949 to serve in the United States Senate.

Thus I was intimately associated for nearly forty years with a law firm which had been founded in 1879 as the partnership venture of two men, Mr. Sullivan and Mr. Cromwell. Out of that beginning has grown a legal institution, now with some 31 partners and 53 legal associates.

It is useful that this volume has been compiled showing, primarily in terms of the professional life of Mr. Cromwell, how an individual law practice can grow into a great and useful institution.

The practice of law is essentially personal, and no law firm can survive if it ignores that fact. The attorney-

client relationship is one of personal confidence. A client must feel that he can talk with complete intimacy with his lawyer as a trusted friend and share with him his hopes and his fears, and get from him counsel which is not merely a technical exposition of law but which will understandingly enable him to realize his legitimate desires and ambitions.

That positive aspect of the legal profession is often ignored. The law is often misconceived as a purely negative force, putting up barriers which say "You cannot do this or that." In reality law is far more than that. Law is a codification of what the community believes to be a sound and constructive way of living. It does seek to prevent men's desires from clashing in ways that are destructive of the social order. But it should also point the way to doing what is creative and constructive. Law, particularly the so-called common law which underlies, and sometimes in practice overrides, statutory law, is flexible. It can, and should, be added to, so as constantly to open new avenues for the accomplishment of what will serve the common good.

A law firm can become an institution if it grows up in an environment which is dynamic and if it develops a tradition of finding the ways by which the healthy, creative impulses of commerce, industry and finance can better serve the needs of their time.

The capacity of law firms to serve their society with continuity was first demonstrated in England when that country effectively led the commerce and finance of the world and firms of English solicitors came into being which still continue.

And as America came of age, and particularly as New York became increasingly a center of finance, commerce and industry, a comparable need arose and was met.

It was the genius of Mr. Cromwell that he saw and responded to the needs of his time. He saw the need of a breakthrough from practices which were parochial and routine and unnecessarily restrictive of the creative impulses of his time. Through imaginative and purposeful action, he and his successors won not merely the transitory successes of juries' verdicts, but they blazed trails, which all could follow for the common good. That is the kind of a tradition, which, so long as it is vigorously pursued, enables a law firm to grow and to serve, and to make continuity an asset rather than a liability.

The volume to which this is a foreword is thus of significance to more than the many who have a personal interest through past association with the events that are narrated.

JOHN FOSTER DULLES

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CHAPTER ONE

The Scope and Interest of Cromwell's Life

WILLIAM NELSON CROMWELL was an energetic, imaginative, colorful figure. He was very much a product of his time. And yet, while not a scholarly lawyer, in the sense of a John Chipman Gray, Benjamin Cardozo, Oliver Wendell Holmes or Learned Hand, he was in many ways ahead of his time and forward looking. To an unusual extent his life and contributions can best be appreciated by recalling the economic and social conditions and the flavor of the period in which he lived. So viewed, his life is of great interest, not only professionally, but also to students of American history in which he played a considerable and significant part.

This general interest derives from the fact that Cromwell's professional life spanned the great period of industrial development in the United States commencing after the Civil War and carrying through the depressions of 1873, 1893 and 1907, through the Spanish War, World War I and the fall of the Czars, into the depression of the early 1930's, through the maze of the New Deal legislation and the attempt to pack the Supreme Court, and

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The text is based in part on an address delivered by the author in Chicago, Illinois, on February 22, 1955 at the dedication of the Cromwell Library of the American Bar Foundation, at which time the author as the present senior partner of Sullivan & Cromwell, the firm that Cromwell helped to found, undertook to sketch some of the experiences and professional achievements of the donor.

For aid in the preparation of this manuscript the writer is greatly indebted to his partners and particularly to Edward H. Green, and to his former partner Reuben B. Crispell for help in connection with the material on "open end" mortgages. He is also greatly indebted to Howard Dausch, Administrative Assistant to the Partners, and to Mitchell Brock, who have been of tremendous assistance in the verification of facts and in assembling the material, but the sole responsibility for the manuscript is the writer's.

thence through World War II and the defeat of Fascism. Few members of the bar have lived as he did during the tenure of office of nine Chief Justices of the United States, Taney, Chase, Waite, Fuller, White, Taft, Hughes, Stone and Vinson, or the Presidencies of such diverse personalities as Abraham Lincoln, Ulysses S. Grant, Grover Cleveland, Theodore Roosevelt, Woodrow Wilson, Calvin Coolidge, Franklin D. Roosevelt and Harry S. Truman.

Cromwell himself played a leading and active role in many phases of American economic expansion. At various times he acted for E. H. Harriman, J. P. Morgan, E. C. Converse, Henry Villard and John H. Flagler, to name a few, and also for Charles Wetmore, John I. Beggs, James Campbell, H. Hobart Porter, Alexander Dow, Harrison Williams and others of the traction and public utility industry.

In the burgeoning public utility industry, he represented such companies as The North American Company and American Water Works and Electric Company and their operating subsidiaries, while his partner, Alfred Jaretzki, Sr. was active in the organization of The Detroit Edison Company and Montana Power Company.

Cromwell played a leading part in the transportation industries, particularly in the affairs of the railroads that pushed through after the Civil War to tie together an undeveloped country. He saw the pony express, stagecoach and river steamboat disappear, the electrical inter-urban car and street railway give way to the automobile and bus, and the railroads in long-haul passenger traffic yield in part to the airplane. Cromwell's work as a lawyer for the railroads related primarily to the financing of equipment, the development of railroad

ALFRED JARETZKI, SR.
1881-1925

mortgages and reorganizations. Among others, the plan for the reorganization of the Northern Pacific Railroad in the receivership of 1893 was largely his creation.

Americans are now inclined to forget the extent to which the development of the American economy before the First World War was dependent on European capital. In 1897 European investments in American securities were valued at nearly three and one-half billion dollars, over half of this being in railroad securities. Cromwell was a prominent member of the relatively small group of American lawyers and investment bankers concerned with the flotation of these securities and the improvement of instruments of finance to facilitate this flow of capital to the new world. At an early age he had gone to Europe to confer with leading lawyers and bankers. He became fully versed in English and continental underwriting and financing methods and the relevant law. In connection with the early financing of American railroads, utilities and industrial concerns he often represented Dutch, English, French and German banks or bond syndicates purchasing American securities or interested in railroad reorganizations.

Cromwell also represented various other interests abroad, including the Aldama, Ceballos and Czarnikow Rionda sugar interests in Cuba, French interests in Brazil and Panama, and the International Railways of Central America. These contacts, in addition to the international character of the world of finance of which he was a part, made him more conscious of the relation of developments in foreign lands to the interests of the American people than the great majority of his contemporaries and permitted him to achieve some measure of objectivity in his assessment of the role of the United States in world affairs.

CHAPTER TWO

Cromwell's Early Life and Environment

CROMWELL was born in Brooklyn in 1854, the second year of the Presidency of Franklin Pierce, and the same year in which the Republican Party was organized. Myron H. Clark was then the Governor of New York and J. A. Westervelt, the Mayor of New York City. At an early age he was taken to Peoria, Illinois.

The year of his birth was only six years after the discovery of gold in California, but two years after the sluice gates of the Saulte Ste. Marie Canal were opened to let the waters of Lake Huron and Lake Superior unite to bring Mesabi iron ore through to Pennsylvania smelters, and just three years prior to Chief Justice Taney's decision in the *Dred Scott* case,[1] which held in substance that since slaves were not persons but property, the Missouri Compromise was of no effect in so far as it purported to prohibit citizens from holding and owning such property in the free territories. It is interesting to note that a distinguished international lawyer, Professor Willard B. Cowles, in 1941, many years before he assumed his present position as Deputy Legal Adviser of the Department of State, pointed out after a careful analysis of the historical antecedents of the *Dred Scott* case that the Missouri Compromise was legislation implementing the Louisiana Purchase Treaty, and that counsel for Scott had argued before the Supreme Court that Congress' power to enact the Missouri Compromise lay in the treaty making power. Cowles' conclusion, of particular interest today in view of the current debate

[1] 19 How. 393 (U. S. 1857).

over the Bricker Amendment, was that, "This was a clear-cut case of a treaty implementing act being held unconstitutional . . . The treaty basis was not sufficient to override the Constitution".[1]

It was in the year 1854 that Congress passed the Kansas-Nebraska Act which repealed in part the Missouri Compromise of 1820 and which, with its doctrine of squatter sovereignty, together with the repeated irritation of northern abolitionists through the operation of the Fugitive Slave Law of 1850, inflamed the passions that led to John Brown's attack on Harper's Ferry and the Civil War—or, as the author's southern friends, who still claim that the Federal Union was a compact from which the sovereign states had a perfect right to withdraw, have with much effort, but without much success, attempted to teach him to say, the "War between the States".

The Brooklyn Years

Cromwell's father, Colonel John Nelson Cromwell of the 47th Illinois Volunteers, left for the war early in 1861, and was killed in Grant's advance on Vicksburg. By a provision of Cromwell's will a salute is annually fired over his father's grave in Plainfield, New Jersey, in tribute to the Colonel's memory. His mother, Sarah Brokaw Cromwell, returned to Brooklyn to bring up the children in Spartan living under extreme financial difficulties. Closed to him were the pastimes of hunting and fishing so dear to the heart of a country boy.

In his youth Cromwell attended the Church of the Pilgrims in Brooklyn, where, on occasion, he lent his services as organist to the minister, the Reverend Richard

[1] Cowles, "Treaties and Constitutional Law", pp. 172-176 (1941).

Salter Storrs, the great-uncle of the present partner of Sullivan & Cromwell of the same name. Playing the organ remained his favorite form of relaxation. Later, when residing in his house in Manhattan at 12 West 49th Street, now occupied by the Sinclair Oil Building, he became a member of St. Bartholomew's Episcopal Church. His wife, Jennie Osgood, was very active in the charitable work of the Dorcas Society of that church.

Cromwell went to the Brooklyn public schools. He wanted to go to college. But conditions forced him after his graduation from high school at the age of 17 to support his mother and brother by working several years as an accountant in a railroad office. A college education was then a privilege available to few. In 1873 it is estimated that there were only 23,000 college students in the entire United States. However, his training in finance and accounts developed in him valuable skills unusual to the lawyers of that day who were generally trained in literature, logic, rhetoric, philosophy, the classics, and to some degree the natural sciences and mathematics, before reading law in an office.

Cromwell thus was possessed of no snobbery of family or, indeed, of any sense of superiority of the professions of the ministry or of the law toward business or trade. Being himself a man of the people, he had a natural affinity toward those who had to earn their living by their industry and by searching out new ideas.

Columbia Law School

Cromwell was, in fact, first employed as an accountant by the law firm of Sullivan, Kobbe & Fowler in 1874. He attended on the side Columbia Law School, then a two year course, through the generosity of Algernon Sydney Sullivan, the senior partner. He graduated with the class of 1876 at the age of 22, just one hundred years after the Declaration of Independence.

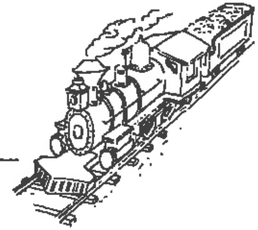
Professor Theodore W. Dwight was then having a phenomenal success as the head of that school, and students flocked to him in large numbers. The extraordinary dependence of the Law School on Professor Dwight's abilities is disclosed in the "History of the School of Law Columbia University," recently published with the aid of the Cromwell Foundation. He gave instruction in every subject in the regular course, including common law, equity jurisprudence, real estate, commercial law, trusts, testamentary dispositions and the Field Code, that radical departure from common law procedure originally enacted in 1848. The sessions of the Law School from 1859-1873 were held in what was formerly a large residence in Lafayette Place below Fourteenth Street and from 1873-1883 in another former residence at 8 Great Jones Street. The junior and senior classes were divided into two sections, with two daily sessions of two hours each for each class, one in the morning and one in the afternoon. One day in each week the students were required to take from dictation Professor Dwight's lectures which embodied, with references to some cases, the general principles which had been discussed. The "case system" of instruction was still in its infancy, having been introduced by Christopher Langdell at the Harvard Law School in 1870.

Throughout Professor Dwight's administration, and in fact until 1928, no examination was required for admission to the Law School of graduates of literary colleges. But in 1874, the year following Cromwell's admission, the Trustees of the Law School adopted a resolution to

the effect that applicants for admission who were not college graduates should have such a knowledge of the Latin language as was required for admission to the freshman class of Columbia College. The following year this resolution was implemented and extended by the requirement that such applicants pass an examination in the outlines of Greek and Roman history, history of England and of the United States, English grammar, rhetoric and the principles of composition, Caesar's Gallic War (entire), six books of Virgil's Aeneid and six Orations of Cicero. Columbia thus became the first law school to institute minimum educational requirements for entrance.

Cromwell was admitted to the New York Bar at the conclusion of the two-year course without the usual bar examination, on presentation of his diploma. This procedure was sanctioned by an act of the New York State Legislature which made the Columbia Law School diploma conclusive evidence of the fitness of the holder to be a member of the bar.[1]

[1]See, *Matter of Cooper*, 22 N. Y. 67 (1860).



CHAPTER THREE

The Setting of Cromwell's Practice—American Society, 1870-1910

THE CIVIL WAR brought to the United States a new birth of freedom and unity. At nearly the same time the British North America Act of March, 1867, confirmed the federal government and established the Dominion of Canada. On the continent the *Realpolitik* of Prince von Bismarck unified the German nation, and the fall of Napoleon III after the crushing defeat at Sedan opened the way for the Third French Republic. These political developments were accompanied by the emergence of a new and intense nationalism in many countries. A second pervasive cast of thought on both sides of the Atlantic derived from the revolutionary ideas of Charles Darwin which gave a new orientation to the discussions of intellectual circles, and later, as popularized by Thomas H. Huxley, became familiar to the general public.

In the United States, the 1870's—the troublesome years after the Civil War—were in some respects not the most propitious years for a young man to be completing his education or to be starting a profession. Cromwell soon found that he had to find new paths with small aid from pre-existing charts.

The Panic of 1873

In the second year of President Grant's administration the depression of 1873, commencing with the failure of Jay Cooke & Company on September 18, 1873, which was followed by the suspension of Fish & Hatch and later of Clews & Company and then the failure of the Spragues of Providence, had demoralized the financial and indus-

trial structure of the country. Prices dropped. Unemployment increased. The annual mileage of railroad track additions fell. Nearly one-fifth of the country's railroads were in receivership and two-fifths of the steel plants were closed down. For five years a most severe depression lingered. Five thousand commercial houses failed in 1873, and the number of annual failures rose each year until in 1878 over ten thousand failures occurred. A great cry for relief went up which, particularly in the Mid-West and Far West, took the form of a demand for currency inflation and the free coinage of silver. It was not until 1878 that the business community shook off the paralysis that hung over it. During the years 1877-78 Secretary of the Treasury Sherman, aided by good crops and heavy agricultural exports, finally managed to pave the way for a resumption of specie payments.

The Free Silver Movement

The western farmer in this period was typically a debtor and often the victim of speculative land developers. With the appreciation of the purchasing power of the dollar arising from the retirement of "greenbacks" after the Civil War and the gradual return to the gold standard in 1879, the burden of his debts increased, and in his view unfairly. He came to regard inflation, to be obtained through the free coinage of silver at 16 to 1, as a panacea for the West's ills. The great silver mines discovered in the West, such as the Comstock Lode in Nevada, had so increased the supply of silver that the pre-Civil War ratio of sixteen ounces of silver to one of gold now greatly overvalued silver. Coinage at that ratio was both inflationary and a subsidy for western mining interests.

The Bland-Allison Act of 1878 and the Sherman Silver Purchase Act of 1890 were partial concessions to the pressure of the free silver forces. In the heated controversy over legislation of this character the important political dichotomy between "hard" and "soft" money men emerged. Perhaps in part because the East with its emphasis on savings was a creditor of the West, or perhaps because it saw more clearly the international importance of a sound dollar and being more industrialized favored lower prices for raw materials, the dichotomy also became in some measure a regional one. The tariff issue divided the country in much the same manner. The West as a net purchaser of machinery and manufactured goods benefited from the influx of cheap foreign manufactures. The industrial East tended to regard a high tariff as essential both to the profits necessary for the development of infant industries and to high employment.

Railroad regulation was another political rallying point for the western wheat farmer, cattleman, and also the smaller manufacturer. As much as two-thirds of the delivered price of wheat in the East was transportation costs. Access to the market was only through the railroads' transportation monopoly. The rate differential between the long haul, where competition between railroads reduced freight charges, and the short haul along one line, reflected the railroads' enormous economic power. The discriminatory practice of the rebate arose in addition from the power of the major shippers.

Grangers and Populists

The agrarian revolt in the West, centering on the issues of coinage, tariff, and government regulation of busi-

ness, first found effective expression in the Granger Movement. This was an attempt to use state regulatory power to improve the economic position of the farmer, particularly by regulation of railroad rates and practices. Better times in the 1880's reduced the agitation, but with the panic of 1893 it arose again with renewed vigor in the Populist Party, and this time with greatly increased support from labor. In the convention of the Democratic Party in Chicago in 1896, the Populists fused with the Democrats, abandoning in the process some of the more radical portions of their platform, to nominate the fiery William Jennings Bryan who with his "Cross of Gold" speech became a symbol of hope for the poorer farmers, immigrants and dissident elements.

William McKinley, Bryan's opponent in the bitter presidential campaign of 1896, had originally been a free silver man, but was then a reluctant convert to the gold standard. The business interests rallied solidly behind McKinley, thoroughly alarmed at the "progressive" ideas of the Populists, many of which have since been accepted. Even with this support McKinley lost virtually all the South and the West, except for California, North Dakota, and Oregon.

The Prevailing Economic Philosophy

Only a few voices, such as Emerson's, then in his seventies, Melville's and, above all, Walt Whitman's, relieved the emphasis on materialism of the 1870's and 1880's. This was a period of unregulated capitalism. *Laissez faire* was the prevailing economic philosophy of the day. Business, while employing in good faith the arguments of Adam Smith and the classical economists against government controls, saw no essential incongruity

in pressing for tariff protection or special grants. Though the Granger Movement marked the beginning of the end of unqualified faith in self-interest as a sufficient social control, effective restraints on commercial power were slow in developing.

The philosophy of Social Darwinism, of which Herbert Spencer and William Graham Sumner were the prophets, continued to be used to justify the harsh working and living conditions which the new immigrant had to face, and which Carl Sandburg has so realistically depicted in "Always the Young Stranger." Among these people were some who paid with their shattered hopes and lives the social cost of a developing economy and others who boldly faced the same conditions, surmounted the challenge and rose to greatness. Perhaps the cost to some was then excessive. Yet under these conditions was developed the necessary foundation of an economy that in two World Wars was to make possible the survival of the American economic and spiritual ideals that had seemed all but submerged in the earlier period of economic growth. Despite these early failings the capitalistic system developed in the United States, and largely without governmental direction, standards of living and working conditions and of social equality that no socialistic or "planned" system has ever obtained, or even approached.

Labor

Labor was as yet ineffectively organized, and of little political power. The Knights of Labor, formed in 1869, attempted to organize workers along industrial lines, but, in spite of initial successes, disintegrated after the unsuccessful Chicago, Pullman strike in 1886. Less conspicu-

ous was the American Federation of Labor which under the skilled leadership of Samuel Gompers developed a federation of trade unions, commencing with the cigar workers. The A. F. of L. survived by eschewing extreme, radical theories in favor of limited, practical ends, and because it derived strength from the fact that the craft unions were composed of skilled workers who could not as readily be replaced by the supply of immigrant labor. The A. F. of L. and the four railroad brotherhoods were probably the only effective labor organizations in the country after the failure of the great strike at the Carnegie Steel Works at Homestead, Pennsylvania, in 1892 and the miners' strike in Idaho shortly thereafter. Without solving the essential economic problem, both of these strikes were "won" by the employer with the aid of federal or state troops. Such a Pyrrhic "victory" would hardly be countenanced today in a society which recognizes as legitimate the social aims of the workingman and is conscious of the importance of the wide market his earnings provide.

Expansion

Even during the depression of the 1870's the country was growing. Waves of immigration bore new, imaginative and vigorous peoples to our shores. Between the Civil War and 1900 nearly fourteen million immigrants came to the United States, and the national population rose from some thirty-one to seventy-five millions. Before 1880 most of the newcomers were of English, Irish, German and Scandinavian extraction, but after that date the tide was increasingly composed of Italians, Slavs and peoples from southern and eastern Europe who have enriched our national life.

Though the South for several decades after the Civil War still endured the throes of reconstruction and the misrule of the "carpetbaggers" and "scalawags", the West was the scene of rapid expansion. Texas cattle, cut off from the market during the Civil War, began to move North again in 1867 along the Old Chisholm Trail to Abilene, Kansas, and other booming railroad towns. Wheat farmers pushed into the Great American Plains, fencing land and displacing, not without occasional violence, the cattlemen. Land speculation and overbuilding were rife. Only the rugged survived.

In industry, John D. Rockefeller and associates were developing the Standard Oil Company. Andrew Carnegie, H. C. Frick, George M. Pullman and others were also bringing new industrial forces into being. Transportation was connecting once isolated regions, providing markets and making the products of eastern industry available to all sections of the rapidly changing country. The United States through the ingenuity and capital of its citizens and with the aid of foreign capital was moving away from a predominantly agricultural toward an industrial and urban economy.

Development of Corporate Law

The rapid economic and political change in the post-Civil War years found reflection in a variety of contemporary legal developments. One such development was the evolution of corporate law, which, building upon the groundwork laid by Chief Justice Lemuel Shaw in Massachusetts from 1830 to 1860 in adapting the law of partnerships to corporations, proceeded at an accelerated pace after the Civil War, as corporations increased greatly in numbers and began to supplant partnerships,

with their defects of unlimited liability and short lives, as the preferred form of business organization. Before the War the corporate form had been employed primarily with banks, insurance companies and railroads. After 1865 the industrial corporation came into its own, and by 1899, 66% of all American manufactured products were produced by corporations. The corporate form facilitated the acquisition of the capital required for growth and brought the security of limited liability to the entrepreneur, but its transferable shares, purchasable by anyone with the money, impaired his ability to choose his associates and his individual freedom. The prominence of corporations in the major constitutional cases that after the Civil War sought to determine the relation of the national government to the several states also testified to their expanded significance in the economy of the country.

Post War Trend of Supreme Court Decisions

During the 1870's the Supreme Court of the United States turned away from the extreme nationalism that had characterized the Civil War years and the beginning of the reconstruction period. Charles Warren suggests in "The Supreme Court in United States History",[1] that this reaction was manifested in a greater willingness to declare federal legislation unconstitutional as well as in cases taking an expansive view of permissible state powers. Indicative of this were the cases resulting from the Granger Movement. The profound influence of the depression of 1873 on social and political conditions facilitated the passage in many states of "Granger Laws" regulating railroads and grain elevators. *Munn*

[1]Vol. III, p. 254 (1926).

v. *Illinois*[1] in sustaining the power of the states to regulate intrastate business clothed with a public interest, gave great encouragement to such reform movements, particularly in the Mid-West.

Perhaps a more striking indication of the trend were the celebrated *Slaughterhouse* cases[2] in which the Court sustained as an exercise of police power an enactment of the Louisiana legislature conferring a monopoly of the slaughterhouse business on one corporation, as against the contention that this action violated the 14th Amendment to the United States Constitution. The Court construed the 14th Amendment as protecting only the narrowly defined privileges and immunities of citizens of the United States, as such, as distinguished from their privileges and immunities under state law. The violation of due process argument received little attention from the Court. The interpretation that the privileges and immunities clause received in the *Slaughterhouse* cases led to increased reliance on the due process clause in subsequent attacks on state legislation. Particularly was this so in the case of corporations which, since *Paul* v. *Virginia*,[3] had no standing as citizens of the United States.

Later Judicial Curtailment of State Powers

In the late 1880's a complex of factors including the marked increase in transactions in interstate commerce, the emergence of corporate giants serving a national market, concern over discriminatory state legislation, and a growing sense of national importance in world affairs caused the sentiment of the times to turn again toward

[1]94 U. S. 113 (1876).
[2]16 Wall. 36 (U. S. 1873).
[3]8 Wall. 168 (U. S. 1868).

a reduction of the power of the several states and, at least by implication, toward that magnification of federal power which a later period was to establish firmly.

This attitude found expression in Supreme Court decisions in which state power was curtailed, not only by the invalidation of legislation affecting interstate commerce, as in *Wabash, St. L. and Pac. Ry. Co.* v. *Illinois,*[1] but by the utilization of the due process and equal protection clauses of the 14th Amendment to protect corporations against confiscatory rates and discriminatory taxation in the several states, significantly qualifying thereby the prior tendency to regard the states as sovereign nations who had only delegated certain specific powers to the Federal Union. It is interesting to note in passing that the doctrine of "interposition" now being advanced in several of the southern states in an effort to limit the effect of the segregation case, *Brown* v. *Board of Education of Topeka,*[2] is perhaps a reassertion of that earlier conception.

While, as Professor Warren points out, less than 70 cases were decided under the 14th Amendment in the 16 years between 1873 and 1888, more than 700 were so decided in the 30-year period between 1888 and the first World War. We are inclined to forget that it was not until 1886 in *Santa Clara County* v. *Southern Pacific Railroad*[3] that corporations were expressly recognized as "persons" within the protection of the due process and equal protection clauses of the 14th Amendment. For the view that this was by no means a necessary conclusion

[1]118 U. S. 557 (1886).
[2]347 U. S. 483 (1954).
[3]118 U. S. 394 (1886).

see, in *Wheeling Steel Corp.* v. *Glander,*[1] the dissenting opinion of Justices Douglas and Black advocating that the *Santa Clara County* case be overruled, though of sixty years standing.

Not until *Stone* v. *Farmers' Loan & Trust Co.*[2] did the Supreme Court indicate that the reasonableness of rates was not solely a legislative question but one subject to judicial scrutiny since confiscatory rates entailed a taking of property without due process of law. It was 12 more years before *Smyth* v. *Ames*[3] in 1898 first held state legislation unconstitutional on this ground. *Allgeyer* v. *Louisiana,*[4] decided the preceding year, which related to the regulation of insurance contracts by the State of Louisiana, was perhaps the high watermark of the use of the due process clause to protect the economic freedom of individuals and their freedom to contract. The case as many others of this period exhibits a reluctance to accept the reasonableness of regulations far less pervasive than many to which we have since been accustomed.

Accompanying the development of a more restrictive interpretation of the powers of the states as sovereign participants in a Federal Union, there came a clarification and expansion of the powers of the federal government. The *Sinking Fund* cases[5] held that the government might amend the charters of corporations chartered by Congress provided that the amendment acted prospectively. *Tennessee* v. *Davis*[6] sustained legislation for the removal

[1]337 U. S. 562 (1949).
[2]116 U. S. 307 (1886).
[3]169 U. S. 466 (1898).
[4]165 U. S. 578 (1897).
[5]99 U. S. 700, 727 (1879).
[6]100 U. S. 297 (1880).

into the United States courts of any civil or criminal suit in a state court against a federal officer acting under a United States revenue law. A variety of cases affirmed the powers of the federal government over commerce, although a divided Court in *Pollock* v. *Farmers' Loan & Trust Co.*[1] held the income tax, a flat 2% on net incomes over $4,000, imposed by the Wilson-Gorman Tariff Act of 1894, unconstitutional in its entirety because the valid portions were not severable from the unconstitutional, and in particular from the tax imposed on interest, dividends, and rents which the Court regarded as an unconstitutional, since unapportioned, direct tax on property. Only 15 years before, *Springer* v. *U. S.*[2] had sustained as a valid excise tax the 1864 income tax, but the proposal of the emergent Populist Party for a graduated income tax had alarmed the eastern business and property interests, and the question of the constitutionality of the income tax was in 1894 skillfully presented by Joseph H. Choate, with the able assistance of his partner Southmayd on the brief, to a receptive Court as one of constitutional protection against discriminatory class legislation.

Federal Regulatory Legislation

The decisions of the Court in the 1880's establishing the infirmity of state regulatory power where interstate commerce was concerned, were among the factors that led to the realization that federal legislation was required in certain areas to control interstate corporations. Supporters of the Granger, Populist and other reform movements began to concentrate more of their efforts on the Congress.

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[1]158 U. S. 601 (1895).
[2]102 U. S. 586 (1880).

Novelists and poets interested in social and economic problems, such as William Dean Howells, Hamlin Garland, Edwin Markham, Edgar Lee Masters, Theodore Dreiser, Frank Norris, and Upton Sinclair, made vivid the evils of a changing society. While of less literary merit, the work of the "muckrakers" published in *McClure's, Everybody's,* and other popular periodicals was no less effective in enlisting a mass support for reform movements and creating a sympathetic audience for the social critic. The Interstate Commerce Act of 1887, the Sherman Act of 1890, The Pure Food and Drug Act of 1906 (in part a consequence of Sinclair's "The Jungle" and the patient work of Doctor Wiley), the Hepburn Act of 1907 and the Mann-Elkins Act of 1910 were among the federal legislation in the exercise of the commerce power responsive to the demands of an awakening people. Such exercises of federal power incidental to the power to regulate commerce or, especially in later years, the power to tax were the beginnings of a striking extension of what Chief Justice Stone described as in effect a federal police power.[1]

United States v. *Trans-Missouri Freight Association,*[2] in holding a regional rate-fixing agreement among railroads a violation of the Sherman Act, showed at an early date the scope of this legislation and relieved some of the doubts as to its efficacy raised by *United States* v. *E. C. Knight Company,*[3] which had held that a monopoly in manufacture was not of itself a restraint of trade or commerce. This and other new federal legislation, super-

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[1]See, Stone, "Fifty Years' Work of the Supreme Court", 14 A. B. A. J. 428 (1928).
[2]166 U. S. 290 (1897).
[3]156 U. S. 1 (1895).

imposed on various state regulatory systems, raised fresh problems of adjustment and gave rise to legal and economic questions of unprecedented intricacy. Legal argument became sociological and economic as well as merely analogical. In *Lochner* v. *New York*[1] the Supreme Court held unconstitutional in 1905 a New York statute fixing a ten-hour day for bakers as a "mere meddlesome interference with the rights of the individual." But three years later in *Muller* v. *Oregon*[2] the Justices listened to Louis D. Brandeis' revolutionary presentation of relevant socio-economic data and upheld the Oregon ten-hour day for women.

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[1] 198 U. S. 45 (1905).
[2] 208 U. S. 412 (1908).

Algernon S. Sullivan.
~~Hermann Kobbe.~~
~~Robt. Ludlow Fowler.~~
Wm. Nelson Cromwell.
[illegible]

Drexel Building.
Wall Street. New York.

This memorandum of agreement between Algernon S. Sullivan, party of the first part and Wm. Nelson Cromwell of the second part, Witnesseth,

First. The parties hereto hereby form themselves into a copartnership, for the practice of law in all its branches, under the firm name of Sullivan & Cromwell,

Second. The interest of said party of the first part in the business of said firm shall be two thirds thereof, and the interest of said party of the second part in the business of said firm shall be one third thereof.

Third. It is understood and agreed that the compensation of said party of the first part as Public Administrator shall not be included in this partnership but shall accrue solely to said party of the first part.

In witness of which mutual covenants the parties hereto have hereunto set their hands this 2nd day of April AD 1879 in duplicate.

Algernon S. Sullivan
Wm. Nelson Cromwell

CHAPTER FOUR

Formation of Sullivan & Cromwell

THE previous outline of a few of the forces and trends that were to emerge during the four decades from 1870 to 1910 can only begin to suggest the tremendous vitality of the period. All in all, these years reflected a flux of political views and ferment in legal thought, quite manifest in the work of the Supreme Court, that called for legal advice of high order. This was the professional environment prevailing and in the offing when Algernon Sydney Sullivan formed with Cromwell (aged 25), on April 2, 1879, the partnership that still bears their names. The original articles of partnership of Sullivan & Cromwell were, as may be seen in the facing reproduction, a model of brevity.

The new partnership followed the dissolution, upon the withdrawal of Kobbe and Fowler, of the firm of Sullivan, Kobbe & Fowler, formed in 1873.

Fowler subsequently became the learned surrogate of New York County. It is interesting to note that though renowned for his erudition and the author of four authoritative texts in the field of trusts and estates, Surrogate Fowler left a holographic will without witnesses which was entitled to probate in New York only because sufficient under the law of France, the place of execution.[1] Surrogate Fowler was the grandfather of the wife of one of the author's present partners, William Ward Foshay.

The new firm of Sullivan & Cromwell in 1879 earned a gross income of approximately $22,500. The total pay-

[1]See, *Matter of Fowler,* 161 Misc. 204 (Surr. Ct. 1936).

roll for that period was $950, of which the janitor received $130, the office boys $300, the engrosser of wills and keeper of accounts $520 and the law clerks nothing. Rent for the firm's four rooms on the 4th floor of the Drexel Building at Broad and Wall Streets, the present site of J. P. Morgan & Co., was $1,700 per annum.

Algernon Sydney Sullivan

Sullivan, son of a scholarly Indiana judge born in Virginia, was like his father and one of his successors, John Foster Dulles, an elder of the Presbyterian Church and a man of high moral attainments. He was a considerably older man than Cromwell, and a well known trial lawyer at the Cincinnati, Ohio, and later the New York Bar. John W. Foster, Secretary of State under President Benjamin Harrison and the grandfather of John Foster Dulles, read law in Sullivan's office in Cincinnati and many years later recommended Dulles to Cromwell. Sullivan had a very deep interest in the South as a result of his Virginia forebears and through his second wife, Mary Mildred Hammond, a Virginian.

During the Civil War, Sullivan, at great personal risk, distinguished himself by his defense of the crew of the Confederate raider SAVANNAH who had been captured and brought to New York for trial as pirates. William Maxwell Evarts argued for the government. For Sullivan's insistence on their right to a fair trial and on their status as prisoners of war, he was summarily imprisoned in a fort off New York Harbor for several weeks on the order of Secretary of State Seward and released only after great public outcry. Through the efforts of himself and others, the captives were eventually exchanged as prisoners of war.

Algernon S. Sullivan

1879-1887

So exceptional was the impact of Sullivan's personality upon his contemporaries that a few years after his death in 1887 a Memorial Committee was organized by citizens of New York for the purpose of "perpetuating in some form the spiritual and inspiring influence which his presence and conduct while living exerted upon all who were, even though only casually, brought in contact with him." This Committee as originally constituted included Grover Cleveland, Roswell P. Flower, Hugh J. Grant, Rt. Rev. Henry C. Potter, William C. Whitney, Andrew Carnegie, James C. Carter, William Nelson Cromwell, Elbridge T. Gerry, Rev. Edward Everett Hale, Abram S. Hewitt, Henry G. Marquand, Cyrus H. McCormick, Jesse Seligman, William L. Trenholm, and sixty-two other citizens of New York. In 1915 the Committee conferred a medallion in Sullivan's memory on his old firm with the following citation:

> "Mr. Sullivan's great general ability, his eminent position at the Bar, his influence in politics and all movements affecting the welfare of the citizens of this community, his delightful and considerate methods in the conduct of affairs and in contact with other people, whether in co-operation or in opposition, brought into constant and public observation his moral qualities, among which were especially noteworthy, an absolute integrity, great generosity in act and in judgment, and a helpful love for men individually and in general, and of whatever rank or station.
>
> While the community benefits incalculably by the lives of all such men, it loses a part of its opportunity whenever it does not in some visible and permanent manner continue to commend and honor their high characteristics. The description of a purely abstract idea has no such power of

influence as a knowledge of the noble nature of a man who has lived among us.

All such cannot be so commended individually, but from time to time, some fitting example of nobility and virtue may be chosen to represent the class and type, and this not for the limited purpose of commending the man but for the broader purpose of commending the moral qualities which he may exemplify.

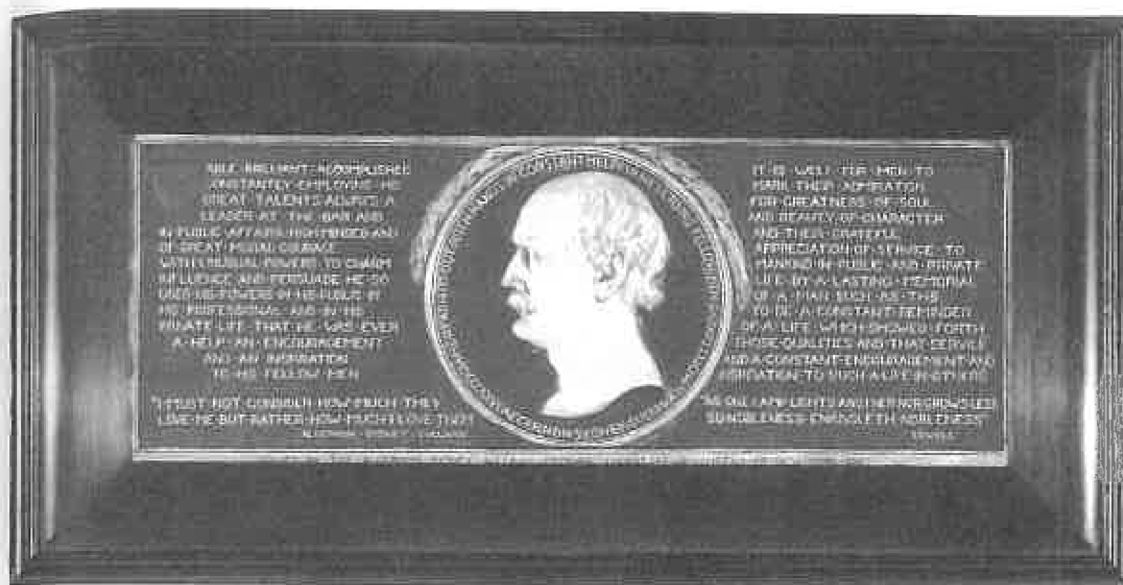
The rare character of Mr. Sullivan makes him the most fitting recent example of which the Committee has knowledge.

This medallion upon your walls will be a concrete evidence that, many years after the death of this man, the Committee was still influenced by his moral worth and revered it enough to feel that in performing this act of public commemoration they are benefiting others. The Committee wishes this medallion to remind those who read it that achievement in the development of noble character and courageous and pure citizenship is admired and valued for its own sake, and confers a distinction as real as does the achievement of prominence in government service or success in more material and less unselfish purposes.

The Committee desires especially that young people whose characters are being formed shall be reminded as often as possible that happiness and honor come to them and to their fellowmen by their learning not only how to accomplish, but also what to desire."

Conditions in New York City

Theron G. Strong's books, "Landmarks of a Lawyer's Lifetime" and "Joseph H. Choate", Everett P. Wheeler's "Sixty Years of American Life", and Joseph S. Auerbach's "The Bar of Other Days", to all of which the author is



THE SULLIVAN MEDALLION

greatly indebted, give some idea of the then current conditions in New York City.

There were comparatively few offices in the 1880's with running water; there was no central heating; and hot water in an office building was unknown. At that time the sewage of New York was mainly surface drainage. These were the "good old days".

Offices at that time were illuminated by candle, kerosene or gas light. Not until 1882 did the Edison Electric Company commence operations in New York. Elevators were still a novelty and rare in downtown buildings. There was little steel construction in lower New York until after the invention of the Basic Bessemer Process in 1878.

Consequently most of the New York City lawyers were located in old-fashioned buildings, for the most part poorly lighted, with few conveniences, and with little attention to cleanliness or internal arrangements. The modern office building, with its superintendent and corps of employees to maintain it and central facilities such as heat, light, water and elevator service, offers a striking contrast to the careless and ofttimes filthy conditions of the earlier law office.

The first telephone exchange was opened in New York City in the fall of 1878. When the telephone first started to come into use, there were a number of companies, and subscribers of one company could reach only the subscribers of the same company. At first it was considered unprofessional for a lawyer to have a telephone. Some lawyers were also distrustful of the privacy afforded by the instrument. This distrust may possibly have been aggravated by the fact that at the time there was one central exchange called "Law" for all lawyers in the boroughs

of Manhattan and the Bronx. Yet the manifest convenience of the telephone rapidly won its acceptance.

The Sullivan & Cromwell office did not boast of a telephone until 1881, and then it was a wall phone located in the outer office, but that was only six years after Alexander Graham Bell had sent his first historic message. The use of the telephone was carefully restricted; clerks in the office were not permitted to touch it except, of course, to answer when it rang. Desk phones did not come into the office until shortly before 1900.

Yesterday's Law Offices

It is hard to believe that it was not till 1860 that the manufacture of steel pens in America began on any large scale. Until then the goose quill pen, the pen knife and the sandbox were on each lawyer's table. Papers and files were kept in red or black japanned boxes which were kept in the lawyer's rooms or in the halls. Each office had some unique factotum who knew the contents of the boxes. The red tape so familiar to oldtime lawyers gave way to the rubber band only in the early 1870's.

The process of manifolding also came into being in the early 1870's. At first copies were produced in much the same method employed for copying letters in a letterpress, that is, by using copying ink in making the first draft and then applying moistened tissue paper to receive the impression of the original. But often the copies so produced were so blurred as to be scarcely legible, and this led to the adoption of court rules which prohibited the submission of such copies to the court or to public officers for the purpose of filing or certifying.

Lithography was also coming into being, but it was expensive. The earlier methods of manifolding grad-

CORNER OF BROAD AND WALL STREETS
THE DREXEL BUILDING, BUILT IN 1870, IS SHOWN ABOVE AS THE HOME OF DREXEL, MORGAN & CO. THIS STRUCTURE WAS REPLACED

ually gave way to the typewriter and carbon paper as they came to be improved. In the early days work on the typewriter was unsatisfactory and many lawyers resented the idea of having a stenographer and typewriter in their offices. Most correspondence remained in longhand until the middle of the 1880's. Women stenographers did not enter offices in force until around the turn of the century. In the firm's first years when Cromwell fell behind in his correspondence, an outside male stenographer was called in twice a week to take dictation, write up the correspondence in longhand at his home and bring it back in several days for Cromwell's signature. But by 1902 six stenographers were regularly employed by the firm which then consisted of twelve lawyers.

Judges and lawyers made detailed notes of judicial proceedings. There were many systems of abbreviations, but as there was not general acceptance of any system of shorthand, it was not customary to take detailed transcripts. When lawyers did bring their own secretaries to court to write down everything that was said, other lawyers, and sometimes the judges, made objection. It is said that the latter sometimes became furious when what they had said was read back to them.

Pleadings were written in longhand at high slanting desks at which the writers stood or sat on high stools, and had all to be copied in longhand, or engrossed by one or more clerks in their fine Spencerian hands. Some of the copyists were engrossers who had learned their art in the old country, or, according to legend, old equity pleaders who had fallen under the evil of alcohol.

Law clerks spent a great deal of their time carrying messages back and forth between law offices and the courts. The only other communication with the Court

House was over the wires of the Law Telegraph Company by means of a dial through which you could ask and have answered certain limited questions.

Lawyers lived not far from their offices in New York City or on the Heights in Brooklyn, and came to work on foot, by ferry, the elevated, the surface car (horse-drawn) or horse and carriage. In the blizzard of '88, Cromwell, who was then living on Brooklyn Heights, almost perished in his attempt to walk from the foot of the ferry slip to his home.

For several years after 1879 Wall Street could be reached by the lumbering omnibus which used to run down Broadway and Wall Street to the ferry, or by the surface cars which ran through Church Street and stopped at Barclay Street, the Sixth Avenue line which terminated at Vesey Street, or the Third and Fourth Avenue lines which terminated at the City Hall.

In the wintertime the horse-drawn omnibus gave way to the horse-drawn sleigh. The floors of the sleighs were covered with dirty straw to keep one's feet warm. There was an almost entire absence of ventilation. A ride in the crowded subway today with its exhausted air is at least shorter and, speaking only comparatively, must be regarded as more pleasant than the all but interminable journeys of those days. The advent of the "els" was hailed as a great blessing, except by Southmayd, Joseph H. Choate's partner, who would not ride in them because they "stole" their franchises.

Legal Research Materials

The library of Sullivan & Cromwell in 1879 had been purchased from Judge Foote, a former judge of the New York Court of Appeals. The whole library, which

for those days was unusually complete, was kept in Mr. Sullivan's room and contained approximately 1000 volumes (many of them English reports of the High Court of Chancery), as against the 3300 feet of shelf space and the approximately 15,000 volumes in the firm's present library, under the supervision of its able librarian.

In contrast with today's numerous reports, digests, annotations, services, law reviews and the system of Shepard's Citations to court decided cases, at that time many cases were either not reported, or were not reported for many months. There was no quick and efficient way to find cases or to find whether a case had been affirmed or overruled, or whether further proceedings were pending, except for a system of pasted tabs, always assuming they were kept up to date, or by correspondence with other lawyers, if, indeed, you knew about the case at all. Abbott's Digest, perhaps the first of the present indispensable sources, was first issued in about 1860.

Texts of the Period

Of necessity greater reliance was then placed on the texts. Charles Warren in his exceptionally interesting "History of the American Bar", outlines in Chapter XX American law books for the period 1815 to 1910. The change in subject matter of these major texts over the 37 years from 1869 to 1905 is an indication of the course of the development of the American economy, as well as a suggestion of the areas in which the evolution of the law was most rapid during that period, which covers most of the years of Cromwell's greatest activity. Among the major texts were Shearman and Redfield "Treatise on the Law of Negligence" (1869); Langdell's "A Selection of Cases on the Law of Contracts" (1870);

Dillon's "Municipal Corporations" (1872); Perry's "Law of Trusts and Trustees" (1872); Wharton's "Conflict of Laws" (1872); Bigelow's "Law of Estoppel" (1872); Bump's "Conveyances Made by Debtors to Defraud Creditors" (1872); Schouler's "Personal Property" (1873); Freeman's "Judgments" (1873); High's "Injunctions" (1874); Daniel's "Negotiable Instruments" (1876); Cooley's "Taxation" (1876); High's "Receivers" (1876); Clemens' "Law of Corporate Securities as Decided in the Federal Courts" (1877); Dillon's "Removal of Causes from State Courts to Federal Courts" (1877); Bigelow's "Fraud" (1877); Jones' "Mortgages" (1878); Jones' "Law of Railroad and Other Corporate Securities" (1879); Bliss' "Code Pleading" (1879); Mills' "Eminent Domain" (1879); Thompson's "Law of Stockholders in Corporations" (1879) and "The Liability of Directors and Other Officers and Agents of Corporations" (1880); Cooley's "Constitutional Law" (1880); Holmes' "The Common Law" (1881); Pomeroy's "Equity Jurisprudence" (1881); Morawetz's "Private Corporations" (1882); Gray's "Restraints on the Alienation of Property" (1883); Cook's "Stock and Stockholders" (1887); Thompson's "Law of Electricity" (1891); Lewis' "The Federal Power over Commerce" (1892); Ray's "Contractual Limitations Including Trade Strikes and Conspiracies, and Corporate Trusts and Combinations" (1892); Keener's "Quasi Contracts" (1893); Thompson's "Commentaries on the Law of Private Corporations" (1895); Beach's "Monopolies and Industrial Trusts" (1895); Thayer's "Preliminary Treatise on Evidence at the Common Law" (1898); Prentice and Egan's "The Commerce Clause of the Federal Constitution" (1898); Noyes' "Law of Intercorporate Relations" (1902); Wig-

more's "A Treatise on the System of Evidence in Trials at Common Law" (1904); and Noyes' "American Railroad Rates" (1905).

So rapid has been the continued development of the law, that a major portion of the time of many law firms today is primarily devoted to laws and subjects not comprehended in these texts. It is intriguing to wonder what the situation will be in yet another fifty years.

Cromwell was always very fond of taking foreign visitors on a tour through the office to show them the library of which he was particularly proud. En route he would outline to them the American system of law reports, mention his partners as he passed their doors and explain the firm's habit of taking on a number of young lawyers each fall, to whom he invariably referred as "geniuses selected from our great law schools." One day he was expounding to a French visitor his belief that every lawyer must have peace and quiet and a room of his own when by accident he threw open the door of the "Bullpen" in which six of his young "geniuses", among whom was the author, were cooped together. Cromwell stared hard at them for a few minutes and they all rose and bowed. Apparently believing explanation to be useless he closed the door without a word, and they heard him as he proceeded down the hall describing to the visitor the treasures of "my magnificent library".

Cromwell's Contemporaries at the Bar

Among Cromwell's associates at the bar and the partnerships among lawyers during this same period in New York were the following: Alexander & Green; Chester A. Arthur, after his term as President was over in 1885; Francis N. Bangs of Bangs, Sedgwick & North,

Bangs & North, and F. N. & C. W. Bangs, and later associated with Francis Lynde Stetson under the firm name of Bangs & Stetson, later Bangs, Stetson, Tracy and MacVeagh (with which firm President Cleveland was associated between his first and second terms as President) which eventually became Stetson, Jennings & Russell (the predecessor of Davis Polk Wardwell Sunderland & Kiendl); C. C. Burlingham; Walter S. Carter (the father-in-law of Charles Evans Hughes) of Carter, Hornblower & Byrne (later Carter, Hughes & Cravath); Cravath & Houston; Blatchford, Seward, Griswold & Da Costa (the predecessor of Guthrie, Cravath & Henderson, and of Cravath, Swaine & Moore); James C. Carter of Scudder & Carter (later Carter, Ledyard & Milburn); Cary, Miller & McKeown; Coudert Bros.; Roscoe Conkling; Noah Davis; John F. Dillon; Delancy Nicoll of Edmunds & Nicoll; William M. Evarts and Joseph H. Choate (the cousin of Rufus Choate) of Evarts, Beaman & Choate; David Dudley Field, the author of the New York Code of Procedure and the brother of Stephen Field, Associate Justice of the U. S. Supreme Court; Foster & Thompson; Hall, Evans & Butler; M. S. Isaacs & I. S. Isaacs; Henry W. Jessup; Adrian H. Joline; Lockwood & Lockwood; Lord, Day & Lord; Macy & MacVeagh; Charles O'Conor; John E. Parsons of Man & Parsons; Wheeler Peckham (the brother of Rufus, an Associate Justice of the Supreme Court, and himself nominated by President Cleveland for Associate Justice of that Court but defeated by the animosity of David Hill); Porter, Lowery, Soren & Stone (later Davies, Stone, Auerbach & Cornell, with the successors of which firm Judge Harold R. Medina and Governor Thomas E. Dewey started their legal careers); Thomas B. Reed (known as Czar Reed when Speaker of

the House, who later joined Reed, Simpson, Thacher & Barnum, now Simpson, Thacher & Bartlett); Elihu Root of Root, Howard, Winthrop & Stimson; Shearman & Sterling; Martin Smith; Strong & Cadwalader (later Cadwalader, Wickersham & Taft); Samuel J. Tilden; Wingate & Cullen; and William C. Whitney (Corporation Counsel of the City of New York and later Secretary of the Navy under Grover Cleveland. Francis Lynde Stetson served under Whitney as Assistant Corporation Counsel and Algernon Sydney Sullivan served under him as Public Administrator).

Excellent sources which bring to life many of the individuals mentioned are Swaine's "The Cravath Firm, 1819-1906", Henry W. Taft's "A Century and a Half at the New York Bar", a privately printed memorandum, "Davis Polk Wardwell Gardiner & Reed—Some of the Antecedents", Otto E. Koegel's "Walter S. Carter, Collector of Young Masters, or the Progenitor of Many Law Firms" and Frederick C. Tanner's, "100th Anniversary". It is the author's hope that some day the "Annals of Sullivan & Cromwell" will further develop the picture of New York practice in those days.

The details recited above suggest how much not only the lawyer's associates but his physical environment and office methods have changed and how comparatively recent are the efficient developments on which the bar of today is now so dependent, and too often takes for granted.

Chronology of Events

The following brief, chronological outline of events, if it serves to sharpen earlier general remarks, may help to place in context and to convey some of the political, social and commercial flavor of the period in which

the firm of Sullivan & Cromwell commenced the practice of law:

In August, 1858 the successful laying of the Atlantic cable by Cyrus Field, the younger brother of David Dudley and Stephen Field, was announced.

In 1859 Colonel Drake successfully drilled an oil well in Pennsylvania to start the petroleum industry.

In April, 1861 the War between the States began.

In the spring of 1865 the War between the States ended at Appomattox and the period of Reconstruction began.

In 1868 Secretary of the Treasury McCulloch was reducing the federal debt by $200,000,000 and was retiring "greenbacks" as the legal tender in circulation.

In May, 1869 the Union Pacific Railroad met the Central Pacific Railroad near Ogden, Utah, to complete the first transcontinental railroad. The bonds of the Union Pacific were offered to yield 8½%.

From 1869 to 1872 over 24,000 miles of new railroad tracks were built; the New York Central was building four tracks; business was booming; steel was $20 a ton.

In 1870 under the leadership of Samuel J. Tilden, the Association of the Bar of the City of New York was started.

In 1870 in *Hepburn* v. *Griswold,*[1] Salmon P. Chase as Chief Justice of the United States delivered an opinion declaring unconstitutional, so far as applicable to pre-existing contracts, the act which made legal tender the United States notes that he

[1] 8 Wall. 603 (1870).

had himself issued as Secretary of the Treasury, eight years before.

1871 was the year of the great Chicago fire and in 1872 the great Boston fire on Kingston and Summer Streets occurred.

On October 9, 1871 Grand Central Station opened. Chicago became the New York Central's western terminus.

In 1871 *Hepburn* v. *Griswold, supra,* was reversed in a 5 to 4 decision of the Supreme Court and the constitutionality of the "greenbacks" reestablished in the *Legal Tender* cases.[1] Since the earlier decision the composition of the Court had been changed by President Grant's appointment of Justices Bradley and Strong to fill the existing vacancy and the vacancy created by the resignation of Justice Grier.

In 1871 the peculations of the "Tweed Ring", estimated to be in excess of $45,000,000, were disclosed by the New York Times and the leaders were indicted. Wheeler H. Peckham, Samuel J. Tilden and Charles O'Conor were special counsel for the People; David Dudley Field and Elihu Root, aged 28, were among the counsel for William Marcy Tweed.

In 1872 Ulysses S. Grant was elected President for his second term, defeating Horace Greeley, the eccentric, impulsive editor of the New York Tribune.

In September, 1873 the start of the panic, money was tight—call money was 77—commercial paper sold at 9 and 12%.

In 1873 Andrew Carnegie started a large steel works on the banks of the Monongahela River near Pittsburgh and a few years later became affiliated with the coal and coke business of H. C. Frick.

[1] 12 Wall. 457 (1871).

In 1874 for the first time since 1863, the Republicans lost the House to the Democrats.

In 1875 G. F. Swift's refrigeration car was brought into use.

The summer of 1875 saw the completion of the separation of railroad and street grades from Grand Central Station to the Harlem River. (Until 1908 Park Avenue was interrupted between 42nd and 50th Street by extensive open railroad yards; coal smoke poured from the funnels of the locomotives).

The Ninth Avenue Elevated reached 59th Street in 1876, the Sixth Avenue Line ran to Central Park in 1878, and the Third Avenue Line, now torn down, was completed to 42nd Street.

In September, 1876 the Hell Gate obstructions in the East River were blown up and traffic opened from New England to New York via Long Island Sound.

In 1876 Colorado with a population of 100,000 composed mainly of miners, farmers and cattle-raisers, was admitted to the Union.

In 1876 at the Philadelphia Centennial Exhibition, the incandescent electric light and machinery exhibits astounded the country.

In 1877 a severe railroad strike in the Central States produced violence and rioting.

In 1877 the last Federal soldiers of occupation were withdrawn from the South, to the consternation of the irreconcilable Radicals in the Republican Party who still adhered to the vindictive views of Thaddeus Stevens.

The old New York City Hall Post Office was first occupied in 1877.

In 1878 the Democrats carried both houses of Congress.

In 1878, to secure capital and aid in developing his patents for electric motors, dynamos, electric lamps and other devices, Thomas A. Edison, with the help of J. P. Morgan & Co., established the Edison Electric Light Company, which began operation of its first plant in New York City in 1882.

The Symphony Society was organized in New York City in 1878 by Leopold Damrosch, the father of Walter Damrosch.

In 1878 the Bland-Allison Act was passed by which the coinage of from 2 to 4 million dollars of silver per month was made obligatory and Congress declared all bonds payable in silver unless otherwise stipulated in the contract.

On December 17, 1878 gold sold at par for the first time since 1862.

On January 9, 1879 H. M. S. PINAFORE, the first of the Gilbert and Sullivan operas, was produced in New York and received with enormous enthusiasm, playing simultaneously at several theatres.

In April, 1879 George Selden, the inventor of the clutch, filed the application for a combination patent on a gasoline road locomotive. The patent, which was not issued until 1895, became the center of much litigation in the infant automobile industry.

In 1879 the Metropolitan Museum of Art was completed.

In 1879 St. Patrick's Cathedral was dedicated.

In 1879 Morrison R. Waite was Chief Justice of the United States Supreme Court and Sanford E. Church, Chief Judge of the New York Court of Appeals.

In 1880 the population of the United States was 50,100,000, of whom only 6,600,000 were foreign

born. The population of New York City was 1,911,698.

In 1880 James A. Garfield of Ohio was elected President, succeeding Rutherford B. Hayes of Ohio (who had "defeated" Samuel J. Tilden in 1876, or at least the Electoral Commission formed to determine the vote in the three remaining "carpet-bag" states subsequently so found, although the old NEW YORK SUN never admitted it). President Hayes had announced at the beginning of his term he would not be a candidate for reelection. This diminished his influence and impaired his efforts to reform the Civil Service.

In 1881 the Metropolitan Opera House Company was formed and built the Opera House at Broadway and 40th Street, the Academy of Music near Union Square having proved inadequate for the needs of the Society.

On July 2, 1881 President Garfield was shot. The Government was paralyzed until his death eighty days later during which period all the urgent matters that required his attention were ignored. Vice President Arthur was unwilling to act during the President's disability, not only because he represented a different branch of the Republican Party, but also from a fear that his doing so would permanently oust Garfield from the Presidency. Shortly before Garfield's death it was rumored that the Central Pacific Railway was threatening to bring a writ of mandamus requiring Arthur to discharge the President's duties.

In 1882 the brokerage firm of Ward & Grant, which ex-President Ulysses S. Grant had joined after he left the White House, failed.

On May 24, 1883 the Brooklyn Bridge opened for travel.

In 1886 George Westinghouse formed the Westinghouse Electric Company. In the same year the first commercial alternating current power plant was installed in Buffalo.

The Statue of Liberty was erected in 1886 on Bedloe's Island with Emma Lazarus' inscription containing the inspiring lines:

> "Give me your tired, your poor,
> Your huddled masses yearning
> to breathe free, . . ."

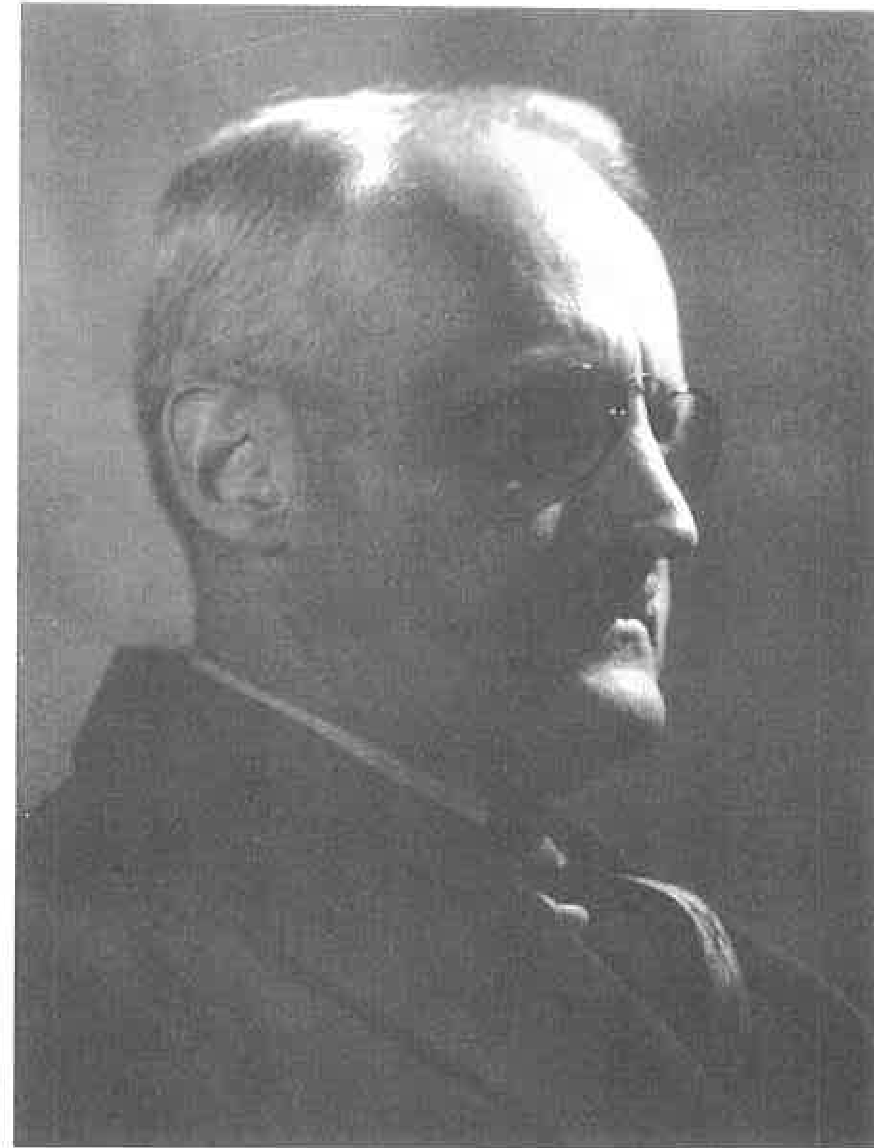
The magnificence and beauty of the Chicago World's Fair of 1893, commemorating the fourth centennial of Columbus' landing in the Bahamas, was a revelation to Europeans and Americans, as well, of the capacities of the maturing United States.

CHAPTER FIVE

Cromwell and His Partners

ON Sullivan's death in 1887, Cromwell became the senior partner of the firm of Sullivan & Cromwell at the age of 33. The active management of the firm remained in his hands until around the turn of the century when Alfred Jaretzki, Sr. became the active managing partner. Cromwell continued, however, to be regarded as the head of the firm for many years thereafter. Royall Victor at the age of 38, succeeded Jaretzki as the day to day managing partner in about 1915. When Victor's career was unseasonably ended on May 30, 1926 by a heart attack while yachting, he in turn was succeeded by a committee consisting of Edward H. Green, John Foster Dulles, Wilbur L. Cummings and Eustace Seligman. Shortly thereafter by common consent Dulles took over the reins as active managing partner. He was then 38 years of age.

Edward H. Green, who had preceded Dulles in the firm by about three years, had a wide knowledge of general corporation law, trusts and the laws relating to industrial and utility financing and had worked extensively in the fields of income tax and anti-trust law. He had studied and followed the development of the income tax law since its enactment in 1913 and had made a particular study of the Clayton Act. Eustace Seligman, the son of E. R. A. Seligman, the noted economist, had come into the firm in 1914 and had also followed the income tax law since its enactment and obtained a wide experience in corporation and financial law. Wilbur L. Cummings, who had practiced law in Seattle before coming to the firm



WILBUR L. CUMMINGS
1918-1941

in 1918, was well acquainted with the general legal problems of industrial corporations. He died on July 26, 1941.

The managing committee, in addition to the blow of Victor's death, faced two other misfortunes which occurred at about the same time, the death of Alfred Jaretzki, Sr. on March 14, 1925 and the serious illness contracted by Henry Hill Pierce in 1923 which led to his retirement in 1928 and ultimately to his death on March 18, 1940. These events deprived the firm of the counsel of two of its most able and experienced partners and immeasurably increased the initial burden of the remaining partners' responsibilities. However, at this junction, the litigation branch of the firm which had just lost Harlan F. Stone who had resigned to become Attorney General in 1924, was strengthened by the entry of John C. Higgins, who had had extensive experience in litigation in the Northwest. David W. Peck, now Presiding Justice of the Appellate Division of the New York Supreme Court, First Department, added further strength when he joined the litigation staff in 1931. Reuben B. Crispell particularly helped the firm to adjust to the loss of Alfred Jaretzki, Sr., with whom he had worked for many years on investment banking and public utility matters. Alfred Jaretzki, Jr. continued to advise the numerous sugar clients of the firm and began his work with investment trusts, while David R. Hawkins, Stoddard M. Stevens and the writer were active in the field of utilities. Edward H. Green continued to be active in the field of estates, ably assisted by S. Pearce Browning, Jr.

The years from 1926 until World War II were busy ones which witnessed considerable growth of the firm. During the presidential campaign of 1944, Foster Dulles

acted as Governor Dewey's principal advisor on foreign affairs. As such he participated in the conferences with Secretary of State Hull which laid the foundations of a bipartisan approach to the nation's foreign policy relating to the post-war world order. The following year he attended with Secretary of State Byrnes the first meeting of the Council of Foreign Ministers in London which began work on the peace treaties. Subsequently Dulles was for several years a member of the United States delegation to the United Nations. His concern for the problems of world peace and his increasing interest in and responsibility for the conduct of foreign and United Nations affairs, with consequent prolonged absences from the firm, made it necessary for Dulles gradually to relinquish many of his responsibilities within the firm to other partners. Eventually at Dulles' request, and with the approval of his partners, the author of these memoirs became senior partner shortly before Dulles resigned from the firm on July 7, 1949 to become United States Senator.

The general standing of the firm at that date spoke eloquently for the leadership that Dulles had given it in the interim. Cromwell until his death in July, 1948 continued to follow closely all general developments in the firm, and throughout all these changes remained a strong and vital influence.

Cromwell's Political Views

Having started from humble beginnings and with a father who lost his life in the Union cause in the War to Save the Union, Cromwell was a great admirer of John Marshall, Daniel Webster and Abraham Lincoln. (We do not know whether as a young boy in Illinois Cromwell heard any of the great debates between

JOHN C. HIGGINS
1926-1938

Abraham Lincoln and Stephen A. Douglas, or was stirred by the anti-slavery issues in the War.) In constitutional and financial theory he adhered to the principles of Alexander Hamilton and Grover Cleveland. Being a "hard" money man he abhorred the views of William Jennings Bryan and was a strong supporter of William McKinley, Theodore Roosevelt and William Howard Taft. Herbert Hoover as candidate and as President particularly inspired his enthusiastic support. In this, perhaps, he was influenced by Royall Victor who had been a classmate of Hoover at Stanford University and had worked for Hoover's nomination in the Republican Convention of 1920 and thereafter. Cromwell was also a friend, on a somewhat formal basis, of Secretary of State Elihu Root, Secretary of State John Hay, Secretary of War Henry L. Stimson, Attorney General Philander C. Knox, Mark Hanna, Frank Ginn of Cleveland, George P. Miller of Milwaukee, and George R. Sheldon of New York, the Treasurer of the Republican National Committee during the Taft campaign of 1908.

Cromwell was a strong believer in decent wages and reasonable hours and conditions of labor for the workingman. When the depression came in late 1929, though a staunch Republican and unwavering supporter of that Party, he quickly recognized the extent of the economic dislocation and, apart from the N. R. A., which he thought impeded economic recovery, supported the initial economic reforms instituted by Franklin D. Roosevelt. He recommended a realistic examination of the actual economic plight of the workingman and the stockholder. He also approved of the author's participation in the drafting of the Securities Act of 1933 and in the work of the interdepartmental committee known as the Dickinson

Committee, which advocated the enactment of the Securities Exchange Act of 1934 and the creation of the Securities and Exchange Commission. Cromwell was not at all appalled at the idea that a society had to take emergency measures to meet unusual situations. He considered that lawyers were frequently unrealistic in their somewhat technical approach to the urgent practical problems a government or business faces in such emergency situations.

In the political campaign of 1936 when Alfred Landon was running as the Republican candidate for President against Franklin D. Roosevelt, one of the members of the Republican National Committee was taken to Cromwell's house for lunch by Allen W. Dulles, then a partner in the firm. The Committee member eulogized Cromwell, praising him extravagantly and frequently expressing his regret that Cromwell's projected visit to Europe would not permit the National Committee and the Presidential candidate to avail themselves of his advice which would be invaluable, etc. As the luncheon progressed the Committee member hinted that just possibly their great grief at his absence might be assuaged if he could see his way clear to giving the Republican National Committee a handsome check. Cromwell was, however, seemingly very obtuse and with a wink at his partners suggested that since his advice was so esteemed he would defer his trip in the interest of the Party.

This possibility threw the Committee member for a loss and he promptly urged that under no circumstances should Cromwell postpone his trip.

"Oh," said Cromwell, "am I to understand, sir, that you value my money more than my advice?"

ALLEN W. DULLES
1926-1951

During the course of the lunch the unfortunate Committee member also discussed his own extensive itinerary which included many flights from Topeka to Denver, to Los Angeles, to Chicago and other points in order to organize the campaign. Cromwell appeared unconvinced that all this flying was necessary and indicated that more time should be spent on constructive thinking as to the best solution of the vast economic problems that faced the country and a little less on merely hating President Roosevelt.

After the luncheon, Cromwell wrote out a very modest check as a contribution, later remarking to one of his partners who remained after the guest had departed, "That young man mistakes energy for brains."

Throughout the 1936 campaign he remained extremely skeptical of the Literary Digest poll and commented a number of times to the author that it ran completely counter to the sentiments of the country and was not to be trusted. "Tell me one good reason why the ordinary citizen will vote for Landon?", he would ask, for he saw clearly the economic dislocations from which the country was suffering and he did not think that the then Republican leadership did.

Cromwell lived a full life as a lawyer, governmental, business and personal adviser, trustee and philanthropist, dying at the age of 94. Although short of stature, his vigor, aquiline countenance, piercing eyes, long white locks and full mustache made him to the end an outstanding and forceful figure in any gathering. He had earlier retired from active practice about the time of World War I, except for his many trusteeships and executorships. Although rarely in the firm's offices thereafter, since he preferred to work at his home, he followed with

unflagging attention the work of the firm until his death in the summer of 1948. The disposition of his personal estate worth approximately $19,000,000, to which later reference is made, showed the continuing breadth of his interests.

Perhaps one measure of his accomplishments is that from comparatively small beginnings, Cromwell, with his extraordinary talent, his tremendous creative energy and passion for work, his capacity for organization and for judgment of men as evidenced by the partners he selected, his understanding of social movements and economics and his feeling for the problems of business men, left behind at his death in July, 1948 a firm of some 70 lawyers.

Cromwell's Partners

Cromwell's partners in the firm, listed in the order of their admission, were: Algernon S. Sullivan, William J. Curtis, Alfred Jaretzki, Sr., William V. Rowe (a former partner of Joseph H. Choate), Francis D. Pollak, Royall Victor, Henry Hill Pierce, Clarke M. Rosecrantz, Edward H. Green, John Foster Dulles (now Secretary of State), Wilbur L. Cummings, Eustace Seligman, Harlan F. Stone (law clerk from 1898 to 1899 when he resigned to become a professor, and later Dean, at Columbia Law School; returned to the office as a partner 1923 to 1924; resigned to become Attorney General of the United States; later Associate Justice of the United States Supreme Court and Chief Justice of the United States), Reuben B. Crispell, Horace G. Reed, Alfred Jaretzki, Jr., John C. Higgins, Laurence A. Crosby (now President of Cuban Atlantic Sugar Company), David R. Hawkins, DeLano Andrews, Robert E. Olds (former Under Secretary of State), Stoddard

FRANCIS D. POLLAK
1899-1916

M. Stevens, Arthur H. Dean (Deputy to the Secretary of State in connection with the political conference envisioned by the Korean Armistice, with the personal rank of Ambassador), Allen W. Dulles (formerly of the State Department and now head of the Central Intelligence Agency), George C. Sharp, Rogers S. Lamont, S. Pearce Browning, Jr., Norris Darrell (law secretary to Mr. Justice Butler from 1923-1925), David W. Peck (now Presiding Justice of the Appellate Division, First Department, of the Supreme Court of the State of New York), Oliver B. Merrill (law secretary to Mr. Justice Stone from 1928-1929), Inzer B. Wyatt, William C. Pierce, Paul W. McQuillen, John F. Dooling, Jr., William Ward Foshay, Charles S. Hamilton, Jr. (a legal adviser to the Republican Party in the New York Constitutional Convention of 1938 and a Commissioner of the Port of New York Authority), William Piel, Jr., Richard S. Storrs, David S. Henkel and Edward G. Miller, Jr. (former Assistant Secretary of State for Inter-American Affairs).

Associates in the firm during Cromwell's lifetime who subsequently became partners were: John R. Raben, Joseph L. Broderick (now Brother Albert, a Dominican friar), Robert J. McDonald, Richard G. Powell, Henry N. Ess, III, Garfield H. Horn, John C. Jaqua, Jr., Roy H. Steyer, Vincent A. Rodriguez, Robert A. McDowell, and Robert MacCrate. John F. Arning, John R. Stevenson and William A. Ziegler, Jr. are the only partners in the firm who were not associated with it during Cromwell's lifetime, but all the present partners began their professional careers with the firm.

The vitality of any firm derives in large measure from the men drawn to it. Attached as Annex A is a list of all lawyers who have been connected with Sullivan

& Cromwell, and their present positions. In the First World War 8 out of the 29 lawyers with the firm served in the armed services, and in World War II, 37 out of 75 were in uniform.

Among the firm's present and former partners who served in World War I, Crosby, Dulles, J. F., and Hawkins were Majors, Andrews, Crispell and Seligman were Captains, McQuillen a First Lieutenant and Darrell a Corporal in the Army. In World War II, Broderick, Foshay and Pierce were Lieutenant Commanders, and Horn, MacCrate, McDonald, McDowell, Raben, Steyer, Stevenson and Ziegler were Lieutenants in the Navy, while Wyatt was a Colonel, Sharp a Lieutenant Colonel, Powell a Captain, Henkel a First Lieutenant and Arning a Private in the Army; Jaqua was a Captain in the Marines. Others in both wars performed no less valuable services for their country as civilians, but in capacities too varied to permit ready description.

Rogers S. Lamont believed so strongly in the preservation of democratic institutions that on the outbreak of the Second World War he withdrew from the firm to become a Captain in the British army. He died fighting in France on May 27, 1940. A fund in his memory was established by his partners at Princeton University to provide a scholarship to be awarded annually in his name to that member of the sophomore or junior class of good scholastic standing who exhibited the qualities which characterized his life. Lamont's sacrifice was not unappreciated in England. On October 27, 1940, which it will be remembered was during the height of the Battle of Britain when the English people were brought by the RAF in its finest hour to a new appreciation of valor, Viscount Castlerosse gave this tribute to him in the Sunday Express (London):

ROGERS S. LAMONT
1924-1939

"It is with sorrow and pride that I now tell you the story of Rogers Lamont of New York, who was, I believe, the first American to die fighting for our cause.

It is the simple story of a quiet man.

Rogers Lamont was a hardworking, successful lawyer in the famous firm of Sullivan & Cromwell. He was forty years of age, dark, good-looking in an unobtrusive way. He also had the gift of clear thinking.

When England went to war with Germany he weighed up the situation and, without any noise, resigned his partnership and slipped over the Canadian border. He had decided to join the British Army and fight for a cause he believed in. I revere men who fight for their country, but men who are prepared to die for a cause are surely doubly courageous.

There were many difficulties in his way. He had, for instance, no passport, nor did Lamont have any friends over here to help him. But he got over these difficulties and managed to get into the Artillery. He had prepared himself for the service by studying the necessary mathematics on his way over.

After some months, Lamont impressed himself on the authorities sufficiently to be given a commission. He went out to France, where he was promoted to captain, and it was as captain he was killed.

There was no farewell letter, no heroics. All he did in that direction was to leave behind him a fat old gold watch, a family heirloom, with a friend.

The story of Lamont will not be blazoned on the pages of history, but I reckon there will be many who, when they look towards the coast of France, will remember that somewhere there lies

buried a simple man who came from a far and a foreign land and who gave up everything he had to die for a creed he believed in.

To me there is something sublime in the life and death of Rogers Lamont, and his sacrifice should stand in the spacious firmament of time, fixed as a star, for such glory is his right.

I can say no more, nor can any words furbish the brightness of such a soul."

Lawyers for Industry

Cromwell began practice at a time when trial work was the path to fame and fortune in the law. Perhaps because of his lack of a college education he did not follow that path; and Mark Sullivan has criticized him in "Our Times" for not being a trial lawyer. Whether the criticism was just or not the reader must determine.

The nation's industrial growth in the 1870's and 80's referred to above demanded a somewhat different breed of lawyer from the combination trial lawyer-politician-statesman-orator-classicists who were traditionally the leading members of the bar. This need Cromwell was particularly well equipped to supply because of his flair for figures, passion for facts and more facts, and insistence on realistic, economic analysis rather than polished rhetoric, literary allusion or poetical quotation. His great gift for analyzing investments, his ability to ascertain the essential facts, to reconcile and bring together conflicting interests out of court, to recognize social change, to formulate conclusions in clear and concise English and to fight for them in conference, and his capacity for advising clients with prudent realism and yet with foresight and imagination were among the attributes that particularly equipped him to be of service in these changed conditions.

These new, factual-minded attorneys were hard-headed business counsellors and draftsmen of precise legal documents, wills and trust agreements, who rarely appeared in court themselves, although they worked in close association with trial lawyers in their own firms or with trial counsel of their choosing. The best of them coupled logic and exact legal training with a sound business knowledge, a thorough grasp of the financial, economic and social system, and a profound realization of the development of the country and optimism in its growth. It was their creative imagination that saw the need to devise new legal forms to support, organize and finance the industrial enterprises that were to produce and sell in a market that was becoming nation-wide and larger than the world had ever known. As the size and complexity of business grew it was to these new attorneys that clients increasingly turned for advice before acting, to avoid pitfalls and the delay, expense and uncertainties of litigation.

In those days a great deal of the time not only of lawyers, but of their clients and witnesses, was wasted in the courts waiting for arguments to be heard. There were many applications for postponements of trials or motions and the calendars were falling badly into arrears. This condition of course is one from which the courts have not yet fully escaped as the recent work of the Tweed Commission makes clear.

Evolution of the Federal Courts

When Cromwell came to the bar, the United States Courts of Appeals had not yet been created. Under the system established by the First Judiciary Act of 1789 (as reestablished by the Jeffersonian Party in 1803 after

the repeal of the Second Judiciary, "Midnight Judges", Act of 1801), which continued with minor modifications until 1869, a Justice of the Supreme Court sat twice a year in each Circuit with a District Judge as a member of the Circuit Court. Appeals from admiralty cases in the District Court might be taken to the Circuit Court, to which a writ of error lay to permit review of District Court common law cases. But most of the business of the Circuit Courts derived from their extensive original jurisdiction.

John Jay regarded the First Judiciary Act as so deficient in its operation that he refused reappointment as Chief Justice. One of the reasons for John Marshall's willingness to become Chief Justice at President Adams' request was his encouragement with the improvements to be brought about by the Judiciary Act of 1801 which eliminated the burden of Circuit riding, confined the duties of the Supreme Court Justices to that Court, thus curing the defect of their passing as Justices of the Supreme Court on cases previously heard on the Circuit bench, and signally strengthened the national judiciary by the appointment of sixteen Circuit Judges.[1] Though the Republicans led by Thomas Jefferson succeeded in repealing the Second Judiciary Act, the gradual return to its premises over the next century testified to its foresight and essential soundness.

In 1869 the pressure of business brought about legislation appointing an additional judge in each Circuit, but the judicial force remained insufficient in many Circuits, including the Second where New York City is located. The Supreme Court docket also reached un-

[1]See, Beveridge, "The Life of John Marshall", Vol. II, p. 58 (1947).

manageable proportions with 1800 cases pending when the October term of 1890 opened. In 1891 the situation was substantially improved by the creation of a three-judge Circuit Court of Appeals in each Circuit. This court, in most instances, was intended to be the court of last resort, although the Supreme Court retained jurisdiction of constitutional questions or by writ of certiorari could permit review of other important judgments of the Circuit Courts. Later a direct appeal could also be taken from the District Courts to the Supreme Court in certain anti-trust cases under the Expediting Act of 1903, as amended. The Circuit Courts were finally abolished by the Judicial Code effective January 1, 1912 which vested their original jurisdiction in the District Courts, from which appeals lay to the Circuit Courts of Appeals.

Reorganization of the New York Courts

Through this period a similar elaboration of the New York State courts was taking place. Under the New York Constitution of 1846, the Court of Appeals was composed of 8 judges, 4 elected for eight-year terms and 4 automatically selected annually from the judges of the Supreme Court with the least remaining tenure. One year selection was made from the even numbered judicial districts, and the next year from the odd numbered. This system kept the personnel of the Court of Appeals in constant flux and sometimes brought to that high post totally inexperienced judges who were completing the terms of Supreme Court Judges eligible for the Court of Appeals. The even number of judges led to affirmances by an evenly divided court which did not settle the underlying question of law.

In 1870 the Court of Appeals was reorganized. Under the plan all judges were elected for a term of 14 years.

This represented a marked improvement. However, it was necessary to institute a Commission of Appeals, composed of judges of the old Court of Appeals, to deal with the steadily increasing volume of business. The Commission sat in the same term though not at the same time as the Court of Appeals. It was abolished after five years, but business again accumulated to such an extent that in 1889 a second division of the Court of Appeals, composed of seven Justices of the Supreme Court, was created. This expedient entailed a divided Court of Appeals and necessarily impaired the consistency and predictability of decisions. Accordingly, it was abolished at the end of the initial period. The preferable remedy, later adopted, was the assignment of four Supreme Court Justices to act as Associate Judges of the Court of Appeals. This system, which permitted seven judges to sit in continuous session while others prepared opinions, so facilitated the disposition of cases that the accumulation was soon disposed of.

Part of the improvement resulted from the revision of the New York Constitution in 1894 which limited to questions of law the jurisdiction of the Court of Appeals and which vested the jurisdiction of the Superior Court of New York City and the Court of Common Pleas for the City and County of New York in the Supreme Court. Prior to this consolidation the practically concurrent jurisdiction of the New York City courts created time-consuming conflicts of jurisdiction and caused great expense to litigants. Consequently, a lawyer whose advice could avoid or settle vexatious litigation was in great demand.

At the same time, the Appellate Divisions of the Supreme Court of New York as they now exist were created in each department with the jurisdiction previously ex-

DAVID W. PECK
1930-1943

ercised by the Supreme Court at its General Term. The Appellate Division, by the New York Constitution, was given power to supervise the Special and Trial Terms. This power of control, together with rules requiring briefs to be filed and served in advance of hearings[1] rendered the disposition of trials more orderly and expeditious. Judge Van Brunt, as Presiding Justice of the Appellate Division, First Department, proved himself particularly capable in carrying out the purposes of these reforms which eliminated much of the waste of time and opportunity for dilatory tactics that Cromwell found so irksome in litigation.[2]

Though Cromwell himself was rarely in court, he frequently devoted long hours to ascertaining the facts, developing the theory of a case, and working with trial counsel in his own or other firms. While his own interests were not centered there, he attached great importance to litigation and to the development of specialists in litigation in his firm. One of his first acts as senior partner was to induce William J. Curtis, who had left the firm, to return and take over the trial work. Many other partners in the firm, including Algernon Sydney Sullivan, Alfred Jaretzki, Sr., Francis D. Pollak, Edward H. Green, John Foster Dulles, Clarke M. Rosecrantz, Harlan F. Stone, John C. Higgins, Norris Darrell, David W. Peck, Stoddard M. Stevens, Inzer B. Wyatt, John F. Dooling, Jr., William Piel, Jr., Roy H. Steyer, Henry N. Ess, III, Robert MacCrate and the author, participate or

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[1]Compare Joseph M. Proskauer's "A Segment of My Times", p. 35 (1950).

[2]Further reform is now required. See the report of The Temporary Commission on the Courts of the State of New York, "A Simplified State-Wide Court System", June 2, 1956.

have participated in many trials, administrative hearings and appellate arguments.

A large part of the present work of the firm consists of litigated matters. Despite the common misconception that Wall Street law firms only rarely engage in litigation, in the month of April, 1956, various members of the firm were engaged on some 142 pending litigated matters. In addition to trials taking place in the City of New York, the firm was participating in litigation in the Chancery Court of the State of Delaware, in the state and federal courts in Massachusetts, and in the Federal District Courts for Connecticut and Colorado, and was also engaged in anti-trust matters in Pittsburgh and St. Louis, in Federal Trade Commission matters in San Francisco, Cleveland and Washington, D. C., and in other litigation in the Tax Court of the United States, in the Supreme Court of the United States and in the International Court of Justice at The Hague.

The Indiana and Ohio reports for 1846 and 1849, respectively, and the New York reports from about 1858 on, when Algernon Sydney Sullivan started to practice in New York, contain numerous references to cases in which one or more of the firm's partners have participated. One of the last cases which Sullivan, himself, handled may be familiar. It is *Anderson* v. *Read,*[1] a leading case in the law of sales with respect to the rights of a vendor against an insolvent purchaser under an executory contract of sale.

The Practice of Cromwell's Firm

The further history of the firm itself is another story and one unfortunately which can not now be told to

[1] 106 N. Y. 333 (1887).

THE 1914 SULLIVAN & CROMWELL DINNER
HELD AT MR. CROMWELL'S HOME
12 WEST 49TH STREET

SEATED FROM LEFT TO RIGHT: DULLES, J. F., SULLIVAN, G. H., GREEN, CURTIS, CROMWELL, CATCHINGS (A GUEST), BOYESEN, SELIGMAN, ROYALL, CRISPELL, JARETZKI, SR., CORLISS, POLLAK, F. D. STANDING LEFT TO RIGHT: COLLETT, DODGE, VICTOR, R., FARNHAM (A GUEST), MARSH, HILL, SYKES, ROSECRANTZ, SHOOP, RIDLEY.

reveal more of the background and professional interest of the items constituting the list that follows which can only suggest the scope of Cromwell's interests and the practice developed by his firm. The gradual emergence in the course of Cromwell's life of New York City as a world financial center may also to some extent be perceived in this listing. Later there will be taken up a few of the matters with which Cromwell was particularly identified.

In the recent article, "The Role of International Law in a Metropolitan Practice",[1] the author of these memoirs had occasion to discuss one aspect of the practice of a large metropolitan firm. The items below, though less detailed, offer a more rounded picture of such a practice, and a picture which, as to the wide variety of legal questions that arise, is representative not only of Cromwell's firm but, with differing emphases, of the practice of other large metropolitan firms.

Among the interesting matters with which Cromwell's office was concerned were:

> In the field of trusts and estates—the Converse, DeLamar,[2] Campbell, Eno,[3] Gurnee, Johnston, Leslie,[4] Lewisohn, Sussman and Harrison Williams estates;
>
> In railroad matters—the representation of Dutch, English, French and German bankers in numerous financings of American railroads from the 1880's to the first World War; receiverships of Northern Pacific and other western railroads; receivership and

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[1] 103 U. of Pa. L. Rev. 886 (1955).
[2] 236 N. Y. 604 (1923).
[3] 196 App. Div. 131 (1st Dept. 1921).
[4] 175 App. Div. 108 (1st Dept. 1916).

reorganization of Seaboard Air Line Railroad in the Federal District Court for the Eastern District of Virginia from 1931 to 1946; reorganizations of the Chicago & Indiana Coal Railway and of the Chicago and Eastern Illinois Railroad;[1] reorganizations of the National Railroad of Haiti and of the Brazilian railroads; Chapter XV proceedings of the Baltimore & Ohio Railroad in 1944-5;[2] and the representation in 1915 of a number of directors of the New Haven Railroad in both criminal and civil litigation;

In public utility matters—numerous public utility rate cases, service at cost contracts and other regulatory problems of The Detroit Edison Company, Potomac Edison Company, Potomac Electric Power Company, Washington Gas Light Company, West Penn Electric Company, Wisconsin Electric Company, and their subsidiaries, among others, which problems while often in one sense routine required an accommodation to changing administrative philosophies and reflected a fascinating evolution of the conceptions of a fair rate of return and of utility income, questions made particularly acute by the almost continuous inflation since 1933;[3] development in 1916 of a program for

[1]*Metropolitan Trust Co.* v. *Chicago & E. I. R. Co.,* 253 Fed. 868 (7th Cir. 1918), decided in the course of this reorganization, remains an important precedent in relation to the effect of the after acquired property clause in a mortgage of the merged corporation on the after acquired property of the surviving corporation in the merger.

[2]*In Re Baltimore & Ohio R. Co.,* 63 F. Supp. 543 (D. Md. 1945), cert. denied sub nom. *Phillips* v. *Baltimore & Ohio R. Co.,* 328 U. S. 871, rehearing denied, 329 U. S. 821 (1946), cert. denied, 332 U. S. 844 (1947).

[3]See, Dean, "Provision for Capital Exhaustion Under Changing Price Levels", 65 Harv. L. Rev. 1339 (1952) and "Recent Trends in Rate-Making in the Light of Changed Price Levels", 52 Pub. Util. Fortn. 817 (1953).

"open end" mortgage financing with all bonds ranking *pari passu* of utilities in the Pittsburgh area; formation of a public utility holding company which acquired operating properties in northern New York State and from which in part resulted the present Niagara Mohawk system; arranging meetings of junior bondholders of Portland General Electric Company in 1934 to obtain their waiver of indenture provisions preventing extension of senior bonds which under then existing market conditions could not be refunded; work for the Electric Bond & Share Company's interests in the Argentine; Tokyo Electric Light & Power Company and Nippon Electric Power Company financings, involving for the first time the creation of "open end" mortgages under Japanese law; reorganization of Postal Telegraph Company which involved the split of assets into foreign and American and the subsequent sale of such assets to American companies; liquidation and reorganization of public utility holding companies pursuant to the Public Utility Holding Company Act of 1935; Mexican Light & Power Company reorganization with loans of Nacional Financiera, S.A. and World Bank loans guaranteed by the Mexican Government; franchise investigations; the Cheat River proceedings concerning the relative jurisdiction of the Federal Power Commission and the State of West Virginia and the constitutionality of West Virginia legislation governing the licensing of water power installations;[1] matters arising under the Federal Water Power Act of 1920 and as amended in 1935, the Public Utility Holding Company Act of 1935

[1]See, *Hodges* v. *Public Service Commission,* 110 W. Va. 649, 159 S. E. 835 (1931).

and the Natural Gas Act, and in connection with the Federal Trade Commission investigation of public utilities in the late twenties; and a study of potential liabilities and other legal problems connected with the use of atomic energy;

In a wide variety of other corporate and specialized security matters such as—the organization of Pacific Development Corporation designed to expand business in the Far East and to finance the requirements of governments; the formation of the Chinese American Bank of Commerce, a Chinese corporation with half its stock subscribed by Chinese and half by Americans, the American half being held in a Philippine corporation set up for the purpose; organization of National Dairy Products Corporation and its acquisition of other milk products companies throughout the East and Mid-West; formation of American Brass Company by a consolidation of 6 metal companies in 1913; organization of Remington-Rand, Inc., involving the bringing together of 11 leading office equipment corporations; organization of Cuba Cane Sugar Company in 1915 including the acquisition of plantations and mills then producing one-seventh of all Cuban sugar; merger of 22 stores into Hahn Department Stores in 1928 to form the corporation now known as Allied Stores; organization in 1931 of the new firm of Kidder, Peabody & Co. for investment banking as successor to the firm of the same name formed in 1865; and participation in the organization of the National Association of Security Dealers, Inc. in 1938;

The development of personal holding companies; the transfer of the state of incorporation of American

ROYALL VICTOR
1904-1926

Waterworks and Electric Company from New Jersey to Virginia and of International Nickel Company from New Jersey to Canada; The First Boston-Mellon Securities merger in 1946; sale of Harris Forbes & Co. (of which the top company had originally been organized as a Massachusetts Trust to avoid, for a transitional period, the 1913 federal income tax on corporations) to Chase Securities Corporation in 1931; and the Matador Ranch acquisition by American investors from Scottish investment trusts in 1951, raising interesting questions of English company and tax law and of the organization of the cattle business most appropriate to the twentieth century;

Representation of tobacco interests in connection with the merger and reorganization of tobacco companies; the bankruptcies and reorganizations of chain stores including the disposition of numerous landlord claims involved in reorganizations before and after the enactment of Chapter 77B of the Bankruptcy Act in 1933; reorganization of Bush Terminal; reorganization of Chautauqua Assembly; reorganization of Aetna Explosives Company in 1918, including the formulation of a plan to which Royall Victor, a partner in the firm, contributed and which at the time was described as a "model plan" by federal Judge Mayer; the reorganization of a large cottonseed oil company into a soap company in which was developed the then rather unique idea of having the subsidiary become the parent company (later followed in American Agricultural Chemical Company with refinements to preserve unimpaired the rights of non-depositing stockholders); Kreuger & Toll reorganization; Cuba Cane Sugar receivership and reorganization and reor-

ganization of other Cuban sugar companies following the great depression; reorganization of Goodyear Tire & Rubber Company in 1921 and the creation of unique creditors' liens on personal property (later availed of in the Krupp mortgage in Germany and referred to in the Bawl Street Journal as a first class lien in the opinion of Sullivan & Cromwell upon second class war materiel); reorganizations of the New York & Cuba Mail Steamship Company and of the Munson Steamship Line; reorganizations of the St. Louis Coke & Iron Company, of the Atlantic Phosphate & Oil Company and of Seaboard Fisheries Company; the transfer in 1925 of all the investments in subsidiaries of The Great Atlantic & Pacific Tea Company, Inc. into a single new subsidiary; equity receiverships; cases arising under Sections 77 and 77B and under the Bankruptcy Acts of 1898 and 1938; and readjustment of bonds of the German shipping lines including clearing up of attachments placed on the lines' ships;

Working out of open end mortgages in this country and later in Germany, Italy and in Japan for public utility enterprises with all the bonds ranking *pari passu;* initial drafting of preferred stock provisions together with certain protective restrictions for industrial enterprises and for merchandising companies where, in general, earnings are more important than physical assets; creation of serial preferred stock for utilities; drafting of income preferred stock and income bonds; preparation of dilution provisions designed to protect the value of a conversion or purchase right in convertible securities and options; working out of American Certificates of Deposit

for foreign securities; the development of lease-back arrangements and new instruments of finance; creation of various investment trusts; qualification of securities under state Blue Sky laws; the elimination of non-callable preferred stocks for Southern California Edison Company and American Metal Company; the clearing up of preferred stock arrears by merger as in the case of Zellerbach Corp. and Crown Willamette Paper Co. after the *Wilson* case;[1] and the series of bank loans and private financings resulting in the complete paying off or refunding of the various Kaiser enterprise loans from the R. F. C.;

Problems in connection with the financing of oil, natural gas and product pipe lines, including titles to rights of way, whether pipe line companies were industrial companies not entitled to exercise the right of eminent domain or public utilities subject to the jurisdiction of local regulatory commissions as to their rates or the issuance of securities, and questions of the relative jurisdiction of state and federal authorities both here and in Canada; general representation of underwriters and issuers in a wide variety and large volume of underwritten, private and public offerings, bank loans, public sealed biddings,[2] offerings to stockholders, and private placements comprehending infinitely diverse securities and issues of all degrees of complexity; consideration in 1924 of the Dawes Plan Loan in relation to the extent and character of the liens created by the law for reparations in connection with German financings; advising with respect to

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[1]21 Del. Ch. 391, 190 Atl. 115 (1936).

[2]See, Henkel, "The Auction Block for Securities", 36 Va. L. Rev. 701 (1950).

the Young Plan; representation of American underwriting houses, issuers of German dollar bonds, from 1931-1934 in connection with the Stillhaltung Agreement; an intensive study from 1932 to 1935 of the Gold Clause, reviewing legislation demonetizing gold, related judicial decisions both here and abroad and the consequent problems of issuers, trustees, custodians and of holders of bonds expressed to be payable in gold (The firm sent John G. Laylin to Europe on this matter and upon his return was asked by William H. Woodin, Secretary of the Treasury in the Roosevelt administration in 1933, to make Laylin available to the Treasury Department as a specialist. Laylin later joined Dean Acheson who was then an Assistant Secretary of the Treasury in the firm of Covington & Burling.); passing upon a wide variety of legal questions in connection with financings in Australia, Belgium, China, Denmark, France, Germany, Holland, Hungary, Italy, Japan, Latin America and the Scandinavian countries; and attention to myriad questions under the Securities Act of 1933,[1] and under the Securities Exchange Act of 1934,[2] the Trust Indenture Act of 1939, the Investment Company Act of 1940,[3] and The Investment Advisers Act of 1940;

[1]See, Dean, "The Lawyer's Problems in the Registration of Securities", 4 Law & Contemp. Prob. 154 (1937), discussing some of the questions that arose in the early years of the Act, the author's earlier articles, "The Federal Securities Act", Fortune Mag., August, 1933, p. 50 and "The Amended Securities Act", Fortune Mag., September, 1934, p. 80 or the article of his partner Eustace Seligman, "Amend the Federal Securities Act", 153 Atl. Monthly 370 (1934).

[2]See, Seligman, "Problems Under the Securities Exchange Act", 21 Va. L. Rev. 1 (1934).

[3]See, Jaretzki, "The Investment Company Act of 1940", 26 Wash. U. Law. Q. 303 (1941).

Cooperation with the New York Stock Exchange in the 1930's on the development of corporate and accounting requirements for stock listings and of its requirements for the greater protection of the public; development of N. R. A. codes; advising on commercial credit; counselling on franchises, corporate acquisitions, mergers, pension plans, executive compensation agreements, stock option plans, and on Sherman, Clayton and Robinson-Patman Act problems; attention to proxy regulations; various proxy campaigns for control of industrial companies; labor matters; patent matters; protecting copyrights and trademarks; legal aspects of accounting questions; problems of private entry into the atomic energy field such as product liability for manufacturers of reactors; and representation of American corporations in Canada, Europe, Africa, Asia and Central and Latin America;

Banking problems in the depressions of 1907 and 1929-33; advising as to the Federal Reserve Act of 1913 and the Glass-Steagall Act of 1933 and in connection with the separation of commercial and investment banking in 1933-34; representation in connection with the Federal Trade Commission Utility Corporation Inquiry commenced in 1928, the Gray and Pecora investigations and the SEC investigations of public utility reorganizations, bankruptcy, corporate reorganizations and investment trusts; the representation of clients before the CAB, the CAA and the NLRB;[1] and problems under the Federal Communications Act, concerning the Federal De-

[1]See, Jaretzki, "The Administrative Law Bill: Unsound and Unworkable", 2 La. L. Rev. 1 (1940).

posit Insurance Corporation, and under the Trading with the Enemy Acts;

Counselling clients on problems arising under the tax statutes of the Federal Government,[1] New York State, New York City and other jurisdictions and representing clients before the administrative bodies which interpret and enforce such statutes, or where necessary, before the courts;

In representation of foreign governments—representation of the Chinese Government before the League of Nations in 1932 to place the Manchurian and Peking incidents before the League; advice in connection with the preparation of corporation laws for Panama and Liberia; Polish Stabilization loans, including drafting central bank legislation on the reorganization of its currency system (facetiously referred to in the Bawl Street Journal as payable "in zlotys or zymole troches at the bearer's option—those who exchange the 7's for the 6's will be given a free psychiatric examination at Bellevue); the Chinese Wheat and Cotton Loan in the 1930's; setting up the Belgium, British and Netherlands purchasing commissions at the start of World War II; representation of the Central Bank of China in connection with the sale by it of materiel on Guam and other islands in the Marianas which had been turned over to Nationalist China by the U. S. Government as part of an overall settlement of claims; *Matter of Banque de France* v. *Supreme Court,* 287 N. Y. 483 (1942),

[1]See, Darrell, "Corporate Liquidations and the Federal Income Tax," 89 V. Pa. L. Rev. 907 (1941), "Creditors' Reorganizations and the Federal Income Tax," 57 Harv. L. Rev. 1009 (1944) and "Recent Developments in the Nontaxable Reorganizations and Stock Dividends," 61 Harv. L. Rev. 958 (1948).

holding that the New York Supreme Court had jurisdiction of a suit against the Banque de France by assignees of the Banque Nationale de Belgique who had levied on over 700 million dollars of accounts and properties of the Banque de France held by the Federal Reserve Bank in New York; the Bank of Poland gold case arising, as did the preceding case, from the German armies overrunning France in the spring of 1940, in which was denied a sheriff's claim for $640,000 poundage arising from attachment of assets of the Banque de France;[1] *Banco de Espana* v. *Federal Reserve Bank,* 114 F. 2d 438 (2nd Cir. 1940), involving title to silver on deposit in the Federal Reserve Bank; the Kingdom of The Netherlands decrees in exile, and *Archimedes* case, *State of the Netherlands* v. *Federal Reserve Bank,* 201 F. 2d 455 (2nd Cir. 1953); and the Republic of Colombia Commercial Debt Readjustment;

Passing upon the bonds of the International Bank for Reconstruction and Development (the "World Bank") and upon the first public offering in the New York market of bonds and serial notes of the High Authority of the European Coal and Steel Community; representation of the United States underwriters of common shares of KLM Royal Dutch Airlines (par value 100 Dutch guilders), believed to have been the first new issue of equity securities of a European corporation registered under the Securities Act of 1933 since World War II; and representation of the prospective purchasers of common stock of Hugo Stinnes Corporation being auctioned by the Attor-

[1]*Stojowski* v. *Banque de France,* 294 N. Y. 135 (1945).

ney General under the Trading With the Enemy Act;

Litigation of tax questions including—moneyed capital tax cases in New York; *General American Investors Company, Inc.* v. *Commissioner,* 348 U. S. 434 (1955), holding that payments under Section 16 (b) of the Securities Exchange Act of 1934 constitute gross income to the recipient; *The Detroit Edison Company* v. *Commissioner,* 319 U. S. 98 (1943), regarding the depreciation of utility facilities; *Edwards* v. *Slocum,* 264 U. S. 61 (1924), establishing that residual charitable bequests may be deducted from the gross estate without diminution on account of the tax which they must bear; *Cluett, Peabody & Co., Inc.* v. *Commissioner,* 3 T. C. 169 (1944), holding no taxable gain to a corporation upon its sale of treasury shares; *The Frank Shepard Co.* v. *Commissioner,* 9 T. C. 913 (1947), concerning the effect upon excess profits credit of the inauguration of a pension system during the base years; *Hochschild* v. *Commissioner,* 161 F. 2d 817 (2nd Cir. 1947), authorizing a corporate officer and director to deduct as personal business expenses legal costs incurred in the successful defense of a stockholder's derivative action; *Commissioner* v. *Western Power Corporation,* 94 F. 2d 563 (2nd Cir. 1938), holding that an exchange of shares was a tax-free reorganization and accordingly the taxpayer had not realized taxable gains of almost $69 millions as claimed by the Commissioner; *Kraft Foods Company* v. *Commissioner,* 232 F. 2d 118 (2nd Cir. 1956),[1] regarding the deductibility of inter-

[1]Reversing 21 T. C. 513 (1955).

est on debentures issued by a wholly owned subsidiary as a dividend to its parent; and

Litigation in many other fields—*National Cash Register Company* v. *Remington Arms Company,* 242 N. Y. 99 (1926), involving a parol modification of a contract under seal; *Federal Trade Commission* v. *A. P. W. Paper Co.,* 328 U. S. 193 (1946), the Red Cross trademark cases; the Russian life insurance and *Credit Lyonnais* cases, 266 N. Y. 126 (1934), arising out of the Bolshevik revolution in 1917, the confiscation of private property and the subsequent attachment of the debtor's property here in order to start the suit; cases arising under the Alien Property law, including the *Bosch* case for the return to Swedish interests of assets seized by the Alien Property Custodian; the AAA Litigation (Agricultural Adjustment Administration—Henry Wallace's "ploughing under"); *Austrian* v. *Williams,* 198 F. 2d 697 (2nd Cir. 1952), reversing 103 F. Supp. 64 (S. D. N. Y. 1952), and *Marco* v. *Sachs,* 295 N. Y. 642 (1945), defending Harrison Williams and Goldman, Sachs & Co. in suits arising from the organization and administration of Central States, Blue Ridge and Shenandoah investment companies; *Myerberg* v. *Webster,* 295 N. Y. 870 (1946), in which plaintiff's breach of his duty of loyalty was held a bar to his recovery of a finder's fee; *Brown* v. *Robinson,* 224 N. Y. 30 (1918), in which was obtained a reversal of a decision of the Appellate Division which had held void certain assignments of interests in remainders and declared the purchase price forfeited; *Kavanaugh* v. *Commonwealth Trust Company of New York,* 223 N. Y. 103 (1918), concerned with the liability of directors for

negligence; *Lonsdale* v. *Speyer,* 284 N. Y. 756 (1940), denying the right of the trustees of the St. Louis-San Francisco Railway Company to rescind the sale of 183,333 shares of common stock of Chicago Rock Island and Pacific Railroad Company purchased in 1926; *Turner* v. *American Metal Company, Ltd.,* 268 App. Div. 239 (1st Dept. 1944), the defense of American Metal Company directors and officers in the suit brought with respect to their ownership of Climax Molybdenum shares; litigation for control of the Czechoslovak Bata Shoe enterprise, *Bata* v. *Bata,* 304 N. Y. 51 (1952) and *Bata* v. *Chase Safe Deposit Co.,* 279 App. Div. 182 (1st Dept. 1951); *Washington Gas Light Co.* v. *Byrnes,* 320 U. S. 731 (1944), defining the power of OPA in relation to a public utility's rates; *District of Columbia* v. *Seaboard Investment Trust,* Eq. No. 50688 (D. C. Sup. Ct. 1930), involving the interpretation of the La-Follette anti-merger law in the District of Columbia; *Fosdick* v. *Investors Syndicate,* 266 N. Y. 130 (1934), holding the failure of a foreign investment company doing business in New York to obtain a license under the New York Banking Law not grounds for rescission of an investment contract; *Sugar Institute, Inc.* v. *United States,* 297 U. S. 553 (1936), the anti-trust case referred to in the 1930's as Sullivan & Cromwell's private P.W.A. project; *U. S.* v. *Cooper Corporation,* 312 U. S. 600 (1941), establishing, before the recent amendment to the anti-trust laws, that the Government is not a "person" who can sue for triple damages under the Sherman Act; *Pennsylvania Water and Power Company* v. *Consolidated Gas, Light & Power Co. of Baltimore,* 209 F. 2d 131 (4th Cir. 1953), sustaining the defense of *in pari delicto* in a private anti-trust action for triple damages predicated upon an allegedly illegal contract between the litigants; *United States* v. *Brown Shoe Company,* E. D. Mo., No. 10527 (2), Jan. 13, 1956, denying the application of the United States for a preliminary injunction to restrain the merger of Brown Shoe Company, Inc. and G. R. Kinney Corporation; and participation in the successful defense of industry members and customary underwriting practices in the investment bankers anti-trust case, *U. S.* v. *Morgan,* 118 F. Supp. 621 (S. D. N. Y. 1953).

Related Individual Pursuits

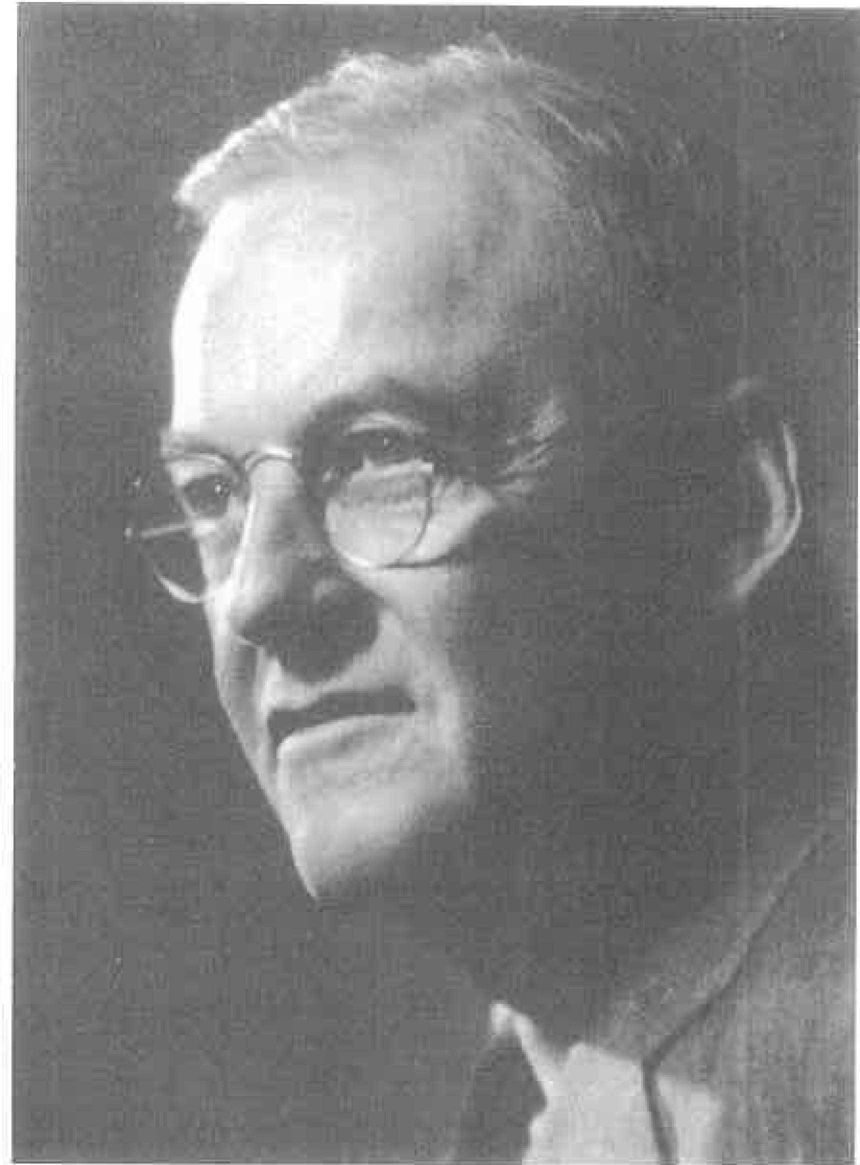
Individual lawyers in the firm, as in others, by reason of their particular interests, stimulated perhaps by their firm's activity in the field, also participated beyond the sphere of private practice in various advisory committees or study groups dealing with, for example, tax and fiscal policy, foreign trade and investment, the revision of the corporation laws of Delaware, New York, Nevada and Ohio, and with the drafting of federal legislation, and particularly that intricate network of securities legislation consisting of the Securities Act of 1933, the Glass-Steagall Act, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the over-the-counter amendments to the 1934 Act in 1936, the Maloney Act (Section 15A of the Securities Exchange Act of 1934), the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. Other lawyers in the firm have been active in the work of the Foreign Policy Association, Council on Foreign Relations, American Law Institute, Practising Law Institute, bar associations, the Legal

Aid Society and in the work of various hospitals, universities, medical schools and law schools.

Innumerable are the opportunities offered by a metropolitan practice for involvement in the widest variety of individual extra curricular work and public service along the lines of the examples suggested, and if a sense of proportion is not observed such work can become more time consuming than practice itself.

These outside pursuits of course do frequently lead to the development of skills and the acquisition of knowledge useful in private practice. For example, John Foster Dulles' grounding in international finance obtained both from his office assignments and from his work with the War Trade Board in 1918, as counsel to the American Delegation at the Versailles Peace Conference and as American Representative on the Reparations Commission in 1919, when combined with the experience of many of his partners in European financings and reorganizations and the representation of European bankers in transactions here, equipped the firm in the years between the wars, during most of which period he was the active senior partner, to represent manufacturers investing or doing business abroad, investment banking houses in connection with foreign bond issues, foreign governments on commercial matters and related questions of trade and exchange.

At times in the years between the First and Second World Wars the firm had offices for various periods in Berlin, Buenos Aires and Paris and men stationed for extensive periods in Havana, Manila and Shanghai. These offices have not survived the Second World War and with the convenience of modern air travel there is not the same necessity to reestablish them. But work of the



JOHN FOSTER DULLES
1911-1949

character that led to their establishment continues. In the spring of 1956 members of the firm were traveling on the firm's business in Belgium, Denmark, France, Norway, Spain, Argentina, Brazil, Colombia, Cuba, and, of course, Canada.

Dulles' continued contact, developing personal acquaintances with the officials of foreign states, insight into diplomatic events and detailed, practical knowledge of contemporary banking, industrial and economic conditions, together with his uncommon administrative ability, in turn fitted him, in addition to being an active senior partner in the firm, to be American Representative to the Berlin Debt Conference in 1933, a member of the Commission on a Just and Durable Peace in 1941, a member of the United States Delegation to the 1945 San Francisco Conference on World Organization which chartered the United Nations, special advisor to the Secretary of State at the Council of Foreign Ministers in London (1945 and 1947), Moscow (1947) and Paris (1949), negotiator of the Japanese Peace Treaty (1951) and architect of the treaty establishing S.E.A.T.O. (1953).

In addition to his broad vision, Dulles manifested an exceptional ability to lead, inspire, attract and to work with younger lawyers and knew well how to develop them by delegating responsibility. As a result he was able to build and direct an effective team of lawyers.

It is one of the satisfactions of the profession of the law, as Henry L. Stimson has well pointed out, that lawyers can more readily than many executives effect temporary total or partial withdrawals from the daily routine to attend to public affairs or matters of particular personal interest. Yet when participation in public affairs growing out of private practice leads to extended

absences, it becomes at times difficult for the absent lawyer to reconcile his voluntarily assumed public obligations with his prior professional obligations to his private clients, or for that matter to his partners.

Such absences require his partners to extend their efforts to carry on the increased day to day work and to satisfy clients who are naturally more interested in their own private affairs, in making a living and in having their daily legal problems or litigation receive diligent, knowledgeable and sympathetic attention, than in freeing their lawyers for participation in public affairs.

Practice in Partnership

It has occasionally been suggested that the emergence of the large law firm, by reason in part of the alleged anonymity of the partners practicing under a continuing firm name (which anonymity is largely a myth since members of the bar and clients retain, deal, work with, talk to and accept advice from partners as individuals, and, indeed, sometimes make the personal attention of particular partners a condition of their retainer), has contributed both to the decline in the standards and prestige of the profession and to a lessening of the role previously played by lawyers in public life.

The prominence of distinguished lawyers from such firms in bar associations, civic life and government today ought certainly to rebut the latter part of that suggestion.

Whether the prestige of the profession has declined since, for example, the time of the Constitutional Convention, in 1786, is certainly a debatable point. Jefferson's unfavorable opinion of lawyers in general, in contrast to Madison's, is of interest in this connection.

If one reads Charles Warren's "History of the American Bar," one would hardly obtain the impression that in the early days of the Republic lawyers as a class were particularly popular. Moreover, it would appear that such decline as there may have been in the prestige of the bar bears no clear relationship to the practice of the law in partnerships, but is a development for which the primary, if not the sufficient causes, have been associated with the rise in literacy, particularly the marked increase in the proportion of the American population receiving higher education, the development of important administrative agencies before which non-lawyers may practice, the rise of accountants, economists, and other experts in such fields as taxation, transportation, communication and trade, the advent of graduate schools of business, economics, journalism and of governmental relations and the improvement in the quality and significant enlargement in the scope of the many varied and personal services which trade associations, chambers of commerce, banks, trust companies, various agencies and corporations publishing news letters or services in numerous fields are now prepared to render, and indeed the rise of legal departments within corporations and governmental agencies.

In 1786 the great preponderance of the educated, and for that reason alone, highly respected, members of society could be found within the professions of law, medicine, the ministry and among the magistrates, merchants, ship owners and landed gentry. It is unrealistic to speak of a decline in the influence of the bar of today as compared with some earlier period without also considering what proportion of the educated segment of society then consisted of lawyers as compared with the present. Also

to be considered in interpreting any comparison with the simpler agrarian society is the fact that, as pointed out in a recent study of reform movements in the United States, the development of modern industry and commerce has greatly diversified the interests and impaired the homogeneity of the bar.[1]

If the Constitutional Convention were reconvened today and took under consideration such a question as the role of the commerce power in the federal system, political scientists, historians, economists, graduates of business schools, government career men, sociologists, geologists, nuclear physicists and other scientists, journalists, publicists, advertising experts in radio, television and other media, engineers, specialists in agriculture, trade, shipping and rail and air transportation, professors in various subjects and labor leaders, to name but a few of many specialists, could make significant contributions to the discussion and would be fully heard. The availability of these new sources of informed opinion necessarily reduces the authority of, and weight to be given to, the views of lawyers as a class on questions of government and related matters of this character which were formerly their field of special and almost exclusive competence.

It is to be doubted if the adoption in the United States today of the English barrister system (barristers may be disciplined by the Benchers of their Inn, and, unlike solicitors, may not have partners and may not have

[1]Hofstadter, "The Age of Reform", p. 147 (1955). Hofstadter though apparently of the view that service to an expanded commerce has impaired the dignity and professional independence of the bar, nevertheless indicates that much of the effective leadership of the progressive movement derived from leading lawyers who were ambivalent toward the emergent industrial forces that they were called upon to serve.

regular clients, although they may, and indeed often do establish reputations in certain legal specialties so that their opinions are constantly demanded by solicitors on questions in their field), would have any beneficial effect on the general standing or eminence of lawyers or barristers.

In other parts of the world there has been a marked tendency toward the same elimination of separate orders of the legal fraternity that has been fully accomplished in the United States. France continues to resist this trend. The principal division of the French legal profession between Avoués who prepare pleadings and Avocats who plead cases is somewhat similar to the structure of the English bar, although the permissibility of partnerships is just the reverse, but Notaires who perform certain of the functions of solicitors and Agrées who act as commercial lawyers, carry the specialization even further. In Germany, however, since 1879 the Advocats and Procurators, until that time the rough equivalent of solicitors and barristers, have been merged into a single class. In Canada, although the distinction continues to exist, there has, for most practical purposes, been a fusion of solicitors and barristers and the system is not far different from that prevailing in the United States.

Concern over the present standing of the legal profession would also appear to be at least as acute in England as it is in the United States. Papers presented at the 1956 Oslo Conference of the International Bar Association suggest that a similar concern exists in Canada, Denmark, Germany and Norway. Nor is this surprising, since it is probable that in most western countries conditions analogous to those in the United States have produced comparable effects. But in many of these countries the organized bar has more extensive

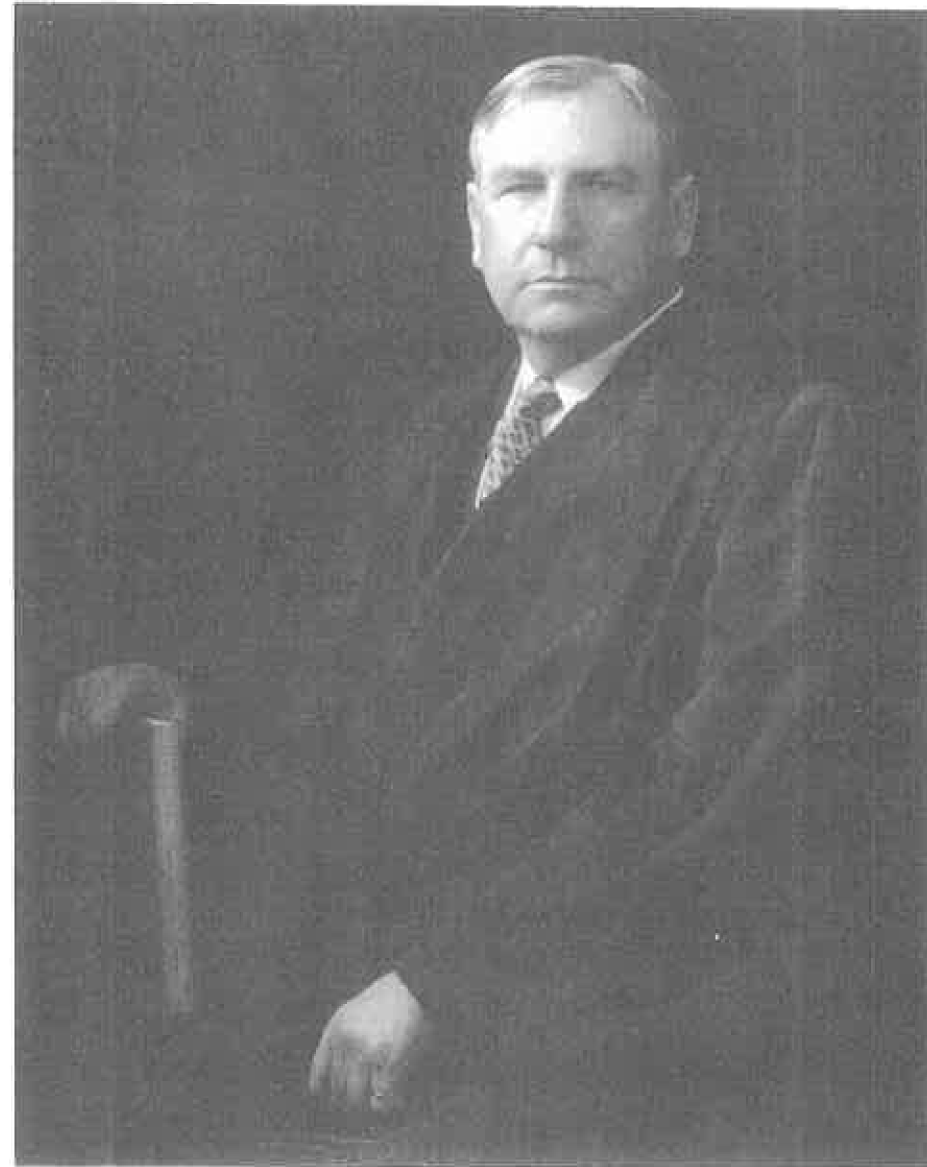
powers of self-government than in the United States and is better equipped to make a concerted effort to promote public understanding of the role of the profession and to regulate the conduct of its members.

In Canada, for example, membership in the provincial law or bar societies is a condition to the right to practice law in the several provinces. By statute these law societies or bar councils are generally given broad powers, exercised by elective bodies known as "Bar Councils" or the "Benchers", to determine qualifications to practice law, to discipline or to suspend from practice, and to supervise legal aid and other matters touching the public confidence and respect for the bar. Coordination between the provincial law societies is accomplished through the Canadian Bar Association. There is reason to believe that the American bar can benefit from a study of the Canadian experience with more extensive professional self-government.

Any approach to a revision of the structure of the American bar must also come to grips with an assessment of the consequences of the fact that as society has become more complex, there has been amassed such a wealth of judicial decisions, statutory law, and administrative regulations, precedents and practices that the lawyer in order to maintain his position has been forced to acquire expert knowledge in various of the complex fields, which are no longer exclusively reserved to him.

Justice Stone (who spent most of his life as a law teacher and judge, apart from an appellate practice while a law professor at Columbia), in a provocative address at the dedication of the Michigan Law School Quadrangle in 1934,[1] expressed the fear that the proficiency

[1]See, "The Public Influence of the Bar", 48 Harv. L. Rev. 1 (1934).



HARLAN F. STONE
1898-1899
1923-1924

and technical skills so acquired were obtained at the loss of well-rounded men (as to some extent specialization must always be obtained), and had contributed to the debasing of a learned profession to the role of servants of business, with the result that for the lawyer of today the advancement of the narrow interests of his clients increasingly overshadows concern for the advancement of the broader public interest.

With great respect for his former preceptor, the author submits that in this widely shared fear there is some of the deceptive plausibility of the half truth. The lawyer in private practice is occasionally but not often in the daily grist given the opportunity to consider a question with all the impartiality of the ideal legislator or judge. Ordinarily questions come to his attention in the form of problems of his clients for whom he must find a workable solution and fight for it. Perhaps, as Justice Frankfurter has suggested in an appreciation of Justice Stone, it is the teacher of law who is best placed to form the habit of seeing law as an historic process or to help fashion it as a fair social instrument.[1] Yet upon review of the field of labor law, for example, including collective bargaining, fair employment, pensions, social security, group life insurance, accident benefits, unemployment and old age insurance, and other fringe benefits, a new field and one in which social, economic and legislative problems are particularly in the foreground, it is found that it has been in the intelligent, effective, partisan representation of the often conflicting interests of management and labor that labor policies conducive to the public welfare have been hammered out. There is reason to believe that all interested parties in these

[1]Frankfurter, "Of Law And Men", p. 155 (1956).

questions with broad social implications are today more adequately represented than may previously have been the case. One of the surest ways in which lawyers can serve the public is to see that this continues to be so and that they are not too narrow and inflexible in their outlook.

No lawyer can effectively represent his client until he understands fully both the correct facts and the law and the position of his client's opponents and can place himself and his client's problems in the most all inclusive and comprehensive social context. It is to be hoped that time bears out Robert T. Swaine's judgment that lawyers today do in fact more generally recognize the interrelation of legal questions with those of a political, social and economic nature and more readily give effect to this broader approach in their advice to clients than they did a generation or two ago.[1] Specialization is dangerous only if it prevents the lawyer from assuming this broader approach.

The development of large partnerships in law is, however, not the cause of specialization but merely one of the effects of a highly complicated society in which trained people increasingly wish to think out their own, individual opinions and make their own decisions, and can only be assisted by experts. The influence of lawyers in their area of competence is not necessarily lessened because professional people or persons with specialized training other than themselves are intelligent, have ideas and are equally capable of rationalization, but the lawyer of today cannot expect professional assurance, unnecessary legalisms and the aura and ritual of a quasi-priestly caste to be accepted by his intelligent contemporaries as

[1]Swaine, "Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar", 35 A.B.A. J. 89 (1949).

a substitute for expert knowledge, sound reasoning, thorough research, incisive and accurate analysis and constructive and timely solutions.

The emergence of large partnerships reflects the attempt of lawyers to offer clients in a more complicated society the competence, the breadth of view, and the ability to cope with the present, complex network of laws and regulations in as efficient a manner as the sole practitioner could offer in a simpler one. As always, individual clients repose their confidence in individual lawyers in such partnerships. Though these lawyers may in a greater or lesser degree rely on the reasoned opinions of their partners, individual responsibility is not lessened.

That legal partnerships have attained a large size in the United States is in part a reflection of the scale of American enterprise, but is also in considerable measure attributable to the enormous complexity of nationwide and foreign commerce under our federal system, the powers reserved to the several states and the perplexing congeries of laws under which we move and have our being. Consider, for example, the recent secondary offering of Ford Motor Company common stock by The Ford Foundation in which Sullivan & Cromwell represented the several underwriters. Six lawyers in the firm worked seven days a week for several weeks on the investigation of relevant questions of law and of fact, on the preparation of a registration statement under the Securities Act of 1933 relating to the stock with a care commensurate with the problems implicit in a $657,900,000 offering, on the qualification of the stock under state Blue Sky laws in many instances before the effectiveness of the federal registration statement (so as to permit under the various state laws the early solicitation of offers to pur-

chase to the full extent permitted by the 1954 amendments to the Securities Act of 1933 to which most state laws had not yet adjusted[1]), on obtaining approval for the use of advertising matter in the several states, in the Canadian provinces and certain foreign countries, on the preparation of material pursuant to Rule 134 under the Securities Act of 1933 through which selected Ford dealers and employees could offer to purchase before the effective date of the registration statement portions of the $100,000,000 of stock initially reserved for offering to them so that the remainder could be released to the public on the effective date, on the preparation of a prospectus for use in Canada, on the preparation of the underwriting agreement, the agreement among underwriters and the selling dealer agreements to be used in the United States, Canada and foreign countries, and in an analytical review of questions of Delaware law relating to the reclassification of the stock and the unique arrangement of voting rights in the several classes of Ford Motor Company stock, on the possible effect of the exercise of stock options previously granted by the Company to Ford executives and on a host of other related matters all involving investigation, conferring, and drafting.

In addition, other lawyers in the firm worked from time to time on other matters such as the stock pledge and bank loan agreement by which the underwriters raised funds to meet the purchase price, questions of federal and state taxation relating to the offer and a review of certain legal questions arising from the listing of the stock on stock exchanges and the registration of the stock under the Securities Exchange Act of 1934.

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[1]Section 18 of the Securities Act of 1933 expressly preserves the jurisdiction of the states and effectively prevents the implication of any intention on the part of the Federal Government to pre-empt the field of securities regulation.

All of this work was, of course, in addition to the intensive work done by the special counsel for The Ford Foundation, by counsel for the Ford Motor Company and by counsel for the Ford family. As the offering of the Ford stock may suggest, a considerable amount of close cooperation between specialists in a number of fields, and therefore of practice in partnership, is simply unavoidable if today's commerce is to receive the competent advice required to permit its nationwide and frequently worldwide scope of operations to continue on the unrelenting and exacting time tables now customary in financial matters.

To a lesser extent, a similar association of specialists has occurred in medicine in the growth of clinics and in the medical departments of hospitals, corporations and governments.

In today's larger legal partnerships advancement is by and large by competence alone. Those who achieve positions of influence and leadership in such firms tend to be those who have manifested their ability to relate into a more comprehensive picture diverse fields of specialization and to view the major problems of clients in a broad social perspective.

The problem of achieving this perspective in view of the enormous intricacy of modern society is an intellectual challenge such as the bar, as an institution of social society, has never previously faced.

In the author's judgment the larger partnership offers a promising environment, though, of course, not the only one, in which widely divergent personalities may find a solution to this challenging problem. Far from being a limiting experience, such a partnership offers to its members by reason of the variety of its contacts and personali-

ties an exceptional opportunity to acquire a liberal education in modern government and society. Such partnerships are likely in the future, as they have in the past, to prepare and offer for public service men exceptionally qualified to serve. The very nature of such a partnership permits a man to do more, not less civic work, and permits him, as a true officer of the court and responsible citizen, more readily to enter public service for various periods and to serve society to his full professional capacity. Elihu Root's reorganization of the War Department, in the breadth of his approach to the problem, the thoroughness of his investigation and the administrative excellence manifested in his execution of needed reforms is a splendid example of the character of the service for which extensive legal experience may prepare a lawyer and a vindication of the value of such experience as training for public service.

Before the enactment of the graduated income tax, which works with peculiar hardship on the professional man, a lawyer could devote more time to public affairs. Today, the struggle to keep his nose above the ever engulfing morass of income tax installments usually keeps a lawyer on the treadmill all of his life. The self-employed lawyer, as a professional man, gets no stock options, has no pension, no group life insurance and until 1956 no social security. He cannot accumulate income in his partnership. Nor can he charge depreciation on his assets of body and brain as "plant" or sell them for capital gain.[1]

[1]This was the contention made in *Norman* v. *Golder*, [1945] 1 All. E. R. 353 (1944) and to which Lord Greene, M. R. replied:

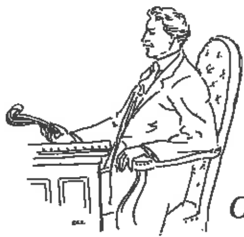
> "It is quite impossible to say that the taxpayer's own body is a thing which is subject to wear and tear, and that the taxpayer is entitled to deduct medical expenses because they relate to wear and tear. It is wear and tear of plant or machinery. Your own body is not plant. Your horse conceivably may be. I do not know what it is under the Income Tax Acts. It certainly has, under the Employee's Liability Acts, been held to be plant in a suitable case, but I have never heard it suggested by anybody that the taxpayer's own body should be regarded as plant."

See also 40 A. B. A. J. 666 (1954) for an excerpt from the celebrated mythical case of *Haddock* v. *Board of Internal Revenue* before Radish, J., reported in full in Herbert's "Uncommon Law" p. 231 (1936), in which an author is held entitled to make deduction for wear and tear on his body and brain.

Generally he is in his late forties or early fifties before he is accepted as a leader by his clients. In these years long, hard, diligent study may begin to show a return, but as a result of the graduated income tax the difference in income after taxes of a junior lawyer and a senior lawyer may be comparatively small.

In England, the General Council of the Bar and the Law Society, believing strongly that the continued existence of the bar as a profession might well depend on the granting of tax relief to permit the creation of pension funds for professional people, have over the past two years made repeated representations in this regard to the Chancellor of the Exchequer. Recently a concession has been granted and members of the professions are now relieved from income tax on amounts up to 10% of their annual income, to a maximum of £750, applied toward the purchase of qualifying retirement annuities. Taxation of these amounts is deferred until the year of receipt.[1] Consideration of this problem and similar relief, such as proposed in the 1955 Jenkins-Keogh Bill, is sorely needed in the United States if the independent professions are not to disappear.

[1]Finance Act, 1956, 4 & 5 Elizabeth 2, c. 54, §§ 22, 23.



CHAPTER SIX

Certain Professional Achievements

As previously suggested, among Cromwell's outstanding characteristics were his skill at factual analysis, his imagination and his ability to meet new and changing problems and situations. Some of our early and all too often, sketchy files have been looked through to bring to light some concrete examples of the ingenuity and foresight of Mr. Cromwell as a financial lawyer.

The Cromwell Plan

One of these professional achievements was an original plan of reorganization foreshadowed by the strikingly successful readjustment of the affairs of Decker, Howell & Co. in 1891 and more fully developed for the Wall Street brokerage firms of W. G. Hitchcock & Co. and Henry S. Ives & Co., which failed in the 1890's. It was modified a few years later to meet the needs of the brokerage and commodity house, Price, McCormick & Company, which was forced to suspend payments with secured and unsecured liabilities of $13,000,000. A related arrangement was worked out in connection with the Thomas Liquidation of 1908 in which five individuals with debts approaching $3,000,000 assigned all their assets to trustees to whom creditors of the five individuals also transferred their collateral and claims. The trustees managed to determine relative priorities in a very complicated factual situation and liquidate the assets for the benefit of creditors without litigation.

The plan was also used to preserve the assets of other firms, including specifically the jewelry importing firms of Joseph Frankel's, Joseph Frankel's Sons Company, E.

M. Gattle & Company and Gattle, Ettinger & Hammer in the panic of 1907. Among the assets of these closely associated jewelers was the Hope Diamond. In this and other instances, in addition to settling the various claims involved, the plan achieved the marked success of enabling the reorganized firms to continue in business without interruption to suppliers, discharge of employees, or disappointment to landlords and creditors.

There was no federal Bankruptcy Act in force from 1878 until 1898. Therefore the state insolvency laws governed under the rule of *Sturges* v. *Crowninshield*.[1] New York had insolvency laws[2] and they are still to be found in the Debtor and Creditor Law, although their operation is largely suspended by reason of the U. S. Bankruptcy Act of 1898, as amended.

These New York insolvency laws afforded a remedy whereby an assignment for the benefit of creditors was made with the consent of creditors holding two-thirds in amount of the debts owed by the assignor. The statute provided for a proceeding commenced by petition in which the insolvent scheduled his assets and liabilities. If the court found that the schedule of liabilities and assets was correct and that creditors holding two-thirds in amount of the insolvent's debts had consented, it directed the insolvent to execute an assignment of all his property, not exempt from execution, to trustees selected by the creditors and named in the order. The assignment vested in the trustees all property of the insolvent and any contingent interests vesting within three years of the assignment. Upon a certificate by the trustees that the

[1] 4 Wheat. 122 (U. S. 1819).
[2] Code Civ. Pro. §§ 2149-2187, Laws of 1880, C. 178.

insolvent had duly so assigned, and upon filing the papers in the county clerk's office, the insolvent was discharged.

In addition, Chapter 466 of the New York Laws of 1877 dealt with the situation where an insolvent made an assignment for the benefit of creditors without the consent of his creditors. In brief, this resulted in a liquidation proceeding under supervision by the court. The court's jurisdiction over the proceeding was essentially *in rem* rather than *in personam*. The statute envisaged an accounting proceeding one year after the date of the assignment, in which all creditors would be cited, an account would be taken, and claims would be proved and paid to the extent of available assets.

Cromwell's plan was designed to prevent the immediate sacrifice sale of slow assets or of assets whose value was not fairly reflected in the distorted market conditions prevailing in a financial crisis. Cromwell went to the underlying inventories, balance sheets, profit and loss statements and company accounts for his realistic analysis.

The realistic plan, utilizing the framework of the nonconsensual assignment for the benefit of creditors, preserved the advantages of the assignment, as against the inflexibility of bankruptcy or state insolvency proceedings, while minimizing the defect of the assignee's limited powers and particularly the accounting and liquidation that could be forced after one year, by the substitution or intervention of trustees with broad powers to hold assets in their discretion until fairer values were obtainable.

The first step in the Cromwell plan was generally the assignment of all the assets of the insolvent firm pursuant to Chapter 466 of the New York Laws of 1877. Responsible trustees then invited all unsecured creditors to participate in a plan of readjustment. Creditors consenting to the plan deposited their claims against the insolvent firm with the trustees and received negotiable certificates of deposit. The trustees had full authority to represent the deposited claims and, when the business hoped to continue, to run the business.

Occasionally the assignee was dispensed with if the creditors consented to a transfer of the property to the trustees directly, such as occurred in the Thomas Liquidation of 1908. This consent could generally only be obtained by including in the assignment property otherwise beyond the creditors' reach.

The assignee then drew the terms of sale for the public auction of the insolvent's assets so as to permit any creditor of the assigned estate an optional reduction on the purchase price at which he might bid in assets. The amount of this reduction was treated as a dividend on the creditor's approved claim. The ceiling on this allowance, expressed as a percentage of the purchaser's claim, was the maximum percentage distribution that the assignee believed could certainly be made on all claims.

Thus, if the assignee had, for example, assets sufficient to pay 50 cents on the dollar, he could permit the trustee representing $1,000,000 of claims to bid in for $200,000 in cash, assets worth $700,000 at the current market. The cash required by the trustee could be obtained by a loan from commercial banks on the security of the assets to be purchased.

When the business was to be liquidated the trustee would bid in at the public auction only such assets as would otherwise have to go at a sacrifice price under

the then current conditions. These assets he might partially distribute in kind or hold for a period not exceeding, say, two years. Pending eventual sale of the assets, additional money could be raised with them as security. The proceeds of the loan from commercial banks along with the dividends that might be declared by the assignee were distributed to the participating creditors.

In the sharp but temporary dislocations that characterized the market in the 80's and 90's, it was generally found that the creditors who joined the plans realized materially more than those who did not, and such creditors often realized their full claims, though in the Price, McCormick & Company insolvency the creditors participating in the plan received only 2% more than those not participating. However, in that instance Mr. Price ultimately paid all the firm's creditors in full.

All this was done on a voluntary basis. At the same time, the confidence of all creditors was required to prevent the institution of other proceedings. Since an assignment for creditors is an act of bankruptcy, supervening bankruptcy proceedings could be instituted by three creditors with $500 of claims. This circumstance discouraged but did not prevent the use of the plan after the passage of the 1898 Bankruptcy Act. It is said that on one occasion Cromwell, with his knowledge of basic values, personally guaranteed payment to prevent the filing of a bankruptcy petition, thus permitting the insolvent's business to be carried on.

This method of handling commercial failures became known as the "Cromwell Plan" and brought him considerable fame.

Equity Receiverships

Some of the procedures later regarded as axiomatic or as just common sense were, according to legend in our office, first conceived or perhaps only perfected or improved upon by Cromwell, but at least utilized with skill, imagination and courage.

In one such case he observed that when an equity receiver of a railroad was appointed in the proper United States Circuit Court (after 1912 in the District Court), creditors in other judicial districts often obtained judgments and handed them to the sheriff for levy and execution on such moveable assets as could be found in the jurisdiction (so that the railroad could no longer be operated as a unit), before ancillary proceedings could be brought in other jurisdictions to extend the receiver's control over local property. To meet this problem he is said to have conceived the idea of retaining local counsel in each of the other jurisdictions, writing out the petition for ancillary receiverships in the necessary longhand copies, sending them in advance to the local counsel with explicit instructions as to timing and procedure in local courts and then sending them the single word "File" as soon as the petition for receivership was granted in New York. Swaine's "The Cravath Firm",[1] states that this was done with great success by Cromwell when the Northern Pacific Railroad went into receivership on August 15, 1893.

Such equity receiverships as a preliminary to the foreclosing of a mortgage or as a means of corporate reorganization became increasingly important and specialized during the years of Cromwell's most active practice.

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[1]P. 496.

Almost invariably the primary bill in equity was filed by a friendly creditor in a federal court, the basis of jurisdiction being diversity of citizenship. Such creditor's bills customarily alleged, in addition to the facts on which jurisdiction was based, that (a) the principal operating offices of the defendant and a material portion of its properties were in the district, (b) the defendant was indebted to the complainant and (c) the defendant was insolvent, there were many creditors whose debts had matured or were about to mature, the defendant was unable to pay them, and if the court did not take the defendant's assets into possession, attachments would be levied, judgments obtained and executions issued and his properties wasted.

Diversity of citizenship was also required for each ancillary bill.[1] Federal courts were preferred to the state courts because of the greater similarity of the rules in different districts, their greater experience and the greater likelihood of cooperation between ancillary courts and the primary court. The Southern District of New York became the favorite judicial district in which to file the primary bill. Not only were the headquarters of many major corporations in the district, but the court in which the bill was first filed was entitled to appoint the receiver,[2] and experienced receivers were not plentiful outside of New York. Cromwell even reorganized the railroads of Haiti through a creditor's bill in the Southern District.

A creditor's bill generally preceded a foreclosure suit because of the difficulties of maintaining the requisite

[1]*Mercantile Trust Co.* v. *Kanawha & O. Ry. Co.*, 39 Fed. 337 (Cir. W. Va. 1889).

[2]*Farmers' Loan & Trust Co.* v. *Lake Street Elevated RR*, 177 U. S. 51 (1900).

diversity of citizenship where a single trustee or joint corporate trustees, together with local trustees where required by state law, sought to maintain an action against a railroad or other corporation incorporated in several states. Furthermore, if no default had occurred, the mortgage was frequently not in a position to be foreclosed though immediate action to preserve the immoveable properties as well as the cash, accounts receivable, coal, ties, rails, supplies and rolling stock as an operating unit might be imperative. Once a federal court had appointed a receiver pursuant to the friendly creditor's bill and established its jurisdiction over the res, the foreclosure suit, though a separate proceeding, could be brought in the federal court even though diversity was lacking.[1]

For a time there was doubt whether the device of the friendly creditor suit for jurisdictional purposes gave rise to a justiciable case or controversy, and also as to whether the defense, waived by the corporate debtor at the outset of the litigation, of the failure of the complainant creditor to exhaust his remedy at law, might not be raised at a later date to upset the proceedings, but these fears were ultimately disposed of.[2]

There were of course a variety of other growing pains, such as concern as to the liability of the complainant for the receiver's expenses where the corporate assets were insufficient,[3] questions as to the rights of holders of receivers' certificates,[4] and major questions as to the validity

[1]*Morgan's Co.* v. *Texas Central Railway*, 137 U. S. 171 (1890).

[2]Re *Metropolitan Railway Receivership*, 208 U. S. 90 (1908); *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371 (1893).

[3]See, *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360 (1908), *reversing* 145 Fed. 820 (9th Cir. 1906).

[4]See, *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434 (1886).

of foreclosure sales to reorganization committees.[1] Brief reviews of this field are contained in the lectures delivered to the Association of the Bar of the City of New York in 1916 by James Byrne and Paul Cravath entitled "Foreclosure of Railroad Mortgages" and "Reorganization of Corporations", both now reprinted in "Some Legal Phases of Corporate Financing, Reorganization and Regulation", and in Roberts Walker, Robert T. Swaine and James Rosenberg's law review articles reprinted in "Corporate Reorganization and the Federal Court" and brought down to 1941 by further lectures delivered before the Association of the Bar of the City of New York by the author.[2]

Much of this specialized learning was superseded by Sections 77 and 77B of the Bankruptcy Act of 1933, by the Chandler Act of 1938 and by the so called "Mahaffie Act," Supreme Court decisions and other developments, but a review of the gradual evolution in this field of the creditor's bill in equity is an instructive example of the adaptability of legal concepts.

Cromwell's legal imagination, broad experience, facility at reconciling conflicting interests, ability to grasp the fundamentals, indefatigable determination and creative resourcefulness made him particularly effective in carrying through these complex reorganizations. Nothing was too much trouble for him, and he was always thinking about ways and means of improving procedural methods. It profoundly irritated him to be told (which he never accepted, as the writer hopes the partnership of which he is a member has never and will never accept), that there

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[1]See, *Northern Pac. Ry.* v. *Boyd,* 228 U. S. 482 (1913).

[2]One of these lectures is reprinted in 26 Corn. L. Q. 537 (1941).

was no effective legal solution for a difficult economic problem. So reluctant was he to do the same thing twice in the same way that alteration and improvement of the precedent to the interest of his client became almost a fetish with him.

Consolidation of Industry

By reason of his background as an accountant and wide experience in finance, Cromwell was also attracted by the opportunities that existed to obtain a wider market, to achieve some measure of stability in the midst of rapid expansion, to improve credit, to produce a better product at lower cost, to give labor better and more secure employment at higher wages, a matter to which he constantly alluded, and to minimize some of the really vicious and anti-social commercial practices of the day through the bringing together of small enterprises into large units.

Many of the consolidations of his day doubtless were accompanied by forms of financing that would now have some difficulty at least in being registered under our various securities laws. But America was then a debtor country in great need of development and capital was hard to come by. It was the development of these large units and the tremendous energy, courage and vision of pioneers that made possible operations on the scale on which our economy rests today. As Benjamin Franklin said, "It is hard for an empty sack to stand upright." The debate over the social consequences of "bigness" continues, but many of today's social practices, of which all concerned are justly proud, came only with stability.

Cromwell with his knowledge of European politics and finance was also aware of the extraordinary develop-

ment of German economic power in the 1890's and early 1900's and believed that American industry had to merge, expand and obtain capital to meet the competition and threat of German industry, just as today it must meet the projected economic expansion of the Soviet Union and of Communist China. He realized as few of the social critics then seemed to that we were not complete masters of our own destiny.

Trusts

New legal techniques were necessary to permit this consolidation. At common law and during the 1880's it was generally regarded as illegal for one corporation to hold the stock of another. This obstacle was first met by the device of the corporate trust, said to have been originated by Samuel Dodd in Ohio, who later represented the Rockefeller interests in developing the Standard Oil Trust. Shares of stock of the constituent corporations were conveyed by the individual stockholders to trustees and trust certificates issued to the owners of the stock so deposited so that the trustees became the actual stockholders of record and controlled all of the member corporations of the trust. These trusts existed with a variety of modifications.

The American Cotton Oil Trust established by Cromwell, with extensive operations in the South and Southwest, was a trust of this character.

There gradually developed, however, a growing popular sentiment against the concentrations of economic power represented by many of these trusts. The Republican platform said in 1880: "We declare our opposition to all combinations of capital organized as trusts or otherwise." This sentiment was followed in 1890 with the passage of the Sherman Act which Senators Edmunds of Ver-

mont and Hoar of Massachusetts drafted for the most part. In the several states the same sentiment was reflected in legislation and extensive litigation against the trusts.

In two significant state cases, one in New York[1] involving the Sugar Trust and the other in Ohio[2] involving the Standard Oil Trust, the Courts regarded the constituent corporations as in effect parties to the trust agreement, considering that the act of the individual shareholders of a corporation in joining a trust was really the act of the corporation and *ultra vires*. The decisions further noted that trust agreements tending to create monopolies were against public policy.

The Cotton Oil Trust had itself been sued by the Attorney General of Louisiana in 1889 on the grounds that it was part of a monopoly and that the trustees were illegally exercising corporate powers within the state. Part of the relief requested was the voiding of the charters of the Louisiana corporations in the trust.

Pending the appeal of an adverse decision, Cromwell called special meetings of all of the constituent corporations, obtained the necessary proxies and quietly dissolved the Louisiana corporations and transferred all their assets to a Rhode Island corporation set up for that purpose, whose stock was held by the trustees. When the appeal came on, he announced to the consternation of the Attorney General of Louisiana that the relief requested was no longer necessary for the corporations were no longer in existence.

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[1]*People* v. *North River Sugar Refining Co.*, 22 Abbott's New Cases 164 (N. Y. Sup. Ct. 1889).

[2]*State* ex rel. *Attorney General* v. *Standard Oil Company*, 49 Ohio State 137, 30 N. E. 279 (1892).

New Jersey Corporation Law

The vulnerability of the trust arrangement to the combination and conspiracy concept of the Sherman Act and to the legal analysis of the Ohio and New York decisions led to a search for new legal techniques. The principal solution was found in an amendment to the Corporation Law of New Jersey. Before that time the laws of no state, with exceptions in the case of railroad and utility companies in a few instances, expressly permitted one corporation to hold the stock of another.

The New Jersey statutes of 1888 granted New Jersey corporations a very limited right to hold the stock of other corporations. In 1889 the New Jersey statutes were amended to permit a New Jersey corporation to purchase the stock of any other company "manufacturing and producing materials necessary to its business." William J. Curtis (then living in Summit, New Jersey, the father-in-law of our late partner, Henry Hill Pierce, and the grandfather of our present partner, William Curtis Pierce) and Hector Tyndale, of Cromwell's firm, together with Richard V. Lindabury, then a young lawyer in New Jersey, were among those active in the drafting of this amendment.

In 1889 the American Cotton Oil Trust availed itself of the new opportunities thus presented. It was perhaps the first major enterprise to be reorganized as a New Jersey corporation. The North American Company, originally incorporated as the Oregon & Transcontinental Co. in 1881, was a close second, incorporating in New Jersey in 1890.

In 1893 and again in 1896 the New Jersey corporate laws were further "liberalized" in this respect. A host of corporations sought to avail themselves of this advantage

and the mass production of New Jersey corporations got underway. Within a few years The Corporation Trust Company in Jersey City was the agent and provided the home office for over 700 corporations with capital approaching $1,000,000,000. Other states, notably Maine and later Delaware, after the passage of Woodrow Wilson's so-called "Seven Sisters Bills" made life for New Jersey corporations rather complicated, joined New Jersey in what soon became a competitive revision of corporate laws.

A high tide of combination was reached at the turn of the century. Mark Sullivan indicates that from 1889 to 1901, 183 holding companies were organized, making in all a total capitalization over $4,000,000,000, 1/20th of the then total wealth of the United States, nearly twice the amount of money in circulation in the country and more than four times the capitalization of all the manufacturing consolidations organized between 1860 and 1893. Of the 318 largest corporations on January 1, 1904, 236, representing aggregate capitalization of over $6,000,000,000, had been formed in the six preceding years. The Pujo Committee in 1913 was later to show that a still greater concentration of economic power obtained.

The Northern Securities Case

Not until 1904 when *Northern Securities Company v. United States*[1] established that a holding company might be the instrument for restraining trade under the Sherman Act was the process slowed. The Northern Securities Company had been formed by J. P. Morgan and James J. Hill to prevent a recurrence of their contest with Edward H. Harriman and Jacob J. Schiff

[1] 193 U. S. 197 (1904).

over the control of the Northern Pacific. The dispute had arisen when Morgan and Hill, controlling the Northern Pacific and the Great Northern, bought out the Burlington in 1901. Harriman and Schiff, controlling the competing Union Pacific and Central Pacific, then sought to buy control of the Northern Pacific. The resulting financial struggle drove up the price of Northern Pacific common stock on the New York Stock Exchange ten-fold before the two groups compromised their differences. Shortly thereafter Harriman and Schiff received in exchange for their Northern Pacific stockholdings a minority interest in the Northern Securities Company which had been formed at Hill's suggestion to control the Great Northern and Northern Pacific in order to insure a continuation of their policies and managements.

Part of the legal interest of the *Northern Securities* case derives from the fact that Justice Harlan, who wrote the majority opinion, there interpreted the Sherman Act as prescribing a rule of free competition. Justice Holmes was quick to point out this interpolation in his dissent:[1]

> "The first section makes 'Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations,' a misdemeanor punishable by fine or imprisonment. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The Court below argued as if maintaining competition was the expressed object of the act. The act says nothing about competition. I stick to the

[1] 193 U. S. 197, 403 (1904).

> exact words used. The words hit two classes of cases, and only two—contracts in restraint of trade and combinations or conspiracies in restraint of trade, and we have to consider what these respectively are."

George Kennan in the discussion of the Northern Pacific Panic in his biography of E. H. Harriman indicates that in fact the extent of the competition that then existed between the Great Northern and the Northern Pacific has been greatly exaggerated. Harriman's concern was not the suppression of minor local competition, but the coordination of the larger rail systems with each other in the interests of better transportation. His ideas, then misrepresented as only monopolistic in intent, have subsequently been accepted, recognized as constructive and now find reflection in the Transportation Act 1920, as amended.

The Illinois Central Proxy Battle

The solicitation of proxies was a means of obtaining corporate control that was less costly than the outright purchase of a controlling stock interest. While not necessarily associated with the consolidation of industry, proxy battles were often related to it and became more familiar as the trend progressed and larger and more widely held corporations emerged. A few years after the struggle for control of the Northern Pacific, E. H. Harriman became involved in a test of strength with Stuyvesant Fish over the control of the connecting Illinois Central Railroad Company. This was one of the first great corporate proxy battles and Cromwell participated throughout as counsel for Harriman.

The rupture between Harriman and Fish had occurred in October, 1906, when Fish refused to abide by

the agreement under which he had been permitted to solicit management proxies to re-elect certain directors and to fill a vacancy on the Board of Directors.[1] Fish, at the annual meeting in 1906, did manage to elect his director with these proxies. He refrained from voting only the proxies received from Harriman and from Kuhn, Loeb & Co., though as Cromwell pointed out at the meeting, "All the proxies that you have received have been influenced in part by the cooperation, as well as by the non-interference of Messrs. Peabody and Harriman under the agreement that they signed with you. It is, therefore, utterly impossible to distinguish what proxies you have received through the benefit and influence of this agreement. It is mere fiction to select a few that came through one particular channel. These proxies came from all over by our suggestion, and often from those who came to Mr. Harriman's office and were directed to you." That the proxies that Fish had refrained from voting represented less than the strength of the Harriman group was clearly borne out at the adjourned annual meeting of stockholders held on March 3, 1908 when Fish himself was denied re-election as a director.

Among those soliciting proxies for Harriman during 1907 was Louis D. Brandeis. When Brandeis was nominated to the United States Supreme Court this fact was urged against his approval by the Senate as being inconsistent with his simultaneous condemnation of the New Haven Railroad as monopolistic. Waddill Catchings, then president of Central Foundry Company, who had been with Sullivan & Cromwell in 1907, appeared in Brandeis' defense and testified that Brandeis had made on him, "the deepest and most lasting impression" as a

[1]See, Kennan, "E. H. Harriman", Vol. II, pp. 43-65 (1922).

lawyer who not only had to be convinced that no possible conflict of interest existed but had also to be satisfied as to the justice of the cause for which he was retained.[1]

It is interesting to note in passing that the outcome of the Illinois Central contest in 1908 turned on whether a Utah corporation and a New Jersey corporation, both of which under the laws of their respective domiciles could hold stock of another corporation, could vote the stock of an Illinois corporation. The very question shows that these were the "salad days" of the law of corporations. The County Court of Illinois held in an unreported case that the power to own was the power to vote.[2]

Whatever the motivation, the enthusiasm of the age for consolidations is well indicated by a memorandum found in our files of an agreement on another matter entered into in 1899, which begins: "Whereas the undersigned is engaged in an endeavor to consolidate most of the shipyards or shipbuilding companies of the United States into one corporation . . ."

Organization of United States Steel

Of these combinations, by far the biggest, at least up to 1901, was J. P. Morgan's masterpiece, United States Steel Corporation. Cromwell and his partner, William J. Curtis, together with Francis Lynde Stetson and Charles MacVeagh of Stetson, Jennings & Russell, were among those who shaped it.

One of the largest corporate constituents of United States Steel was the National Tube Company which was a

[1]See, Mason, "Brandeis", p. 478 (1946).

[2]*Wolfson* v. *Avery*, 61 Ill. 2d 78, 126 N. E. 2d 701 (1955), suggests that, despite these pioneer efforts a few problems as to the manner of election of directors of Illinois corporations were left unsettled.

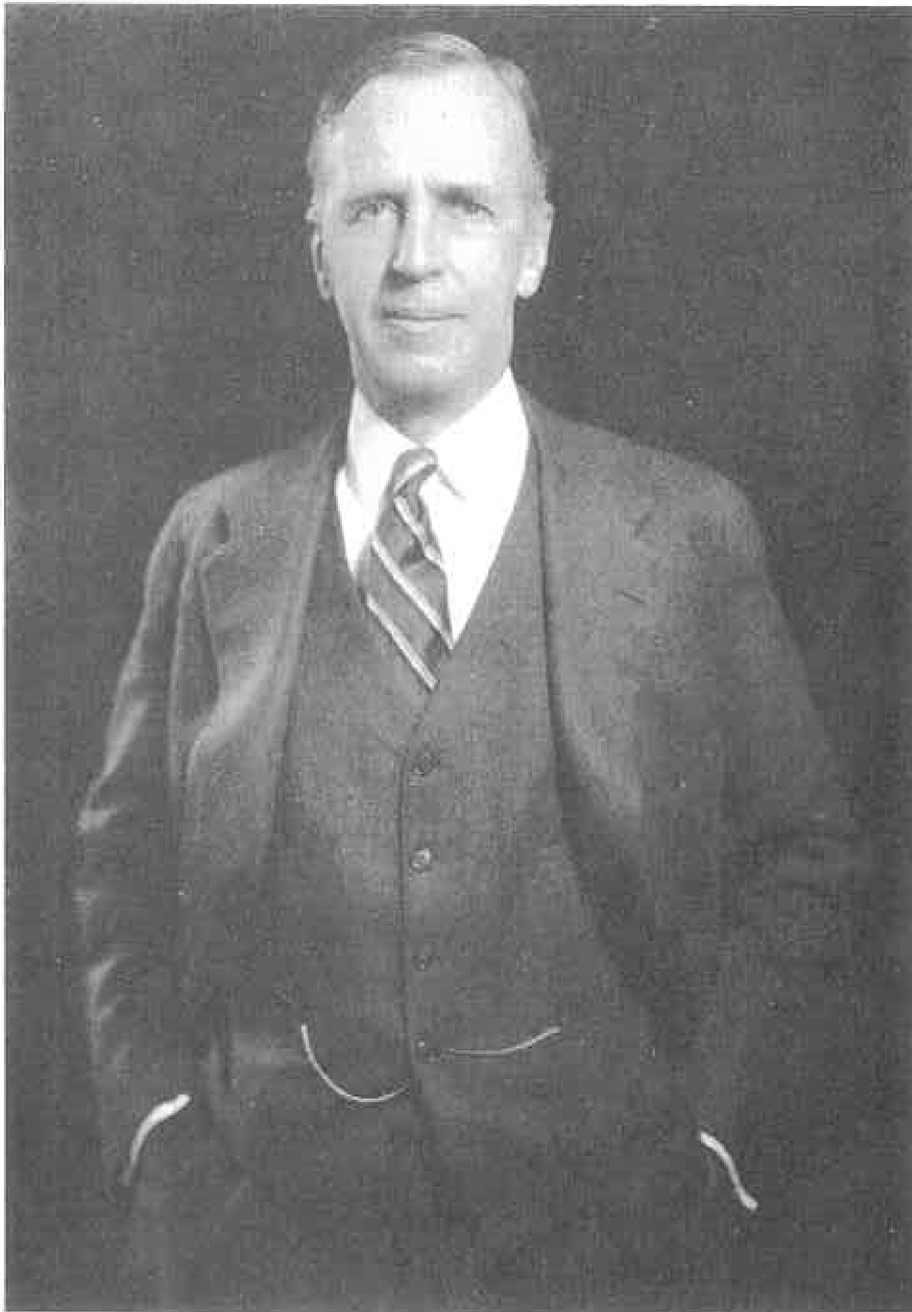
combination of 16 of the leading tube manufacturers in the country. This consolidation had first been attempted in 1893, but had been abandoned when one of the leading producers withdrew. The continued recession in steel until 1897 brought about a change of heart, however, and in 1899 it was effected.

Cromwell and Edmund C. Converse, the son-in-law of John H. Flagler, obtained options to purchase the property or stock of the constituents for stock of the National Tube Company or cash. National Tube was formed in 1899 with an authorized capital of $80,000,000, the largest capitalization of any corporation yet created. The public was offered $7,500,000 of this capital through J. P. Morgan & Company and the rest was distributed to the participants.

With his experience in this successful consolidation, Cromwell was among those who conceived the plan of a still larger corporation, United States Steel, and discussed it with J. P. Morgan. Among the incorporators was Cromwell's partner, Curtis, who also served for a month as its first President.

Public Utilities—The "Open End" Mortgage

The same desires to expand, to obtain stability and to improve credit which had contributed to the merger movement in industry, in the field of public utilities, in part because of regulatory problems, led toward the formation of public utility holding companies. That the holding company device was subject to abuse should not blind us to its contribution toward an intelligent development of utility properties. But perhaps in the long run a more beneficial, and certainly less controversial, means of facilitating utility expansion was the "open end" mort-



HENRY HILL PIERCE
1907-1928

gage. Members of Cromwell's firm, and particularly his partners, Henry Hill Pierce, Reuben B. Crispell, David R. Hawkins and later the writer, participated in the development of the "open end" mortgage with all bonds ranking *pari passu* without regard to the date of issue. Such mortgages, now so familiar and essential to utility debt financing, have greatly reduced the cost of money and the expenses of financing and have prevented unnecessary mortgage foreclosures.

Credit for the initial development of the "open end" mortgage must, of course, be given to John G. Johnson of Philadelphia whose Pennsylvania Railroad Company General Mortgage of June 1, 1915 was a precedent of major significance, although other firms, including Cromwell's as the office correspondence reveals, had been working on the idea for some time before that date.[1] Probably the first indenture drawn by Cromwell's firm to employ essentially this innovation, which took some years to develop as is set forth in Annex B, was the West Penn Power Company, First Mortgage of March 1, 1916.

The excerpts that follow from a letter written by Henry Hill Pierce on October 23, 1916 to an attorney who seemed to question the validity of the West Penn

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[1]Francis Lynde Stetson in a lecture delivered before The Association of the Bar of the City of New York in 1916 (reproduced in "Some Legal Phases of Corporate Financing, Reorganization and Regulation" (1927)), referred to the Chicago City Railway Company Mortgage of 1907, the New York Central Mortgage of 1913, and the Northern Pacific Mortgage of 1914 as being substantially "open-ended." So also were the mortgages referred to in Annex B at page 192. Many prototypes of the "open-end" mortgage, particularly railroad mortgages, had restrictions on the interest rate and on the maturity of bond issues subsequent to the initial issue which prevented the issuer from taking full advantage of conditions in the money market in these subsequent bond issues.

Power Company Mortgage summarize succinctly certain of the legal considerations that permitted, and practical considerations that promoted, the adoption of the "open end" mortgage:

> "I understand the law to be in Pennsylvania, as in most states, that a mortgage to secure future advances is not good (except as to the amount recited to have been advanced at the time the mortgage is made) as against intervening creditors, unless it contains a definite statement of the amount of future advances to be made and a definite agreement by the mortgagee to make them.
>
> I do not understand, however, that this rule applies to corporate mortgages made to secure issues of negotiable bonds. The Court has clearly pointed out the distinction between an ordinary mortgage to secure future advances and one made by a corporation to secure bonds some of which are reserved for future issuance, [citations omitted]. The courts in Pennsylvania as well as those in other jurisdictions seem to regard it as settled that there is a conclusive presumption that all bonds outstanding under a corporate mortgage were actually issued at the time of the making and recording of the mortgage irrespective of whether they were actually issued or sold at that time or from time to time thereafter under the provisions of the mortgage permitting the issuance of additional bonds.
>
> * * *
>
> Bond issues without a fixed upper limit are, of course, of comparatively recent use in this country, but seem to me to be an immensely valuable contribution to the financing of public enterprises.

The very great desirability of an open mortgage such as the Pennsylvania Railroad Company General Mortgage or the West Penn Power First Mortgage, from the point of view of both of the corporation and the public, is so obvious that we should think the courts of any state would be extremely reluctant to hold it objectionable for any technical reason. The avoiding of closed mortgages or of issues which must eventually become closed so as to leave corporations under the necessity of financing entirely through the sale of junior securities, the simplicity introduced into the financial setup of the Company, the advantage accruing from the existence of but one issue of bonded debt with the resulting broader market for bonds and better public acquaintance with them, the advantage of provisions such as have been made in the West Penn Power and Pennsylvania Railroad Mortgages for the issuances of bonds under the mortgage to refund bonds maturing under it with the result that there will be but one continuous lien upon the property and that the necessity of creating new mortgages for refunding purposes will be avoided, all should result over a course of years in the Company's being able to raise money at a cost much less than has prevailed under former methods of financing with a consequent benefit to the Company and the public. The issuance of additional bonds under such a mortgage should, of course, be most

carefully guarded as has been done in the present instance. The Company is obligated by covenants in the mortgage to expend and set aside large amounts annually for maintenance and depreciation, these amounts growing proportionately as the size of the bond issue increases, and is permitted to issue new bonds only to the extent of seventy-five per cent. of cash actually expended for new property and improvements, and only provided the property is earning twice the interest charge upon the bonds already outstanding and those applied for. These provisions are, of course, in themselves an actual limitation upon the amount of bonds issuable under this mortgage so that they, together with the provisions limiting the size of the issue to the amount of indebtedness as authorized by the stockholders, really make the bond issue a limited one with provisions permitting its increase from time to time."

As sperm oil and candles yielded to kerosene, kerosene to illuminating gas and that in turn to electricity in the course of Cromwell's life, the "open end" mortgage took on major importance in facilitating the acquisition under all market conditions of the prodigious amount of funds required to meet the later phases of this technological conversion and concomitant expansion. Merely as one example of the demand for debt capital occasioned by this development of American utilities, over half a billion dollars of bonds, of which over three hundred million dollars are still outstanding, have to date been issued under The Detroit Edison Company Indenture, drafted in Cromwell's office in 1924, primarily by Alfred Jaretzki, Sr. and Reuben B. Crispell.

Foreign Capital

The accelerated expansion of all aspects of the American economy after the Civil War, but particularly railroads and utilities, was enormously assisted by European investment in American securities. Among the incentives for such investment were not only the profits implicit in extensive untapped resources and a vigorous and growing population, but the political stability of the United States and the complete absence of restrictions on the repatriation of profits or invested capital for which the gold standard was in part responsible. Even the trend toward consolidation in industry, by creating larger, more familiar and more stable economic units, operated to encourage foreign investment. Since this prominent role of European capital in the American securities market, which continued until as late as the First World War, offers such a striking contrast to the conditions that now obtain, it may be of interest to refer to a few of the financings upon which Cromwell himself worked to suggest the character and the mechanics of this participation.

An interesting example of European underwriting of American securities is provided by the Pennsylvania Company 3¾% French Franc Loan of 1906 in the principal amount of Fr. Francs 250,000,000, guaranteed by the Pennsylvania Railroad Company and secured by a pledge of railroad stocks, the market value of which was to be maintained at all times at 120% of the principal amount of the Loan. The indenture permitted the Pennsylvania Company freely to substitute collateral of equal value. These provisions later gave rise to difficulties

requiring Cromwell's prolonged attention. Credit Lyonnais and Banque de Paris et des Pays Bas, whom he represented, entered into a firm commitment with Kuhn, Loeb & Company to purchase one-half of the entire issue and had 30 and 60 day options, but without commitment, to purchase the remaining one-fifth and three-tenths of the issue, respectively. The French banks were to receive as a bonus 4.7% of the securities in each fractional part of the issue taken and to purchase the remainder of each fraction at 96.45%. Payment was made by crediting the purchase price to the Paris account of the Pennsylvania Railroad Company with the French banks, to be withdrawn over a period of seven months. This presents quite a contrast to the present method where the underwriter's firm commitment guarantees the issuer a definite purchase price on a day certain for securities of known interest cost or dividend rate, if any. The development of this technique is a major and unheralded accomplishment of the American system of underwriting securities.

Such issues appear to have originated with increasing frequency in the years immediately prior to World War I. For example, in 1910 Cromwell represented J. Henry Schroder & Co., together with the same French banks, among others, who were acting as underwriters of the Chicago, Milwaukee & St. Paul 4% European Loan in the aggregate principal amount of Fr. Francs 250,000,000. He served in addition as one of the trustees under the indenture for the 4% Bonds, but his duties as trustee were to commence only if a default occurred. In 1911, he once more acted for Banque de Paris et de Pays Bas in association with Société Générale pour Favoriser le Developpement du Commerce et

de l'Industrie en France who were underwriters of an issue of Central Pacific Railway Company 4% Bonds, again in the principal amount of Fr. Francs 250,000,000 or £9,850,750. In contrast to the present brief, distillate opinion, the printed opinion of Sullivan & Cromwell delivered in connection with this issue was over eighty pages in length. In both the Central Pacific and the Chicago, Milwaukee & St. Paul issues the underwriters had firm commitments as to a portion of the issue and options on the remainder.

Cromwell has so far been pictured only as a financial lawyer, as a builder of trusts, or, as some journalist dubbed him for his work in reorganizations, as the "physician of Wall Street." In all this work he shared the enthusiasms of the time and had an abiding faith in America's future and in the wisdom and soundness of what he was doing. He was never fainthearted. He invested in common stock of companies he considered sound and rarely changed his investments. Indeed, it was almost impossible to get him to sell anything at any time. He was a firm believer in America's future, and was extremely scornful of those who gave great weight to the current quotations of outstanding securities on a stock exchange or were ready to sell on the first inklings of bad news.

Cromwell's Views on Disclosure

In certain respects Cromwell had views which were advanced for those days. For example, in 1900, some thirty-odd years before the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934, he was advocating that it is in the best interest of a corporation to make full public disclosure of its assets and of its

financial position by means of regular full reports to its security holders.

In 1900 he wrote to the President of the Cotton Oil Company as follows:

> "Without at all meaning to influence your action today in passing the Report, I will, however, express to you a reflection which I have on the subject: Our Annual Reports do not give a clear, nor convincing idea of the variety and value of our properties—the extent of operations—the magnitude of interests involved. In my judgment, this accounts for the lack of interest by the investing public in our securities. There is an intelligent demand for fuller reports—reports upon which an investor may make some intelligent calculation as to the value of his holdings. This is emphatically expressed by the banking fraternity, who discriminate, as you know, against this class of securities, and it has been taken up and put in definite form by the New York Stock Exchange. The Stock Listing Committee passed a Rule urging corporations to publish fuller reports.
>
> I entertained these views when I formed the National Tube Company, and at the very outset determined to initiate a new method, and one which would win and hold the confidence of the investing public. Consequently our application to list our stock was unprecedently full, and we received the warmest expressions of approval from the officials of the Stock Exchange. I hand you herewith a copy. It followed that when we made our first Annual Report, we carried out the same idea. I hand you a copy of this also. You will notice that we betrayed no secrets of our business, nor anything that would give a competitor advantage; but we stated significant facts upon which

> intelligent investors desired information, and with the consequence that in the first year of our existence our stockholders are nearly 3,000, and the securities daily growing in confidence without any fictitious methods.
>
> At this juncture, when capital feels at liberty, and when there will be an awakening on the subject of Industrials, and a disposition to separate the 'Sheep from the Goats,' I think it would have been very useful if we had made this Report one that would excite marked attention and greater confidence, than any routine Report would do. In other words, it seems to me an opportunity (and a legitimate one) to arouse interest and increase confidence in the securities of the Company. Such information can only properly be given in the Annual Report; if published at other times, it is misconstrued as a design to effect markets. The proper and legitimate channel is the Report itself, and if you do not avail of the opportunity at this moment, you will not have another until another year has passed."

Some Personal Characteristics

When he walked through the office Cromwell wanted no attention and it made him very angry for a young man to get up and open the door for him or to "sir" him. Yet he was not cold or remote. He followed each young lawyer's development with interest, always wanted to know what each was doing, with whom he was working and whether he was pursuing the subject with interest, enthusiasm and purpose.

He also took a sincere, devoted interest in the personal affairs of his clients, remembered all of his wards' birthdays and interests and followed their comings and goings and their selection of schools and careers with a deep and genuine personal concern.

In his personal habits Cromwell was extremely careful and most meticulous about the care and filing of his papers, his correspondence, his accounts and in his unflagging attention to clients' affairs. From the day of the organization of the firm he meticulously separated the accounts of the firm and of its clients and kept most detailed and interesting records of receipts and expenditures. To the end of his life he carefully picked up paper clips or rubber bands on the floor, turned out electric lights and was saving and frugal in his habits, though for a cause that evoked his concern he could be and frequently was extremely generous. From time to time he also entertained foreign dignitaries with great dignity and charm.

When the firm moved in 1929 from the Atlantic Building at 49 Wall Street, to its present quarters at 48 Wall Street, the closets storing papers, pads, etc. in the new building were equipped with automatic electric switches which released a button and turned on the light when the door was opened and turned the light off when the door was closed. Cromwell in passing saw an office boy close a door without turning off the light and called it to his attention. The boy explained how the door worked. Cromwell was incredulous. He insisted upon going inside the closet and having the boy close the door upon him. He emerged laughing cheerfully, pronounced it a great invention, but remarked that you must never take anything for granted until you have proved it for yourself.

Shortly after his entry into the office in 1921 one of the firm's present partners, David R. Hawkins, was seated in the firm's library when an office boy ushered in a most striking lady of great charm and poise and exquisitely

dressed. Hawkins knew that he had seen her before but wrack his brain as he would, he could not recall her.

Cromwell then entered, knelt, kissed her hand and said, "Ah, my fair Portia"—The lady coughed, to indicate that they were not alone. Cromwell looked around, turned to Hawkins, bowed and said in a most courtly way, "Young man, would you do me the courtesy of giving me the privacy of my own library?"

Hawkins beat a hasty retreat and the lady gave him a most gracious smile. It then dawned on him that she was none other than the incomparable Ethel Barrymore who was then a client of Cromwell's.

He was not always so courtly. He was a great stickler for details and planned every phase of a matter with the greatest precision. If any important paper had to be filed or delivered to other counsel, he prepared in long hand several sets and dispatched them by separate mails and often sent another set by personal messenger on a later train or one going by a different route. He wanted all delivered and wanted a report on each. He examined time tables and wrote out detailed instructions. When told that floods, train wrecks or fires had prevented the timely carrying out of his orders, he would comment acidly, "Accidents don't happen, they are permitted to happen by fools who take no thought of misadventure." On at least one occasion the train bearing the first set was delayed by floods, the plane with the second grounded but the messenger got through. For years, every air mail letter had to be followed by one sent regular mail and every telegram confirmed by mail. He never became fully accustomed to the transaction of important business on the telephone because of the

possibility of misunderstanding, the lack of privacy and the lack of a written record.

Once when it was necessary for him to hold an important series of stockholders meetings in the New England States and threatened flood conditions made it improbable that railroad trains could get through he organized and successfully employed a series of boats to take stockholders and officials to the meetings.

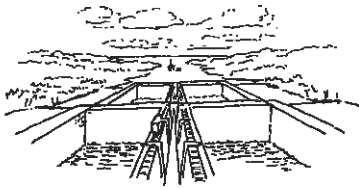
On another occasion, in order to comply with one section of the Decedent Estates Law, as executor or trustee, he had to have a notice published once a week for two successive weeks. Having read the statute carefully he noted that the second publication of the notice did not have to be on the same day of the week as the first. As he wanted to proceed quickly, he suggested that it be published on a Friday of one week and on Monday of the following week.

The young lawyer to whom the publication of the notice was delegated simply gave instructions to have it published once in each of two successive weeks. When Tuesday came and Cromwell wanted to act he sent for the young lawyer and proceeded to call him to task when he learned that the second notice was not yet published.

The young lawyer protested that a week was seven days and once a week meant once in a period of seven days. Cromwell insisted this was not the case. He examined the derivation of the law, the General Construction Law and the cases, finally satisfied himself that a Friday and a Monday publication sufficed and called the young man to task again.

By this time, of course, the second Friday publication had taken place. The young lawyer protested in his

defense that more time had been taken up with the investigation than with the publication in ordinary course. This infuriated Cromwell who proceeded to explain that he might have collapsed between Monday and Friday, that time was precious, and that things should not be taken for granted. The incident, while not important in itself, illustrates, despite the breadth of his interests, Cromwell's great attention to detail, his personal interest in small matters and the extraordinary care he took in anything for which he was responsible.



CHAPTER SEVEN

The Panama Canal

But perhaps the matter for which Cromwell is best known is his unselfish and patriotic work in helping to gain for the United States the Panama Canal. His exact role in this has never been clear to historians, some of whom have tended to vilify and malign him, for he himself always took the position, without regard to the consequences to himself, that professional confidence prevented disclosure. He tended to be somewhat curt with the researchers. With his great love of the theatre and of the dramatic, it is quite possible that he rather enjoyed being a man of mystery. Perhaps he also had accepted the wisdom of Abraham Lincoln's policy of ignoring personal attacks.

Fifty years of historical research, however, have tended to magnify rather than to diminish the constructive and patriotic role that he played in obtaining the Panama route for the United States and in drafting the numerous treaties leading up to its acquisition.

Growth of American Interest

As far back as 1846, a realization by the Government of the United States of the importance of transportation across the Isthmus resulted in a treaty with the Republic of New Granada (as Colombia was then known). By that treaty, New Granada guaranteed that transportation across the Isthmus would be open to citizens of the United States, and the United States guaranteed New Granada's rights of sovereignty and property in the territory. An attempt in 1868 and again in 1870 to modify the treaty so as to give the United States greater powers over the

Isthmus failed to receive the approval of the United States Senate.

In 1867 the United States and Nicaragua entered into a treaty comparable to the 1846 treaty with New Granada, but with specific reference to an interoceanic canal. The 1867 treaty contemplated a neutral canal compatible with the United States' engagements with England in the Clayton-Bulwer Treaty of 1850 which forbade any interoceanic canal under the exclusive control of either signatory.

The Gold Rush of 1848 dramatized the need for a short water route to California and the role of the clipper ship in keeping the Union together. An additional spur to public understanding of the importance of an Isthmian canal was the presence of Confederate raiders in the Pacific during the Civil War. Fifty miles of land separating the Atlantic from the Pacific Ocean was profoundly irritating.

Between 1870 and 1875, the United States Government sent out a series of expeditions, one headed by A. G. Menocal, an engineer in the Navy, to determine the best route across the American Isthmus. These exploratory missions developed Panama (which was then a department of Colombia) and Nicaragua, north of Panama, as the only possible alternatives. Menocal, himself, developed a preference for the Nicaraguan route, secured a canal concession from Nicaragua, and was subsequently active in the promotion of Nicaraguan canal companies.

The Nicaraguan Route

The Nicaraguan route across the Isthmus was far longer than the route through Panama, 183.66 miles

against 49.09, but Lake Nicaragua made up much of the added distance, and the Nicaraguan route lay several hundred miles nearer the United States. The Isthmus in the vicinity of the Panama Canal is not a north and south neck of land connecting the two Americas, but makes a northerly turn where the Canal crosses and there runs from west to east. As a result, the Atlantic terminus of the Canal at Colon is nearly twenty miles west of Panama, the Pacific terminus, and the Canal runs from the northwest to the southeast to connect the eastern with the western ocean. Perhaps this geographical quirk also accounts for the persistent conviction that there is something crooked about the Panama Canal. Certainly the available, non-geographic, evidence is insufficient to explain the tenacity of this viewpoint.

During the fever of the gold rush, steamers had run between New York and the port of Greytown, Nicaragua. Shallow draft boats went from there up the San Juan River and across to the western shore of Lake Nicaragua. There passengers were trans-shipped by coach to Brito and other ports on the Pacific and then by steamer up the West Coast. The San Juan, however, could not accommodate ocean-going vessels, and by 1890 the harbor of Greytown had filled with sand.

The following receipt for part-payment of passage indicates the terms upon which transit across the Nicaraguan Isthmus was available in the earlier days of regular service.

State Room Passage.

GORDON'S PASSENGER LINE

TO

SAN FRANCISCO, via LAKE NICARAGUA AND REALEJO.

Received of *the sum of one hundred and thirty dollars being in part for his passage to* SAN FRANCISCO, *in the above line.*

On payment of Balance, One Hundred and Thirty Dollars, this Receipt secures to him passage in the *Mary,* Captain Hayes, from New York to San Juan de Nicaragua, from thence per Steam Boat *Plutus to* GRANADA, on Lake Nicaragua; or, navigation permitting, to Managua, Matiares or Nagarote on Lake Léon, as may be most convenient for landing; and a passage from Realejo, on the Pacific, to San Francisco, with Hammock, Bed, and Bedding for the voyage, and Camp accommodations during detention on land, *en route.*

The following provisions will be provided, viz:

FOR BREAKFAST. — *Coffee and White Sugar — Ham, Fish, Sausages—White Biscuit—half a pound Preserved Fruit to each ten persons.*

FOR DINNER. — *One third of a quart of Soup made from* Kensett & Co.'s preserved Soups—*Salt Beef or Pork —Potatoes, Hominy, Peas, or Rice—Rice or Flour Puddings.*

FOR SUPPER.—*Tea and White Sugar—Ham, Fish, or Sausage—White Biscuit—half a pound of Fruit Marmalade to each ten persons.*

The above is to be served up during the voyages, and on the Lake and Land transit, circumstances permitting.

Saloon Passengers will be expected to form into Messes, and the Gentlemen in rotation to receive and serve up their own meals from the Cooks (in the manner pursued in the U. S. Service). Passengers who take State Rooms will have a Steward provided who will expect a fee of $5 from each passenger. The provisions are alike in both cases.

One Hundred Pounds of personal Baggage will be carried free if packed in round covered Valises or Bags weighing not more than 125 lb. each package; freight above that weight taken at $6 per 100 lb. Passengers are expected to assist in packing, stowing and unloading Baggage and provisions if necessary.

Any extra charges for passports, or transit Duties to be borne by each passenger. The general Customs Business will be transacted by an agent of the Line at San Juan or San Carlos without charge.

Gentlemen Passengers, if required, will have to walk from Granada or Lake Léon to Realejo (1½ or 3 days' march).

The Line provides an agent to charter vessels at Panama, Acapulco, and other Pacific Ports, so as to avoid detention at Realejo.

In the *unexpected* event of Vessels not being procured, $75 of the passage money and 60 days' provisions will be refunded to each passenger at Realejo which will procure passage in the Mail Steamers which touch there.

On the arrival of the passengers at San Francisco each passenger will have handed to him

1 Barrel White Biscuit.
½ Barrel Flour.
1½ lb. of Tea, in ½ lb. leaden packages.

6 lb. of Ground Coffee, in 1 lb. leaden packages.
15 lb. White Sugar.
1 Cheese (boxed up) about twenty pounds.

Which will furnish one person with all necessary provisions, except meat, for three months.

Every Gentleman passenger is required to provide himself with a Rifle or Musket. All Powder must positively be placed in the hands of the Agent of the line.

GEO. GORDON.

The French Initiative

The completion of the Suez Canal by a French Company in 1869 demonstrated the enormous benefits and the feasibility of interoceanic canals. Verdi's opera, "Aida", which had been commissioned to celebrate the grand opening of the Suez Canal, first played in New York in 1873 and in its own triumph added luster to the achievement.

Stimulated by the Suez success, the Société Civile International de Canal Interocéanique was organized in France in 1877 by General Turr who was an intimate friend and admirer of Ferdinand de Lesseps, the builder of the Suez Canal. For this company Lieutenant Wyse obtained from Colombia in 1877 an exclusive 99-year franchise, known as the Wyse Concession, to build and operate an interoceanic canal in the territory of Colombia. The terms of the franchise forbade its transfer to a foreign power. The canal was required to be built before 1893 or the concession terminated. Three extensions were ultimately granted to permit completion.

Abrogation of the Clayton-Bulwer Treaty

Congress watched with keen interest the progress of de Lesseps and his company in Panama. Public interest in a canal awakened. An American company was formed to construct a rival canal in Nicaragua, and ex-President Grant agreed to act as its president. Congress supported the revived scheme of a purely American, Nicaraguan Canal by requesting the President in 1880 to secure the abrogation of the Clayton-Bulwer Treaty with England which required that any Isthmian Canal be under the joint protection of the United States and Great Britain. Secretary of State Blaine entered into correspondence with the British Government which evinced no desire to abrogate the Treaty. Nonetheless in 1884 the Frelinghuysen-Zavala Treaty was negotiated with Nicaragua (though withdrawn the following year by President Cleveland from consideration by the Senate), giving the United States the right of a protectorate over a canal.

The Clayton-Bulwer Treaty, when ratified in 1850, had seemed prudent in its curtailment of British interests in Central America, and its prohibition of an American canal not an unacceptable concession at a time when American capital and technology were probably unequal to the task of building an Isthmian canal. England moreover was then in actual possession of Greytown at the mouth of the San Juan River and claimed a protectorate over the Mosquito Coast. The British Consul in New York had served notice in 1849 on an American company formed to construct a canal pursuant to a contract with Nicaragua that the right to make use of the lower San Juan and the Port of Greytown could only be obtained from the Mosquito protectorate. Secretary of State Clayton, rather than to invoke the general principles of the Monroe Doctrine which was still developing and which had to a large extent been neglected from 1826 to 1845, preferred to enter into a specific agreement that would make possible a canal, even if under joint control, and that would limit British influence in the area. By the first article of the Clayton-Bulwer Treaty the signatories agreed that they would not ". . . assume or exercise any domination over Nicaragua, Costa Rica, the Mosquito Coast or any part of Central America". Ambiguity of language, particularly the failure to define "Central America", reduced the effectiveness of the Treaty, but for a time it served a useful purpose.

As the century wore on, witnessing the remarkable development of the Pacific Coast and the growth both in the resources of the American people and their inclination to build a canal, the Treaty was to appear less desirable. Throughout that period Anglo-American relations were repeatedly strained by successive disputes over the Alabama claims, the North Atlantic Fisheries, the fur seal islands, the Venezuelan question and the Alaskan boundary, and reconsideration of the Clayton-Bulwer Treaty was complicated by its relation to these issues. The friendly persistence of Secretary of State Hay, coupled with Great Britain's diplomatic isolation at the time of the Boer War, was finally required to bring about the abrogation of the Clayton-Bulwer Treaty in the Hay-Pauncefote Treaty of 1901.

French Failure

La Compagnie Universelle de Canal Interocéanique de Panama (the Old Panama Canal Company) was organized in 1881 by de Lesseps. It raised $60,000,000 of equity capital, principally in France, the offering in the

United States having been poorly received, and acquired the Wyse Concession. Under the direction of de Lesseps the Company began digging a sea level canal in Panama in 1882. The estimated time required was 8 years. The Company, however, was extravagantly managed and had not fully grasped the difficulty of the problem of the cuts and the possibility of slides or the need for skilled labor and yellow fever control. It ultimately failed. But the full contributions of de Lesseps, both through his plans and in the actual work, have never been given adequate credit in this country. In part this is because of the antipathy of Americans to the idea of a French canal on the North American continent and their natural pride in the extraordinary achievements of Col. Goethals and General Gorgas, and in part because of the efforts of numerous Americans who were trying to sell securities in a Nicaraguan Canal Company and therefore maligned the Panamanian alternative.

It is estimated that the French canal companies spent the equivalent of over $275,000,000, and that 18,000 men died on the Isthmus in the course of excavating 78,146,960 cubic yards of earth between 1881 and 1903, 30,000,000 cubic yards of which were ultimately used by the American engineers. Though all was not used, principally because of changes made in the approaches to the Canal, the French excavation equaled almost one-third of the 240,000,000 cubic yards of excavation required for the completion of the Canal proper.[1] The American engineers when they began work were amazed at what the French had managed to accomplish with equipment which, while well constructed and of continuing utility, was because of its limited capacity vastly inferior to the American. The French accomplishments can only be considered as truly remarkable when further allowance is made for the fact that one out of every three white men employed died of yellow fever.

[1]See, Bishop, "The Panama Gateway," pp. 108, 284 (1913), or Pepperman, "Who Built the Canal?", pp. 32-55 (1915).

Cromwell's Attitude

In 1893 Cromwell became general counsel for the Panama Railroad Company which had constructed a railroad across the Isthmus. At that time the Old Panama Canal Company held a controlling interest in the Railroad Company. In addition, in 1896 he began to represent the New Panama Canal Company, a successor to de Lesseps' bankrupt old canal company.

As a forward looking American, Cromwell was convinced of the importance of developing an Isthmian canal. With his extraordinary capacity for marshalling facts, he made himself master of the terrain, of engineering theory and design, of the models of the locks and of the practical proposals for the construction of a canal on either the Nicaraguan or Panamanian route. He had detailed maps and geodetic surveys prepared and engineering reports developed. He interviewed coastwise traders as to navigational difficulties in the area, and discussed with steamship captains on the East and West Coasts the practical operations of the locks, the probable future size and draught of vessels, and the savings in time and fuel if the Cape Horn voyage could be avoided.

Cromwell believed thoroughly that the Panama route, with all the engineering difficulties that it entailed, was nevertheless preferable to the Nicaraguan route from an engineering standpoint; that the Panama route was more economical in terms of construction cost; and that

it would be sooner available, for the plans for the Panama route were better developed and the work much further advanced than in Nicaragua where in fact, despite enormous propaganda and stock promotional schemes, little work was actually done.

When Cromwell was retained as counsel for the New Panama Canal Company, the failure of the de Lesseps company, the serious doubts as to the soundness of the title to its property derived from the Wyse Concession, the natural antipathy of Americans to French interests acquiring a foothold on the North American continent, and extensive propaganda for the Nicaraguan route in which many prominent American politicians were interested, had left Panama far behind in the competitive race for the site.

American Preference for Nicaraguan Route

A major consequence of the French Company's presence on Panama was renewed United States interest in Nicaragua. In 1899 a United States charter had been granted to the Maritime Canal Co. for the construction of a Nicaraguan Canal under the Menocal Concessions. Capital was invested in it by prominent persons. The financial difficulties of the French Company tended to confirm the desirability of the Nicaraguan route, which its partisans called the "American Route." Many of its backers were not at all displeased at the thought that its successful completion would be disastrous to the French concession. Napoleon III's conquest of Mexico while the energies of the United States were absorbed in the Civil War, and the brief reign of Maximilian I as Emperor of Mexico, were well remembered. Such a recollection caused many to be apprehensive over any French presence in Central America.

In Cromwell's own words: "Public opinion demanded the Nicaraguan Canal. The only canal known, the only wanted, the only spoken of was the Nicaraguan Canal. The Panama Canal was looked upon as a vanished dream."

One of the planks of the Republican Party platform in 1896 was the construction of a Nicaraguan Canal. The public suspense aroused by the exciting voyage of the OREGON around Cape Horn to join our fleet off Cuba during the Spanish-American War in 1898 gave tremendous impetus to the idea.

In 1900 a similar plank appeared in the Democratic platform.

But by that time, Mark Hanna (formerly an opponent of the Panama Canal) and other members of the Republican National Committee were impressed with the engineering data supplied by Cromwell, and the Republican platform in that year spoke only for an Isthmian Canal and did not specify the route. Cromwell did his level best to convince Mark Hanna, Myron T. Herrick of Cleveland, Thomas Reed, Speaker of the House, Congressman Theodore Burton of Ohio, engineering societies and shipping interests with the data, maps, plans and models he had assembled.

Senator Morgan of Alabama, a former Confederate general, and the Chairman of the Nicaragua Canal Committee of the Senate, later the Committee on Interoceanic Canals, was the great indefatigable supporter of the Nicaraguan route, seeing in it the means of restoring the industrially prostrate South. It was apparently his belief that in backing the Panama Canal, Cromwell was representing the trans-continental railroads and such railroad magnates as Collis P. Huntington and that Crom-

well was in fact fighting the principle of a canal and the rebuilding of the South, which of course he was not.

In the House of Representatives, the Committee on Interstate Commerce had jurisdiction of canal matters. A former Colonel on General Sheridan's staff, William Hepburn of Iowa, was Chairman of that Committee, and perhaps the most intense and able advocate of the Nicaraguan Canal in the House.

In 1899 Senator Morgan pushed through the Senate by a vote of 48 to 6 a bill providing for the construction of a Nicaraguan Canal under American control. This Bill simply ignored the Clayton-Bulwer Treaty (as of course Congress has the naked power to do as the author has pointed out in his articles and letters on the Bricker Amendment, if the nation is willing to bear the consequences of unilateral denunciations of treaties). The British Ambassador formally protested such cavalier treatment of an obligation, an objection which Cromwell and the Panamanian forces had successfully opposed to the hasty adoption of earlier Nicaraguan Bills.

The companion to the Morgan Bill would undoubtedly have passed the House if it had been allowed to come to a vote, but it did not because several leaders of the House, including Speaker Reed, had been convinced that a commission should be appointed to study both routes. The Nicaraguan forces countered by inserting the Morgan Bill verbatim as an amendment to the Rivers and Harbors Bill then in committee in the Senate. The Rivers and Harbors Bill, as amended, passed the Senate only a few days before the end of the session. Before the House conferees could concur in the amendment, the Panama Canal Company was persuaded by Cromwell to promulgate a plan assuring American representation in the

Canal Company. Bolstered by this proposal, the House conferees led by Congressman Burton held firm in March of 1899 for the replacement of the amendment by a provision appointing a commission to study the question. This was the origin of the Isthmian Canal Commission, under the Chairmanship of Admiral Walker.

The plan to obtain American representation in the New Panama Canal Company had been proposed by Cromwell in order to give American citizens a direct, pecuniary interest in the fortunes of the company and thereby to broaden the base of American support for the Panama route. The plan contemplated the transfer of all of the assets of the New Panama Canal Company to a New Jersey corporation to be called the Panama Canal Company of America. This New Jersey corporation, in exchange for all the assets of the French company, was to issue such preferred stock as would give the latter power to elect a majority of the directors of the Panama Canal Company of America. The remainder of the preferred stock and the common stock of the New Jersey corporation were to be sold to American investors. The Panama Canal Company of America was incorporated on December 27, 1899. Cromwell had previously obtained the requisite American financial backing. The plan had been approved by the directors of the French company. Its final adoption was dependent only upon its approval by the shareholders of that company. This approval the shareholders declined to give. The Board of Directors of the New Panama Canal Company who had been committed to the plan, resigned in a body, the plan was abandoned, and never revived.

In May, 1900, without waiting for the Isthmian Canal Commission's report, the House by a heavy major-

ity passed a bill providing for a Nicaraguan Canal. This was only defeated by a narrow margin in the Senate by those who felt that action should not be taken until the Commission had reported. The Commission in November of 1900 then made a preliminary report in favor of a Nicaraguan Canal.

The Panama situation could only be salvaged by an immediate Americanization of the Canal. Cromwell was at this juncture primarily instrumental in persuading the Colombian Government to agree to permit the New Panama Canal Company to sell its properties to the United States Government, and the Company to agree in principle to the sale to our Government.

Hay-Pauncefote Treaty and Panama Tolls

International obstacles to an American Nicaraguan Canal were eliminated with the ratification of the Hay-Pauncefote Treaty in 1901. In retrospect it may seem surprising that Secretary of State John Hay's disdain in the case of this and other treaties for the Senate's constitutional role in the treaty-making process did not produce a progenitor of the Bricker Amendment. Hay negotiated the first version of the Treaty without consulting the Senate, and did not deign to include a single word of explanation when President McKinley transmitted it to the Senate. The Senate, however, had little need of a constitutional amendment to maintain its position. The Treaty was extensively discussed both in committee and on the floor and amendments were insisted on which required further negotiation with Great Britain and resulted in a revised Treaty so satisfactory to the Senate that it was finally ratified by a vote of 72 to 6 on December 16, 1901, almost two years from the time the first version had been presented to the Senate.

In this connection it is interesting to note with relation to the power of Congress, that the Congress later elected to disregard the Hay-Pauncefote Treaty in the Panama Tolls Act of 1912, which by exempting United States coastal traders from tolls, violated the provisions of that Treaty that the Panama Canal, like the Suez Canal, should be open to vessels of all nations upon equal terms. The Panama Tolls Act embarrassed the administration in the conduct of foreign affairs to such an extent that President Wilson with considerable political courage made an extraordinary appeal to Congress in 1914 to secure its repeal.

Oscar S. Straus has particularly called attention to the fact that the repeal of the exemption was a bi-partisan effort guided by a regard for our international character in accord with "a decent respect for the opinions of mankind." Indeed there is reason to suppose that the firmness of President Wilson's position in the matter may in part be attributable to conversations that he had had while President-elect with Elihu Root, the leader of the Republicans opposed to the exemption.[1] The President, as indicated in Joseph Tumulty's, "Woodrow Wilson As I Know Him," believed that the repeal of the exemption was the only course consistent with our national honor. As he was later to remark after the repeal had been obtained, "When everything else about this Administration has been forgotten, its attitude on the Panama Tolls Act will be remembered as a long forward step in the process of making the conduct between nations the same as that which obtains between honorable individuals dealing with each other, scrupu-

[1]See, Philip C. Jessup, "Elihu Root," Vol. II, p. 265 (1938).

lously respecting their contracts, no matter what the cost."[1]

The French Offer of Sale

Despite Cromwell's urgings, the New Panama Canal Company refused to make a definite offer for the sale of its properties. In consequence the Canal Commission in November, 1901 presented a final report in favor of the Nicaraguan route. The Nicaraguan Bill seemed all but certain of adoption when it passed the House by a vote of 309 to 2 and was referred to Senator Morgan's Committee in the Senate.

These events led to the resignation of the management of the New Panama Canal Company which had disregarded Cromwell's advice and from July, 1901 to January, 1902 had conducted its affairs in the United States without his assistance. The new management, in accordance with Cromwell's advice, immediately named a price of $40,000,000 for all its assets on the Isthmus and all its plans. This was the value that the report of the Canal Commission of November 16, 1901 had placed on only the excavations, plans and the Canal Company's stockholdings in the Railroad Company. President Roosevelt then reconvened the Canal Commission which, in light of the firm offer to sell, reversed its stand and on January 18, 1902 reported in favor of the Panama works, which it preferred both from an engineering standpoint and from considerations of cost. Cromwell, whose judgment had been thoroughly vindicated by the turn of events, was again retained as counsel for the New Panama Canal Company.

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[1]P. 162 (1921).

Secretary of State Hay, though he tended to favor the Nicaraguan route, remained impartial as the debate over the canal neared its climax. He sought to prepare for either alternative by securing from the countries concerned protocols as to treaties acceptable to them. But as he stated in a letter to Senator Morgan in April of 1902, the principal difficulty was that, "both in Colombia and in Nicaragua great ignorance exists as to the attitude of the United States. In both countries it is believed that their route is the only one possible or practicable, and that the Government of the United States, in the last resort, will accept any terms they choose to demand."[1]

The Spooner Bill

After a bitter battle in Congress, the Spooner (Panama) Bill replaced the Hepburn (Nicaragua) Bill by the margin of 8 votes and was signed by President Theodore Roosevelt on June 28, 1902. The Bill, as passed, favored the Panama route, but at the same time authorized the construction of the Nicaraguan Canal if two conditions precedent could not be met within a reasonable time upon reasonable terms; (i) if a clear title to the Panama concession could not be obtained for $40,000,000; and (ii) if Colombia would not agree to perpetual United States control over the Canal Zone.

It has been said that the day was finally carried in the Senate for the Spooner Bill by a speech of Senator Mark Hanna of Ohio, buttressed in large part by marine charts, maps, engineering data, sketches and models supplied him by Cromwell, and emphasizing among other things the dangers of the active volcanoes along the Nicaraguan route as demonstrated by the recent eruption of

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[1]Dennett, "John Hay", p. 367 (1934).

Mount Momotombo on Lake Nicaragua, a few miles north of the line of the Nicaraguan route. To support this contention there had been placed on the desk of every Senator a full set of Nicaraguan stamps graphically portraying the volcanoes.

Following the passage of the Spooner Bill, Attorney General Knox, assisted materially by detailed reports, briefs and carefully prepared opinions that Cromwell had supplied him, delivered his opinion that the Panama Canal Company had clear title to its Isthmian concession. Since the Company was willing to sell, the only major matter remaining to effectuate the adoption of the Panama route was the ratification of the long-negotiated Hay-Herran Treaty which would have given the United States the right of way through Colombia for a payment of $10,000,000.

The Colombian Congress, however, adjourned on August 1 and again on November 2, 1903 without ratifying the Treaty. Genuine nationalism, a conviction that the United States could be compelled to offer more money, and a desire to share in the payments to the Canal Company or obtain the full amount by delaying ratification until the Wyse Concession had expired, were among the factors leading to the Treaty's rejection. This adjournment appeared to spell disaster for the Panama route. Supporters of the Canal were outraged as their hopes were dashed.

The Panama Revolution

The possibility that the Hay-Herran Treaty might not be ratified had become apparent as political tension increased in Colombia during the month of October.

Panama had been an independent nation in 1841, but revolution and war had subsequently changed its government. Many Panamanians had only limited allegiance to the Government at Bogota. They were incensed at the impending loss of all the advantages that the Canal would bring them and at what they deemed the irresponsibility of certain Colombian politicians who allegedly sought only personal gain in the situation. In 1895 there had been an uprising in Panama. A state of almost chronic revolt there had prevailed since 1895, and talk of insurrection once again filled the papers.

Secretary Hay in a letter to President Roosevelt in September, 1903, said with reference to the explosive situation, "It is altogether clear that there will be an insurrection on the Isthmus against the régime of folly and graft that now rules at Bogota. It is for you to decide whether you will 1) await the result of that movement, or 2) take a hand in rescuing the Isthmus from anarchy, or 3) treat with Nicaragua".[1]

The political unrest in Panama led President Roosevelt to order three American cruisers to the scene, a practice that was not unusual. The NASHVILLE arrived off Colon, Colombia, on November 2, 1903 with orders to "prevent the landing of any armed forces with hostile intent, either Government or insurgent, at any points within 50 miles of Panama."

A résumé of the diplomatic correspondence at that point is interesting. At 3:40 p.m. on November 3, 1903 the following dispatch was sent by the State Department to the American Consulate in Colon: "Uprising on Isthmus reported. Keep Department promptly and fully informed, signed Loomis, Acting." At 8:15 p.m. on November 3rd a reply was received from the Consul at Panama: "No uprising yet. Reported will be tonight.

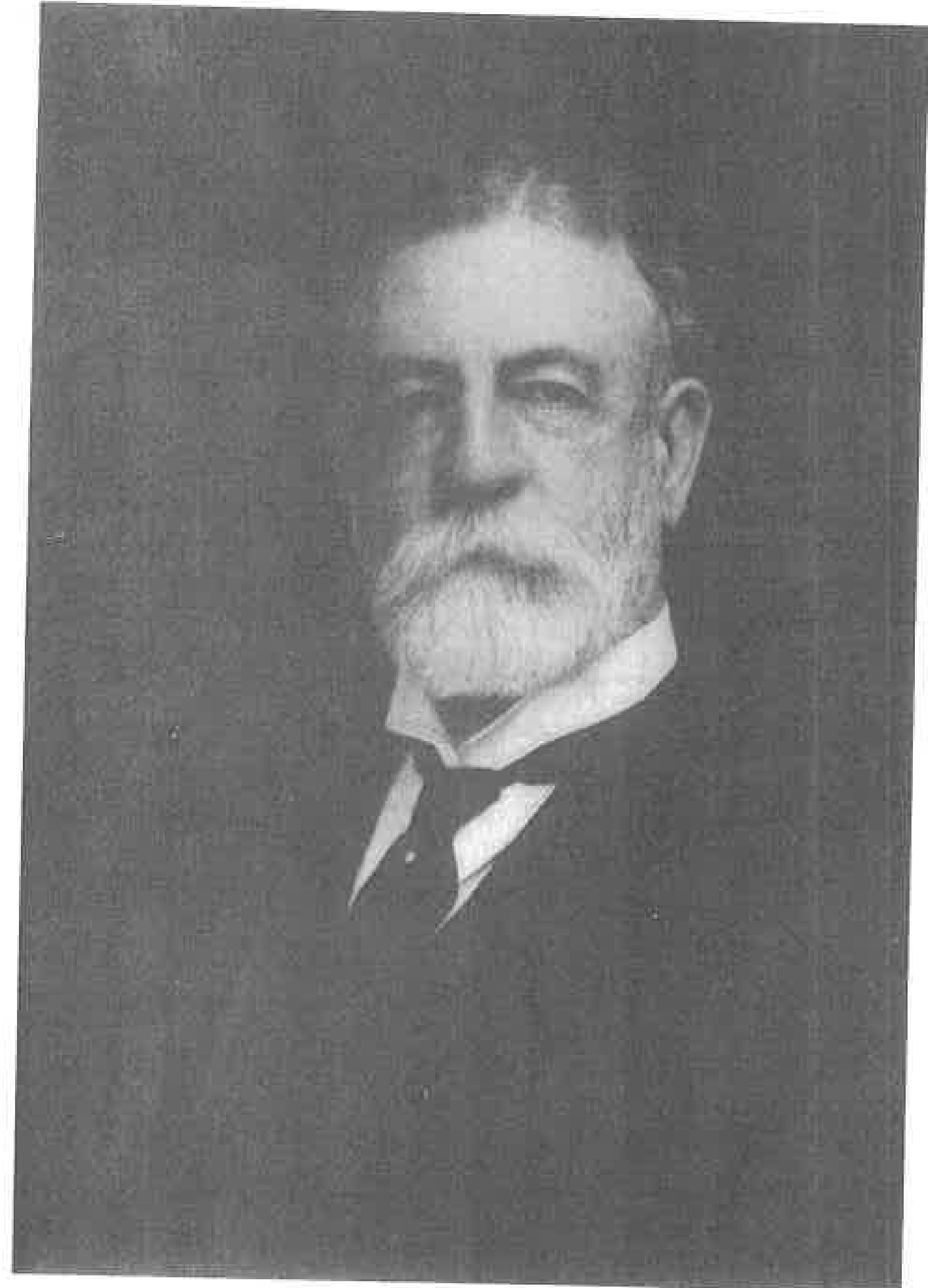
[1]Dennett, "John Hay", p. 377 (1934).

Situation is critical." At 9 p.m. a second dispatch was received from the same source: "Uprising occurred tonight at 6. No bloodshed. Army and Navy officials taken prisoners. Government will be organized tonight."

The successful revolution dramatically altered the prospects for the Panama Canal.

Phillipe Bunau-Varilla, lecturer, author of several books on the Canal, a former chief engineer of the Old Canal Company, a shareholder in the New Canal Company and an enthusiastic supporter of the revolution was named as Envoy Extraordinary and Minister Plenipotentiary of the Republic. Contrary to general impression Cromwell had no use for Bunau-Varilla whom he regarded as an unprincipled adventurer and meddlesome intruder. The Canal Company through William J. Curtis, a member of Cromwell's firm, promptly notified President Roosevelt that it had no connection with, or responsibility for, Bunau-Varilla's appointment and further disavowed any relations between the Panama Canal Company and the revolution.

Thereafter the *de facto* government of the Republic of Panama was recognized by the United States, and shortly after Bunau-Varilla's arrival in Washington the Hay-Bunau-Varilla Treaty was signed, granting the United States in perpetuity the "use, occupation and control" of a ten-mile-wide zone of land and land under water "for the construction, maintenance, operation, sanitation and protection" of the Canal, with "all the rights, power and authority within the zone . . . which the United States would possess and exercise if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority". Panama also renounced, confirmed and granted to the United States all present and rever-



WILLIAM J. CURTIS
1880-1886

sionary rights and property interests reserved to Panama under the terms of the concessions of the New Panama Canal Company and the Panama Railroad Company, and in the lands, canal, works, property and rights held by the companies, and acquired or to be acquired by the United States.

The clear intention of the parties that the grant be for an endless period of time was manifest. An explicit time limit of 100 years had been included in the abortive Hay-Herran Treaty, but in the new Treaty the grant was made "in perpetuity" and no provision was made or implied for revocation or recapture by the Republic of Panama.[1]

At a round table discussion of the judicial aspects of the Panama and Suez Canals held in Panama in March 1957 the former Panamanian Foreign Minister Octavio Fabrega argued that under a proper system of international law such "in perpetuity" grants would be invalid as inconsistent with the sovereignty of the nation where the canal lies.[2] However, as pointed out by Oxford's brilliant professor of international law, J. L. Brierley, under international law the intention of the parties as to the term of a treaty of indefinite duration is controlling and "there are many such treaties in which the obvious intention of such parties is to establish a permanent state of things."[3]

Criticism of President Roosevelt

The course of events had redounded to the benefit of the United States to such an extent that some persons refused to accept the developments as fortuitous. Sug-

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[1]Padelford, *American Rights in The Panama Canal,* 34 American Journal of International Law, 416, 424 (1940).

[2]*New York Times,* March 31, 1957, p. 15.

[3]*The Law of Nations*, 240 (1949).

gested as evidence of the complicity of the United States Government in the Panamanian revolution was a personal letter dated October 10, 1903 which President Roosevelt had written to Dr. Albert Shaw, Editor of the Review of Reviews and a supporter of the Panama route. The President said:

> "I enclose you, purely for your own information, a copy of a letter of September 5 from our Minister to Colombia. I think it might interest you to see that there was absolutely not the slightest chance of securing by treaty any more than we endeavored to secure. The alternatives were to go to Nicaragua, against the advice of the great majority of competent engineers—some of the most competent saying that we had better have no canal at this time than go there—or else to take the territory by force without any attempt at getting a treaty. I cast aside the proposition at this time to foment the secession of Panama. Whatever other governments can do, the United States can not go into the securing, by such underhand means, the cession. Privately, I freely say to you that I should be delighted if Panama were an independent state, or if it made itself so at this moment; but for me to say so publicly would amount to an instigation of a revolt, and therefore I cannot say it."

President Roosevelt himself was the subject of severe criticism for his role in what some, including James C. Carter, chose to call the "rape of Panama." His celebrated remark at the University of California in 1912 did nothing to soothe his critics: "If I had followed traditional, conservative methods I should have submitted a dignified state paper of probably two hundred pages to the Congress and the debate would be going on yet,

but I took the Canal Zone and let Congress debate and while the debate goes on the Canal does also."

Secretary of State Root many years later explained the President's remark as merely his manner of expression and gave the following explanation for what had occurred:

> "Roosevelt's statement that he had taken Panama was the kind of exaggeration that he liked to make. He could have made a perfectly sound technical presentation of his case but he had no patience with that. I was in Europe at the time on the Alaska Boundary case and had nothing direct to do with it—I was over there all summer and it was a *fait accompli* when I returned. No, Roosevelt did not discuss it with me before I left; it was not brewing at that time. But I have always felt that his action was right. I always thought Panama had the better claim in substantial justice. Colombia had proceeded in flagrant disregard of the constitutional rights of Panama and held the territory by right of force. If you choose to look at it as an international lawyer *in vacuo*, I suppose Colombia had a good right there, but you must look at the substance.
>
> Bunau-Varilla was a very clever person and his adroit Latin American diplomacy was something Roosevelt never had patience with and never understood. Bunau-Varilla told me about his talk with Roosevelt. He said that he merely stated what he thought Roosevelt's idea was about the Colombians and by talking about them and what they did, he got from Roosevelt such violent expressions of opinion unfriendly to the Colombians that when he left he told his people in Panama to go ahead, that Roosevelt would never take sides against them with the Colombians. Roosevelt did not say a single word to him about what he wanted

to do or intended to do, but Bunau-Varilla found out just what he thought from his explosive comments on what Bunau-Varilla said.

Hay agreed to what Roosevelt did. Of course a lot of people objected; it is the very common practice of objecting so you will have an alibi if the thing turns out wrong. How often I have seen the Latin Americans dying of eagerness to have something done over their objection!"[1]

Some of the criticism of the President was of a purely political nature. Some could be traced to disappointed adherents of the Nicaraguan Canal. But some derived from high minded and distinterested persons, such as Henry L. Stimson, who felt that the United States had not acted with due regard to the norms of international relations or to what was proper in dealing with the sister nations in Central and South America.

Joseph Auerbach, in "The Bar of Other Days", recounts the doubtless apocryphal tale that on one occasion President Roosevelt, having at some length defended to his cabinet the acquisition of Panama, demanded rhetorically whether he had answered the charges against him. Secretary of War Root is said to have replied: "You certainly have, Mr. President. You have shown that you were accused of seduction and you have conclusively proved that you were guilty of rape."

Neither President Roosevelt nor Secretary Hay ever regretted their part in obtaining the Canal. Secretary of State Elihu Root's admirable and objective address on "The Ethics of the Panama Question" before the Union League Club in Chicago on February 22, 1904 is perhaps the best exposition of the Government's position in the matter.

[1]Jessup, "Elihu Root", Vol. I, p. 403 (1938).

Root's initial reactions to the Panama Revolution were stated in an interesting, private letter to General Horace Porter, then American Ambassador to France, on December 15, 1903:

"You will remember how much troubled I was about the Panama situation, and our conversations about the possible ways to solve the difficulty. I was met at quarantine by the news of the revolution, and found, upon reaching Washington, that the whole subject was disposed of. I found Hay as emphatic and free from doubt about our Government's course as the President was, and the country generally appears to approve the Government's action, although of course there are some people who take a different view. I think there is little doubt of the treaty with Panama being confirmed by the Senate, and in that case we shall probably begin our work on the canal as soon as the frost is out of the ground and the Bay of Panama is free from icebergs. The central idea under which the Bogota patriots were holding up the canal seems to have been the very attractive idea of bilking the French people by declaring the last extension of the concession to the new Panama Canal Company illegal and void, declaring the concession ended, and taking possession of the canal property and thus getting the forty millions which our Government was proposing to pay the Panama Company. They are now in the position of a girl who keeps refusing a fellow, with the idea that she will marry him sometime or other when she gets ready, and who wakes up some fine morning to find that he has married another girl."[1]

The amount paid for the Panama Canal and the manner of payment were also criticized. Fantastic

[1]Jessup, "Elihu Root", Vol. I, p. 402 (1938).

rumors were current as to irregularities in the distribution of the proceeds of sale and as to large profits made by secret American syndicates and persons in high places. Some of these allegations, though entirely unsupported by any evidence, have regrettably been perpetuated by uncritical historians apparently more impressed by the lurid journalism of the day than by the cold, hard, objective, uninteresting facts which effectively remove the romance and the intriguing possibilities of scandal and corruption.

The detailed address of William J. Curtis to the Alabama State Bar Association delivered July 8, 1909 shows how little basis there was for any criticism. The $40,000,000 purchase price was transferred to France in part by the export of bullion and in part by the purchase of exchange through the agency of J. P. Morgan & Company. The Civil Tribunal of the Seine then confirmed the decision of arbitrators awarding 60% of the proceeds to the receiver of the Old Panama Canal Company and 40% to the New Panama Canal Company. The award to the Old Company was all distributed to claimants and bondholders, leaving nothing for liquidating dividends to stockholders. The New Company distributed its portion to its stockholders in four separate payments, the last of which was made in June 1908. The amount distributed came to 129.78 francs per 100 franc share. At least 70% of the stockholders existing at the date of the initial distribution had been stockholders at the time of the organization of the Company. The accounts of the liquidators of both companies were filed with and approved by the Civil Tribunal of the Seine and are a matter of public record and available for all to see who have the scholarly interest to do so.

Cromwell's Contributions

Because of the active role played in the Panama revolution by certain employees on the Isthmus of the Panama Railroad Company and because of Bunau-Varilla's connections with the French companies, some historians have assumed that Cromwell worked with Bunau-Varilla to promote the Revolution.[1] Cromwell had no love or use for the impetuous Bunau-Varilla whose own writings make clear that the dislike was mutual. They were not cooperators. Cromwell undoubtedly knew about some of the agitation then current on the Isthmus and may even have regarded it as salutary pressure on Bogota. Though he realized that a successful revolution might benefit the Panama Canal Company, he knew that for the Company to have become identified with an abortive revolution would very likely have meant the forfeiture of its properties and the loss of all for which he had been working. It is perhaps for this reason that Cromwell refused to see or assist Dr. Amador, who subsequently became the first President of Panama, when that gentleman in New York City during the summer of 1903 attempted to enlist the support of Cromwell and the Canal Company for his revolutionary schemes. Dr. Amador was finally assisted by Bunau-Varilla, but there is no reason to suppose that Cromwell knew of or would have supported this. Cromwell's partner, Curtis, states in his privately printed Memoirs that the officers of the Panama Canal Company had always desired to avoid any alliance with Bunau-Varilla. Cromwell himself mistrusted him and would certainly not have employed him as an agent. Bunau-Varilla later became the editor of "Le Matin" in Paris and in its columns, as well as in his numerous, egocentric and extraordinary books, vilified

[1]See, e.g., Pringle, "Theodore Roosevelt," pp. 302-38 (1931).

Cromwell on many occasions. These completely unsupported assertions have been accepted by many historians as facts.

Up to the revolution Cromwell had been doing his best to work the matter out legally with the Government of Colombia and Secretary Hay. As counsel for a company holding a Colombian concession, it may be seriously doubted whether he favored, much less abetted, the insurrection (at the time he was in fact in Paris). But Cromwell's unremitting efforts for the Panama Canal were also misrepresented in some quarters.

Perhaps the most extreme view, apart from those of Senator Morgan of Alabama, was that espoused by Congressman Rainey in the course of the House Committee on Foreign Affairs' inquiry into the Panama matter in 1912. He said, without any evidence or proof:

> "He [Cromwell] was the revolutionist who promoted and made possible the revolution on the Isthmus of Panama . . . when the old Panama Canal Company, just before its dissolution, acquired control of the Panama Railroad Co. by buying a majority of the stock they annexed, unfortunately for this Government, William Nelson Cromwell of New York, the most dangerous man this country has produced since the days of Aaron Burr—a professional revolutionist—and, we will be able to show you, one of the most accomplished lobbyists that this country has ever produced."[1]

Perhaps Cromwell, with his flair for the dramatic, would not have been entirely displeased at this characterization as the "most dangerous man" in the country.

[1]Hearings on the Rainey Resolution before the Committee on Foreign Affairs, p. 61 (1912).

A diligent research has revealed nothing, however, to support the assertion that Cromwell or his associates inspired, assisted or abetted in any way the revolution, the possibilities of the occurrence of which had for some time been openly referred to in the public press. The revolution subsequently proved to be advantageous to the interests of his client, as well as to what he regarded as the interests of his country, but Cromwell and his associates firmly and consistently denied any identification with the revolution and nothing has ever been found to connect them with it or with the activities of his detractor Bunau-Varilla.

What does appear is that Cromwell devoted almost 8 years of his life to the Panama project. With his complete mastery of a complicated factual situation in its engineering, geological, legal, political and diplomatic aspects, and conviction in his cause, he was able to take a case that was all but lost and, in company with a few like-minded partisans, educate and persuade a reluctant nation that the Panama route offered the more desirable opportunity. In this effort he became a well known figure in Washington, in frequent contact with such people as Senators Hanna and Spooner, Secretary of State Hay, Secretary of War Taft, Congressman Theodore Burton of Ohio and President Theodore Roosevelt. He had also worked particularly closely with the Colombian representatives in Washington.

Cromwell's detailed knowledge, legal training and skill as a negotiator made him of particular assistance in matters relating to the careful drafting of the treaties necessary to define the legal status of the Canal. Many of these he drafted and submitted to Secretary Hay.

The negotiations between Secretary Hay and General Concha in relation to United States sovereignty and con-

trol in the Canal Zone, a condition precedent to construction of a Canal under the Spooner Bill, were largely conducted with Cromwell as an intermediary and principal draftsman. The final draft of the proposed Hay-Concha Treaty was in his hand. When Dr. Herran succeeded General Concha, Cromwell was also instrumental in the drafting of the Hay-Herran Treaty, which, although it failed to be ratified by Colombia, became with only a few changes the Hay-Bunau-Varilla Treaty, which, as amended, still defines United States rights to the Canal Zone, together with the Treaty of Friendship and Cooperation of 1936 and the Treaty of Mutual Understanding and Cooperation of January 25, 1955.[1]

In the process of settling the details of actual operations in the Canal Zone under the Treaty, Cromwell accompanied William Howard Taft, then Secretary of War, to Panama. On their return Mr. Taft wrote to Cromwell the following words under date of December 12, 1904:

> "As our trip to and from Panama draws to a close, I desire to express to you my sincere gratitude for the assistance which you have rendered the Government and me in bringing about a satisfactory agreement upon a *modus vivendi* with the Republic of Panama. The truth is that after the first conference between President Amador and me, all subsequent negotiation was carried on through you as an intermediary. You acted in more or less of a judicial capacity, defending the interests of Panama, and at the same time making clear the needs of the United States Government in the great work which it has now set out to do. What you have done has been done both as a friend of the Republic of Panama and as a citizen of the United States intensely interested, by reason of your previous association with the enterprise,

[1]See Department of State Bulletin, February 7, 1955, p. 237.

> in the successful solving of the great problem, so important to the world, of connecting the two oceans."

The Republic of Panama recognized Cromwell's contribution toward bringing the Canal to Panama by appointing him Fiscal Agent of the Republic of Panama. It decided to retain in the United States $6,000,000 of the sum to be paid it under the Hay-Bunau-Varilla Treaty. A Fiscal Commission, for whom Cromwell acted as counsel, initially invested this sum, known as the "Constitutional Fund", in first mortgages on real estate in New York State. The Commission then withdrew. Cromwell in 1905 was appointed sole Fiscal Agent of the Republic and charged with the responsibility of supervising the investments of the Constitutional Fund, collecting the interest thereon and reinvesting the free funds. For over thirty years he acted for the Republic in this capacity with virtually unfettered discretion.

In 1937 he volunteered his resignation as Fiscal Agent because his residence in France then prevented him from giving to the interests of the Republic of Panama in the United States entrusted to his care the personal attention which he believed that they required. The formal published resolution of the Government of the Republic which accepted his resignation with regret, expressed the gratitude of the Republic for his services and stated in part: ". . . Mr. Cromwell has earned from this Government a well deserved and frank approval of all his activities in connection with the management of the large capital under his control, and the absolute confidence and trust bestowed on him at all times by this Government has enabled him to devote his professional abilities to the utmost on behalf of the vast and delicate interests entrusted to his care."

Upon his resignation Cromwell turned over to The Chase National Bank, as successor Fiscal Agent, the $6,000,000 constituting the Constitutional Fund which at November 30, 1938 was invested in 107 mortgages with an aggregate principal amount of $5,768,186.32, in a note in the amount of $7,500 and in cash to the amount of $224,313.68.[1] In connection with the refunding of the outstanding bonds of the Republic of Panama by Lehman Brothers in 1950, the Constitutional Fund was applied toward the retirement of certain internal indebtedness of the Republic.

The amount of the fee which Cromwell suggested to the French Canal Company to compensate his firm for eight years of services culminating in the sale of their properties, including 98% of the stock of the Panama Railroad Company, to the United States for $40,000,000, was referred to French arbitrators and an amount agreed upon. Raymond Poincaré, later President of France, represented the firm in this arbitration. As was natural, much was made of the fee and the arbitration in the newspapers, but little attention was paid to the tremendous value of his services and the indefatigable courage and determination with which he carried on.

Somewhat less space was subsequently given to the fact that Cromwell thereafter took great pains to find and purchase for the United States all of the shares of the Panama Railroad Company that were still outstanding in Europe. For this he refused a fee or compensation.

Secretary of War Taft wrote to him the following letter in this connection on March 29, 1905:

> "I beg to acknowledge receipt of your letter of the 28th instant, explaining the circumstances of the purchase by you of the remaining 275 shares of stock of the Panama Railroad Company, in addition to the 728 shares you have previously purchased under authority of the President and myself. I have conferred with the President in respect to this matter, and also with a number of prominent Senators and Representatives, whose acquaintance with the situation made me feel their advice to be of especial value, and we all regard the purchase as of the utmost benefit to the Government, and a feat which, but for your assistance, would have been exceedingly difficult to accomplish. I cannot exaggerate the importance to the Government of securing all the shares of stock, and therefore I tender to you, on behalf of the President and myself, our sincere thanks for the very great rapidity and success with which you have brought about this much desired result. I cannot fail to note the patriotism and unselfishness that prompted it, and the fact that you will not permit me to hand you, as I might reasonably do, a substantial sum in compensation for your services, which have been of such great value to the government."

[1]See the Registration Statement of the Republic of Panama which became effective on March 28, 1941 at p. 44.

This outline of Cromwell's part in the Panama Canal may appropriately be closed by repeating a story reported by Mark Sullivan: It is said that Mark Hanna in his role as elder statesman came to the President and said, "Theodore, you must be extremely careful; this South American affair is very ticklish business. You had better be guided by Cromwell; he knows all about the subject and the people down there." The President is said to have replied: "The great trouble with Cromwell is that he over-estimates his relations to Cosmos." "Cosmos?" said Hanna, "I don't know him; I don't know the name of any of these South Americans. But Cromwell knows them all; you better stick close to Cromwell."[1]

CHAPTER EIGHT

Cromwell's Later Life

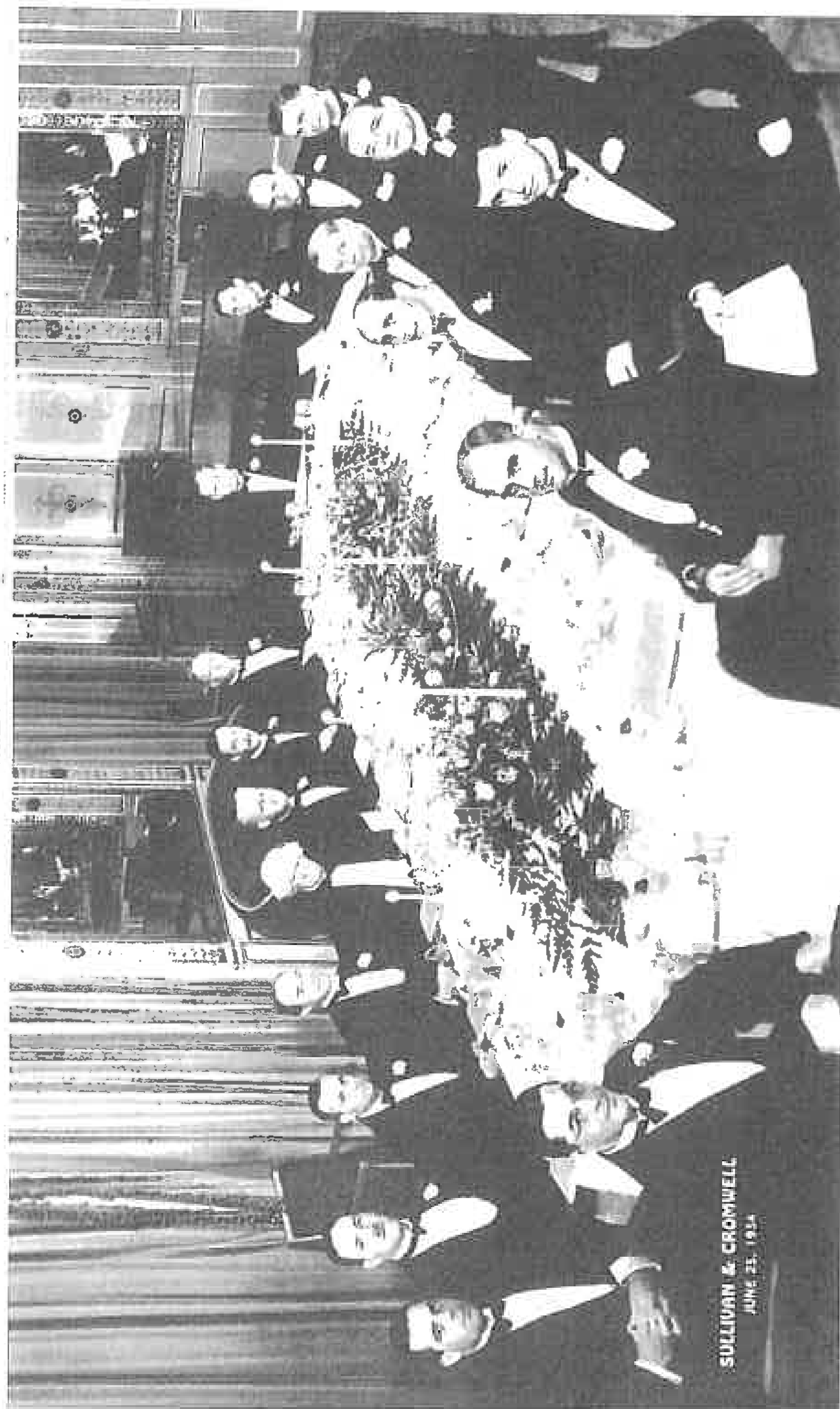
The Leslie Estate and Other Matters

ONE of the many interesting legal matters that occupied Mr. Cromwell in his later years, some of which have been previously itemized, had, perhaps, indirectly as much influence in American history as the Panama Canal. It concerned litigation which he supervised as executor of the estate of Mrs. Frank Leslie, widow of the publisher of Leslie's Illustrated Weekly. Historically, the interest of the matter is that Cromwell preserved for Carrie Chapman Catt, as a legatee under the will, the vast estate that she employed so effectively in the cause of woman's suffrage, and the bringing about of the Nineteenth Amendment.

The case was then of considerable interest since it involved a point of first impression under the New York Decedent Estate Law as well as the assertion, found to be baseless by the Court, that the decedent was the illegitimate daughter of a negro slave. Hamilton Basso's recent novel, "The View From Pompey's Head", is an enjoyable account of a lawyer's experience with a related problem that brings out the highly emotional character of the issues raised by such an assertion.

Section 91 of the New York Decedent Estate Law,[1] provided that an inheritance which had come to an intestate from a deceased husband or wife should descend to the heirs of such deceased husband or wife if the intestate left no heirs entitled to take. The claimant, a grandson of Mr. Leslie, sued to re-open the probate of Mrs.

[1]Formerly Section 290-a of the Real Property Law as added by L. 1901, C. 481.



The Last Partners' Dinner Attended By Mr. Cromwell

ent at the dinner reading clockwise from Mr. Cromwell are: Wilbur L. Cummings, Horace G. Reed, Stoddard M. Stevens, earce Browning, Jr., David W. Peck, Arthur H. Dean, David R. Hawkins, John C. Higgins, John Foster Dulles, Eustace gman, Alfred Jaretzki, Jr., DeLano Andrews, Norris Darrell, Rogers S. Lamont, Allen W. Dulles, Reuben B. Crispell and ard H. Green.

Leslie's will, contending that a codicil of the will was invalid and that thereafter she died intestate.

To make his case, he had also to show that she had no relatives at law. On this point the claimant contended that Mrs. Leslie was in fact the illegitimate child of a female negro slave "who would have no inheritable blood," and could therefore have no relatives on her mother's side.

The New York Appellate Division, First Department,[1] noting that she had left at least one relative on the side of her admitted father's wife, held that the claimant's assertions were without support and did not justify the court in vacating the probate.

Cromwell also represented the directors of The Equitable Life Assurance Company in the mutualization of that company following the Hughes investigation into the financial practices of New York insurance companies, as well as the officers of the Riggs National Bank in a criminal proceeding instituted by John Skelton Williams, Comptroller of the Currency in 1916. This was the celebrated case in which ex-Presidents Taft and Roosevelt, through Cromwell's intervention, appeared as character witnesses for the defendants. The jury returned a verdict of not guilty after ten minutes' deliberation.

In the hearing before the Senate Committee on Banking and Currency on the renomination of Mr. Williams as Comptroller, Samuel Untermeyer, who had acted as special counsel for the Government in the Riggs Bank case, had this to say of Cromwell with reference to attempted amicable settlements of the matter: ". . . there is no man in this country who has been more resourceful

[1]*Matter of Leslie,* 175 App. Div. 108 (1916).

or more distinctly helpful in negotiations and in the difficulties of finance than is Mr. Cromwell, besides which he has a constructive mind that amounts to genius in transactions of this kind."[1]

In the field of trusts and estates, Cromwell also participated in the Gould proceeding for the removal of trustees and an accounting in trusts involving eighty million dollars, *Gould* v. *Gould*.[2] He also had an active part in the Campbell will contest,[3] and the Eno will contest,[4] which in their day were of considerable professional interest. In the Campbell case the unsuccessful contestants claimed that a foundling had been substituted for Campbell's only child who they alleged had died at birth. The case involved enormous evidentiary difficulty for the child had been born more than twenty years before when Mrs. Campbell who had come to New York from Saint Louis to purchase a layette suddenly gave birth to the child, not in the hotel where she was registered, but in a hotel of similar name where she was taken in error, when seized with labor pains while shopping, by a carriage driver who misunderstood the name of the correct hotel.

Activities in World War I

Cromwell was an ardent admirer of France and spent most of the years of World War I in France. For a time he was principally engaged in assisting French banks in the reorganization of Brazilian railways and in new financings. But as the sufferings of the people of

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[1]Hearings on the Nomination of John Skelton Williams to be Comptroller of the Currency before the Committee on Banking and Currency, United States Senate, p. 647 (1919).

[2]203 App. Div. 807 (1st Dept. 1922).

[3]The last phase is reported in 274 Mo. 343, 202 S. W. 1114 (1918).

[4]196 App. Div. 131 (1st Dept. 1921).

France in the War were borne in on him, he applied himself increasingly to the war effort, and gave with great generosity to construct homes for the wounded and farm schools for orphans, to provide assistance for the blind and to provide recreational facilities for American soldiers in France, an activity initiated by Mrs. William Graves Sharp, the wife of the then Ambassador of the United States to France and the mother of George C. Sharp, a partner in the firm. He was instrumental in installing a great Braille press in the old Hotel de Chermont-Tonnerre, which made available books for those blinded in the war.

After the war he was much concerned for the restoration of the ravaged areas. In particular he became a patron of the stricken French hand-lace industry. He created the Cromwell-Dislere Foundation to encourage Valenciennes lace-making through arranging expositions and competitions. For his work he was named Honorary Citizen of the City of Bailleul. Later his work for France received recognition in his appointment as a Grand Officer of the Legion of Honor. In 1936 he was awarded the Grand Cross, supreme award of the Legion of Honor.

He was also strongly moved by the devotion and sacrifice of the American aviators in the Lafayette Escadrille, and was one of the prime movers and generous contributors to the movement to build a memorial for them in the park of Villeneuve l'Etang.

In the years between the two World Wars Cromwell resided increasingly in France. One summer when he had rented a place outside of Paris near Fontainebleau, he, as was his practice, invited for the weekend a young lawyer from the office who was in Paris with his wife. The next morning they had breakfast on the terrace

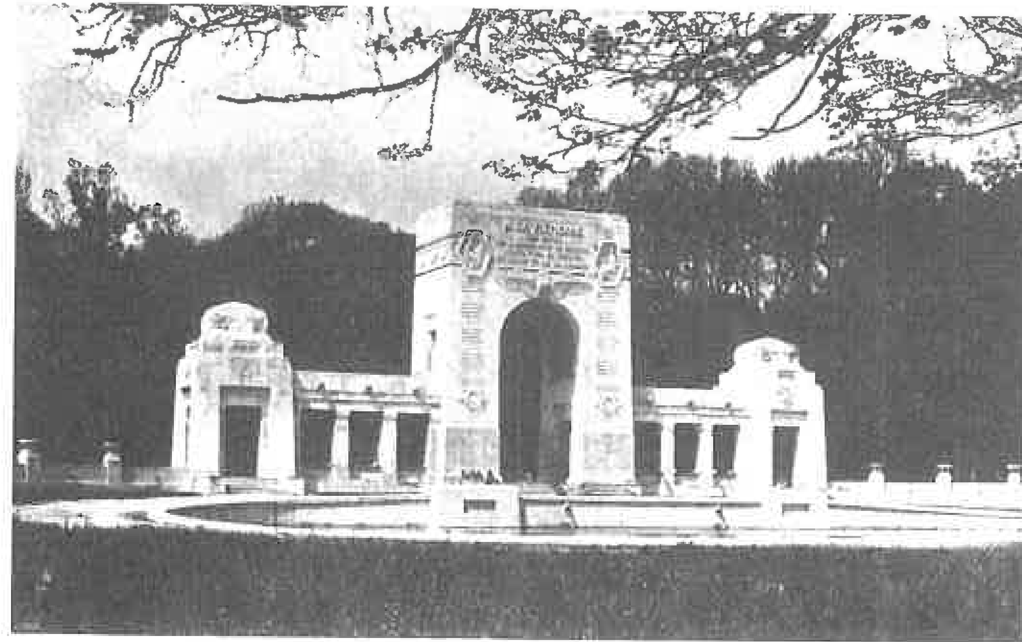
and the eggs were served, in the continental fashion, in egg cups. The young lawyer's wife tentatively cut off the top of her egg with a knife, but noticing that the egg was bad, did not proceed. Cromwell, believing that she was not accustomed to opening eggs served in this manner and thinking to help her, reached forward and with his knife severed neatly the top of her egg. Whereupon the hydrogen sulphide odor poured forth and the young wife burst into tears.

Some time later when she left she thanked Cromwell for a most enjoyable time. "No, my dear," said he taking her hand, "I am sorry that due to my fault you did not have a most enjoyable time but I am sure you had a most interesting time." And so she did.

Cromwell's contacts with charities for the blind in France led him to give much of his time in this country to The American Foundation for the Blind, Inc., of which he was a trustee. In connection with this work his friend Helen Keller presented to him on his 90th birthday the Gold Medal of the Association of the Blind. He was later to make provision for Miss Keller in his will.

Support of Professional Associations

Always an active member of The American Bar Association, he was also at one time President of The New York County Lawyers' Association and Vice President of the Association of the Bar of the City of New York. Cromwell felt strongly that every member of the bar should be able to join a bar association and for a nominal amount be able to participate in its activities and to have access to a good library. He encouraged both partners and associates in his firm to participate fully in the activities of these and other professional or charitable associa-



LAFAYETTE ESCADRILLE MEMORIAL

tions. The present partners and associates of his firm have continued in that tradition, taking, for example, active parts in the work of bar association committees and serving on the boards of hospitals, colleges and charitable foundations.

He was largely instrumental in the building of the "Home of Law" of the New York County Lawyers' Association on Vesey Street and, in his lifetime, contributed some $485,000 to its building fund. The author recalls this project vividly since he was assigned the tasks of selecting the books for its library and the pictures for its walls, and the supervisory work with the architect.

Cromwell also in his lifetime made various contributions totaling $130,000 to the Association of the Bar of the City of New York. In addition, he established with an initial gift of $150,000, the "William Nelson Cromwell Foundation for Research of the Law and Legal History of the Colonial Period of the United States of America; a Museum and other Matters of a Legal Nature." Colonial history, architecture and law had long been one of his great interests. The author when in Paris with him in the middle twenties used to have many interesting conversations on these subjects and on what Cromwell planned to do.

Cromwell's Estate

In his will this Foundation received another bequest of a quarter million dollars. The first fruits of the activities of the Foundation appeared in Henry S. Drinker's book entitled "Legal Ethics," the most comprehensive subject on this work to date, and the first in many years. The most recent publication of the Foundation has been "A History of the School of Law Columbia

University". In publishing this History the Trustees of the Foundation were mindful of Cromwell's loyalty and devotion to the Columbia Law School. Foundation projects currently under way include the "Opinions of the Committee on Legal Ethics," a companion to the Drinker book, and the "Pynchon Diary."

Inasmuch as Mrs. Cromwell, to whom he was most tenderly devoted, died in 1931, and since he had no children, Cromwell died without direct descendants. He discussed at length with the author the plan of disposition of his estate (although the draftsmanship of the will and all the testamentary provisions were peculiarly his own). Almost his entire estate was left to a wide list of charities, including Saint Bartholomew's Church, The Metropolitan Museum of Art, The National Gallery of Art in Washington, The New York Public Library, Juilliard Musical Foundation, Mount Sinai Hospital, and the British War Relief Society. The bequest to Saint Bartholomew's created an endowment for the improvement of the interior of the Church, which has provided funds for the new air-conditioning system recently placed in operation. This system is believed to be the first installed in a Protestant church in New York City.

Since the will was drawn in 1943 during the middle of World War II a legacy was also left to Russian War Relief, Inc. Because that society was not functioning at the date of his death and the gift would no longer fulfill the testator's intention, his executors, as directed by the will, declined to pay the legacy and obtained from Surrogate Frankenthaler a decision that they did not have to pay it.

The gross estate was almost $19,000,000. The residue of the estate was divided into 100 parts, each part being

at present worth in excess of $130,000 and subject to increase in the event of a favorable termination of litigation now in progress to determine, among other questions, the charitable character, within the meaning of the estate tax, of certain bar associations.

To The American Bar Association he left three parts, or some $400,000. Three parts were left also to The New York County Lawyers' Association and The Association of the Bar of the City of New York and a lesser amount to the New York State Bar Association.

Contributions to bar associations totaled approximately $1,500,000.

Three parts were left also to the New York Law Institute, which operates a law library much frequented by downtown New York lawyers. The Legal Aid Society was the recipient of two parts.

Many bequests in his will were made to universities and law schools. Out of loyalty to his partners, their several alma maters received bequests of from one to three parts of his estate.

Ever a loyal son of Columbia, Cromwell had been devoted to Nicholas Murray Butler and Columbia College and to Dean Harlan Fiske Stone of the Law School and had regularly given generously to Columbia's academic work as well as to the Law School. On his death Columbia University and its Law School received in total 9 parts of his estate, or some $1,170,000. It is expected that this fund will be used for the Law School's new building. The Ford Foundation has recently supplemented this fund in its grants for international studies.

Amherst, Cornell Law, Harvard Law, Johns Hopkins, Kenyon College, Princeton University, Stanford Law and Yale Law each receive two parts, and Bowdoin,

Dartmouth, and William and Mary, one part each. Dartmouth was included because of his tremendous admiration for Daniel Webster and his celebrated argument in the *Dartmouth College*[1] case, his high regard for U. S. Circuit Judge Charles Merrill Hough (Dartmouth 1879) and his close personal friend Amos Tuck, but primarily, the author believes from numerous discussions with him, because of Daniel Webster and his great services to the Union. William and Mary was included for a number of reasons connected with Cromwell's interest in law during the Colonial period of our history. He believed that John Marshall, its distinguished alumnus, had with great courage and insight framed the fundamental principles of our Federal Union and he also held in great respect George Wythe who as Chancellor of the Commonwealth of Virginia in 1782 had established the principle that a court can annul a law inconsistent with an overriding constitution. While he was Chancellor, Wythe served as one of the first professors of law at William and Mary. John Marshall and Thomas Jefferson were among his pupils. Cromwell's attention was also drawn to William and Mary because of his admiration for what John D. Rockefeller and his sons were doing at nearby Williamsburg and his appreciation for their courtesy in allowing him to remain, after his ground lease had expired, in his home at 12 West 49th Street while Rockefeller Center was being built.

A Changing Practice

When Cromwell came to the Bar the judicial system was designed to deal with rather simple questions of fact.

[1] 4 Wheat. 518 (U. S. 1819).

Mr. Cromwell Accepting a Scroll from his Partners on his Ninetieth Birthday

William Nelson Cromwell Edward H. Green John Foster Dulles Eustace Seligman

The object of common law pleading was to reduce the triable issues to the decision of the one ultimate question of fact which was decisive. With the introduction of code pleading the emphasis shifted to bringing out the facts of the transaction in suit, but even code pleading was appropriate only to meet the problems incident to basically simple factual controversies. The actual trials of Cromwell's early days at the Bar were for the most part normally simple accident and relatively simple commercial cases, although from time to time the courts had to examine into complicated real property titles.

Cromwell lived to see the advent of the modern "big case" such as the American Tobacco[1] and the Standard Oil cases[2] in which the economics of an entire industry are examined critically and presented to a court.[3] He also lived to see the rise of complex business litigation, such as stockholders' derivative actions, in which the aspects of a single business must be turned inside out against the economic background in which the particular business operates. In cases under Section 7 of the Clayton Act, indeed, the statute requires the courts to make economic predictions regarding relevant lines of commerce and future potentialities.

In a very real sense Cromwell was a pioneer in this type of situation and had the genius to see things in their total setting. His presentation of the economic and

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[1]*United States* v. *American Tobacco Co.,* 221 U. S. 106 (1911).

[2]*Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911).

[3]Harrison Tweed, in "The Changing Practice of Law", an address delivered in 1955 before The Association of the Bar of the City of New York, suggested that both an increase in specialization and in the size of law firms has been found necessary to give today's clients the legal services that they require. The rise of complex business litigation is one of the more important of the developments that has spurred this trend.

political factors in the Panama Canal Hearings before Congress was a masterly demonstration of techniques later to become invaluable in handling modern economic litigation.

Because the issues in modern economic litigation range so wide, both the bench and bar have had to invent new techniques of proof while at the same time carefully retaining vital common law safeguards relating to the trustworthiness and authenticity of evidence. Expert testimony in these cases is helpful but the factual predicate of these cases must be adduced by the lawyers in the form of evidence competent for admission under common law rules. Under our system, the judge cannot supply what is not before him in the form of competent evidence in the record.

The development of modern economic litigation means that it is extremely important to have trial judges who are alive to what Mr. Justice Holmes termed "the felt necessities" of the times. It is frequently difficult for a judge who has had experience only in trying relatively simple cases arising in a state court to keep abreast of changing economic and social conditions on a national and perhaps international scale, an understanding of which is essential in handling major economic litigation. Our legal system has been criticized for years because the public has felt that it is behind the times, though most of the criticism is often more emotional than factual, and the current emphasis on speed rather than analysis is not necessarily in accordance with the highest standards for the administration of justice.

Having winnowed and sifted his evidence and having discarded the immaterial and the irrelevant, it is the

lawyer's duty to organize the evidence and to present it to the court in an orderly manner in accordance with the rules of evidence and of procedure so as most effectively to aid the court. In a long trial the authentication of documents and offering and marking them into evidence and ascertaining whether they were sent or received and the examination and cross-examination of witnesses in an effort to ascertain the truth is a long and complicated procedure which is sometimes bewildering to a layman, who asks, "Is it necessary?" But without these carefully evolved procedures, many of which have stood the test of centuries, unsupported and uncorroborated testimony, an unauthentic or spurious document or hearsay and unchallenged testimony might deprive a man of his liberty, deprive him of his property, wife or children or subject him not only to the payment of heavy fines but hold him up to contumely and contempt in his community.

Cromwell was, of course, primarily what is known colloquially as an "office lawyer". As Judge Cardozo has written with his distinctive grace,

> ". . . in the literature of the law there has been a tendency to underestimate the importance of the role that is played by the office adviser, not merely in keeping his client out of jail or in avoiding civil liability, but even in shaping and directing the institutions of law itself. He is much more than a traffic officer, warning of obstructions and keeping travellers to the travelled path. He is a creative agent just as truly as the advocate or the judge. In our complex economic life, new problems call from day to day for new methods and devices. The lawyer in his office formulates a trust receipt, or stock certificates with novel incidents, or bonds, municipal or

> corporate, with privileges or safeguards till then unknown to the business world. At times legislation is necessary to make the innovation lawful. More often, the new device establishes itself in practice, is taken up by business men generally as one of the accepted moulds of conduct. When this happens, the function of the court becomes in a sense supervisory and secondary. The innovation must still be tested for possible infringements of the behests of public policy and justice. Even so, except in rare cases—in cases where the infringement is serious and manifest—the form that has thus worked itself into the methods of business life will be accepted almost automatically as postulates of the legal order. The courts do no more than set the *imprimatur* of regularity upon methods that have had an origin in the creative activity of an adviser, working independently of courts in the quiet of an office."[1]

As an office lawyer Cromwell did everything he reasonably could to avoid and prevent litigation and to bring about a reasonable meeting of the minds. It is commonly supposed that there is a sharp line dividing practitioners of this class from the trial bar. But the difference can be and usually is a difference of the forum and the rules under which the particular practitioner operates and not one of fundamental substance. The office lawyer is the planner, the diagnostician, the trial lawyer, the surgeon. But frequently the office lawyer may have to try cases before administrative agencies, present matters before public bodies, boards of directors or stockholders' meetings, carry on settlement negotiations with the other side or persuade his own client as to the most advisable course of action.

[1]Memorial to John G. Milburn in the Year Book of The Association of the Bar of The City of New York, p. 435 (1931).

In order to perform the role of diagnostician the office lawyer must develop essentially the same techniques as the trial lawyer. The trial lawyer must convince the mind of the judge. The office lawyer must convince not only his own client but the representatives on the other side and seek to remove friction. He must be able to elicit by patient effort not only the facts favorable to his own client, but all the facts, favorable or unfavorable, before he gives his opinion on which the client relies. The general character and reputation of a lawyer for clarity, probity, integrity and fairness are powerful assets for his clients. Moreover, he must have the character and intestinal fortitude not to be browbeaten by his own clients. He must be essentially realistic and must not be bullied or cajoled into calling the kitchen sink the kitchen stove.

Cromwell never forgot that he was first and foremost an "officer of the court", a professional man, or that his clients were human beings with human emotions, human aspirations, prejudices and feelings. He was a man of understanding and compassion. He had a high standard of ethics and lived up to his code. He fought hard on behalf of his clients. But he never thought that his duty to his clients, which he placed very high, required him to forego his duty to his country or his duty to the courts, or, indeed, to society. He would never knowingly condone the submission of any evidence or of any document unless he was prepared to defend its correctness or authenticity. He prided himself on his objectivity. He was not necessarily influenced in his professional judgment by what the clients wanted. But as an advocate he believed strongly that every legitimate facet of a client's case should be put before the court in as able a way as

he knew how in accordance with accepted rules of court procedure. If there were legitimate doubts that troubled him he believed they should be placed before the court. But he believed that it was the court's function to decide between conflicting statements of facts or the application of the law to the facts and that it was his duty as a lawyer to help the court in every proper way that he could. He never forgot that he was an advocate riding into the lists for his client, and that he himself was not sitting as the impartial judge. He was critical but not censorious, sympathetic and understanding without being unobjectively partial, and always indefatigable in his client's behalf.

Both in literature and conversation today it is often insinuated, if not asserted, that the young lawyer starting out in a law firm cannot maintain his integrity and still rise in his profession. Whatever the cynics may say, and they are legion, the plain truth is that no lawyer, whatever his age, can afford to be anything else but rigidly honest with his client and with himself. Cromwell's own career exemplifies this truth.

To those who knew him William Nelson Cromwell was indeed a unique and fascinating figure. The author will rest satisfied if this glimpse into his late partner's life and times has permitted him to share some of the interest that Cromwell inspired in all who knew him. In an age of individualists he was a personality of exceptional color and vigor.

Time gave to him the generous gift of 94 years of life. He made them useful and memorable.

ANNEX A

LAWYERS IN THE OFFICE OF SULLIVAN & CROMWELL

1879-1957

	Period of Association	Present Affiliation As of May 1, 1957
* Algernon S. Sullivan	1879-1887	
* William Nelson Cromwell	1879-1948	
* Isaac Carrillo	1879-1886	
* William J. Curtis	1880-1886 1888-1919	
* George C. Comstock	1880-1885	
* Alfred Jaretzki, Sr.	1881-1925	
* George H. Sullivan	1882-1912	
* William L. Stone	1884	
* Alex S. Bacon	1884-1885	
* Canby T. Christensen	1886-1887	
* Merritt E. Haviland	1887-1890	
* Hector H. Tyndale	1887-1912	
* Clarence M. Lewis	1890-1894	

* Deceased
† Absence in war service is not shown
p Partner Sullivan & Cromwell
a Associate Sullivan & Cromwell

	Period of Association	Present Affiliation As of May 1, 1957
* George Douglas	1891-1899	
* Robert Gibson	1891-1892	
* Wolcott G. Lane	1891-1893	
* Edward Bruce Hill	1891-1917	
Edward d'O. Tittman	1893-1895	Retired, Hillsboro, New Mexico
* William F. Kip	1893-1894	
* Clarke M. Rosecrantz	1894-1896 1914-1920	
* William F. Goldbeck	1894-1896	
* Edward T. McLaughlin	1894-1902	
* Charles E. Mahony	1895-1902	
* Frederick C. Gladden	1896-1897	
* Albert S. Ridley	1896-1938	
* William P. Chapman, Jr.	1897-1906	
* Harlan F. Stone	1898-1899 1923-1924	
* Henry W. Clark	1899-1904	
* Francis D. Pollak	1899-1916	
* James C. Converse	1900-1902	
* George H. Olney	1900-1903	
* William V. Rowe	1902-1911	
Carl R. Ganter	1902-1910	Retired, New York, New York
William F. Corliss	1902-1952	Retired, Freeport, L. I., New York
* Emery H. Sykes	1903-1949	

	Period of Association	Present Affiliation As of May 1, 1957
* Royall Victor	1904-1926	
Waddill Catchings	1904-1908	President, Radio Program Production Company, New York, New York
Henry A. Yeomans	1904-1909	Retired, Cambridge, Massachusetts
* Hjalmar H. Boyesen	1904-1923	
* George H. Stover	1906-1910	
* Henry H. Pierce	1907-1928	
Arthur S. Hills	1907-1909	Attorney at Law Washington, D. C.
p Edward H. Green	1908-	
J. Hampden Dougherty, Jr.	1909-1911	Lowe, Dougherty, Hart & Marcus New York, New York
* Walter H. Pollak	1910-1912	
* Ralph L. Collett	1910-1917	
Robert McC. Marsh	1910-1915	Delafield, Marsh & Hope New York, New York
John K. Byard	1911-1914	Antiques, Silvermine, Connecticut
John Foster Dulles	1911-1949†	The Secretary of State Washington, D. C.
* Ralph Royall	1912-1928	
Reuben B. Crispell	1913-1942†	Retired, New York, New York
* Max Shoop	1913-1919 1923-1939	
p Eustace Seligman	1914- †	
Donald D. Dodge	1914-1916	Retired, Philadelphia, Pennsylvania

	Name	Period of Association	Present Affiliation As of May 1, 1957
*	William T. Quinn	1915-1925	
a	Walter G. Wiechmann	1915- †	
*	Henry N. Arnold	1916	
p	Alfred Jaretzki, Jr.	1916- †	
	H. Starr Giddings	1916-1920	Giddings, Keating & Reid New York, New York
p	Paul W. McQuillen	1916- †	
	Laurence A. Crosby	1917-1946†	President, Cuban Atlantic Sugar Company Havana, Cuba
p	Stoddard M. Stevens	1917-	
*	Philip L. Miller	1917-1945	
°	Lawrence E. Sherwood	1917-1919	
*	Miner W. Tuttle	1917-1932†	
*	Wilbur L. Cummings	1918-1941	
	Charles P. Stewart	1918-1919	Attorney at Law Jamaica, L. I., New York
	William W. Worthington	1918-1920	Attorney at Law San Diego, California
°	Robert T. Woodruff	1918	
	Walter Chalaire	1919-1921 1927-1932	Scandrett & Chalaire New York, New York
*	Lee R. Francis	1919-1945	
	Charles MacGregor	1919-1922	Attorney at Law Scarsdale, New York
	Horace G. Reed	1920-1946	Federal Operations Administration Washington, D. C.

	Name	Period of Association	Present Affiliation As of May 1, 1957
	Orville W. Wood	1920-1922	Retired, formerly with Milbank, Tweed, Hope & Hadley, New York, New York
	Horace R. Lamb	1920-1926	LeBoeuf, Lamb & Leiby New York, New York
	Herman H. Hoss	1920-1922	Vice President, Schwabacher-Frey Company San Francisco, California
	DeLano Andrews	1921-1955	Retired, Columbia, South Carolina
	Loring W. Post	1921-1929	Department of Justice Washington, D. C.
p	David R. Hawkins	1921-	
	Harold F. Butler	1922-1935	Vice President, West Penn Electric Company, New York, New York
°	Kenneth M. Bixler	1922-1924	
	Allan Van Wyck	1922-1933	President, Illinois Power Company Decatur, Illinois
p	George C. Sharp	1922- †	
p	Arthur H. Dean	1923-	
*	William K. Laws	1923-1933	
	Emery J. Woodall	1924-1928	Examiner, Federal Power Commission Washington, D. C.
*	Rogers S. Lamont	1924-1939	
	Jay J. M. Scandrett	1924-1925	Savannah, Georgia
*	William Leo Mulry	1924-1947	
p	Norris Darrell	1925-	
p	S. Pearce Browning, Jr.	1925-	
	James P. Gifford	1925-1929	Assistant Dean, School of Law, Columbia University, New York, New York

	Period of Association	Present Affiliation As of May 1, 1957
Robert S. Gordon	1925-1934	Vice President and General Counsel National Dairy Products Corporation New York, New York
Baldwin Maull	1925-1935	President, Marine Midland Corporation Buffalo, New York
* Jacob I. Bergen	1925-1929	
John C. Higgins	1926-1938	Mining and Lumber Interests Portland, Oregon
Frederick C. Bangs	1926-1933	Attorney at Law New York, New York
Hyman Zettler	1926-1934	Retired, Pacific Palisades, California
Robert E. Goldsby	1926-1930	President, Jersey Mortgage Company Elizabeth, New Jersey
* Jerome W. Thompson	1926-1927	
Allen W. Dulles	1926-1951†	Director, Central Intelligence Agency Washington, D. C.
John Dern	1927-1929	Sidley, Austin, Burgess & Smith Chicago, Illinois
John A. Woodbridge	1927-1939	Vice President and General Counsel Union Electric Company St. Louis, Missouri
Carter M. Braxton	1927-1935	Braxton & Co. New York, New York
Franklin S. Pollak	1927-1933	Bureau of State and Community Service, University of Colorado Boulder, Colorado
Frederick L. Strong	1927-1931	City Magistrate New York, New York
* Robert E. Olds	1928-1932	

	Period of Association	Present Affiliation As of May 1, 1957
John G. Laylin	1928-1933	Covington & Burling Washington, D. C.
Francis X. Downey	1928-1937	Hodges, Reavis, McGrath & Downey New York, New York
Walter C. Lundgren	1928-1938	Lundgren, Lincoln & McDaniel New York, New York
Lauson H. Stone	1928-1933	Dwight, Royall, Harris, Koegel & Caskey New York, New York
Emmet McCaffery	1928-1938	Dorr, Hand, Whittaker & Peet New York, New York
Joseph A. Grazier	1928-1937	President, American Radiator & Standard Sanitary Corporation New York, New York
Joseph F. Gillis, Jr.	1929-1930	Tolbert, Gillis & Bengard New York, New York
W. Arthur Roseborough	1929-1939	Petroleum Consultant Paris, France
John C. Hover	1929-1944	Davis Polk Wardwell Sunderland & Kiendl New York, New York
p Oliver B. Merrill	1929-	
Samuel Winokur	1929-1931	Vice President, Seeman Brothers, Inc. New York, New York
Raymond B. Goodell	1929-1934	Coudert Brothers New York, New York
Knight G. Aulsbrook	1929-1932	Attorney at Law St. Petersburg, Florida
* James P. Granville	1929-1931	
William F. Treiber	1929-1931	First Vice President, Federal Reserve Bank of New York New York, New York

	Period of Association	Present Affiliation As of May 1, 1957
Joseph Prendergast	1929-1933	Executive Director, National Recreation Association New York, New York
* Charles H. Sarolea	1929-1934	
Henry S. Wingate	1929-1935	President, The International Nickel Company of Canada, Limited New York, New York
Earle J. Machold	1929-1930	President, Niagara Mohawk Power Corporation Syracuse, New York
David W. Peck	1930-1943	Presiding Justice, Appellate Division, Supreme Court of the State of New York New York, New York
Alexander M. Grean, Jr.	1930-1938	Vice President, Ward Baking Company New York, New York
p Inzer B. Wyatt	1930- †	
Elvin R. Latty	1930-1933	Professor, School of Law, Duke University Durham, North Carolina
William F. Kennedy	1930-1945	Secretary, The International Nickel Company of Canada, Limited New York, New York
W. Frederic Colclough, Jr.	1930-1940	President, American Bank Note Company New York, New York
Clarence O. Dimmock, Jr.	1930-1940	Dimmock, Snyder & Van Patten New York, New York
Elizabeth Beam Osborne (Mrs.)	1930-1939 1942-1944	Geneva, Illinois
Madeline Smythe (Miss)	1930-1931	Menlo Park, California
a Lois S. Rodgers (Mrs.)	1931-1934 1942	

	Period of Association	Present Affiliation As of May 1, 1957
Ruth A. Hall (Miss)	1931-1937	Attorney at Law Kansas City, Missouri
Edward J. McGratty, Jr.	1931-1937	Legal Department, General Motors Corporation, Detroit, Michigan
William E. Nuessle	1931-1934	Assistant General Counsel, National Dairy Products Corporation New York, New York
J. Edward Mount	1931-1937	Assistant to President, Bethlehem Steel Company Bethlehem, Pennsylvania
p William Curtis Pierce	1931- †	
Thomas W. Childs	1932-1940	Vice President and Secretary The American Metal Company, Ltd. New York, New York
John C. Bruton	1932-1947	Boyd, Bruton & Lumpkin Columbia, South Carolina
C. Harold Taylor	1932-1940	Hall, Haywood, Patterson & Taylor New York, New York
Evelyn E. West (Miss)	1932-1933	Attorney at Law New York, New York
Malcolm A. MacIntyre	1933-1940	Debevoise, Plimpton & McLean New York, New York
Richard G. Pettingill	1933-1946†	Dunnington, Bartholow & Miller New York, New York
Robert E. Houston, Jr.	1933-1942	Haynsworth, Perry, Bryant, Marion & Johnstone Greenville, South Carolina
Gordon B. Tweedy	1933-1939	Vice President, C. V. Starr & Co., Inc. New York, New York

	Period of Association	Present Affiliation As of May 1, 1957
* T. Ross Cissel, Jr.	1934-1942	
Franklin B. Lincoln, Jr.	1934-1939	Lundgren, Lincoln & McDaniel New York, New York
p John F. Dooling, Jr.	1934-	
Robert T. Kimberlin	1934-1938	Vice President, Crown Zellerbach Corporation San Francisco, California
Robert L. Lingelbach	1934-1941	Secretary, Rayonier, Inc. New York, New York
Howard S. McMorris	1934-1937	Hodges, Reavis, McGrath & Downey New York, New York
Harmar Brereton	1934-1941	Vice-President and General Counsel, Eastman Kodak Company Rochester, New York
Hamilton Robinson	1934-1940	Investments, Washington, D. C.
Bernard C. Hemmer, Jr.	1935-1952†	President, River Brand Rice Mills, Inc. Houston, Texas
p William Piel, Jr.	1935- †	
p William Ward Foshay	1935- †	
p Charles S. Hamilton, Jr.	1935-	
James B. Hoffman	1935-1944	Pacific Palisades, California
Cornelius Means	1935-1950†	Counsel, Potomac Electric Power Company Washington, D. C.
p Richard S. Storrs	1935-	
Marshall W. MacDuffie, Jr.	1936-1941	Secretary, Unitronics Corporation New York, New York

	Period of Association	Present Affiliation As of May 1, 1957
Edwin S. Cohen	1936-1949	Root, Barrett, Cohen, Knapp & Smith New York, New York
James E. Birdsall	1936-1941	Warner, Birdsall & Anfuso New York, New York
p David S. Henkel	1936- †	
Glen McDaniel	1936-1942	Lundgren, Lincoln & McDaniel New York, New York
Houston H. Wasson	1936-1946	Lovejoy, Morris, Wasson & Huppich New York, New York
Alexander L. Keyes	1936-1940	Attorney at Law Morristown, New Jersey
p Edward G. Miller, Jr.	1936- †	
Franklin O. Canfield	1936-1939	Standard Oil Company (New Jersey) Paris, France
Charles W. Allen	1937-1942	Hutchinson, Pierce, Atwood & Allen Portland, Maine
Albert O'B. Andrews	1937-1950†	Vice President, American Standard Products (Canada) Limited Toronto, Canada
Robert L. Augenblick	1937-1950†	Augenblick, Emmet, Frost & Evarts New York, New York
Frank J. Berberich	1937-1947	Secretary, American Radiator & Standard Sanitary Corporation New York, New York
Henry P. deVries	1937-1948	Professor of Law Columbia University Hyde & deVries New York, New York
Macklin Fleming	1937-1939	Attorney at Law San Francisco, California

	Period of Association	Present Affiliation As of May 1, 1957
Charles A. Bane	1938-1949†	Isham, Lincoln and Beale Chicago, Illinois
Lincoln C. Brownell	1938-1949†	Brownell, Lane & Co., Inc. New York, New York
Martin Victor	1938-1952	Secretary, The Babcock & Wilcox Company New York, New York
Richard A. Cabell	1938-1944	Assistant Vice President, The International Nickel Company of Canada, Limited New York, New York
a Howard T. Milman	1939-	
p John R. Raben	1939- †	
Hadlai A. Hull	1939-1941	Treasurer and Director, The Dayton Company Minneapolis, Minnesota
Arthur A. Ballantine, Jr.	1939-1940	Publisher, Durango, Colorado
Ruth Cutter Smiley (Mrs.)	1940-1943	Chappaqua, New York
James T. Hill, Jr.	1940-1950†	Vice President, William A. M. Burden & Co. New York
Roy L. Steinheimer, Jr.	1940-1950	Professor, School of Law, University of Michigan Ann Arbor, Michigan
MacDonald Deming	1940-1942	Haight, Gardner, Poor & Havens New York, New York
Theodore O. Rogers	1940-1942	Attorney at Law West Chester, Pennsylvania
F. Hodge O'Neal	1941	Professor, School of Law, Vanderbilt University Nashville, Tennessee
Louis S. Auchincloss	1941-1951†	Hawkins, Delafield & Wood New York, New York
p Robert J. McDonald	1941- †	

	Period of Association	Present Affiliation As of May 1, 1957
p Richard G. Powell	1941- †	
p Roy H. Steyer	1941- †	
Bernard C. Rankin	1941-1942	Dickinson, Wright, Davis, McKean & Cudlip Detroit, Michigan
Gray Thoron	1941-1948†	Dean, School of Law, Cornell University Ithaca, New York
Herman W. Gruning	1941-1949†	Confectioner, Maplewood, New Jersey
Jonathan L. Collens	1941-1942	Cleveland, Ohio
Marion E. Horsburgh (Miss)	1942-1947	Legal Department, New York Telephone Company New York, New York
Frank T. Cotter	1942-1943	Wilson, Selig & Cotter Los Angeles, California
William A. Underwood	1942	Director, U. S. A. Operations, Mission to Jordan, American Embassy, Amman, Jordan
Richard D. Griffen	1942-1945†	Secretary, The Best Foods, Inc. New York, New York
Roderick J. Kirkpatrick	1942-1956†	Secretary, The First Boston Corporation New York, New York
Mary Winn Bruton (Mrs.)	1942-1944	Boyd, Bruton & Lumpkin Columbia, South Carolina
Edward H. Schlaudt	1942-1952	Tax Counsel, The Texas Company New York, New York
Doris H. Webster (Mrs.)	1942-1943	Highland Park, New Jersey
Maurice Winger	1942-1943	Secretary, American Enka Corp. Enka, North Carolina
Margaret D. Merli (Mrs.)	1942-1945	Port Washington, Long Island, New York

	Period of Association	Present Affiliation As of May 1, 1957
Watson S. Campbell	1942-1944	Montgomery, McCracken, Walker & Rhoads Philadelphia, Pennsylvania
Catherine McPolan Enisy (Mrs.)	1942-1944	Scarsdale, New York
David A. Kerr	1942-1943	MacCoy, Evans & Lewis Philadelphia, Pennsylvania
Mary L. Rea (Mrs.)	1942-1944	Roslyn, Long Island, New York
Donald C. Hain	1943-1949	McCanliss & Early New York, New York
Walter W. Malone	1943-1944	Attorney at Law Washington, D. C.
Elizabeth L. Krauss (Miss)	1943-1945	Attorney at Law New York, New York
Marinus Contant, Jr.	1943-1944	Manufacturer of Aircraft Corona Del Mar, California
Henry B. Armstrong, III	1943-1947†	Legal Department, Travelers Insurance Company Hartford, Connecticut
a Alexander Jay Bruen	1943-	
Ernest J. Jenner	1944-1945	J. C. Penney Company Minneapolis, Minnesota
Effingham Evarts	1944-1946	Attorney at Law Windsor, Vermont
Arthur J. P. Smith	1944	Attorney at Law Brooklyn, New York
Lillian J. Kaminsky (Miss)	1944-1946	Attorney at Law Johnson City, New York
Marjorie J. Ball (Mrs.)	1944-1945	Cleveland, Ohio
Richard C. Kellogg	1944-1945	Minneapolis, Minnesota

	Period of Association	Present Affiliation As of May 1, 1957
Frederick R. Suits	1944-1946	Western Electric Company, Inc. New York, New York
p Vincent A. Rodriguez	1944-	
p Henry N. Ess, III	1944-	
Charles L. Jones, II	1944-1952	Law Department, Standard Oil Company (N. J.) New York, New York
* Charles S. Reilley	1945-1952	
* Robert H. Parker	1945-1948	
Mary Clarke Haberle (Mrs.)	1946	Manhasset, Long Island, New York
Bruce A. Hecker	1946-1955	Manning, Hollinger & Shea New York, New York
John R. Miller	1946-1955	Law Clerk to Judge Wortendyke Newark, New Jersey
p John C. Jaqua, Jr.	1946-	
Victor Futter	1946-1952	Legal Division, Allied Chemical & Dye Corporation New York, New York
Matthew J. Kust	1946-1950	Harvard University, School of Law Cambridge, Massachusetts
William H. Kinsey	1946-1947†	Mautz, Souther, Spalding, Denecke & Kinsey Portland, Oregon
Charles H. Watts	1946-1952	Legal Dept., National Dairy Products Corporation New York, New York
Joseph L. Broderick	1946-1952	Brother Albert, O.P., St. Stephen's Priory Dover, Massachusetts
John G. Dorsey	1946-1951	Dorsey, Colman, Barker, Scott & Barber Minneapolis, Minnesota
Irving Kuraner	1946-1947	Kuraner, Freeman, Kuraner & Oberlander Kansas City, Missouri
p Robert A. McDowell	1946-1953 1956-	

	Period of Association	Present Affiliation As of May 1, 1957
p Garfield H. Horn	1946- †	
Francis E. Barkman	1946-1956	Associate Professor, School of Law, University of Toledo Toledo, Ohio
William H. Buchanan	1946-1955	Legal Department, United States Steel Corporation Pittsburgh, Pennsylvania
Ernest L. Godshalk, Jr.	1946-1948	Legal Department, American Oil Company New York, New York
Allan Kramer	1946-1954	Manning, Hollinger & Shea New York, New York
Robert T. Quittmeyer	1946-1956	Legal Department, American Sugar Refining Company New York, New York
Thomas V. Lefevre	1946-1948	Attorney at Law Philadelphia, Pennsylvania
a Hubert J. DeLynn	1947-	
Donald McL. Davidson	1947-1951	Ferguson & Burdell Seattle, Washington
a George A. Scholze	1947-	
Robert Lockwood	1947-1955	Secretary, Cluett, Peabody & Co., Inc. New York, New York
Howard N. Golden	1947-1950	Golden, Wienskienk & Rosenthal New York, New York
Anthony Chandler	1947-1955	Office of the Secretary, The American Metal Company, Limited New York, New York
Charlotte James Hoyt (Mrs.)	1947-1951	Walden, New York
Daniel F. Kelley, Jr.	1947-1949	McConnell, Valdes & Kelley San Juan, Puerto Rico

	Period of Association	Present Affiliation As of May 1, 1957
H. Bartow Farr, Jr.	1948-1951	Willkie, Owen, Farr & Gallagher New York, New York
Kenneth N. Jolly	1948-1955	Assistant to General Counsel, Campbell Soup Company Camden, New Jersey
Eugene L. Bondy, Jr.	1948-1956	Dwight, Royall, Harris, Koegel & Caskey New York, New York
Robert B. Seidman	1948	Attorney at Law, Norwalk, Connecticut
Paul C. Sheeline	1948-1954	Lambert & Co., New York, New York
William F. Voelker	1948-1954†	Dawson, Nagel, Sherman & Howard Denver, Colorado
p Robert MacCrate	1948-	
H. Donald Wilson	1948-1949	Regional Director, United World Federalists Cleveland, Ohio
John M. Keefe	1948-1952	General Counsel, Textile Banking Company New York, New York
Donald Vail	1949-1953	McCanliss & Early New York, New York
David A. DeWahl	1949-1952	Office of the Secretary, American Radiator & Standard Sanitary Corporation New York, New York
Charles G. Rodman	1949-1952	Executive Vice President, Food Fair Super Markets Washington, D. C.
p John F. Arning	1949-	
a Edward M. Harris, Jr.	1949-	
Ashby McC. Sutherland	1949-1953	General Solicitor, The International Nickel Company, Inc. New York, New York
p William A. Ziegler, Jr.	1949-	

	Name	Period of Association	Present Affiliation As of May 1, 1957
	John A. Richardson, Jr.	1949-1955	Paine Webber Jackson & Curtis New York, New York
	Charles Maechling, Jr.	1949-1951	Radio Electronic Television Manufacturers Association, Washington, D. C.
a	James A. Thomas, Jr.	1949-	
	Dean D. Ramstad	1949-1957	Assistant to General Solicitor, The International Nickel Company, Inc. New York, New York
	William C. Gordon	1950-1954	Legal Department, Hercules Powder Company, Wilmington, Del.
	Karl G. Harr, Jr.	1950-1954	Office of Secretary of Defense Washington, D. C.
	Oliver B. James, Jr.	1950	Trust Officer, San Diego Trust and Savings Bank San Diego, Cal.
	Marvin S. Sloman	1950-1956	Carrington, Gowan, Johnson, Bromberg & Leeds Dallas, Texas
a	Arthur D. Sporn	1950-	
p	John R. Stevenson	1950-	
a	Thomas H. Beddall, Jr.	1950-	
*	H. Reed Baldwin	1951-1952	
a	George E. Hall	1951-	
a	Marvin Schwartz	1951-	
	Albert F. Rothwell	1951-1956	Secretary, National Potash Company, New York, New York
a	William E. Willis	1951-	
	Philip M. Drake	1951-1953	Cummings & Lockwood Stamford, Conn.
	David G. Gill	1951-1954	Davis Polk Wardwell Sunderland & Kiendl New York, New York
	James F. Thacher	1951-1952	Thacher, Jones, Casey & Ball San Francisco, California

	Name	Period of Association	Present Affiliation As of May 1, 1957
	Louise Jayne Kurzet (Mrs.)	1951-1952	Attorney at Law, Portland, Oregon
a	Edwin M. Zimmerman	1951-	
a	William J. Kirby	1952-	
a	Langdon M. Day	1952-	
a	George C. Kern, Jr.	1952-	
	Max A. Stolper	1952-1956	General Counsel, Van Norman Industries, Inc. New York, New York
a	Lorene Joergensen (Miss)	1952-	
a	Andrew N. Heine	1952- †	
	Robert M. McAnerney	1953	Durey, Pierson & Jamieson Stamford, Connecticut
a	Kenneth M. Seggerman, Jr.	1953-	
	Calvin Woodard	1953-1955	Cambridge University England
a	M. Bernard Aidinoff	1953; 1956-	
	Jack G. Clarke	1953-1956	Legal Department, Creole Petroleum Corporation New York, New York
	Robert P. Beshar	1953-1954	Casey, Lane & Mittendorf New York, New York
	James R. Cogan	1953-1957	Alexander & Green New York, New York
a	Jerome Gotkin	1953-	
	George J. Phocas	1953-1956	Legal Department, Creole Petroleum Corporation New York, New York
a	Mitchell Brock	1953-	
a	James F. Haley	1953-	
	Ann Mathis Pfohl Kirby (Mrs.)	1953-1954	New York, New York
	William F. Gleason	1953-1956	St. John's College Annapolis, Maryland
a	John N. Ledbetter	1954-	

	Period of Association	Present Affiliation As of May 1, 1957
a Henry Pollard	1954- †	
Edward C. Stebbins	1954-1955	Pvt., U. S. Army Fort Dix, New Jersey
a Raymond S. Troubh	1954-	
Frederick R. Blackwell	1954-1955	Cooper & Gary Columbia, South Carolina
a Lawrence C. McQuade	1954-	
a George DeGenaro	1954-	
a John W. Dickey	1954-	
a William W. Crawford	1954-	
James M. Carter	1955	Norfolk, Virginia
a David L. Ratner	1955-	
a Gordon Erickson	1955-	
Donald G. Black	1955-1957	Pillsbury, Madison & Sutro San Francisco, California
a William J. Ivey	1955-	
a Frederick C. Seibold, Jr.	1956-	
a Stuart W. Thayer	1956-	
Jackson B. Gilbert	1956-1957	Lt., U. S. Air Force El Paso, Texas
a P. Griffith Garland	1956-	
a Donald F. French	1956-	
Henry J. Steiner	1956-1957	Law Clerk to Justice John M. Harlan Washington, D. C.
a Robert E. Mitchell	1956-	
a Hamilton F. Potter, Jr.	1956-	
a Stephen R. Kaye	1956-	
a Barbara A. Lindemann (Miss)	1956-	
a Norris Darrell, Jr.	1956-	
Robin T. Tait	1956-1957	Pvt., U. S. Army
a Kenneth Scott	1956-	
a Richard M. Price	1957-	
a Stephen K. West	1957-	
a Ronald M. Dworkin	1957-	

ANNEX B

EARLY PROBLEMS IN THE DEVELOPMENT OF THE "OPEN END" MORTGAGE

The first known consideration of an "open end" mortgage* in the office of Sullivan & Cromwell was by Mr. Henry H. Pierce in connection with the General and Refunding Mortgage of Milwaukee Electric Railway and Light Company dated December 1, 1911, but actually executed on January 2, 1912.

The doubts as to validity of such a mortgage arose:

1) From the status of the law regarding mortgages for both present and future advances, many lawyers contending that liens could intervene between various series of bonds unless there was a firm obligation by the creditor to make the future advances. A trustee under a corporate mortgage is required to certify bonds and deliver them to the corporate mortgagor if the conditions of the mortgage such as those relating to property additions and earnings are complied with. But the corporation might never issue the bonds from its treasury.

2) The recording acts usually required that a definite notice as to amount must be on the record. A firm obligation to advance moneys at least gave the maximum amount of the mortgage.

These objections seemed insuperable in 1911 to counsel for the underwriters and the Milwaukee Electric Railway and Light Company mortgage fixed a limit of $90,000,000 on the amount of bonds issuable under it, though the initial issue of bonds was only $3,000,000.**

All bonds under this mortgage were to be dated December 1, 1911 and were to mature on December 1, 1951. This was an attempt to create a conclusive presumption that all bonds out-

*A corporate mortgage in which there is no definite amount of bonds issuable, the amount being governed largely by the amount of additions made to the property or by the earnings of the particular corporation.

**$13,228,000 principal amount of bonds were reserved to provide for underlying bonds and the balance of $73,772,000 of bonds was issuable against future property additions or cash deposited with the Trustee which could in turn be withdrawn against future property additions.

standing under the mortgage were issued at the same time and would rank equally. There was some basis for this in the law of municipal bonds.

The initial issue of bonds bore 5% interest and future issues were to bear such interest rate as the directors of the mortgagor might fix but not exceeding 5% per annum. No special point was made of this variation.

For a company of the size of Milwaukee Electric Railway and Light Company in 1912, a top limit of $90,000,000 on the amount of bonds issuable under its mortgage seemed a figure which would never be reached. But the rapid growth of the electric light and railroad industries soon showed the way to further thinking on the subject. The limits fixed in many mortgages were becoming quite embarrassing by this time, and the era of First and Refunding Mortgages was beginning.

West Penn Power Mortgage of March 1, 1916

This mortgage was the next forward step in the office of Sullivan & Cromwell.

A proposal for an "open end" mortgage was clearly stated in a letter dated December 27, 1915 from Sullivan & Cromwell to Messrs. Gordon & Smith of Pittsburgh who were acting as associate counsel:

"The suggestion is that the mortgage shall authorize the immediate issuance of $9,500,000 of bonds and shall provide for the issuance of additional bonds from time to time to reimburse the Company for the cost of improvements without any fixed limit at all as to the amount which may be issued, except that the amount shall at all times be within the limit of authorized indebtedness of the Company as fixed from time to time by the stockholders. The idea is then that at the time the mortgage is made the stockholders shall authorize an increase of indebtedness to, say $20,000,000, and that, when the Company shall have, under the terms of the mortgage, issued $20,000,000 of bonds, there shall be another stockholders' vote increasing the limit of indebtedness to some higher figure whereupon the Company can continue to issue bonds under the mortgage until that higher figure is reached, when another increase of indebtedness will be necessary if the Company is to issue still additional bonds. In

other words, the proposition is that the mortgage shall not place any fixed limit at all in the amount of bonds which can be issued under it. As a practical matter, the issue would be limited by three requirements:

1st: Additional bonds to be issued only to an amount equal to, say, 80% of cash actually spent on the property after the mortgage is made;

2nd: Bonds can be issued only provided the Company is earning, say, twice the interest on bonds already outstanding plus twice the interest on additional bonds proposed to be issued; and

3rd: Bonds cannot be issued in an amount in excess of the limit of indebtedness authorized from time to time by the stockholders of the Company.

What is proposed is therefore, you will see, an absolutely open mortgage subject to the restrictions above suggested or some similar ones, and the question is whether this will be valid under the law of Pennsylvania."

This plan did not contemplate a blanket authorization by the stockholders nor did it squarely meet the problems raised by the fear that liens might intervene between various issues of bonds, nor did it deal with the mechanical problems arising under the recording acts.

Messrs. Gordon & Smith replied under date of January 7, 1916 that while the mortgage contemplated would be good as between the parties, it would not be valid under Pennsylvania law against third parties:

1) Because the mortgagee would not be obligated to make the future advances; and

2) Because neither the amount of the mortgage nor the amount of the future advances would be fixed or definite, but would be subject to change from time to time in accordance with the action of the stockholders.

They considered the first objection to be insuperable as they did not believe it would be practicable to have the Trustee "representing the bondholders" under the mortgage bind itself to make future advances. As to the second objection, they could

cite no Pennsylvania case directly in point, but it was their opinion that their view represented the trend of the authorities and that against third parties a mortgage so indefinite in its terms would not be upheld.

Sullivan & Cromwell replied under date of January 10, 1916:

"While we do not question the correctness of your conclusions so far as they relate to ordinary mortgages to secure future advances, it seems to us that a different rule must necessarily be applied to a corporate mortgage made to secure an issue of bonds. The Supreme Court of Pennsylvania has clearly pointed out this distinction in *Rauch* v. *Island Park Association*, 75 Atlantic Reporter 202 (1910). If the rule which you suggest were to be applied to corporate mortgages securing issues of negotiable bonds, it would, of course, as a practical matter, be wholly impossible for a corporation to make a mortgage to secure anything but an immediate issue of bonds. All bonds issued from time to time after the mortgage has been made in accordance with the provisions usually contained in any corporate mortgage would be subject to the rights of intervening purchasers and encumbrances which, as a practical matter, would make the negotiation and sale of such issues impossible. See also *Commonwealth* v. *Susquehanna and Delaware River Railway Company*, 122 Penna. State 306 and *Reed's Appeal* 122 Penna. State 565, particularly the opinion of the lower court in that case, at pages 573-574."

Additional cases in jurisdictions other than Pennsylvania were also cited.

The letter continued:

"We think the rule must today be regarded as clearly settled that there is a conclusive presumption that all bonds issued under a corporate mortgage were actually issued at the time of the making and recording of the mortgage irrespective of whether they were actually issued or sold at that time or from time to time under the provisions of the mortgage permitting the issuance of additional bonds. The only difference between the proposed West Penn Mortgage and the usual corporate mortgage securing an issue of bonds of which some are to be immediately put forth and others from time to time in the

future is that the West Penn Mortgage is to be an absolutely open mortgage without top limit. Such mortgages have been quite frequent during the last four or five years, as for instance, the First Mortgage of the Commonwealth Edison Company of Chicago, First Mortgage of Wisconsin Gas and Electric Company, First Consolidated Mortgage of Connecticut River Power Company and First Mortgage of Eastern Texas Electric Company.

We are not aware of any Pennsylvania corporation which has made an open mortgage (that is, one to which there is absolutely no authorized limit), but it seems to us to be no distinction in principle between a mortgage securing an issue of which a part are immediately issuable and the remainder from time to time in accordance with the provisions contained in the mortgage, but in which a top limit is placed on the total authorized issue, and a similar mortgage which differs from it only in that no such limit is imposed.

Will you kindly look at the cases to which we have referred and let us confer with you again with reference to this matter."

Gordon & Smith replied under date of January 15, 1916:

"It is common practice in Pennsylvania for corporations to execute mortgages securing bonds to be issued from time to time for future advances. It is true that in order to render it practicable to market such bonds the courts have relaxed, to some extent, the strict rules applying to mortgages of individuals, including the requirement that the mortgagee must be legally bound to make the future advances. We have had this question before us in connection with mortgages which we have drawn securing bond issues for large amounts and we do not doubt the validity of such issues. But so far as we know from experience and examination of the Pennsylvania authorities, in all these cases the mortgages have been for fixed amounts. The reason that the courts have made the distinction with respect to mortgages of corporations is that it was necessary to do so in order that the bonds might be marketable. It is a matter of common knowledge that for many years past corporations have been able to market their bonds under mortgages which, while permitting future advances, nevertheless contain a fixed top limit. It seems to us, therefore, that it could not be successfully con-

tended that there is any necessity for a mortgage of such indefinite character as you propose and that the argument as to the necessities of the situation entirely disappears. We think it is clear that in Pennsylvania a mortgage from an individual providing for future advances without limit as to amount would be invalid as against subsequent creditors. We can see no substantial reason for any different rule with respect to a mortgage of a corporation. The strong practical objections to such an instrument from the standpoint of creditors are obvious. It is our opinion, therefore, that the courts would apply the same strict rules to such a mortgage as are applicable to a similar instrument executed by an individual and as stated in our letter of the 7th inst. would hold it to be invalid. In every case mentioned in your favor of the 10th inst. the mortgage was for a fixed amount and, so far as we have been able to ascertain, there is no Pennsylvania case which holds to be valid an open mortgage with no top limit.

We express our opinion with some diffidence as we infer that you are inclined to the contrary now. Since receipt of your letter of the 10th inst. we have again considered the question in the endeavor to find some solid ground for an opinion maintaining the validity of such a mortgage but without success. We note from your letter that several such mortgages have been drawn in other states. We assume that these instruments have never been before the courts and moreover the laws of other states may differ from the law of Pennsylvania.

It is not apparent to us why it would be impracticable to place a limit on the future advances high enough to cover any future requirements you have in hand, although of course we are not familiar with the facts. We will be glad to confer with you on this subject at any time, if you so desire."

At about this time it was ascertained that the Pennsylvania Railroad Company had created its new General Mortgage to Girard Trust Company, dated June 1, 1915. This Mortgage contained the following provisions governing the amount of bonds issuable under it, in addition to the initial issue:

"The bonds issued under this Indenture shall be designated as 'General Mortgage Bonds'. The authorized total issue at any one time outstanding, including bonds at the time reserved

under Article Third hereof, is limited to the aggregate par value of the then outstanding paid up capital stock of the Railroad Company. When and as the amount of the capital stock of the Railroad Company shall from time to time be increased and additional paid up stock be outstanding, then and thereupon the limit upon the amount of bonds that may be issued hereunder shall be correspondingly increased, but when bonds have been duly issued hereunder and are outstanding, neither the bonds nor the lien or security thereof hereunder, shall be in any wise affected or impaired by any reduction in the amount of the outstanding stock."*

This formula provided an ascertainable limit on the amount of bonds issuable under the mortgage, though under the governing clause quoted above a reduction in outstanding stock would result in a reduction in the authorized amount of bonds in so far as future issues were concerned.

The validity of this issue had been approved by Messrs. Cravath & Henderson of New York for the Bankers and by Messrs. John G. Johnson and Gowan, General Counsel for the Pennsylvania Railroad Company.

Under date of January 17, 1916, the provisions of the General Mortgage of the Pennsylvania Railroad Company were called to the attention of Messrs. Gordon & Smith, after Mr. Pierce had conferred with Mr. John G. Johnson in Philadelphia, and arranged for his opinion.** This apparently settled the matter because the scheme of the Pennsylvania Railroad Company Mortgage was adopted, except that the governing limit on the amount of authorized bonds was, as originally contemplated, to be the authorized indebtedness of West Penn Power Company.***

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*The Baltimore & Ohio Railroad Company had also created a similar mortgage.

**Mr. Johnson gave his approval of the suggested plan for the West Penn Power Company Mortgage but his formal written opinion was not obtained as he died on April 14, 1917.

***In Pennsylvania a corporation has both a limit on its authorized stock and on its authorized debt, certificates showing these being filed in the office of the Secretary of the Commonwealth.

In any event there could be no objection to the validity of the first issue under such a mortgage and the financing of West Penn Power Company under its new First Mortgage to The Equitable Trust Company of New York, as Trustee, dated March 1, 1916, was completed.

This Mortgage in the form of bond called for all bonds to be dated March 1, 1916, though there is no express provision to that effect in the "issue clauses" of the Mortgage.

The basic provision of the Mortgage (Section 1 of Article I) governing the amount of bonds issuable thereunder is as follows:

"This Indenture creates a continuing lien to secure the full and final payment of the principal and interest of all bonds which may, from time to time, be made, authenticated and delivered hereunder. The amount of bonds which may be so made, authenticated and delivered hereunder is not limited except that the total amount of bonds outstanding at any time shall not in any event exceed the amount at that time permitted by law or the then limit of indebtedness of the Company as fixed from time to time in accordance with law. All bonds issued under and in pursuance of this Indenture and at any time outstanding shall in all respects, subject to the provisions of Section 2 of Article II hereof,* be equally and ratably secured hereby without preference, priority or distinction on account of the actual time or times of the issue or maturity of said bonds or of any of them, so that all bonds at any time issued and outstanding hereunder shall have the same right, lien and preference under and by virtue of this Indenture, and shall be equally secured hereby, with like effect as if they had all been made, issued and certified simultaneously on the date hereof, whether the same, or any of them, shall actually be sold or disposed of at such date, or whether they, or any of them, shall be sold or disposed of at some future date, or whether they, or any of them, shall be authorized to be issued under the provisions of Article 2 of this Article I** or may be authorized to be issued hereafter pursuant to the provisions of Section 3 of this Article I***.

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*Dealing with extended coupons.

**The original issue of $8,500,000 of Bonds.

***Further issues against property additions in amount not exceeding 75% of cost or fair value of property additions provided net earnings were at least twice all interest charges.

Among the covenants of the Company (Section 13 of Article II) is the following:

"That in case it shall hereafter create any mortgage upon the property subject to the lien of this Indenture or any part thereof, such mortgage shall be and shall be expressed to be subject to the prior lien of this Indenture for the security of all bonds issued or thereafter to be issued hereunder within the limitation of amount then fixed or thereafter to be fixed as in this Indenture recited or provided."

This clause was obviously to bind holders of junior issues of bonds.

This mortgage did not really provide for the mechanics of the recording acts nor require counsel in connection with the legalities of future bond issues to certify that there were no intervening liens on any of the mortgaged property. Counsel was merely to deliver his opinion that the Company has title to the property with respect to which the authentication of bonds was requested, "subject to no deed of trust, mortgage, lien, charge or encumbrance thereon or affecting the title thereto, prior to this Indenture (except taxes for the then current year), with the exception of such lien or liens as shall be expressly specified in said opinion, which shall state the amount due and owing thereon by way respectively of principal and interest; and that the amount of bonds so requested together with the amount of bonds previously issued and outstanding does not exceed the amount at that time permitted by law."

Later mortgages dealt with these points.

A letter written by Mr. Pierce under date of October 23, 1916 to Mr. Edwin W. Smith of Messrs. Reed, Smith, Shaw & Beal of Pittsburgh is so interesting in its clear exposition of the validity of all "open end" mortgages, that it and the reply of Mr. Smith, dated November 2, 1916, are included in their entirety:

(Letterhead of SULLIVAN & CROMWELL)

October 23, 1916.

"Edwin W. Smith, Esq.,
Messrs. Reed, Smith, Shaw & Beal,
Carnegie Building,
Pittsburgh, Pa.

"Dear Sir:

"Mr. McCahill, attorney for the West Penn Power Company, writes me that you have been considering some questions with reference to the validity of an open or unlimited mortgage in Pennsylvania, particularly with reference to the mortgage and bond issue of the West Penn Power Company, and suggests that I tell you briefly the view which we took of this subject.

"I understand the law to be in Pennsylvania, as in most states, that a mortgage to secure future advances is not good (except as to the amount recited to have been advanced at the time the mortgage is made) as against intervening creditors, unless it contains a definite statement of the amount of future advances to be made and a definite agreement by the mortgagee to make them.

"I do not understand, however, that this rule applies to corporate mortgages made to secure issues of negotiable bonds. The Court has clearly pointed out the distinction between an ordinary mortgage to secure future advances and one made by a corporation to secure bonds some of which are reserved for future issuance, *in Rauch vs. Island Park Assn.*, 75 Atl. Rep. 202; 226 Pa. State, 178 (1910). See also *Reed's Appeal*, 122 Pa. State, 565. *Commonwealth* v. *Susquehanna & Delaware River Ry. Co.* 122 Pa. State 306. The courts in Pennsylvania as well as those in other jurisdictions seem to regard it as settled that there is a conclusive presumption that all bonds outstanding under a corporate mortgage were actually issued at the time of the making and recording of the mortgage irrespective of whether they were actually issued or sold at that time or from time to time thereafter under the provisions of the mortgage permitting the issuance of additional bonds.

"So *in Rauch vs. Island Park Assn.*, the Court said:

> 'The mortgage was the security for all the bonds, and the whole issue must be treated as of its date.'

"In fact corporate mortgages to secure bond issues, a large part of which are reserved for future issuance, are, of course, familiar in Pennsylvania. The only distinction between the West Penn Power mortgage and the ordinary type of corporate mortgage securing future issues of bonds, is that it has ordinarily been the practice in the past to fix an outside limit upon the amount of bonds issuable under the mortgage, while this has not been done in the West Penn Power mortgage except by limiting the indebtedness secured so

> 'that the total amount of bonds outstanding at any time shall not, in any event, exceed the amount at that time permitted by law or the then limit of indebtedness of the Company as fixed from time to time in accordance with law.' (Art. I, Section 1).

"This language does place a definite limit upon the size of the issue so that any person interested would be enabled by consulting the certificate of the increase of indebtedness on file in Harrisburg to determine how many bonds are actually authorized, although, of course, this limit is subject to further increase in the future by the filing of new certificates. In this respect the mortgage is nearly identical with the provisions contained in the General Mortgage of the Pennsylvania Railroad Company, dated June 1, 1915. Article I, Section 1, of this Mortgage provides:

> 'The authorized total issue at any one time outstanding including bonds at the time reserved under Article Third hereof is limited to the aggregate par value of the then outstanding paid-up capital stock of the Railroad Company. When and as the amount of the capital stock of the Railroad Company shall from time to time be increased and additional paid-up stock be outstanding, then and thereupon the limit upon the amount of bonds that may be issued hereunder shall be correspondingly increased.'

"It was our view that there could be no valid difference in principle between a mortgage to secure future issues of bonds with a definite top limit and one without, both being apparently alike open to the objection, if it be a valid one, that mortgages to secure future advances are not ordinarily valid as against intervening purchasers or incumbrances, and the exception which the courts have made to the rule in favor of corporate mortgages

to secure issues of negotiable bonds being so far as we could see equally applicable whether there was a top limit on the issue or not.

"Nevertheless we thought it desirable to follow the precedent contained in the General Mortgage of the Pennsylvania Railroad and in that manner to place a top limit upon the amount of bonds issuable under the mortgage, although the limit was one which could be indefinitely extended just as in the case of the Pennsylvania mortgage.

"The following authorities in other jurisdictions are in accord with the rule declared by the Pennsylvania cases with reference to corporate mortgages securing future issues of bonds, although none of them involves the case of a bond issue without a fixed top limit.

> *Central Trust Co.* v. *Continental Iron Wk.*, 51 N. J. Equity, 605;
>
> *Claflin* v. *S. C. Railroad Co.*, 8 Fed. Rep. 118;
>
> *Pitts. Ry.* v. *Loan & Trust Co.*, 172 U. S. 493;
>
> *Central Trust Co.* v. *Lousville Ry. Co.*, 70 Fed. Rep. 282;
>
> *Re Sunflower State Refining Co.*, 183 Fed. Rep. 834.

"Bond issues without a fixed upper limit are, of course, of comparatively recent use in this country, but seem to me to be an immensely valuable contribution to the financing of public enterprises.

"The very great desirability of an open mortgage such as the Pennsylvania Railroad General Mortgage or the West Penn Power First Mortgage, from the point of view both of the corporation and the public, is so obvious that we should think the courts of any state would be extremely reluctant to hold it objectionable for any technical reason. The avoiding of closed mortgages or of issues which must eventually become closed so as to leave corporations under the necessity of financing entirely through the sale of junior securities, the simplicity introduced into the financial setup of the Company, the advantage accruing from the existence of but one issue of bonded debt with the resulting broader market for bonds and better public acquaintance with them, the advantage of provisions such as have been made in the West Penn Power and Pennsylvania Railroad mort-

gages for the issuance of bonds under the mortgage to refund bonds maturing under it with the result that there will be but one continuous lien upon the property and that the necessity of creating new mortgages for refunding purposes will be avoided, all should result over a course of years in the Company's being able to raise money at a cost much less than has prevailed under former methods of financing with a consequent benefit to the Company and the public. The issuance of additional bonds under such a mortgage should, of course, be most carefully guarded as has been done in the present instance. The Company is obligated by covenants in the mortgage to expend and set aside large amounts annually for maintenance and depreciation, these amounts growing proportionately as the size of the bond issue increases, and is permitted to issue new bonds only to the extent of seventy-five per cent. of cash actually expended for new property and improvements, and only provided the property is earning twice the interest charge upon the bonds already outstanding and those applied for. These provisions are, of course, in themselves an actual limitation upon the amount of bonds issuable under this mortgage so that they, together with the provisions limiting the size of the issue to the amount of indebtedness as authorized by the stockholders, really make the bond issue a limited one with provisions permitting its increase from time to time.

"Mr. McCahill has not advised me of any specific objections which have occurred to you with reference to open mortgages, and what I have said above is, therefore, somewhat general in character. If you have any particular objection in mind which I have not noted, I should much appreciate it if you would let me know what it is.

Yours very truly,

H. H. P."

(Letterhead of Reed, Smith, Shaw & Beal)

Pittsburgh, November 2, 1916.

"Henry H. Pierce, Esq.,
c/o Sullivan & Cromwell,
51 Wall Street, New York City.

"Dear Mr. Pierce:

"I received your letter of October 23rd, 1916, in which you stated that Mr. McCahill had written you that I had been considering some questions with reference to the validity of an open or unlimited mortgage in Pennsylvania, particularly with reference to the mortgage and bond issue of the West Penn Power Company.

"I have read your letter with a great deal of interest, but I regret very much that this matter was called to your attention.

"The question arose when a circular of the West Penn Power Company bonds was submitted to a Trust Company in which I am interested, and my attention was attracted by the fact that no amount of the issue was given. I had the mortgage examined to ascertain what the amount of the issue was. Afterwards I casually spoke to Mr. McCahill, whom I know quite well. I did not intend to raise any question as to the validity of the mortgage, and I do not wish you to feel that I have given any particular attention to the subject. Frankly, however, I have always felt that under a mortgage which was open at the top and covering issues later than the date of the mortgage, based upon meetings of the stockholders to authorize increases, held after the date of the mortgage, the lien of these later issues did not revert back to the date of the mortgage.

"You also wrote a letter to Mr. Beal, and he and I have discussed your letter. I understand that he will write you later. I intend also to make a further examination of your authorities.

Yours very truly,

(Signed) Edwin W. Smith

EWS/FJH"

There was no further correspondence.

Mortgage of Penn Public Service Corporation to Bankers Trust Company, Dated December 1, 1919.

This Mortgage contains detailed provisions to perfect the record notice under the recording acts but it does not contain the more modern certification by counsel to guard against the possibility of liens intervening between various series of bonds. It also does not require that all bonds should have the same date. It was a First and Refunding Mortgage.

The grant in trust was amplified to read as follows:

"In trust nevertheless for the equal and proportionate use, benefit and security of all present and future holders of the bonds and coupons issued and to be issued under this Indenture, and for the enforcement of the payment of said bonds and coupons when payable according to their tenor, purport and effect, and to secure the performance of and compliance with the covenants and conditions of said bonds and coupons and of this Indenture, without preference, priority or distinction as to lien or otherwise (except as otherwise hereinafter provided*) of any one bond or coupon over any other bond or coupon, or of the bonds or coupons of any series over the bonds or coupons of any other series, by reason of priority in time of issue, sale or negotiation thereof or by reason of the purpose of issue or otherwise howsoever, so that, except as aforesaid, each and every bond issued and to be issued hereunder, shall have the same right, lien and privilege under and by virtue of this Indenture, and so that, except as aforesaid, the principal and interest of every bond shall be equally and proportionately secured hereby, as if all such bonds at any time outstanding had been duly issued, sold and negotiated simultaneously with the execution and delivery of this Indenture, and for the same consideration; it being intended that the lien and security of this Indenture and of all of the bonds issued and to be issued hereunder shall take effect from the day of the execution and delivery hereof, without regard to the time of the actual issue, sale or disposition of said bonds, and as though upon said date all of said bonds had been actually sold and delivered to and were in the hands of bona fide purchasers thereof for value."

*Extended coupons again.

Particular attention was paid to the recording acts of Pennsylvania. The Mortgage provides: "The aggregate principal amount of bonds which may be executed by the Company and authenticated and delivered by the Trustee and be secured by this Indenture, is not limited except as in this Article II provided;* and this Indenture shall be and constitute a continuing lien to secure the full and final payment of the principal of and interest on all bonds which may, from time to time, be executed, authenticated and delivered hereunder."

"The aggregate principal amount of bonds hereby secured at any time outstanding shall not at any time exceed the amount of the then authorized indebtedness of the Company as fixed from time to time in accordance with law, said amount of authorized indebtedness (to be evidenced to the Trustee in the manner hereinafter in clause (c) of this Section 1 provided**) at the date hereof being and limited to $20,000,000. When and as the amount of the authorized indebtedness of the Company shall from time to time be increased (every such increase to be evidenced to the Trustee in the manner hereinafter in clause (c) of this Section 1 provided), then and thereupon the limit upon the aggregate principal amount of bonds issuable hereunder shall be from time to time correspondingly increased, provided, however, that when and as the principal aggregate amount of bonds issuable hereunder shall from time to time be so increased, the Company shall from time to time, in order to evidence of record such increase, execute, acknowledge and deliver to the Trustee an indenture supplemental hereto, in form approved by counsel selected by the Company and acceptable to the Trustee, who may be counsel for the Company, appropriately reciting the fact that the amount of the authorized indebtedness of the Company has been increased and that the aggregate principal amount of bonds issuable hereunder has been correspondingly increased and setting forth the then limit of the aggregate principal amount of bonds which may be authenticated and delivered under and pursuant to, and be entitled to the security of, this Indenture, and containing a covenant to and with the Trustee

*Principally limited by authorized debt, to 80% of property additions, and by a 10% earnings restriction.

**A certificate and opinion of counsel.

upon the part of the Company not to issue under this Indenture bonds in excess of such limit without thereafter first executing, acknowledging and delivering from time to time a further supplemental indenture or indentures as in this clause (b) of this Section 1 provided. Every such indenture shall, if permitted by law, be filed or recorded in all offices in which this Indenture shall be filed or recorded. Each and every holder from time to time of bonds, hereby secured, hereby agrees that the total aggregate principal amount of bonds issuable hereunder may be increased from time to time, as and when the amount of the authorized indebtedness of the Company shall be from time to time increased, as in this clause (b) provided."

It is interesting to note that, if all underlying liens are satisfied, the Company may use the title First Mortgage Bonds, and if it does so, no bonds may be authenticated and delivered in respect of property subject to lien, as would otherwise have been permitted.

The Mortgage required the officers of the Company to certify that to their knowledge the particular property additions serving as a basis for the issue of bonds "are not subject to any mortgage or other similar lien prior to the lien of this Indenture other than liens of underlying mortgages securing underlying securities in respect whereof bonds hereby secured have been or are then to be reserved hereunder, and that no part thereof is, within their knowledge, subject to any liens for labor or material or other similar liens, except undetermined liens or charges, if any, incidental to construction." The opinion of counsel also required as one of the supporting papers is similarly limited to the current property additions.

The Mortgage contains covenants by the Company that:

a) "It will cause this Indenture and every additional instrument which shall be executed pursuant to the provisions hereof, to be recorded, registered and/or filed and to be re-recorded, re-registered and/or re-filed as a mortgage of real estate and personal property, in such manner, in such places and at such terms, as may be permitted by law and as may be necessary to preserve and protect the security of the bonds, the superior lien hereof on the trust estate, and the rights and remedies of the Trustee and of the bondholders; and that it will furnish satisfactory evidence thereof to the Trustee."

b) "It will not create or suffer to be created or to accrue, any lien or charge of equal rank with or having priority to or preference over the lien of this Indenture upon the trust estate or any part thereof, or upon the income and profits thereof, except any mortgage or other lien on any property hereafter acquired by the Company which may exist at the date of the acquisition of such property by the Company; and that it will not do or omit to do, or suffer to be done or omitted to be done, any matter or thing whatsoever whereby the lien of this Indenture or the priority of such lien or the indebtedness hereby secured, might or could be lost or impaired; and that it will pay or cause to be paid, or will make adequate provision for the satisfaction and discharge of, all lawful claims and demands for labor, materials, supplies or other objects which, if unpaid, might by law be given precedence to or an equality with this Indenture as a lien or charge upon the trust estate or any part thereof or the income or profits thereof; provided, however, that nothing in this Indenture shall require the Company to pay, discharge or make provision for any such lien, charge, claim or demand so long as the validity thereof shall be by it in good faith contested, unless thereby in the opinion of the Trustee, the trust estate or some part thereof will be lost, forfeited or materially endangered."

c) "In case it shall hereafter create any mortgage upon its property or any part thereof, such mortgage shall be and shall be therein expressed to be subject to the prior lien of this Indenture for the security of all bonds hereby secured then outstanding and of all bonds which may thereafter be authenticated and delivered hereunder within the limitations of amounts, then fixed or as may thereafter be fixed from time to time, as in this Indenture provided and permitted."

d) "It will duly and punctually keep, observe and perform each and every term, covenant and condition on its part to be kept, observed and performed contained in any and every indenture supplemental hereto which may be executed and delivered by the Company to the Trustee as provided or permitted by this Indenture."

MORTGAGE OF THE DETROIT EDISON COMPANY TO BANKERS TRUST COMPANY, DATED OCTOBER 1, 1924.

Michigan (unlike Pennsylvania) did not have a statutory debt limit for corporations and New York, where the Company was organized, did not either.

Sullivan & Cromwell, in connection with this Mortgage, acted as counsel for the Company, the Trustee and the underwriting Bankers. Nevertheless it represents an advance in the thinking on the subject of the "open end" mortgage and it is, it is believed, the first unqualified "open end" mortgage produced in the office of Sullivan & Cromwell. It is still in 1956 the vehicle for the senior financing of The Detroit Edison Company and the only substantial amendments to date have been those required to conform to the provisions of the Federal Trust Indenture Act and to effect the surrender of rights to issue bonds for certain refundings and for some property additions. A total of $567,016,000 principal amount of bonds have been issued under it, of which $309,000,000 are still outstanding in 1955. It has long since been a First Mortgage but the title General and Refunding Mortgage Bonds is still used for the Bonds issued under it. The Mortgage was one of the earlier of those making extensive use of definitions of certain terms and permitting modification of the Indenture in certain respects by vote of 85% in amount of the outstanding bonds.

The form of bond recites that it is one of an "authorized issue of bonds of the Company, unlimited as to amount except as provided in the Indenture."

This Mortgage also added a new feature. Except for the important power plant lands which were described by metes and bounds, the remaining mortgaged real estate was described only by the Liber and Page of the deed by which the Company acquired it.

The trust clause is in substance the same as the clause quoted above from the Penn Public Service Corporation Mortgage.

Under the Mortgage all bonds (except registered bonds) were to have the date of October 1, 1924 to take advantage of any presumption that all were issued at the same time.

The Mortgage provides:

"The aggregate principal amount of bonds which may be executed by the Company and authenticated and delivered by

the Trustee and be secured by this Indenture, is not limited, except as hereinafter in this Article III provided;* but shall include such amount as may, from time to time, be executed, authenticated and issued under the terms hereof; and this Indenture shall be and constitute a continuing lien to secure the full and final payment of the principal of and interest on and the terms and provisions of all bonds which may, from time to time, be executed, authenticated and issued hereunder. The total amount of bonds outstanding at any time shall not, in any event, exceed the amount permitted by law or by this Indenture." Among the papers required by the Mortgage in connection with the authentication of bonds is:

1) A certificate: "That to the knowledge or belief of the signers of the certificate the property additions described in the certificate are subject to the direct lien of this Indenture or are held by the Trustee for the benefit of all bonds outstanding hereunder; and are not subject to any mortgage or similar lien prior to the lien of this Indenture other than the liens of the underlying mortgages or prior liens securing prior lien bonds (in respect whereof bonds hereby secured have been or are then to be reserved hereunder); and that no part thereof is to their knowledge or belief, subject to any liens for labor or material or other similar liens, except undetermined liens or charges, if any, incidental to construction."

2) An opinion of counsel stating among other things: "that such property additions, *and all other property which has theretofore been used as the basis for the authentication and delivery of bonds, the withdrawal of cash and/or the release of property hereunder,* are free and clear of mortgages or other liens prior to the lien of this Indenture other than the liens of any underlying mortgage or any prior liens (in respect whereof bonds hereby secured have been, or are then to be, reserved hereunder), other than undetermined liens or charges, if any, incidental to construction, and other than liens for current taxes, or of taxes or assessments not yet due, if any; and that such property additions are free and clear of easements or other similar encumbrances

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*In general 75% of cost or fair value of property additions and a 1¾ earnings showing.

except such as do not in his or their opinion, impair the use thereof for the purpose for which they were acquired."

We believed that these opinions afforded sufficient protection regarding intervening liens on both the original trust estate and any additions which were later bonded. The mortgage did allow the Company to acquire property subject to an existing mortgage but as soon as the equity was bonded, the above provisions would apply. The spreading of the lien of such a mortgage was so unlikely as to render the possibility *de minimis*. The mortgage contains the usual provisions for deducting prior lien bonds from the amount of bonds otherwise issuable under it.

The Company covenanted that "it will cause this Indenture and every additional instrument which shall be executed pursuant to the provisions hereof, to be recorded, registered and/or filed and to be re-recorded, re-registered and/or re-filed both as a mortgage of real estate and of personal property, in such manner, in such places and at such times, as may be required by law and as may be necessary to preserve and protect the security of the bonds, the lien hereof on the trust estate, and the rights and remedies of the Trustee and of the bondholders; and that it will furnish satisfactory evidence thereof to the Trustee."

The Company also covenanted that "it will not create any lien or charge of equal rank with or having priority to or preference over the lien of this Indenture upon the trust estate or any part thereof, or upon the income and profits thereof, except any mortgage or other lien on any property which may exist at the date of the acquisition of such property or created thereon at the time of the acquisition thereof to secure the payment of any unpaid portion of the purchase price thereof; and that it will not do or omit to do, or suffer to be done or omitted to be done, any matter or thing whatsoever whereby the lien of this Indenture or the priority of such lien or the indebtedness hereby secured might or could be lost or impaired; and that, within three months of the accrual thereof, it will pay or cause to be paid, or will make adequate provision for the satisfaction and discharge of, all lawful claims and demands for labor, materials, supplies or other objects, which, if unpaid, might by law be given precedence to or an equality with the Indenture as a lien or charge upon the trust estate or any part thereof or the income and profits thereof; provided, however, that nothing in this

Indenture shall require the Company to pay, discharge or make provision for any such lien, charge, claim or demand so long as the validity thereof shall be in good faith contested, unless thereby, in the opinion of the Trustee, the trust estate or some part thereof will be lost, forfeited or materially endangered," and "that it will pay all taxes and assessments lawfully levied or assessed upon the trust estate, or upon any part thereof or upon any income therefrom, or upon the interest of the Trustee therein, when the same shall become due, and will duly observe and conform to all covenants, terms and conditions upon or under which any portion of the trust estate is held; provided, however, that nothing in this Indenture shall require the Company to pay, discharge or make provision for any such tax or assessment or to observe or conform to any such covenant, term or condition, so long as the validity thereof shall be in good faith contested, unless thereby in the opinion of the Trustee, the trust estate or some part thereof will be lost, forfeited or materially endangered."

The Company also agreed "that in case it shall hereafter create any mortgage upon any of its property subject to the lien hereof, such mortgage shall be, and shall be therein expressed to be, subject to the prior lien of this Indenture for the security of all bonds hereby secured then outstanding and of all bonds which may thereafter be authenticated and delivered hereunder, as in this Indenture provided and permitted."

Though not spelled out in the mortgage the Company adopted two procedures:

1) Supplemental indentures creating new series of bonds, in addition to stating the initial amount of the new series, recite (a) all bonds by amount and series which have been issued and retired and (b) all bonds then outstanding by amount and series, including the current issue.

2) As bonds are retired (so far through redemption) a certificate is prepared reciting the facts regarding the current and all past retirements and stating the amounts of bonds then outstanding under the mortgage.

These indentures and certificates are recorded and filed in every office in which the original mortgage is recorded and filed.

It is believed that this gives effective notice of the current amount of bonds secured by the lien of the mortgage.

The basic structure of the "open end" mortgage has not altered significantly since the date of The Detroit Edison Company Mortgage though there have been refinements and some simplifications. But the passage of years has made customary and commonplace what at its inception was a bold entry into virgin country. Later judicial decisions have had relatively little to do with facilitating the acceptance of such mortgages. Decisions in this area have remained rare. Rather, ready acceptance has followed familiarity, and in more recent years many states have enacted legislation modifying recording acts, expressly approving the "open end" feature and otherwise removing obstacles to the general adoption of this convenient instrument of finance.

Since the earlier "open end" mortgages tremendous amounts of bonds have been issued under that type of mortgage. It is believed that, even where there has been no clarifying legislation, the courts today would protect against intervening liens and against subsequent purchasers and encumbrances in the interest of facilitating corporate financing.

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