DELAWARE LAWYER

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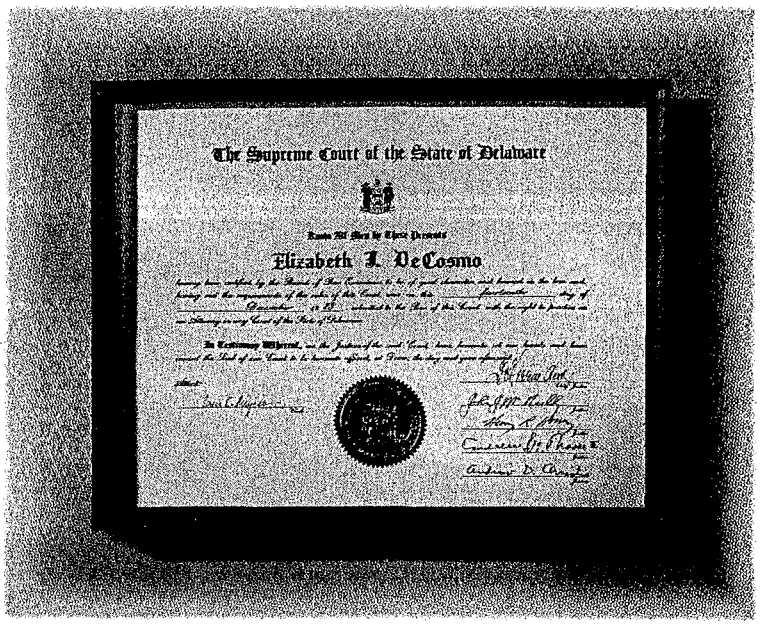
Season's Greetings



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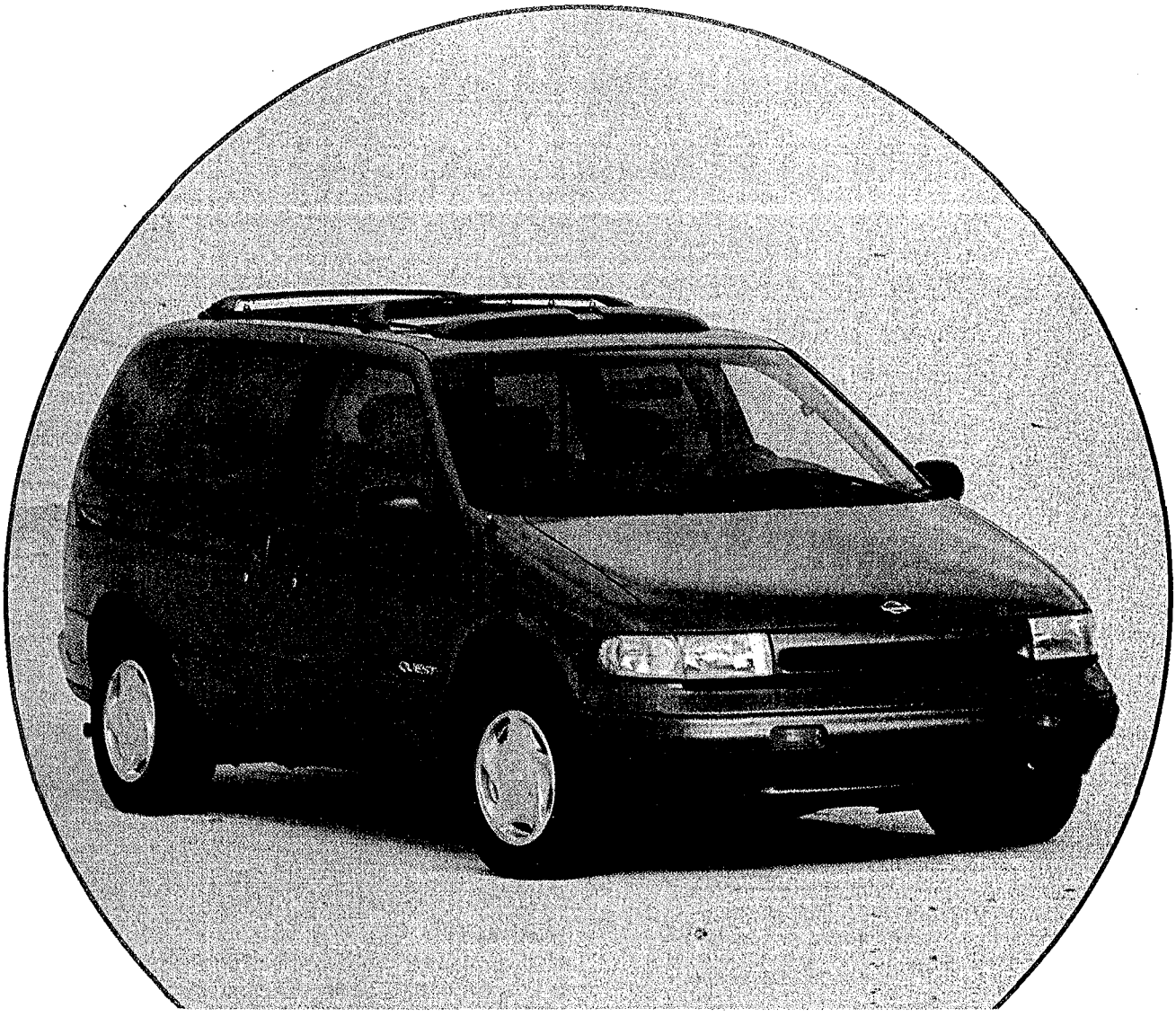

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Personal Asset Management: Obtaining The Advice You Need

by Geoffrey M. Rogers

Every day, each of us is inundated with information. Some is important to us, some is not. Separating the wheat from the chaff is becoming more and more difficult.

Nowhere is this more significant than in the area of financial information. It seems that every publication you read has at least one article on investments, taxes, or other aspects of financial planning. Some books and magazines provide only financial information and investment advice.

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Geoffrey M. Rogers is an Assistant Vice President at Delaware Trust Capital Management, Inc.

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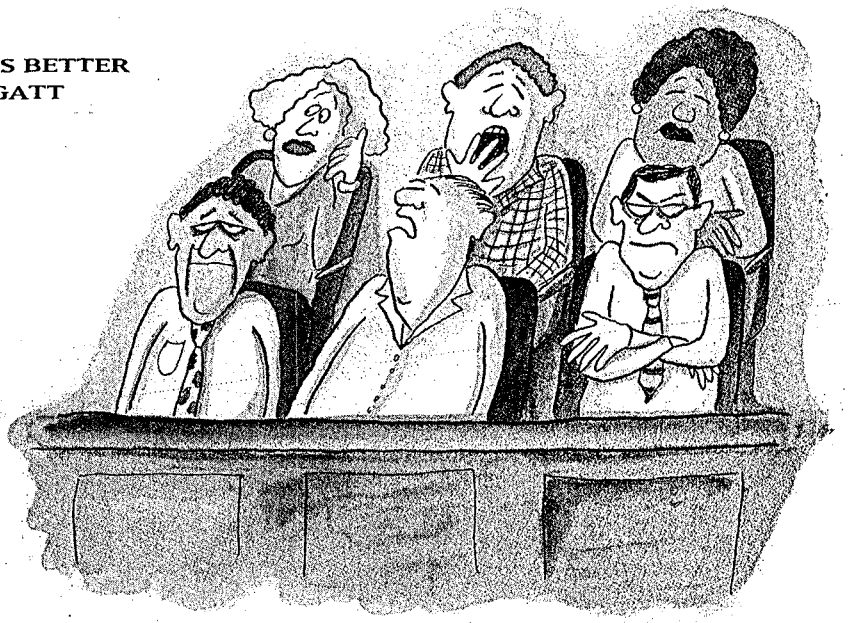

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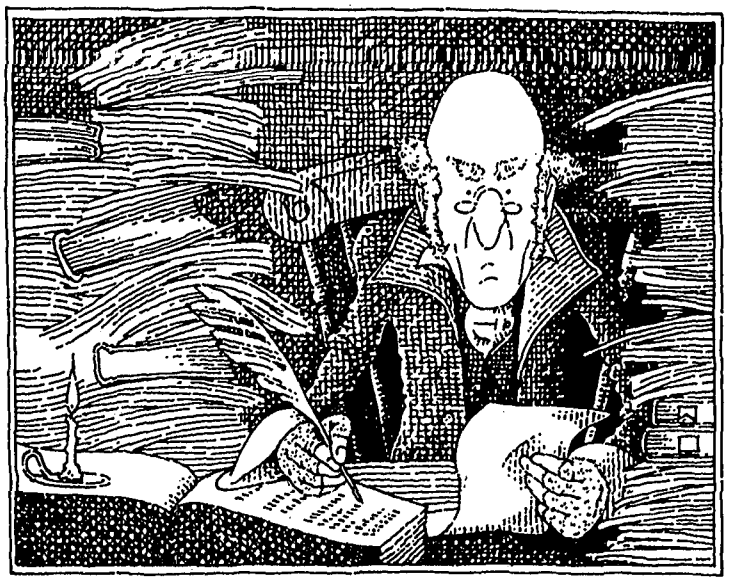

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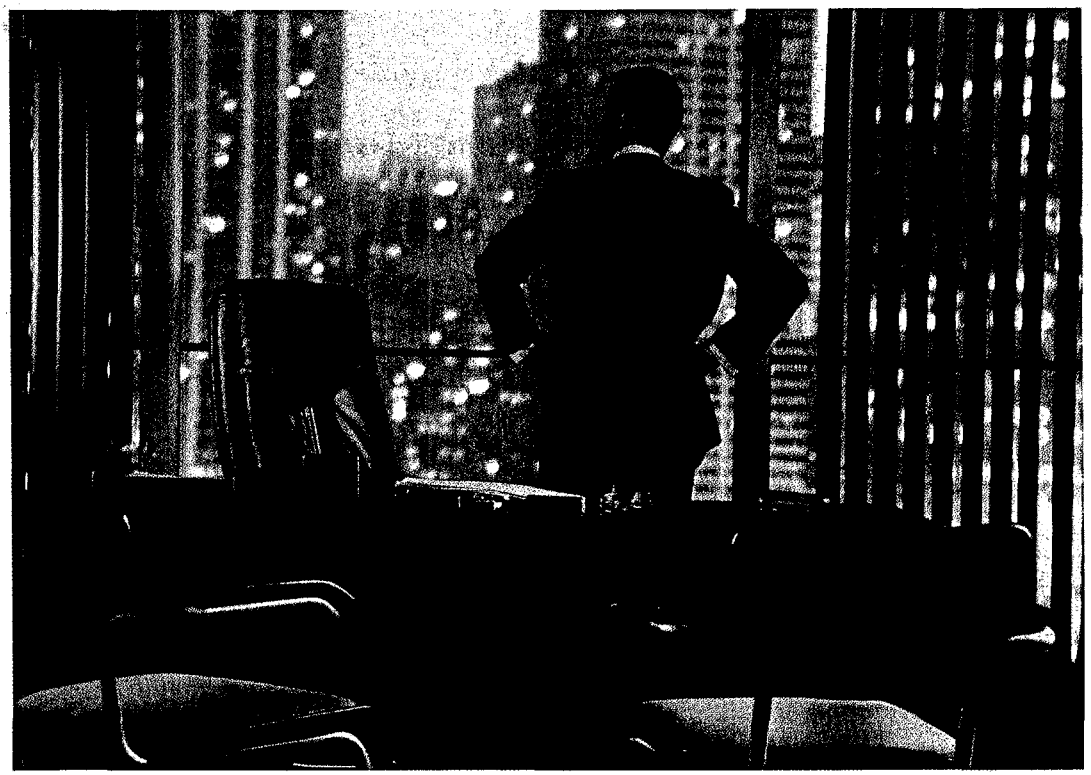

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EDITOR'S PAGE

THE PLEASURES OF THE SEASON

In the self indulgence of the holiday season we devote this issue to a small number of articles of superior entertainment. That is not to say that they are without interest to the profession or instructional value.

Our authors, David Drexler of our Board of Editors, Bill Prickett and Bruce Stargatt, both former Presidents of the Delaware State Bar Association and current members of the Bar Foundation Board of Directors, and Ed Ianni are among the most gifted writers the profession in Delaware has produced. They have also been generous in their contributions to this magazine.

Since the inception of DELAWARE LAWYER in May 1982 Bill Prickett has given us no less than thirteen pieces, beginning with his account of the career of Thomas Spry, the first Delaware lawyer. His latest and longest, our premier season's greeting, is intended for much more than holiday amusement: its account of that shrewd old Sussex County trial lawyer, Everett Warrington, delivers more practical advice on trial conduct than one is likely to receive in a day long CLE program. I remember the case Bill describes, for I was carrying a briefcase for Ned Carpenter and was privileged to observe the amazing Mr. Warrington in action — but let me not give away the delights and surprises of Bill's story.

Dave Drexler describes an unusual case in the Court of Chancery, demonstrating the extraordinary reach and range of interests of that remarkable Court now celebrating its 200th anniversary. One of the illustrations demonstrates the results of George Bernard Shaw's resolve to recast our chaotic English alphabet. While the litigation over Shaw's will took place in Great Britain, alphabet reform produced a closely related case in Chancery, all fascinatingly described in Dave's account.

It is interesting to note that Shaw also contemplated another form of charitable bequest. When his wife died in 1943 she left a will that created an unholy row. She directed that the bulk of her estate be turned over to a foundation to educate the Irish out of their "vulgarity of speech and other defects".* How this was to be accomplished is uncertain. Anyone foolhardy enough to tell a self-respecting Irishman to mend his speech and manners would doubtless find himself on the wrong end of a shillelagh. Furthermore, how could one achieve Mrs. Shaw's charitable goal? Were the trustees of this goofy largesse expected to hand out finger bowls to marchers in the St. Patrick's Day parade? No matter. The press enthusiastically picked up this gorgeous piece of testamentary chutzpah, and the various loyal sons of this and the ancient honorables of that among the Irish American community began to fulminate like nobody's business. Shaw, good man and good Irishman that he was, sided with the affronted Hibernians: "At the time my wife made that will I was seriously considering doing the same thing for the English — and I would now, only I haven't enough money left." When Shaw's estate was probated in the early 1950's, it comfortably exceeded a million dollars — and this before the Niagara of royalties began to pour in from "My Fair Lady". Presumably that crafty old party deemed his prospective estate insufficient for cleaning up the Augean Stables of English bad manners, and he settled for the more modest goal of alphabet reform.

It is with particular pleasure we mark the return to these pages of Bruce Stargatt, who ornamented the first issue of this magazine with an article so graceful and witty that the News-Journal papers sought permission (happily granted) to reprint it, thereby establishing DELAWARE LAWYER as a publication worthy of the attention of discriminating readers.

We are also happy to welcome back our fourth author, Ed Ianni. His article was originally planned for our issue on international trade. Press of business, missed deadlines, and the tyranny of scheduling prevented inclusion, but it was too good to pass up. So here it is in all its tardy splendor.

*I strongly suspect Mrs. Shaw's bequest was playfully intended to vex her spouse. Like Shaw, she too was of Anglo-Irish origin.

We owe our readers an explanation about one of the articles in the September issue (Volume 10, Number 3). We had received a request from high places to include David Johnson-Glebe's very able, if somewhat menacing, discussion of notarial misconduct by lawyers ("Professional Integrity and the Delaware Lawyer"). Little did we realize that, in accepting his article for publication, we had enlisted as foot soldiers in a media blitz. Even before our readers received their copies of the magazine the same article had appeared as a pullout supplement to the August issue of IN RE:, the house organ of the Delaware State Bar Association. On top of that the Supreme Court directed that a copy of the article be mailed to every member of the Delaware bar. And as if this were not enough, highlights from Mr. Johnson-Glebe's cautionary message brightened the pages of the Delaware Business Review. At this point we should hardly be surprised to learn that *Professional Integrity, etc.* was "soon to be a major motion picture". Well, if there is a whiff of overkill here, it is surely in a good cause, and Delaware lawyers, chastened by this barrage of rectitude, will consider very carefully the gravity of the behavior condemned and so lucidly and intelligently analyzed. That such behavior may be widespread justifies the broad dissemination of a corrective. Accordingly we are glad to have been a part of this campaign. It's nice to be needed.

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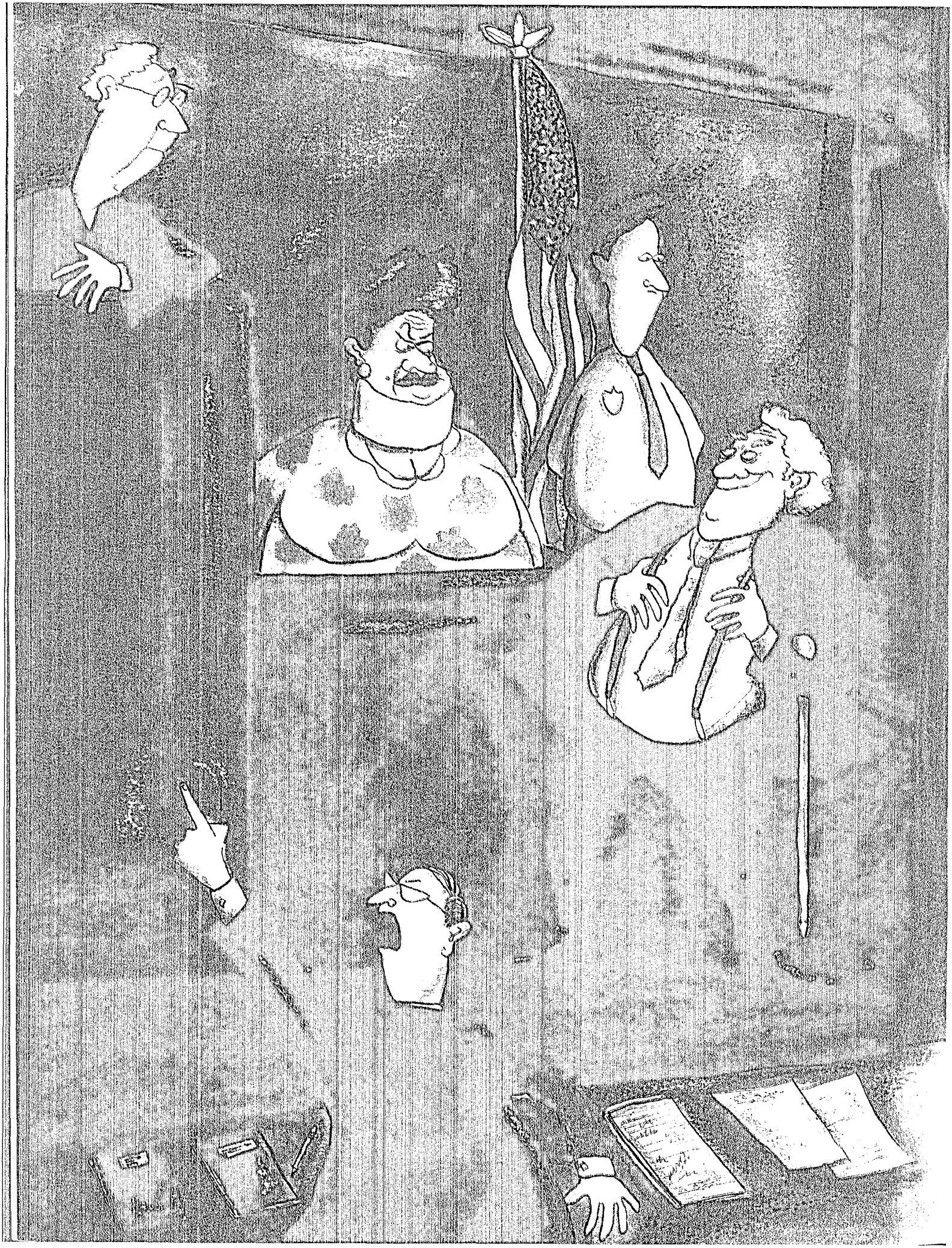


WHY I SOMETIMES WEAR RED SUSPENDERS ON TUESDAYS

by William Prickett

I am quite often asked why I sometimes wear fireman's suspenders on Tuesdays. Usually, I give a deadpan reply, "Why, to hold up my pants!" That answer, while correct, and a somewhat smarty pants answer, is really not the whole truth. If the reader for some inexplicable reason would like to know the whole truth about why I sometimes wear red suspenders on Tuesdays, then it is necessary to wade through this whole effort unless the reader is an intellectual chiseler by nature or training; a cheater will flip right to the end and learn this reason why I usually wear, etc. But, as the great Chinese literary critic, Lin Sung, so wisely remarked at the end of the Hung Period, "In any decent sandwich, the meat is always between the slices of bread." Thus, the reader who wants the real meatball, if there is one, has got to read this whole damn piece, okay? (But, there is also a thin slice of Thucydides, as a sort of classic pickle to spice up this homely American literary sandwich.)

Recently, the entire Bench and Bar of Delaware, Princeton University, the American Judicature Society, and a number of other organizations have striven to outdo one another in heaping honors on the head of an outstanding Delaware lawyer, E.N. Carpenter, II. I have been among those who have enjoyed seeing Ned reap in his lifetime the deserved praise for all of his many accomplishments. Indeed, Delaware and all of its people owe Ned a huge debt, which they will never really know about or be able to repay: Ned, forsaking national office and wider fields of endeavor in which he would undoubtedly have excelled, preferred to stay on in his native Delaware. He worked as a lawyer and, in a very real sense, as a servant of this very small State and all of its people. Thus, as he reached three score and ten, it was entirely appropriate that his home State and those who have enjoyed the benefits of his hard work and intelligence over all these years should pause and pay him deserved homage.

However, when the incense clears, it should be remembered that Ned was and is after all a Delaware trial lawyer. This, then, is a little account to recall that Ned, like every other lawyer, did occasionally have (if only very occasionally) a professional reverse or two along the way: indeed, every serious trial lawyer does lose a close case now and then. but, it will be seen that the plaintiffs' defeat was not Ned's fault: it was due mostly to Ned's out-of-state colleague and a most unpleasant client. Still, Ned made one mistake but it was a fatal one: he was just too gracious. Let me quickly add that the plaintiffs' defeat was not in any way as a result of my puny efforts: I was really a bystander. Actually, Everett F. Warrington, Esquire of Georgetown, as you will see, was the wily architect of the plaintiffs' and Ned's defeat.

Of course, this account is only my recollection of what happened. Others, including Ned himself, may recall things quite differently. Probably the true facts (whatever that means), are irretrievably lost in the mists of time. On the other hand, the facts may have been quite different from the impressions of each of us at the time. So be it: here, then, for what they are worth, are my recollections.

The attorney who bested the plaintiffs, as I say, is a long deceased Delaware lawyer by the name of Everett F. Warrington, Esquire. Mr. Warrington was born in Hollyville, a small town near Georgetown in Sussex County, Delaware. For a crossroads in the piney woods of lower Delaware, Georgetown and its environs have been an amazingly fertile source of legal giants. Indeed, a list of great Delaware lawyers and Judges who originally came from Georgetown would use up the rest of the space. (Ned himself has Sussex County roots.) But, this article is, after all, not about Sussex County lawyers generally

but about one very crafty old Sussex County trial lawyer, Mr. Warrington, and Ned and his snooty but incompetent out-of-state colleague.

My father told me that Mr. Warrington had not returned to his native Sussex County after law school: rather, he had sought and found legal success in the big city — New York. There Mr. Warrington had a very successful career as an insurance company attorney. However, Mr. Warrington had a taste for rye whiskey, like some other attorneys from Sussex County (and indeed, unfortunately, all too many Delaware attorneys both before and since Mr. Warrington). Thus, Mr. Warrington's New York legal career had been suddenly truncated. A legal Icarus, he had toppled from New York's lofty legal heights. Mr. Warrington had spiralled back down to earth and landed, plunk, in his native Sussex County. When he had recovered somewhat, Mr. Warrington got himself admitted to the Delaware Bar and turned to a country trial practice. Thus, Everett F. Warrington, Esquire, late in life, with the rasping voice of a man who has wrestled many a night with alcohol, came to be a fixture in the trial courts of Sussex County, Delaware. Mr. Warrington did not care much what sort of a case it was, criminal or civil — they were all grist for Everett's fierce advocacy.

Mr. Warrington's particular domain was the Superior Court of Sussex County. My father, a Wilmington trial lawyer, at times traveled down to Sussex County to try civil cases there against various Sussex County lawyers, including Mr. Warrington. Mr. Warrington was an astute and able practitioner. My father was an aggressive trial lawyer, but his trademark was careful and thorough preparation of both the law and the facts in every case he tried. Mr. Warrington's swashbuckling style was entirely different. All Mr. Warrington really needed was a client whose cause Mr. Warrington believed in. Without very much preparation at all on either the law or the facts, Mr. Warrington would do his very best to convince a jury to find for his client.

After Harvard Law School, I became the junior attorney in my father's office. Early one Tuesday morning in January, shortly after I was admitted (a year late as some readers of this magazine may remember), the telephone rang. I was in my father's office at the time. The booming raspy voice on the telephone could be none other than that of Everett F. Warrington. The conversation went something like this:

"Bill, can you hear me? This is Everett Warrington. I am up here in Wilmington to defend a case against a lawyer from Hartford, Connecticut name of O. B. Priscott. Because of his style, I call him "prissy", but not to his face, mind you. He really does not know his elbow from second base. Prissy thinks that he has a hell of a plaintiff's case. I'm defending for the insurance company. There is also a young Delaware lawyer in the case. I have a feeling he at least is very energetic and able. I am not worried a bit about Mr. Prissy, but Mr. Carpenter is a different sort of cat, don't you think?

"Yes, you say you know Ned? You say he is a capable young lawyer who went to Harvard Law School. Prissy also went there.

"Well, be that as it may, but Prissy has not got much of a case so far as I can see. It involves traumatic neurosis, whatever the hell that is. Yes, I'm up here in Wilmington to try the case starting this morning. I wonder if you would have the time to come up to Court today and sort of lend me a hand. Prissy has kind of worn me down with damned fool interrogatories, production, and all that sort of thing. But I am up here now for trial — fact is, as I said, trial starts later this morning. Like you when you came down to Sussex County, I am sort of a country fish out of the water up here in Wilmington."

My father looked aghast. He had a mountain of work to do. He could not suddenly drop everything and stroll over to Court for three days as some Sussex County lawyers were apt to do in those halcyon days. My father replied gravely:

"Everett, I am honored to be asked especially by someone who finished four years of law at St. James College. But I happen to be very busy for the next couple of days: things I simply cannot put off. However, my young son, Bill, was just admitted. He also went to Harvard Law School. Now, Everett, don't hold that against him. Of course, he doesn't have any trial experience at all but maybe he can help you with the papers. I will tell him not to get in your way.

Everett replied: "Oh, well, Bill, send your young man on up. He can't hurt anything. He and I will see what we can do for Mr. Carpenter and Prissy and their traumatic and neurotic lady plaintiff. Thanks, Bill, I appreciate the loan of your son."

My father hung up the phone. He turned to me and told me to get into a white shirt and go up and do what I could to help Mr. Warrington. He said to me:

"Now, Mr. Warrington may have seen brighter days but, mark my words, young man, there is no better lawyer before a jury in the whole State of Delaware. Though he is dramatic and flamboyant, you can learn some things from Mr. Warrington if you can manage to get over your snootiness at having gone to Harvard Law School. In fact, you might just find out something about how to try a jury case."

I could tell my father basically disapproved of Mr. Warrington and his brava-

"Though he is dramatic and flamboyant, you can learn some things from Mr. Warrington if you can manage to get over your snootiness at having gone to Harvard Law School."

do style. Therefore, almost instinctively, I was fully prepared to like Mr. Warrington's way of trying a case.

My father continued, "But, pay close attention to Ned. His style is the direct opposite of that of Mr. Warrington — diligent, thorough, and fully prepared. You'll learn a lot from him if you just take the trouble to do so. I have, of course, never heard of Mr. Priscott."

My father added, "Mr. Warrington still drinks more than he should. Furthermore, like you, Mr. Warrington has the filthy habit of smoking cigarettes."

My father exclaimed indignantly, "Mr. Warrington even smokes in the Courtroom, though it is strictly forbidden to do so. He stamps his disgusting cigarette butts out right on the floor underneath the counsel table. It's a disgrace! Don't ever let me or one of the Judges catch you doing that, do you hear, young man?"

"Yes, Father," I replied. (In those days, we did what we were told. Besides, I was trying for the 19th time to quit.) My father concluded, "Now, go on up to Mansure & Prettyman and get yourself a pair of white shirts: you may charge them to my account." I went and bought two new white shirts and hurried up to the Courthouse and into Courtroom No. 1. There was bull-headed, red-faced Mr. Warrington, leaning back in a chair at the defense table, inhaling deeply on a Lucky Strike cigarette. He had a mane of disheveled white hair, a big chest, a short bull neck, and broad shoulders. The tabs of the collar of his somewhat faded blue shirt were curled up. His dark blue suit was a trifle shiny and there were some cigarette ashes scattered down the front of his suit. His pants were held up by both an old leather belt and faded red fireman's suspenders. (That is obviously a clue to the title of this little effort.) His tie had a large spot on it. He wore low black boots that laced up above his ankles. Mr. Warrington said in a loud rasping voice:

"Well, Sonny Boy, I'm mighty glad to see you. We really do not have much of a defense in this case when all is said and done. Maybe young Mr. Prissy and his colleague, Mr. Carpenter, will overtry their case. Let's hope so anyway. I hope Prissy handles most of their case rather than Ned: I do not think a Delaware jury will cotton to that stuck-up Yankee." I said to Mr. Warrington:

"Sir, may I please look at the pleading file to get some idea of what this case is all about?"

Mr. Warrington laughed and replied with a twinkle:

"Of course, Sonny Boy, here it all is."

He picked up his battered old leather briefcase. He turned it upside down on the counsel table. Out spilled a mass of crumpled papers — complaint, answer, motions, statements, photographs — a messy pile of papers about a foot high. Mr. Warrington smiled at my surprised look and said:

"My secretary, Miss Betts, was supposed to have straightened this mess out. She somehow never quite gets around to such jobs. But, the complaint and answer are some place in there. So is everything else. Go to it, if you like."

Mr. Warrington then said:

"Sonny Boy, your father tells me you went to Harvard Law School and that this is your first jury trial. That's fine. I'll tell you what we'll do: we will handle this trial together. I will tell you as we go along which of the plaintiffs' witnesses I will cross and which you will cross-examine. Okay with you?"

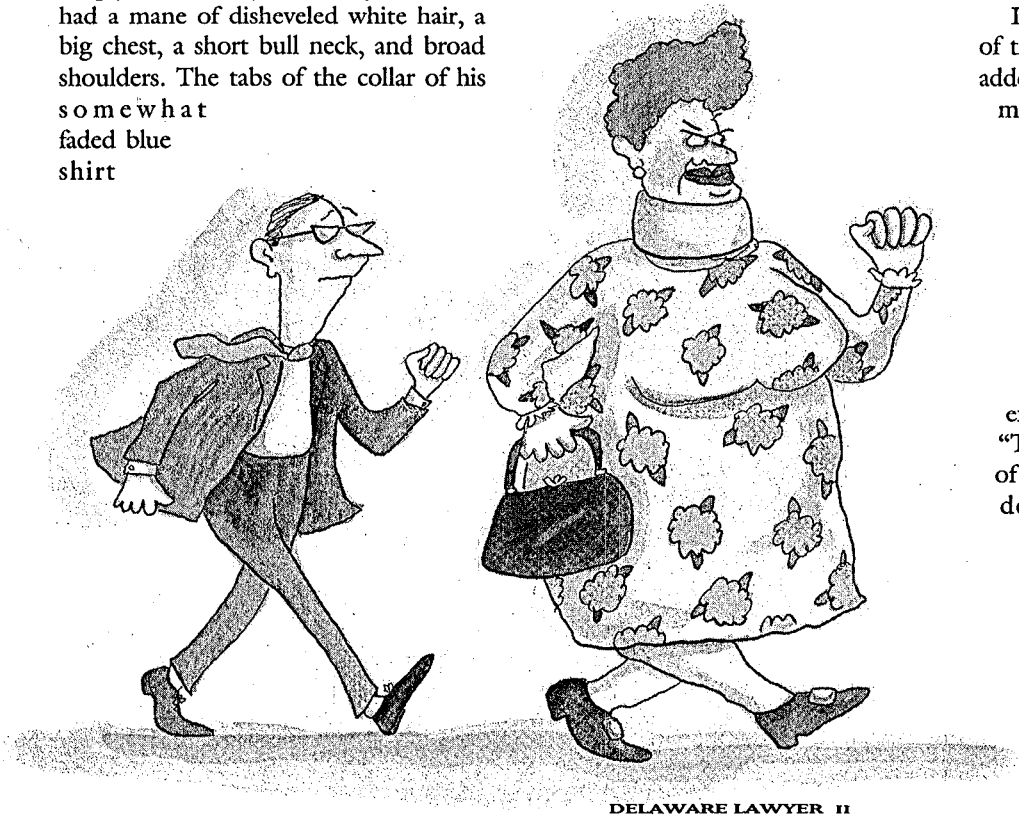
I was dumbfounded, but delighted. I quickly tried to sort the papers into piles so that I could at least scan the important ones. It was quite impossible to get them in any sort of order: there just was not enough time. Implausibly, at least to my way of thinking, at the very bottom of the pike, there was a battered and soiled copy of Thucydides, "History of the Peloponnesian Wars", in Greek. Just at that moment, Ned Carpenter strode athletically into the courtroom followed by a fastidious young lawyer, already prematurely balding, who sort of trotted along at Ned's heels. Mr. Carpenter's colleague's eye lit on the battered copy of Thucydides in Greek lying before me on the counsel table. He smiled and said, "Look, Ned, are they reading Thucydides in preparation for this trial?"

I replied, "Not me. I've never heard of the gentleman before today." I then added, with the leer of the true ignoramus, "It's all Greek to me. It's Mr. Warrington's book."

Ned said, "Well, I myself need the translation: I never did find the time to learn Greek as I should have. But I guess that failure will not have any effect on the proceedings that bring us together, will it?"

Mr. Warrington's response to this exchange was to say privately to me, "Thucydides contains many examples of the folly of hubris." I openly nodded in agreement but privately I decided to look up "hubris".

Behind Mr. Carpenter and Prissy sailed the large lady plaintiff prominently displaying a gleaming white neck brace. Well, back of her, her husband slinked in, a timid little rabbit of a man.



The plaintiff's team sat down at their table. Ned unloaded six massive black trial notebooks and his spiral notebook from three tidy leather trial briefcases. The notebooks, for which Ned was already well known, were clearly labeled and indexed. Ned opened Notebook Number One. I was standing beside him: there was "The Plaintff's Opening", all typed out, underlined and with exclamation marks. Prepared: wow!

I asked Mr. Warrington behind my hand, "Where is our truck driver defendant?" Mr. Warrington replied quietly:

"Well, Sonny Boy, between us, the fact is I never could quite catch up with that rascal. He is known all over Sussex County as Crazy Jim, probably because he is cross-eyed and somewhat wild. His common law wife, Lydia Mae, and the Sheriff of Sussex County have all been chasing all around trying to find Crazy Jim. None of us ever found out where he was until a day or so ago. Then, a State Trooper happened to shoot Crazy Jim in the gut as he was trying to break into a gas station late Sunday night. Jim still has a .38 calibre bullet in his stomach. That bullet and a criminal charge are keeping him in the Beebe Hospital just for the moment. Jim is not going to be able to show up for this trial, thank goodness. We'll just have to get along without him. Not to worry, okay?"

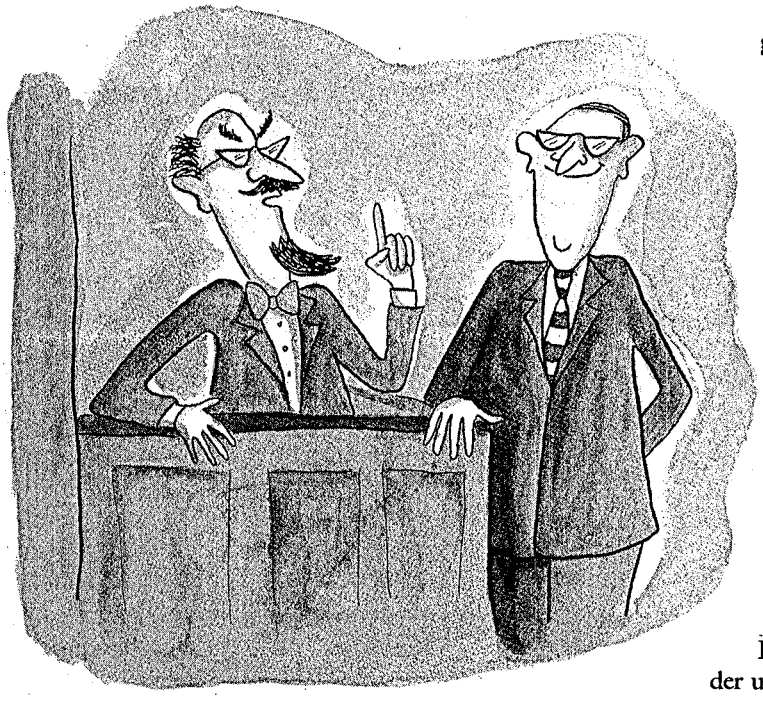
Just then, the Chief Bailiff intoned in a solemn official voice: "All rise. All those having business before this Court draw nigh and they shall be heard. God save the State of Delaware and this Honorable Court. Court is now in session." The small door behind the Bench opened and the Judge walked in. The panel of jurors was ushered in under the watchful eyes of the Chief Bailiff and his tipstaffs. The Court had the Prothonotary announce the case.

Mr. Carpenter said, "If it please the Court, may I present and move the admission of O. B. Priscott, Esquire, of the Connecticut Bar. Mr. Priscott was a classmate of mine at Harvard Law School. Mr. Priscott and I, with the Court's permission, will present the plaintiff's case jointly."

The Court was about to graciously welcome Mr. Priscott and grant Mr. Carpenter's motion when Mr. Warrington stood up and said, "Your Honor, may I be heard?"

The Judge looked surprised and clearly annoyed. Motions for admission pro hac vice were granted as a matter of course at that time. Thus, the Court said, "No, Mr. Warrington, you may not be heard."

Mr. Warrington said, "Well, now, Your Honor, hold on, if Your Honor please. Down where I come from in Sussex County, an attorney is entitled to be heard as a matter of right on any motion. But, Your Honor, I was not going to challenge Mr. Carpenter's motion as to Mr. Priss, or Mr. Priscott, or whatever his name is, though Mr. Carpenter did not state that his colleague was in good standing in Connecticut or wherever he comes from."



Mr. Priscott got angrily to his feet and blurted out, "Your Honor, I resent that: of course, I am in good standing in Connecticut!"

Mr. Warrington: "Hold on, Sir. Don't go getting your New England dander up. I never said you weren't in good standing. For all I know, you are. I just said Mr. Carpenter had not assured the Judge you were. But, what I got up to do was to make my own motion. When I heard that there were not one but two lawyers from the Harvard Law School against my poor client, Jim, I decided I better get myself a Harvard Law School lawyer. Young Mr. Prickett here beside me has finally gotten admitted to the Bar. I have associated him with me for the trial of this case. Mr. Prickett also went to Harvard Law School. However, Your Honor, as you can see, it was still two Harvard Law School lawyers against one. I just wondered if Mr. Priscott was in good standing. If by any chance he wasn't, then it would be all even so far as Harvard Law School grads are concerned. but, Your Honor, my colleague and I are quite willing to take both of the plaintiff's Harvard Law School grads on."

The Court relaxed, smiled, and said, "Come, come, gentlemen, let's not start off on a discordant note over how many Harvard Law School graduates each side has. Mr. Priscott and Mr. Prickett, you are both welcome."

The Judge then asked, "Ready for the plaintiff?" Prissy rose and replied in a squeaky voice, "Ready for the plaintiff, Your Honor." The Court turned and said, "Well, and what about you, Mr. Warrington — is the defendant ready?" Mr. Warrington stood up slowly, leaned on his cane and boomed out with just a hint of sarcasm, "Your Honor, the defendant has always been ready to try this particular case. We are still ready. Let's begin."

That was in the good old days when a Delaware jury could be impaneled in ten minutes. But, this time it took a full twenty-five minutes because Prissy, armed with a detailed jury card on each juror, scanned each card and each juryman again and again as they took their place in the box. Prissy exercised each of his six peremptory challenges, as he had every right to do. Each time it was his turn to challenge, Mr. Warrington slowly got up and with thinly disguised disdain and, looking directly at Mr. Priscott, said: "The defendant is still quite, quite satisfied, Your Honor, with the jury as it is now constituted". There were a couple of jurors that I certainly would have stricken, though I knew nothing about jurymen, or trial tactics, or indeed anything at all for that matter. But Mr. Warrington was making it abundantly clear to everyone in the

Courtroom that he was not at all finicky which jurors heard and decided the case. The implication was plain: Mr. Warrington was going to win the case no matter which jurors sat.

By this time, I had managed to read the plaintiffs' tidy and detailed complaint and indeed Mr. Warrington's somewhat badly typed answer. It was a fairly straightforward case. Basically, the plaintiff's husband had been driving to the Hotel DuPont in downtown Wilmington when our non-appearing defendant had driven his employer's 18-wheel chicken truck right smack dab into the back of the plaintiff's car. The plaintiffs claimed that their Buick had been stopped for a red light. The truck had pushed the Buick all the way across the intersection and into a fireplug standing on the far side of the intersection. (Our answer asserted that the plaintiff had stopped suddenly on a yellow light rather than going on through.) Neither the plaintiff nor her husband had suffered any broken bones or indeed any cuts or bruises. In fact, the husband was not hurt at all. But the lady alleged she had suffered a simply awful neck injury and traumatic neurosis. Indeed, there was an impressive list of doctors' visits for traumatic neurosis, but $131.00 was the total amount claimed for her medical bills other than for traumatic neurosis. Her husband politely and diffidently alleged loss of his right to his wife's consortium — a polite way that the law (before the Thomas and Kennedy T.V. dramas) used to refer to the fact that the plaintiff's neck was so painful that she was no earthly use to her husband in her matrimonial obligations. However, looking at the lady plaintiff, a scowling middle-aged harridan if I ever saw one, I smiled inwardly, thinking that her little timid husband had not really missed much, if anything, along these lines. In an aside to me, Mr. Warrington had labeled the husband as "Mr. Mousey".

I could have saved myself the trouble of reading the complaint. Prissy turned and bowed deeply to the Judge, and requested with elaborate politeness the required leave of Court to address the jury directly. Then he turned to the jury and explained in exquisite detail just what had happened and how seriously and permanently hurt the plaintiff was as a result of the negligence of our truck driver.

At the end of his explanation, it was obvious to me (and I supposed everyone else) that this was a case of clear liability. The only real question that the jury would have was the amount of the damages: after all, our defendant truck driver had come up to a car stopping for a yellow light which was about to turn red. Our driver had run right smack dab into the back of the car in which the plaintiff was riding. What could be clearer?

The Court asked Mr. Warrington if he wanted to make an opening. Mr. Warrington again got slowly to his feet and said to the Court:

"No, thank you, Your Honor. I don't think that's at all necessary at this point. But I would hope someone at some point is going to tell an old country fellow like me just what this so-called traumatic neurosis is really all about. When folks in Sussex County where I come from sue, it's usually over real injuries, such as broken bones."

Mr. Warrington's remark was clearly improper. Prissy half rose to his feet to object. Prissy looked at Ned who shook his head imperceptibly. Prissy caught the signal and sank back into his seat.

Prissy first called our defendant truck driver as an adverse witness, again as he had every right to do.

Mr. Warrington said evenly,

"Sorry, Sir, the defendant cannot be here."

Prissy was clearly surprised and said indignantly:

"Well and just why not?" (Mistake, mistake, mistake.)

Mr. Warrington replied:

"Well, if you must know, Mr. Priscott, because poor young Jim is at death's door in the intensive care unit of Beebe Hospital with massive bleeding in his lower intestine. Lydia Mae was crying her heart out when she telephoned me to say the doctor's prognosis is guarded on several counts and that Jim could not possibly come to trial. I'll be glad to get an affidavit from Lydia Mae, or the attending physician, if you like. I'd also try to get Lydia Mae to come up from Felton, Delaware, if you want or need her but she has no one to take care of her three youngsters" (one by Crazy Jim maybe and the other two by her former husband or boyfriend, Mr. Warrington privately told me later).

Mr. Priscott replied somewhat dryly:

"No, no. That won't be at all necessary. We are all sorry to hear your client is indisposed, so to speak, Mr. Warrington. But what about the trucking company? Anyone here for them?"

Mr. Warrington replied, "Nope. The company went out of business long ago sort of leaving my client, Jim, in the lurch, so to speak. Sorry, can't help you there, Mr. Priscott."

Mr. Warrington winked, but only to me, and said quietly to me as he sat back down, "Everything I said was true. Now, Prissy will have to use Crazy Jim's deposition. Jim testified on deposition that the Buick had stopped for no apparent reason quite suddenly when the yellow light came on. When our truck lightly tapped the rear bumper of the plaintiffs' Buick, the Buick lurched forward and then under its own power went all the way across through the intersection and ran into the fireplug. Jim also said that when the lady got out, she was cursing

Neither the plaintiff nor her husband had suffered any broken bones or indeed any cuts or bruises. But the lady alleged she had suffered a simply awful neck injury and traumatic neurosis.

like a trooper at Mousey saying he had no business stopping at all and had not kept his foot on the brake. She told Jim the accident was all Mousey's fault. Jim also testified that she had told him flat out that she wasn't hurt at all, just real mad at Mousey. I bet Prissy never mentions the trucking company again!"

Prissy then called the big lady plaintiff with the stiff white neck collar, as his first witness. Unfortunately for her (and for Prissy), she was obviously a nasty frump and came across just that way. Under Prissy's too prolonged questioning, she recounted in far too much fussy detail all about the drive down from their home near Bridgeport, Connecticut. She told us that she and "Mousey" were on their way to visit with her only niece who lived near Lynchburg, Virginia. Prissy got her to state in detail the intersection in Wilmington where this horrible accident had happened to her. She went on to describe in rehearsed detail how the defendant had slammed right into the back of their nice new Buick car, which was fully stopped in obedience to a yellow traffic light. She said that the Buick has been propelled by the truck all the way across the intersection and into a fireplug. She twisted her hankie and said that it was a mercy that she and "Mousey" had not suffered any broken bones or been cut or bruised. However, she more than made up for the lack of visible injuries by stating in reply to Prissy's detailed questions that she had suffered a whiplash injury for which she was forced to wear the big white neck collar she was so prominently displaying. She whined that her most serious injury, however, was "traumatic neurosis". She said that she could scarcely ever abide to ride in a car. Rolling her eyes piously toward heaven, she said she got the "willies", riding in a car even just to the Methodist Church which was only four and a half blocks from her house. Simply thinking about the intersection and the accident often made her weep. She proved her point by sniveling in her moist handkerchief right then and there. There had to be a recess so that she could regain her composure. On her return to the witness stand she said that, of course, she was still under her doctor's care. She was still taking medication and had to have weekly visits to the doctor for traumatic neurosis. She again dabbed her eyes with her handkerchief as she modestly admitted in some nice detail, in response to Prissy's delicate questioning, just why she was no longer able to perform her marital obligations for her husband as she had heretofore done with regularity and to their great pleasure and satisfaction. Her husband, Mr. Mousey, looked uncomfortable. The jury knew by common sense and experience that this tale of interrupted mid-life romance was exaggerated, if not downright litigation fantasy. Indeed, a couple of older country women on the jury looked outright skeptical at these alleged bedroom heroics.

The jury knew by common sense and experience that this tale of interrupted mid-life romance was exaggerated, if not downright litigation fantasy. Indeed, a couple of older country women on the jury looked outright skeptical at these alleged bedroom heroics.

However, all in all, this was pretty devastating stuff. I looked covertly over at the jury: some members at least were clearly sympathizing with the plaintiff.

Mr. Priscott then turned to Mr. Warrington and said with elaborate courtesy and a little bow, "Your witness, Mr. Warrington."

Mr. Warrington got somewhat heavily to his feet, with the help of his gold headed cane. He walked slowly over to the lectern. He paused, then turned and then said with gravity and courtesy to the frump on the stand:

"Madam, I doubt that you are very comfortable on the witness stand, particularly with that huge white neck collar that keeps your head and neck in place, right? Let me try to be very brief, unlike your able counsel, Mr. Priscott. I have only three questions to put to you. If you will be good enough to pay strict attention and answer my three questions truthfully, you will be off the witness stand very shortly. Okay? Are you ready? Let's begin.

"My first question in simple: Did you drive down yesterday with your husband from Connecticut for this trial?"

The lady's eyes rolled wildly around. Then she blurted out:

"No... Yes... But there was no train at the right time. Besides..."

Mr. Warrington let her flounder for a while. He then cut in firmly:

"No. Madam, please just answer my question. Did you drive here from Connecticut in a car driven by your husband? Please answer that question 'yes or no'. Then you can explain to the jury the reason you came by car in spite of your traumatic neurosis was because the trains of the Pennsylvania Railroad were not convenient to your schedule."

The plaintiff said in a low voice with downcast eyes: "Yes, we did drive down in our car."

Prissy whispered something feverishly to Ned. Ned nodded but made a little motion with his head indicating Prissy should be quiet.

Mr. Warrington savored that last answer for an additional moment to let it sink in. He then said, "Good. Now, let's turn to question No. 2. Ready?"

"In getting to the Hotel DuPont where you and your husband are staying, did you drive through the very intersection where the accident happened?"

Again, the lady looked up at the ceiling, than at the far wall of the Courtroom. She looked at Mr. Priscott for help: he was looking at the floor. Finally she said, "But there was no other way to get to the Hotel DuPont ..."

Mr. Warrington looked pained and said:

"Ah, I see. But, Madam, you are unnecessarily prolonging my examination of you. I told you that I would ask only three questions. But, if I am to keep my end of the bargain and confine myself to three questions, you must help me and the jury by answering those questions and answering them directly and truthfully. Is that clear? Good. Let's try my second question again: It is a fact, is it not, that in driving down here and getting to the Hotel DuPont, you came right through the very intersection that you have told us in such exquisite detail is a source of your 'traumatic neurosis', vivid dreams, weeping, and all that stuff? Please answer that 'yes or no'. Then perhaps you can inform the jury as to why you think that there is only one street in Wilmington that leads to the Hotel DuPont."

After a long pause, the lady said in a subdued voice, "Yes, Sir. We did come through that intersection."

Ned frowned imperceptibly. Prissy got halfway to his feet but Ned tapped his arm and he sat back down.

Mr. Warrington let the jury think about that answer for a little while. Then Mr. Warrington said:

"How about that! Well, then, now let's get to my third and last question. My final question to you is simple: tell all of us exactly what traumatic neurosis is."

The lady looked perplexed and thought for quite a while. She then said cautiously, "Well, I am not real sure I can tell you exactly what it is but my Hartford doctor tells me it's what I've got as a result of this terrible accident."

Mr. Warrington looked pained and said, "Madam, I, the Court, and the members of this jury all know that you claim that you have traumatic neurosis. But what I want to know is, *what is it*? Just tell us plainly in your own words so we can all understand just what traumatic neurosis is."

There was a long silence and then the lady said:

"I don't know really what traumatic neurosis is. All I know is that I am told that I have it and that I have it as a result of the accident."

Then she added in a snippy and belligerent tone, "So, there. That's my answer for you, Mr. Warrington." (Mistake, mistake, mistake!) Ned winced. I glanced at Mousey: I got the distinct impression that along with everyone else Mousey was secretly enjoying seeing his overbearing wife's discomfiture.

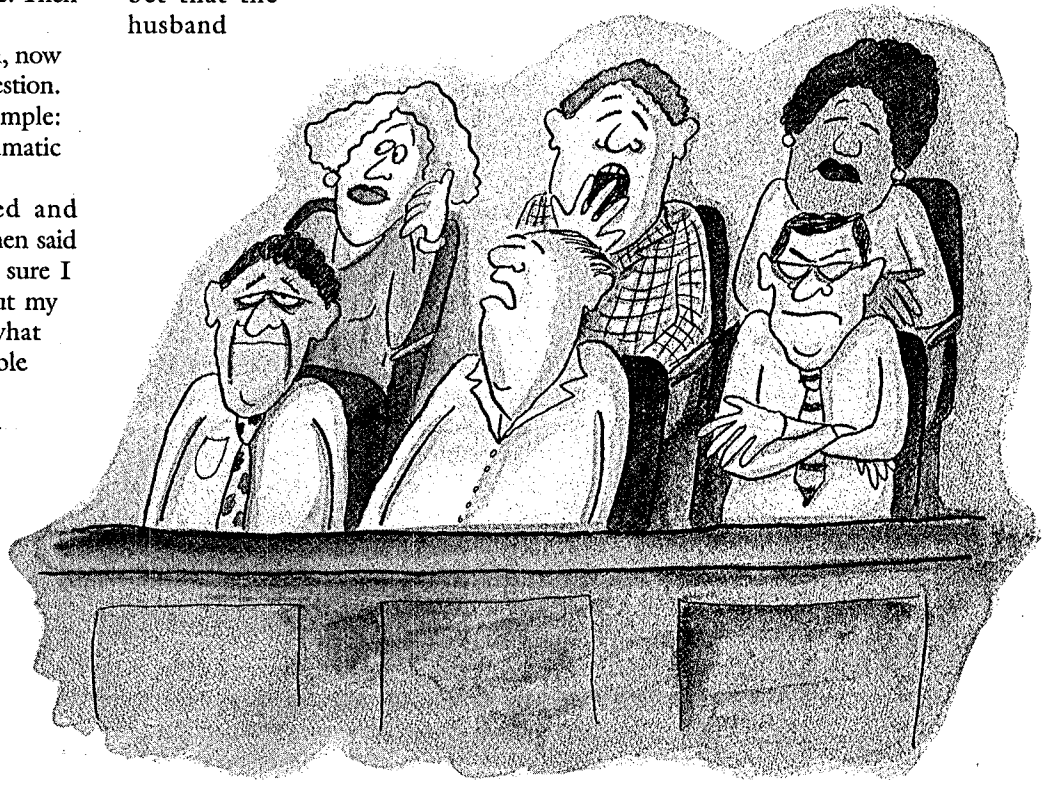
Mr. Warrington said, "Why, thank you, madam, you have been quite informative in your own way in helping me and the jury in getting to the bottom of your claim of traumatic neurosis. Your Honor, I have no further questions for the plaintiff." He sat down. Ned looked grave. Prissy looked perplexed.

There was a recess. I asked Mr. Warrington how he had known that the plaintiff and her husband had driven down and how she had come through the intersection. Mr. Warrington offered me a Lucky Strike, which I of course accepted. He lit our cigarettes with a blue kitchen match which he struck on the seat of his pants. He replied:

"Sonny, when I got to the Hotel DuPont, I saw a little Buick sitting there with Connecticut plates. It had a little dent in its rear bumper. I put two and two together. I took a chance on the second question. I bet that the husband would have come through the same intersection since it in fact is the best street to get to the Hotel DuPont."

I then asked, "Well, how did you know to ask her what traumatic neurosis is?" Mr. Warrington replied, "Well, Sonny Boy, I don't know what traumatic neurosis is. I don't suppose that even a smart young fellow like you right out of Harvard Law School or anybody on that jury has ever heard of it before. So, I thought that I just might ask her. It turns out that she, like the rest of us, doesn't know. But, you can be right sure Ned and Prissy know. They will undoubtedly tell us with the help of their famous Hartford psychiatrist. But, that is not the same as if the plaintiff knew and told the jury, now is it, Sonny Boy?"

Well the trial went on. Ned's fastidious colleague, Prissy, insisted on calling not one but both Wilmington Policemen. They testified after consulting their laboriously handwritten notes and the official traffic report that the defendant's truck had in fact come up to the traffic light, did not stop and then and there did rear end the car of party No. 2 from Connecticut and pushed the said car 17 feel, 6 inches, in a Northeasterly direction across the intersection where it ended up 3.19 inches, from the curb, and against an (innocent) fireplug that just happened to be there, etc. etc. Mr. Warrington asked me to cross-examine the two policemen, saying each time as



clapped me on the back, "Go get 'em Tiger." I did cross-examine at great length and with great enthusiasm but with absolutely no effect whatsoever except to bore the hell out of the jury by too precise establishment of all these irrelevant petty details. The jury's annoyance was compounded when Prissy insisted on calling two eye witnesses who also testified *ad nauseam* under Prissy's detailed questions (and my interminable cross) about the incontrovertible fact that the big bad chicken truck had indeed struck the plaintiff's car from behind, and that it had gone across the intersection and into the innocent fireplug, etc. We rehashed these now stale and uncontested facts and measurements with all the intensity, sarcasm, posturing, and incredulity that two lawyers from Harvard Law School can muster, seeking to impress the jury. Mr. Warrington himself nodded in his seat. At least two of the jurors snored audibly during all of this useless infighting.

During the afternoon recess, I asked Mr. Warrington why he did not just admit liability and be done with it. It was perfectly clear in spite of my valiant efforts on cross-examination of the police, Mousey, and the eye witnesses and Crazy Jim's deposition that our driver had come up to the light, had not stopped, and had hit the plaintiff's car in the rear. Mr. Warrington said, "Sonny Boy, I thought some about admitting liability but then I thought, maybe, just maybe, Prissy might just bore the almighty hell out of this long suffering jury by proving over and over what the jury understood from the opening." Mr. Warrington went on to remark that Juror Number 2 had had a nice nap all afternoon long and that Numbers 3 and 7 seemed irritated. Mr. Warrington concluded with a sly smile, "Could be things are looking somewhat up. Sonny Boy, your father once told me that he never wins cases: other people just lose them. Well, Prissy may be in a fair way of doing just that. We'll just have to hope Ned does not get a chance to correct the damage Prissy has already managed to do to his nice little plaintiff's case."

Prissy had said in his opening that this case was really about damages and the extent of the plaintiff's grievous injuries. Prissy then called a nurse from the emergency ward of what was then the old Delaware Hospital. This crusty old Emergency Ward nurse made it quite clear that she was highly exasperated at having to come to Court to testify in this particular case. She testified that the plaintiff had been brought in after the accident on a stretcher, had been examined, x-rayed and released. Mr. Warrington elected to handle this cross-examination himself. He established again in three questions that, after an examination and a couple of x-rays the plaintiff had been released, that she had walked ut of the Emergency Room on her own two feet and in fact had walked all the way over to the Hotel DuPont and that she had never come back for the scheduled follow-up examination and medicine the next day. Her total medical expenses (other than for weekly visits to her psychiatrist) came to only $131.00. (I noted that Mousey half smiled.)

At the end of the first day, Mr. Warrington lit up a Lucky Strike, gave me one, and allowed that he felt sort of tired. I asked whether I could take any portion of his file, so that I could review it that night (and put it in some sort of order). Mr. Warrington replied, "You can have the whole damn file: I certainly don't need any of those papers tonight. Please give back my Thucydides. But, what I do really need is a drink of rye whiskey. Would you care to join me?" Indeed, I would. We walked over to the Hotel DuPont bar and had a drink together. I left Mr. Warrington there, ordering yet another Maryland Rye Whiskey on the rocks and chain smoking Lucky Strike cigarettes. I went dutifully back to the office. I asked my father just who Thucydides was and what the Peloponnesian Wars were.

"Good God," my father exclaimed in real surprise. "I have paid literally a small size fortune for your four years at Princeton: and you have never even heard of the world's greatest historian. What did you learn there besides how to drink beer? I guess you think that some familiarity with the filthy books of that Irish expatriate, James Joyce, makes you an educated person, right?"

I replied smugly, "Well, I guess I am better educated than Mr. Warrington who, I believe, went to a little unknown law school that I at least have never heard of, called, I believe, St. James."

My father roared with laughter. "My dear boy, St. James is one of the oldest colleges at Oxford University. Mr. Warrington was an early Rhodes Scholar from Delaware. He was at Oxford before I was and graduated in law in 1911. So, there, Mister Smarty Pants: put that in your pipe and smoke it. Incidentally, you just might some time read Thucydides — not in Greek, it goes without saying. You must might find it interesting and instructive."

Considerably humbled and now in real awe of Mr. Warrington, I spent until midnight reviewing and organizing the file for whatever good that might do. Clearly, on the following day, the preliminaries being over, we were going to have to face the traumatic music, so to speak. Ned and Prissy had scheduled their fancy Hartford psychiatrist to come all the way down to Wilmington and testify as to the plaintiff's traumatic neurosis. We had a report from this distinguished Connecticut doctor flatly stating that the plaintiff's traumatic neurosis was the result of the accident. The doctor concluded that she unfortunately would never for the rest of her natural life be the same gentle, pleasant, loving wife and homemaker she had been before the accident. I trembled as I read this most damaging report: it certainly looked like there was going to be a verdict of tidal proportions against us.

The next day, I joined Mr. Warrington at 10:00 a.m. He was seated at the defense table with his cane between his knees. His eyes were closed. He was either in deep thought or fast asleep. Two crushed Lucky Strike butts lay at his feet. The trial got underway. With great formality, Prissy called the Hartford psychiatrist: the doctor was bald headed, had a neatly trimmed reddish Van Dyke beard, and little beady eyes behind steel rim glasses. He was very intense and serious. He spoke with just a touch of Germanic accent but without the faintest glimmer of humor. His six page, single-spaced resume or curriculum vitae was made a trial exhibit. Mr. Warrington looked at our copy of this impressive document very briefly and then openly turned it over on the table in front of him, making certain that the jury saw him do it. At this point, I was afraid Mr. Warrington would again turn to me for the cross-examination of this distinguished and assured witness. I therefore covertly examined the vita carefully. I saw nothing at all on which I could attack the doctor. Prissy's examination started with a review of the great man's career. The doctor had attended prominent medical schools in Germany and Austria. The recitation of his list of medical societies and committees, the books and papers he had written, the grants that he had received and the honors heaped on his bald head took half an hour in itself. Mr. Warrington appeared to be napping

while Prissy went over the doctor's resume. Then the doctor was examined in great detail on traumatic neurosis generally: we all knew than that at least Prissy knew exactly what traumatic neurosis was: he suavely testified about traumatic neurosis long and lovingly. (Of course, it was his "bread and butter".) I wondered how Mr. Warrington was going to deal with this distinguished expert who had testified so knowledgeably and so convincingly. I shuddered at the thought that Mr. Warrington, whose attention clearly seemed to be elsewhere, would turn and ask me to take the doctor on in cross-examination.

Eventually, Prissy finished and said, again with a little bow and great politeness, "Your witness, Mr. Warrington." His tone clearly implied that Mr. Warrington would not be able to do anything with such a great medical authority. Mr. Warrington stood up (thank God) and, while walking over to the podium, said "By the way, Professor, you a real doctor?" The witness bristled visibly at this insult and retorted fiercely, his Germanic accent becoming more pronounced, "Ja" or rather 'yes', of course I am: we have just been over my credentials." Mr. Warrington replied evenly: "Hold on, don't get yourself in an uproar. Everybody heard all your lengthy credentials. But I was not quite sure that you are still a real medical doctor or whether you had become just a professor of some sort at this point." Prissy at this point objected and was sustained.

Mr. Warrington said: "I see, Doctor, you are something of an expert on rats."

The doctor again visibly bristled: "No, not on der rats. I am a psychiatrist and treat humans, not rats." Her Germanic accent became more pronounced.

Mr. Warrington, "Why, Doctor, your vita says right here that you got a three-year grant to do a study for the U.S. Department of Health entitled "Empiric Studies on the Emotional and Sexual Behavior of Male Rates in Three-Rat Combinations'."

The doctor nodded, "Ja, so?"

Mr. Warrington said, "Doctor, just how much money did you get over the three years from the United States Treasury for your studies of the romantic doings of male rats?"

The jury was convulsed. (Even Mousey smirked.)

Prissy jumped to his feet in spite of Ned's attempt to restrain him, "We object, Your Honor. These questions are not relevant and are highly improper!"

Mr. Warrington responded gently, "But, Your Honor, Mr. Priscott himself has just put the good doctor's vita in evidence. Surely, I am entitled to a few ratty questions, so to speak."

"Doctor, just how much money did you get over the three years from the United States Treasury for your studies of the romantic doings of male rats?"

The Court, attempting itself to cover its own amusement, ruled: "Objection overruled. You may proceed briefly, Mr. Warrington." (The Court could not resist a "funny" of its own.) "But, let's all remember this is not a trial about the emotional and sexual behavior of rats a number of years ago."

Mr. Warrington said, "Very well, Your Honor. Now, how much did you get to study and report on rat sex, doctor?"

The doctor was plainly a trifle rattled (so to speak) and finally said, "Maybe $15-20,000."

Mr. Warrington, "Per year, Doctor?"

Doctor, "Of course."

Mr. Warrington, "Well, Doctor, you certainly are a worthy successor of that former German rat doctor, the great Pied Piper of Hamlin."

But the Court plainly had had enough of Mr. Warrington's playing cat and mouse with the doctor and said, "Mr. Warrington, enough of this. Do you have any serious questions to put to this witness?"

Mr. Warrington continued, "Ah, yes, indeed I do, Your Honor. Doctor, bear with me. I know from your charges how valuable your time is. I am just a country lawyer from lower Delaware trying to do my job for my client, Jim, who really is sick and may be dying at this very moment. Okay? I can only afford about three minutes of your precious time. Thus, I will ask you only three questions. Please pay strict attention and answer my three questions truthfully." (The jury clearly knew what was coming: they became instantly attentive and sat forward on the edges of their seats.) The doctor looked puzzled: he instinctively smelled a rat but he did not know what was coming. Mr. Warrington paused for a moment and said, "Well now, Doctor, tell us all when was it that you last treated someone with a broken bone or you last stitched a kid up who had cut his leg, or treated a housewife who burned herself while cooking."

The doctor said, slightly uncomfortably: "Vell, now, let's see. That would have been way back ven I was in medical school back in Vienna in the 1920's, or perhaps ven I was a young intern in Bremen. But, I haven't done any of that ordinary sort of medicine in the last thirty years or so." Mr. Warrington said, "I see."

The doctor then turned directly to the Judge and said somewhat fiercely: "Your Honor, what's all this got to do with this case? Your Honor, I came all der way here to Wilmington to testify on traumatic neurosis, not common everyday household injuries or rats." Mistake, mistake, mistake! The jury was not impressed. The Court said impassively, "Doctor, please answer Mr. Warrington's questions."

Mr. Warrington said reflectively, "Oh, I see. You haven't treated visible injuries for some thirty years. You treat the invisible injuries?"

Prissy objected again to Ned's disguised dismay. The Curt overruled him. "This is cross-examination, Mr. Priscott."

Mr. Warrington: "Second question. Now, tell us, Doctor, has this lady improved at all in the year and a half she has been coming to you for treatment every single week for a half hour visit?"

The doctor paused nervously, obviously undecided which way to jump. He took off his glasses and polished them

with his white handkerchief. Finally, he said with fine German deliberation, "No, as a matter of fact, she has not improved at all. She has der permanent condition. She will need my help, guidance, and support for a very long time."

Mr. Warrington: "Third and final question, Doctor, what do you charge this unfortunate patient of yours for a half hour visit?"

The doctor said uncomfortably, "Well, my normal charge should be $200.00 per visit, but I am only charging her $180.00 per visit." Some of the jury looked shocked, incredulous, or disturbed.

Mr. Warrington said, "Well, Doctor, it would be a pity for you, I guess, if she ever got better, right?" Before the doctor could answer or Prissy sputter another objection, Mr. Warrington said, "Your Honor, that last question is withdrawn. No further questions, Herr Doctor, thank you."

In spite of Mr. Warrington's devastating "three questions", I worried about what effect this distinguished doctor would have on our Delaware jury. This Germanic psychiatrist had been pretty impressive. But Mr. Warrington had a medical ace up his sleeve: an elderly doctor of his own. It turned out that our doctor was a plain old fashioned American doctor who had grown up in Felton, Delaware. He had worked at the Delaware State Mental Hospital for some thirty-three years. I am sure some of the jury had had family members who had been treated and helped by our medical witness. Our doctor was of the conservative school: he didn't believe one damn bit in traumatic neurosis and said so. (I noticed that he also wore black boots that laced up to his ankles.) He testified under Mr. Warrington's questioning that traumatic neurosis was either self-induced or could be induced and indeed prolonged by doctors who claimed that an indefinite program of expensive weekly visits was necessary. He concluded by saying in his opinion the lady would be quite her old self again once this case was over, no matter what the outcome.

The testimony was all in by the end of the second day. We then had a prayer conference. Ned and Prissy handed the Court the original and two copies of carefully prepared prayers (or Requests to Charge) with citations to all the cases and authorities. Mr. Warrington told the Judge that the defendant would be quite content with the Court's usual charge on negligence, burden of proof, damages, consortium, credibility, etc. Thus, Ned

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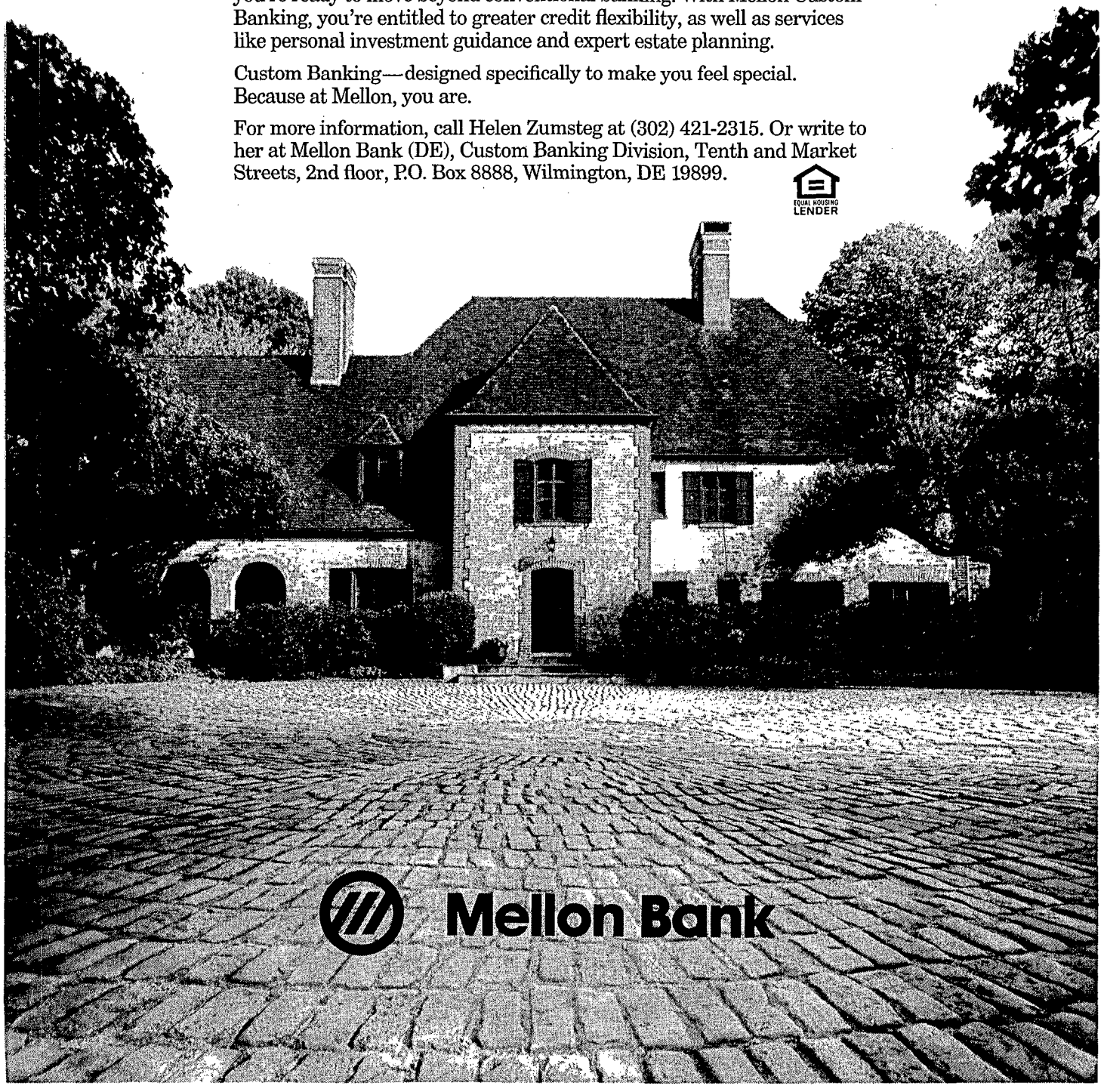
EQUAL HOUSING LENDER



and Prissy virtually wrote the Judge's charge. I told Mr Warrington that the plaintiffs had had the better of us on what was going to go into the Judge's charge to the jury. Mr. Warrington replied evenly, "Sonny Boy, maybe in the Harvard Law School classrooms the charge is important. But, I have found that a Delaware jury can't be expected to hear and understand the niceties of the law when it is read to them by the Judge, especially after lunch. Besides, most juries have too much common sense to decide a case based on what the Judge and the lawyers say the law is. The system works as well as it does for that very reason: the jury brings its collective sense of reality to bear on the case and decides that way, no matter what the Court says in its so-called charge. Thus, the jury comes out right in most cases. That is the real reason why we still need juries. Prayers and the charge are the legal folderol of lawyers and judges. The charge is the basis of 90% of the appeals. But, you and I, Sonny Boy, if we win this case in this connection, have got to make damn sure Ned and Prissy have no basis for an appeal, right?" I replied "Right", quite firmly. Privately, I thought Mr. Warrington had gone bonkers if he thought he was going to win this particular case.

Again, Mr. Warrington invited me up to the Brandywine Room for a little snort at the end of the day. As he sat down and lit up a Lucky with a kitchen match which he somehow managed to strike with his thumbnail, I asked Mr. Warrington how he thought the case was going. He replied noncommittally: "Okay, I guess." Actually, though Mr. Warrington had scored some counterpunches, the plaintiff's case had gone in like clockwork. Prissy had gone from one of Ned's big black notebooks to another, ticking off all the points. When asked, I told Mr. Warrington frankly that I thought we were going to get a good shellacking. I asked Mr. Warrington if he had recommended any settlement to the insurance company. Mr. Warrington replied: "No, Sonny Boy, of course, I did not. I am paid to defend cases. Any nincompoop can give the insurance company's money away in cases like this one. That just makes everybody's auto insurance premiums go up for no good reason at all. This lady doesn't have one goddamn thing wrong with her really. Of course, she probably imagines she does. She is encouraged in this fantasy by the whole litigation process and by that bearded disciple of Dr. Freud from Hartford."

He then went on: "Now, Billy Boy, you've been a real help to me in this case. But, I'm getting too old to do this sort of thing. It sort of wears me down. Could you prepare and give the closing argument to the jury? I may read a few pages of Thucydides this evening." I set my glass down. I thanked Mr. Warrington for the drink and for the honor he had done me in giving me the responsibility of the closing. I hurried back to the office. I wrote out the closing as carefully as I could. I memorized it. I then rehearsed it before my mirror. Indeed, I rehearsed it again the following morning before my father. My father was most doubtful that we had any chance at all. He gruffly allowed that my closing was reasonably adequate considering the poverty of what we had to go on both as to liability and damages. He said gloomily as I left, "Well, good luck, my boy."

I got to Court. It looked like Mr. Warrington had had a bad evening. He looked very old and tired. Ned bounced into Court, full of energy. Prissy minced in. His plaintiff lady looked like it was Christmas morning and she was going to go down to open her presents under the tree. (Even

Mr. Mousey looked quite perky: new Buick?) Mousey said good morning to me in a friendly sort of manner.

In due course, the Judge came on the Bench. He asked if we were ready to give our closings. We were. The jury was ushered in and seated. Prissy got up and nervously gave a closing in his high pitched voice from typed notes covering all the points in precise detail, making it exquisitely clear once again that there simply could be no doubt about liability. Of course, Prissy spent the bulk of his time pointing out the plaintiff's injuries and damages, including, of course, traumatic neurosis. He even mentioned Mr. Mousey's loss of consortium and the $179.50 for repairs to the Buick. He sat down. I then got up. I recited in a half apologetic manner my little closing. I skipped over liability, not even mentioning the damning admissions that Mousey had made as to both liability and damages in his deposition, which Prissy had himself introduced. I then talked a little bit about the lady's injuries and the damages, trying as best I could to minimize them. Then, I sat down.

Prissy then had the right to make a reply to my closing, though nothing that I had been able to say merited much by way of reply. but just as Prissy got to his feet, Mr. Warrington hoisted himself to his feet with the aid of his cane. He said to the Court, "Your Honor, my young friend here from Harvard Law School has done right well in closing to the jury, especially as this is his very first jury trial. I am proud to have been associated with him in this trial. However, it seems to me as an old attorney that he may have overlooked or not touched on a few things. I wonder if the Court and plaintiffs' counsel would do me the courtesy of permitting me to say just a few words at this point to the jury." The Court looked over at Mr. Carpenter and Mr. Priscott and said doubtfully, "Well, it's a little bit irregular to have two attorneys for the defendant participate in a closing, but if Mr. Carpenter and Mr. Priscott have no objection, then I don't see any reason why not." After conferring a moment with Mr. Priscott (who clearly was vehemently opposed), Mr. Carpenter stood up and said (gracious to a fault), "Why, of course, Your Honor, the plaintiffs have no objection, Your Honor." (Mistake, mistake, mistake!)

Mr. Warrington then walked slowly over in front of the jury, leaning on his gold headed cane. He began speaking in his great rasping booming voice. He reviewed the whole damn case right from start to finish. He emphasized the fact that Crazy Jim's deposition testimony showed that the accident had happened according to his wife, because Mousey had stopped suddenly for a yellow light and had let his foot slip off the brake when the Buick was rear ended. Mr. Warrington also drove home the point that the plaintiff herself had said she was not hurt at the scene and had walked out of the Emergency Room on her own two feet and had never come back. The jury and indeed everyone in the courtroom listened to him with rapt attention, mesmerized like mice before a swaying cobra. Mr. Warrington's gestures, his every inflection fascinated each and every person in that courtroom, including the Judge himself. About half an hour later, Mr. Warrington concluded in a swelling climax: "Members of the jury, like some of you, I am a plain sort of fellow. I was raised down in Sussex County where my dear old father, may he rest in peace, worked as a poor farmer. We were also the part owners of a little country general store near Hollyville. One Summer day, when I was about nine years, my old pa told me that when I was tending our

general store not just to take a quarter that a customer offered without carefully examining it to see if it was genuine. My father said, "Son, slip the quarter in the air. Listen to its ring; then, slap it down on the counter. If the quarter sings in the air and slaps down true, then put it in the register. However, if it has a phony lead sound and does not ring true when it hits the counter, why, then shove that counterfeit quarter right back to the customer." Well, members of the jury, in

Now that you have heard the case, does traumatic neurosis ring true to you? No, of course it certainly does not.

this traumatic neurosis case Billy Boy and I have sort of tried to flip this case in the air for you." He took his thumb and flipped an imaginary quarter high in the air. The jury's eyes watched the invisible coin spiral upward. They watched as Mr. Warrington slapped the invisible coin down on the counsel table, then hit the counsel table smartly with his cane. His red face was flushed with anger as he thundered like an Old Testament prophet, "Members of the jury, we've all had to sit there and listen to this traumatic neurosis clap-trap for three whole days. Like that slug that was offered to me so many years ago when I was a kid down in Sussex County, this case does not ring true. Now that you have heard the case, does traumatic neurosis ring true to you? No, of course it certainly does not. Since it does not ring true, send it back to the lady plaintiff and her phony German doctor." then, pausing and changing and softening his tone and manner, Mr. Warrington continued. "But, members of the jury, don't be harsh; don't be mean: be sympathetic and kindly. In spite of everything, perhaps you should allow the lady $100 for the shaking up she got in the accident. Also, you just might give her $131.00 for the out-of-pocket expenses for the medical expenses she really did pay. Throw in $179 for the

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Buick's dented bumper. But, don't, don't for pity sake encourage this sort of snake oil medicine by paying her and the Pied Piper from Hartford for the so-called traumatic neurosis or loss of consortium. Thank you." Ned smiled wanly during these last remarks. There was silence: you could have heard the proverbial pin drop. Then the jury (and indeed the bailiffs) sort of half broke into applause. Mr. Warrington walked slowly back to his seat and sat down, breathing heavily. (The Judge tapped his gavel but not forcefully — he too was still under the spell of Mr. Warrington's oratory.) Mr. Warrington mopped the perspiration from his red face with a soiled blue bandanna which he pulled from his back pocket. He said in an aside to me, "Now, that's what I get paid for." But, I was taken aback: why didn't Mr. Warrington go for broke and demand a defendants' verdict" (I certainly would have.)

Prissy had the right to reply and did so. but, after Mr. Warrington, it was difficult for Prissy to say anything at all, much less anything that would overcome Mr. Warrington's awesome performance.

The Court then gave its charge to the jury. As Mr. Warrington predicted, those jurymen who did not doze or nod looked glass-eyed. Prissy scribbled notes furiously. Mr. Warrington surreptitiously brought out a big black jackknife and pared his nail underneath the counsel table. I tried to pay attention as the Court droned on. Eventually, the jury filed out.

But, the jury was back in less than half an hour. They gave the lady $100.00 general damages plus $131.00, her medical expenses other than for the bills for the traumatic neurosis treatment. The jury did not give one red cent for pain and suffering, nor a penny for traumatic neurosis and for her traumatic neurosis doctor bills, just as Mr. Warrington suggested. They gave Mr. Mousey $171 for his dented bumper, but not a cent for consortium he had never lost. The Court smiled benignly, thanking the jury for its service. (The Court knew that the ends of justice had been served that day at least.)

When the jury had retired, Ned came right over and courteously congratulated Mr. Warrington (and me) on the trial and the result. Mr. Warrington replied to Ned's congratulations, "Fleet and Army perished from the face of the earth: nothing was saved, and of many who set out, few returned home. These were the events in Sicily." Ned replied somewhat ruefully, "The end of the Athenian expedition to Syracuse: Thucydides really knew how to describe a defeat." The lady plaintiff spat out, "Goddamn you, Mr. Warrington, you can go right straight to hell for all I care." Mr. Mousey suppressed another little smile behind his wife's big back. Prissy said nothing but scowled as he packed up the briefcases.

Mr. Warrington and I puffed on Lucky Strikes. Mr. Warrington lit our cigarettes with a blue kitchen match which he struck on the counsel table. When the "Athenians" left, he clapped me on the back and said, "Well, thanks, Sonny Boy, for all your assistance. You were a real help. Guess we showed them, right? Wish we had time for a victory drink or two." I asked Mr. Warrington, "Mr. Warrington, why didn't you ask the jury for a defendant's verdict?" Mr. Warrington winked and said, "No time to explain now, Sonny Boy. Ask your father — he'll know. Mr. Carpenter also knows. but, poor old Prissy is too damn dumb to figure that one out" (as indeed I was as well).

Mr. Warrington then left right away saying that he had a manslaughter case starting the next morning in Sussex County and that he had to prepare that case.

I heard later that Prissy became a law professor — "Those who can do, those who can't teach". Two or three years after the trial, Mousey wrote me a nice note from Florida right out of the blue. His wife had indeed discarded her neck collar on the drive back to Hartford and had never gone back to the doctor.

The Court then gave its charge to the jury. As Mr. Warrington predicted, those jurymen who did not doze or nod looked glass-eyed.

Mercifully for Mousey, she had died of a stroke about a year later. Mousey had since married a nice hairdresser and moved to Rondo Bay, Florida, where he was doing well, thank you.

Ned had uncharacteristically left his spiral notebook behind him on the counsel table. His last note said, "'Sonny Boy' never will be a threat, not a chip off the old block — a pebble maybe? But, never, never again agree to letting two lawyers participate in a closing, especially when one is Everett Warrington." Right, right, right!

I hurried back to our office, triumphant and wreathed in smiles, though I had precious little to do with this incredible result. To my father's profound irritation, I lit up a Lucky Strike. (I burned my thumb as I have many times since then trying to light a blue match with my thumbnail.) My father listened and somewhat grudgingly felicitated me for having participated in a trial with such a wonderful outcome. He warned me about hubris. Then I asked with real puzzlement why Mr. Warrington had not asked the jury for a defendant's verdict. My father replied, "What a goose you are! The reason is obvious. Since the jury has brought in a verdict for the plaintiffs, there is no way

Continued on page 46

Aa Bb Cc Dd Ee Ff Gg Hh Ii Jj Kk Ll M

Ghoti

DAVID A. DREXLER

Its recent prominence in the world of mega-mergers and corporate takeovers has perhaps obscured the fact that, as one of the few remaining American courts whose jurisdiction is exclusively equity, the Delaware Court of Chancery is the pigeon hole into which our judicial system stuffs most of the unusual controversies arising from the eccentricities of the human condition. Accidents, crimes, breaches of contract, divorce, and custody — the grist of most judicial mills — are all for other venues. It is not that Chancery does not have its own routine matters, but the tedium of day-to-day corporate disputes and trust accountings is occasionally relieved by the truly unusual — indeed oddball — disputes, which inevitably find their way to its door for resolution. One such matter is the story of Eugene Kelly and "Alphabet X".

It is a little remembered fact that during the 1930's, the Coca-Cola Company, long identified with Atlanta, had for tax reasons relocated its corporate headquarters to Wilmington. One of its executives was a dapper bachelor named Eugene Kelly, who after a tour of duty in Delaware ultimately became president of Coca-Cola of Canada. One of Kelly's memorable social achievements had been serving as an escort to Vivien Leigh at the world premiere of "Gone With The Wind".

After retiring in the 1950's, Kelly remained in Toronto pursuing his two principal passions — golf and dodging the tax collector. Living in Canada made it possible to claim that for U.S. tax purposes he was a non-resident. At the same time he spent enough time below the border to avoid untoward scrutiny by the Canadian fiscal authorities. Three or four times each year Kelly would make lengthy golfing visits to this country, hopping from country club to country club and calling upon friends in leisurely fashion as he worked his way south and back. His only family was a sister who, with her children and grandchildren, resided in Virginia. His relationship with his kin was warm and affectionate, but not intimate.

As Kelly chipped down the shortening fairways of life, he developed a new intellectual pursuit, orthography — the study of alphabets, — and, specifically, reform of the English alphabet. It has been through the years a source of mind-boggling vexation to many English-speaking people of an orderly frame of mind that the English alphabet is a disaster. In most Western languages, each symbol or combination of symbols of their written alphabet represents a singular, never-varying sound. This is true even in languages such as Italian, which share our alphabet. It is not true for English. Critics offer the example, "ghoti", as an arguably correct spelling for the denizens of the deep: "gh" as in "rough", "o" as in women and "ti" as in "motion". These critics postulate that many of the ills of civilized English-speaking society, including illiteracy and perhaps even ulcers, would be magically cured if we could only straighten out our damnable alphabet. There is an hypothesis that a disciplined alphabet might even have saved the British Empire.

Among the men of renown who have been driven up the wall by the chaotic state of the English alphabet were the great Irish playwright, George Bernard Shaw, and Colonel Robert McCormick, the late moss-backed publisher of the Chicago Tribune, whose affectation of "thoro" for "thorough" and "thru" for "through" was attributed by skeptical critics not so much to a yen for reform as an effort to scrimp on his ink bills. Shaw, in fact, plays an indirect role in Kelly's story.

How Kelly's interest in orthography materialized is a mystery. What is known is that he learned that the then foremost living authority on reform of the English alphabet was Sir James Pitman, K.B.E., of London. Sir James had come to the field by heredity. Combining a distinguished career in public service with private business, he was chairman of Pitman Publishing Company, whose founder, his grandfather, had been Sir Isaac Pitman, the inventor of an early form of shorthand, which is, of course, an exercise in creative orthography. The social benefits of alphabet reform had played a role in the earlier Pitman's pioneering efforts. In Victorian times, skill in Pitman Shorthand was promoted as a pathway to gainful employment for underprivileged girls, whose opportunities for advancement might have otherwise been limited to the cotton mills or the streets.

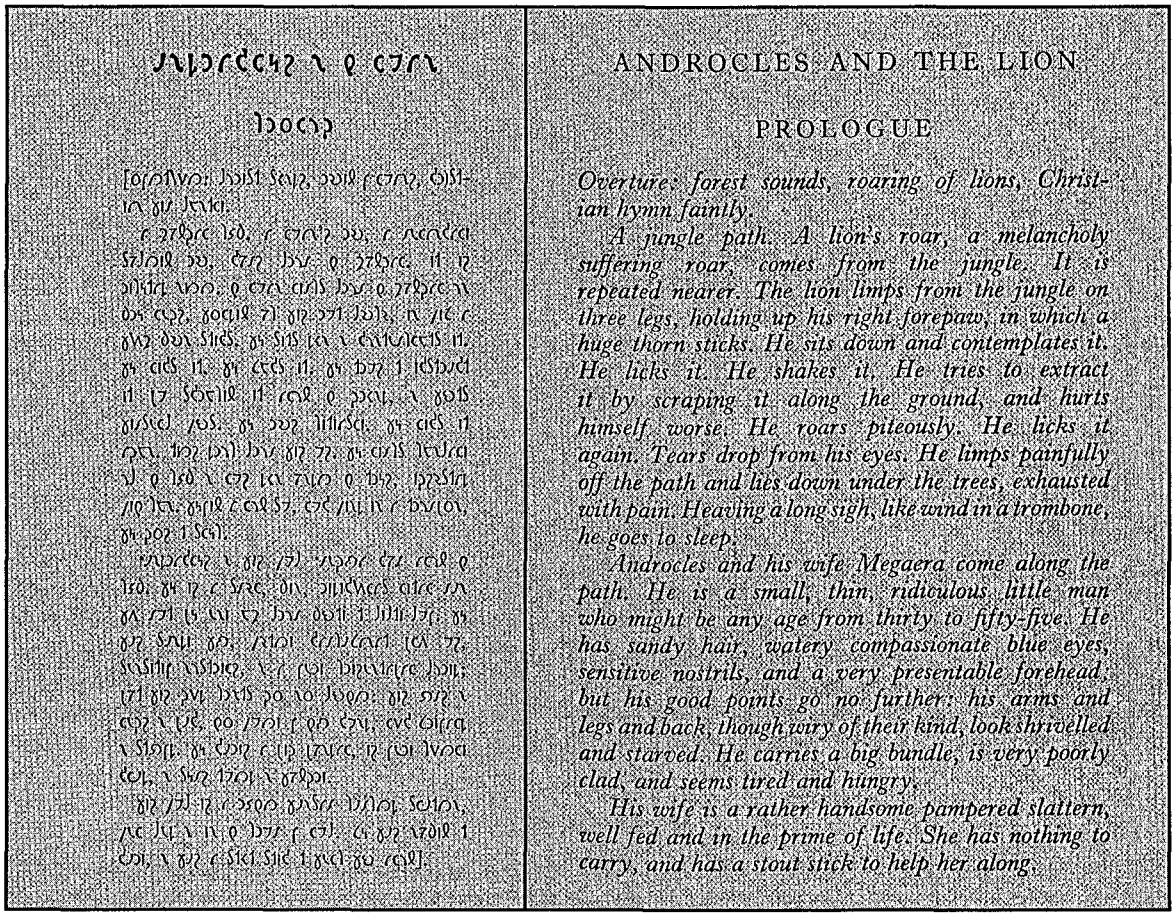
From his lodgings in Toronto Kelly initiated a correspondence with Pitman, in which they commiserated over the sad state of the English alphabet and speculated over the prospects for reform. After a while, Kelly's end of the dialogue took a more pointed direction. Kelly had a client, he informed Pitman, who was interested in providing some funding for the creation of a new English phonetic alphabet, which the client called "Alphabet X". Could Sir James provide Mr. Kelly's client with some appropriate language for use in his will which defined the objectives to be achieved by Alphabet X, (How many letters? What sounds should be represented by single symbols? What sounds by diphthongs? *Etc.*) and, moreover, did Sir James have any suggestions as to some person or organization that could be entrusted to pursue those objectives diligently?

Pitman had never met Kelly. However, his son, Michael, lived in Toronto, running the Canadian end of the family publishing business. The younger Pitman arranged a meeting and reported to his father that Kelly was an elderly fellow living in a single, book-filled room in a downtown Toronto men's club, which furnished him with meals and the other amenities of life. The Pitmans saw immediately through the conceit of the ostensible "client", who was obviously Kelly

himself. Forming a seat-of-the-pants judgment based on Kelly's lifestyle as Michael Pitman had observed it, Sir James concluded that what Kelly had in mind might be a contribution of $25,000 or so, a drop in the bucket for any genuine research in orthography. Based on this estimate, he recommended to Kelly that he consider designating the ita Foundation of New York, Inc. as the recipient of Mr. Kelly's client's gift.

ita (always in lower case without periods; orthographists also have a thing about capital letters and punctuation) stood for "Initial Teaching Alphabet". The Initial Teaching Alphabet was not Alphabet X; rather it was an existing specialized alphabet of approximately forty symbols then in use in which the conventional shapes of the vowels were physically altered slightly so to make each represent a unique sound. This "a" used in "apple" varied slightly in shape from the "a" in "make". However, to a person literate in English, each symbol was readily recognizable as an "a". Similarly, commonly used diphthongs such as "th" or "st", became a single symbol, generally recognizable, however, as "th" or "st" by conventional English-reading persons. The Initial Teaching Alphabet had been developed by educators as a device for teaching English literacy and had achieved considerable success in use both among adult illiterates and foreigners learning English as a second language. Literacy in ita, it was found, could be acquired quickly, and, once familiar with ita, a reader could be readily weaned to the conventional English alphabet.

Pitman Publishing Company was a major publisher of ita materials, and Sir James had founded the ita Foundation both in England and New York as a non-profit organization to promote its use. The ita itself had not been copyrighted. The Foundation's principal office was in London where Sir James was chairman. The New York Foundation was headed by Professor J. R. Block of Hofstra University on Long Island. The ita Foundation of New York was a small organization, funded largely by contributions from the London Foundation and from the New York branch of Pitman Publishing Company. Because Kelly was an American, Pitman felt that a bequest to it rather than to its London "parent" would more likely pass tax muster as a charitable contribution. He also suggested to Kelly that the gift specifically refer to promotion of the "Initial Teaching Alphabet" as a subsidiary objective of the



ANDROCLES AND THE LION

PROLOGUE

Overture: forest sounds, roaring of lions, Christian hymn faintly.

A jungle path. A lion's roar, a melancholy suffering roar, comes from the jungle. It is repeated nearer. The lion limps from the jungle on three legs, holding up his right forepaw, in which a huge thorn sticks. He sits down and contemplates it. He licks it. He shakes it. He tries to extract it by scraping it along the ground, and hurts himself worse. He roars piteously. He licks it again. Tears drop from his eyes. He limps painfully off the path and lies down under the trees, exhausted with pain. Heaving a long sigh, like wind in a trombone, he goes to sleep.

Androcles and his wife Megaera come along the path. He is a small, thin, ridiculous little man who might be any age from thirty to fifty-five. He has sandy hair, watery compassionate blue eyes, sensitive nostrils, and a very presentable forehead; but his good points go no further: his arms and legs and back, though wiry of their kind, look shrivelled and starved. He carries a big bundle, is very poorly clad, and seems tired and hungry.

His wife is a rather handsome pampered slattern, well fed and in the prime of life. She has nothing to carry, and has a stout stick to help her along.

Shaw's fund was used to publish a version of "Androcles and the Lion".

proposed gift, figuring that, even though Alphabet X was no doubt beyond Kelly's "client's" means, ita could put the money to good use in a related field.

During his annual summer golfing sojourn in 1969, Kelly stopped in at the offices of the Wilmington bank that had served as the custodian of his funds since his Wilmington days with Coca-Cola and arranged for a change in his testamentary dispositions. He executed documents substituting the ita Foundation of New York, Inc. for the prior beneficiary, referring in the documentation to the agreement he was about to make with it for development of Alphabet X.

This was the status of matters in the Fall of 1969 when Kelly, in the midst of preparations for his annual fall golfing tour to Georgia, died suddenly. A few days later, Professor Block received a phone call from a Delaware banker, who told him that the ita Foundation of New York, Inc., whose total budget for 1969 had been approximately $12,000, had been designated as the primary income beneficiary of the testamentary trust of one Eugene Kelly, the principal value of which was some $4.5 million, which gift was to be used in accordance with the agreement between Kelly and the Foundation to expand the Initial Teaching Alphabet and develop Alphabet X.

Professor Block had never heard of Eugene Kelly, of Alphabet X, or of the purported agreement.

Kelly's sudden demise had left the transaction in the air. However, within a few days it was learned that before his death Kelly had drafted and executed his proposed agreement, including Pitman's description of Alphabet X, and sent it to London for review Sir James had approved it, and the letter of approval had been in the mails back to Kelly when he died. It also became clear that Mr. Kelly's grandnieces and grandnephews had harbored some expectancy with respect to his estate and were surprised, to say the least, at the turn of events.

The inchoate nature of Kelly's agreement with the ita Foundation raised legal questions about the validity of the bequest. However, the more fundamental question was whether even a perfected gift for the purpose of creating a new English alphabet was valid.

Which brings the story back to George Bernard Shaw. While the courts are liberal in permitting testators to define the charitable endeavors to which their bequests are to be devoted, there are some limits, and bequests for purpos-

es which are obviously screwball or totally lacking in public benefit will be set aside when challenged. For example, gifts to establish a fund to prove the moon is made of green cheese or to turn the testator's residence into a museum for the permanent display of the donor's collection of carnival kewpie dolls, Niagara Falls pillows, and souvenir matchbooks will raise judicial eyebrows. English and American courts, invoking an ancient doctrine called *"cy pres"*, have assumed

Skill in shorthand was a pathway to gainful employment for underprivledged girls, who might have otherwise been limited to the cotton mills or the streets.

the power to channel bequests or other gifts of no apparent redeeming societal or scientific benefit into worthwhile charitable purposes, but the question of what has or has not redeeming social or scientific benefit can often be a knotty one.

The particular problem with Kelly's proposed Alphabet X was that Shaw at his death in the 1950's had left a bequest for much the same purpose, and an English chancellor, perhaps bristling at Shaw's overall reputation for iconoclasm, had found as a matter of law that a new English alphabet, however worthwhile, was an objective not realistically capable of achievement. He had disallowed Shaw's bequest under the *cy pres* concept. An appeal had been taken and, while on appeal, the dispute had been settled through an agreement under which Shaw's fund was to be utilized to develop a new alphabet which Penguin Books would use to publish a version of Shaw's "Androcles and the Lion". All of this had been accomplished. Indeed, Sir James Pitman had been one of those employed to create Shaw's alphabet. However, neither the existence of "Androcles and the Lion" in the Shavian alphabet nor subsequent judicial precedents casting doubts upon the efficacy of the *Shaw* holding[1] could obscure the

fact that the *only* reported judicial opinion directly on point was the declaration of the English Court of Chancery that a gift for the purposes of creating a new English alphabet was invalid.

The problems led to a filing by the Wilmington bank, as Kelly's trustee, of a petition for instructions as to what to do, and all parties to the controversy came to the Court of Chancery. Aligned on one side was Kelly's sister's family who, though affluent, viewed with some dismay the idea of their uncle's wealth passing to a bunch of professorial types for the purpose of reconstructing the alphabet. On the other side, technically, was the ita Foundation of New York. However, the most significant player was Sir James Pitman, who, given the unhappy judicial experience his ideas had earlier suffered at the hands of the English Court of Chancery, was prepared to defend personally and vigorously his lifelong crusade, namely, the efficacy of both the Initial Teaching Alphabet and proposed Alphabet X.

This case came on for trial in the court of then Vice Chancellor William Marvel in the Spring of 1971. It was a one-day hearing. The morning was spent clearing away the legal chaff surrounding the creation of the gift, Kelly's death, and the belated acceptance of Kelly's agreement by the ita Foundation.

The afternoon belonged to Sir James Pitman. Among his accomplishments had been twenty years of service as a Conservative member of Parliament with, among others, Sir Winston Churchill. Placed under oath, he was afforded the opportunity of offering as sworn testimony his oft-delivered lecture on the chaotic state of the English alphabet, and he waxed eloquent. Vice Chancellor Marvel, himself educated in England and a man whose sometime standoffish courtroom demeanor masked a wide-ranging intellectual curiosity, was utterly beguiled. After a few minutes, counsel could only sit back and listen as Sir James and the Vice chancellor exchanged thought-provoking ideas about the English language, its off-the-wall alphabet, and "why Johnny can't read". The session ended with the Vice Chancellor's comment on the record that it had been one of the most pleasurable experiences of his judicial career.

That was all there was to the litigation. Thereafter, the parties settled their differences. Sir James' charm had worked on Kelly's family. The hearing had cleared up some of the unanswered questions about

Kelly's intentions, and the family realized that, even if alphabet X was held to be unattainable, the stated secondary purpose of advancing the Initial Teaching Alphabet would undoubtedly sustain the gift. In all events, the most the family could possibly achieve would be to divert the funds to some other educational use by some other professorial types under the *cy pres* doctrine, a direction which would probably lead to further, less seemly litigation. Kelly's will had also provided

Bringing logic and order to man-made chaos is apparently too daunting an undertaking for the American psyche, no matter how commendable it appears in the abstact.

modest annuities to his grandnieces and nephews, and all of the parties saw a benefit in settling those gifts on a lump-sum basis. There was never a need for a judicial decision, a turn of events perhaps viewed with a tinge of regret by Vice Chancellor Marvel.

The ita Foundation was funded and exists to this date as a grant-making agency. Precisely what it is doing with Kelly's bequest is shrouded in mystery. A condition of the Delaware bank's agreement to become Kelly's trustee was that it would assume no oversight responsibility whatsoever for the ita Foundation, which remains headquartered in New York.

Professor Block, a psychologist by profession, was displaced by a full-time administrator in the mid-1970's, and inquiries as to the foundation's current activities have gone unanswered. For a number of years, the foundation continued its efforts to promote the Initial Teaching Alphabet as an educational tool particularly for use in teaching dyslectics and other learning-disabled persons to read. But, if one judges by the absence of recent references to it in academic publications, the use of ita has

lapsed almost completely, at least in the United States. Sir James Pitman died in 1988, a few days before a major symposium on the Initial Teaching Alphabet in London at which he was to be honored.

So far as can be ascertained, no credible applicants have applied to the foundation for grants to work on Alphabet X. So that, almost twenty-five years after Kelly's death, there is no realistic possibility of its coming to fruition in the foreseeable future. Orthographists will no doubt continue to wring their hands in despair. But, they might take comfort from the fact that other equally well-meaning folk have been trying for almost 150 years to get Americans to adopt the metric system, as cogent an idea as a new alphabet. Bringing logic and order to man-made chaos is apparently too daunting an undertaking for the American psyche, no matter how commendable it appears in the abstract.

There is, however, one dim light on the horizon. Given the appalling current levels of illiteracy, the growth of "sound bites" on television, and the burgeoning of computer graphics, there is some possibility that the end of English as a written language in America is in sight, to be replaced by a new form of pictorial hieroglyphics. This may not be the solution that Kelly had in mind, but then one won't have to worry ever again whether the correct spelling is "fish" or "ghoti".◆

1. In the 1960's, the English Courts had upheld a bequest by a gentleman named Bacon for the purpose of finding the lost manuscripts which would prove that Sir Francis Bacon had written Shakespeare's plays. Its holding was that an educational purpose — however nutty — was being served by the gift.

David A. Drexler

EDMOND M. IANNI

International Contracts for the Sale of Goods

A commercial transaction for the international sale of goods involves a variety of considerations.

International trade is regularly conducted in Delaware, Pennsylvania, Maryland and other neighboring states. Last year, the customs district encompassing Wilmington, Delaware City, Claymont, Philadelphia and other nearby areas exported $4.38 billion and imported $13.55 billion in goods.[1] Thus, approximately $18 billion of goods were traded internationally in this region in 1991 alone, and much of that trade occurred in Delaware. As the international trade of goods in this mid-Atlantic region is substantial I will address international sales contracts with specific reference to (a) the international commercial context in which this trade is conducted, (b) an overview of international contracts for the sale of goods, (c) two selected issues affecting these contracts (namely, governing law and force majeure) and (d) some practical considerations for their negotiation and drafting.

The International Commercial Context

Commercial transactions between parties from different countries are generally conducted in the context of different cultures, economies (e.g., market and nonmarket economies), legal systems, languages, currencies and governments. International commercial transactions for the sale of goods are often conducted by parties who lack thorough knowledge of, or have little or no direct contact with, each other. Intermediaries such as banks, freight forwarders, carriers and global institutions commonly provide international linkages between buyers and sellers of goods. In short, it is difficult to conduct a trading relationship at a distance in the absence of some form of intermediation and documentation.

Once a commercial transaction becomes "international," it may be regulated by not only the chosen domestic law of a particular country but also international treaties or conventions. For example, the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), which became effective in the United States on January 1, 1988, may regulate (depending on the parties and other circumstances) an international contract for the sale of goods from the United States. In addition, international institutions may be involved in the trading relationship. These institutions may include, for example, the Overseas Private Investment Corporation (a U.S. governmental corporation providing insurance and financial programs to protect against political and economic risks), the World Bank (a global lending agency) and the General Agreement on Tariffs and Trade (a multilateral framework governing certain trade practices and barriers).

Guideline No. 1: Know Thy Neighbor. In this context of international differences, distances and institutions, it is important that the contracting party know its "neighbor" in what has been termed the "global trading village." In other words, the contracting party (or its legal counsel) should become informed about not only the foreign party but also its legal, political, economic, and social environment. The business cus-

Illustration by Stephanie Shieldhouse

toms of the foreign country often are critical in the negotiation, structuring, and performance of the international commercial transaction. Thus, an understanding not only of the business interests and commercial objectives of the client, but also of this foreign context is important to negotiating and drafting the international sales contract.

Contracts play an essential role in international commerce. Common types of international commercial transactions involving contracts include the sales of goods, direct investments in a foreign venture (e.g., international joint ventures), foreign licensing of technology, foreign distributorships and agencies, and crossborder mergers and acquisitions. International commercial contracts are designed generally to (i) establish and define the trading relationship between contracting parties and (ii) provide the terms on which the relationship will be managed and fulfilled. Specifically, an international commercial contract should allocate responsibilities, liabilities, costs and rights between the contracting parties — that is, the risks and rewards of the trading relationship. By specifically defining the trading relationship and allocating responsibilities, liabilities, costs and rights, international commercial contracts provide certainty and predictability to the contracting parties, thereby establishing in writing their bargained expectations.

The International Sales Contract

An international sales transaction may involve several agreements and other documents. Agreements often include the contract between buyer and seller for the sale of goods (the chief contract), seller's agreement with a freight forwarder who makes arrangements for shipment of the goods, seller's contract with a carrier for the carriage of goods to the agreed destination point and a letter of credit representing the agreement of buyer's bank to pay the contract price to the seller's account upon presentation of required drafts and accompanying documents.[2] Other documents in the international sales transaction may include a bill of lading[3] evidencing title to and receipt of the goods, the invoice, a certificate of insurance covering the goods, a certificate of inspection of the goods and guarantees or other forms of credit support.[4] In a transaction for the international sale of goods, buyer and seller are principally concerned with delivery, payment and voyage of the goods. Accordingly, the international sales contract, the principal agreement in the transaction, should address these commercial terms and clearly allocate the parties' responsibilities and risks in connection with these issues.

F.O.B. (Free On Board), F.A.S. (Free Alongside), C.I.F. (Cost, Insurance and Freight) and C. & F. (Cost and Freight) are often described by textbook authors as common types of international sales "contracts." Although these shorthand terms have useful meanings (and sometimes the same term may have different meanings in different countries), they represent only certain terms of the contract. They do not signify all the commercial and other terms of an international sales contract. Nonetheless, as these terms are still commonly used today in international commerce, it is useful to examine them.

In international trade, where buyer and seller do business at a distance, contracts are essential.

F.O.B. (Free On Board)

"F.O.B." followed by a named vessel at the port of shipment (or named place of shipment) traditionally means that the goods will be "delivered" to buyer at that point; i.e., when the goods pass the shipping vessel's rail at the loading port. Under this traditional meaning of F.O.B., the risk of loss of the goods passes to buyer upon delivery, and buyer, therefore, is responsible to arrange for the transportation (and insurance, if any) of the goods from the point of shipment to its desired destination.[5] The F.O.B. price of the goods includes the cost of the goods delivered to the specified location.

Modern commercial practice in the United States, however, also uses "F.O.B." followed by the place of destination (rather than the place of shipment). In that case, the goods are not deemed "delivered" until they reach the destination point required by the international sales contract. The seller in that case, therefore, bears the risk of loss until the goods are delivered at the destination point.[6] In England, though, F.O.B. has the traditional meaning, F.O.B. place of shipment (or shipping vessel). Consequently, in an international sales contract between an American party and an English party, the term "F.O.B." may be ambiguous — unless, of course, the contract otherwise specifies the terms of delivery, allocation of the risk of loss, and who is responsible for arranging transportation of the goods.

Guideline No. 2: Silence is Not Golden. Use of F.O.B. in an international sales contract, without further explanation, may signify different meanings to the contracting parties — and to third parties interpreting the contract, such as courts and arbitrators. As a practical matter, parties to an international sales contract should not rely exclusively on shorthand trade terms such as "F.O.B." to express delivery and other terms of their bargain. Rather, the parties should expressly and unambiguously provide for delivery, risk of loss and other commercial terms in their contract. Alternatively, if they are unable to agree on such contractual provisions, they may consider incorporating established trade definitions (for example, the International Chamber of Commerce's Incoterms[7]) into their contract.

F.A.S. (Free Alongside)

F.A.S. followed by the name of the shipping vessel signifies that the goods are "delivered" when they are placed alongside the shipping vessel. It is therefore seller's responsibility to provide transportation of the goods alongside the shipping vessel (usually on the dock), but it is buyer's responsibility to arrange for their carriage thenceforth.[8] The F.A.S. price of the goods includes all costs of the goods delivered alongside the shipping vessel.

Unlike F.O.B. shipping vessel, F.A.S. shipping vessel passes the risk of loss to buyer before the goods are placed on the ship. Thus, for example, if the goods are damaged or destroyed after they have been placed on the dock but before they have been loaded on the ship, it is buyer's liability in an F.A.S. transaction and seller's liability in an F.O.B. arrangement.

C.I.F. (Cost, Insurance and Freight)

C.I.F. followed by the name of the destination point (like F.O.B. shipping point) signifies that delivery occurs when the goods are placed on the shipping vessel at the loading port rather than at the time the goods arrive at the agreed destination point. This feature of the C.I.F. arrangement is often misunder-

stood. Specifying the destination point after the C.I.F. term does not mean that delivery of the goods and transfer of the risk of loss are made at that point. Rather, like the F.O.B. shipping point arrangement, the C.I.F. destination point arrangement passes the risk of loss to buyer when the goods pass the shipping vessel's rail at the loading point. The C.I.F. price of the goods, however, is the cost of the goods, insurance and freight to the specified destination point.

C.I.F. destination point usually means that seller is responsible to arrange, at its expense, transportation of the goods to the destination point and insurance covering the goods during their carriage. Seller, however, is obligated to provide only minimum insurance coverage against buyer's risks of loss of or damage to the cargo during carriage. Minimum cargo insurance does not cover special risks such as theft or breakage of the goods, unless the contracting parties otherwise agree. Furthermore, seller's cost of the cargo insurance in a C.I.F. transaction is, in effect, passed on to buyer in the price of the goods. Thus, in practice, buyer may choose a C. & F. arrangement (i.e., where seller is not obligated to provide insurance on the goods during their carriage) rather than C.I.F. when buyer is able to obtain cargo insurance at a cost lower than seller's (or is able to purchase greater insurance coverage at an acceptable cost).

Seller in a C.I.F. sale customarily must deliver to buyer a bill of lading, insurance policy (or certificate of insurance), invoice and other documents covering the goods. Upon tender of the required documents, buyer is obligated to pay (or make arrangements for timely payment of) the contract price for the goods — whether or not the goods have been delivered to the agreed destination point. In other words, buyer is obligated to pay for the goods when the required documents, rather than the goods, are delivered. Buyer, therefore, does not have the right to inspect the goods before payment is required in the customary C.I.F. sale.

Guideline No. 3: Cover Your Risks. As buyer is required to pay the contract price upon presentation of the required documents (rather than upon arrival of the goods at the destination point) in a C.I.F. sale, buyer may want to require in the international sales contract that seller provide a certificate of inspection from an acceptable third-party inspector certifying that the goods conform in quality and quantity to the contractual specifications. Such an arrangement illustrates two themes of international commercial transactions: reliable third-party intermediaries may be used by contracting parties to protect against certain risks; and the international sales contract is an effective way of providing risk-covering measures at the beginning of the trading relationship.

C. & F. (Cost and Freight)

C. & F. followed by the named destination point signifies that the goods are delivered when they are placed on the shipping vessel at the loading point, as in the F.O.B. shipping vessel and C.I.F. destination point cases. The risk of loss accordingly passes to buyer upon loading the goods at the origination point rather than the destination point.[9] Although buyer assumes the risk of loss during the goods' voyage, seller is responsible to provide, at its expense, transportation of the goods to the destination point. As in the C.I.F. arrangement, seller must deliver to buyer the bill of lading and other required documents covering the goods, and buyer must pay the contract price for the goods upon delivery of those documents. The C. & F. price of the goods is the cost of the goods plus freight charges to the specified destination point.

Contracting parties generally may allocate the risks of their international sales transaction as they see fit. Although the risk of loss passes to buyer at the loading point in the traditional C. & F., C.I.F. and F.O.B. cases, buyer may consider a different allocation of that risk. In those cases, after the goods have been loaded on the shipping vessel, buyer assumes the risk of loss during their voyage. Buyer, however, may want to share more of that risk with seller. Accordingly, buyer may try to negotiate the transfer of the risk of loss at some point between the loading and destination points (e.g., at a specified meridian on the high seas), thereby allocating that risk more evenly between buyer and seller.

In short, the international sales contract should be tailored to suit the client's commercial objectives and to provide appropriate legal protection for the client during the course of the contractual trading relationship. In order to accomplish these goals and to avoid uncertainties, it is better to provide clearly in the contract for the responsibilities of delivery, payment, price and voyage than to rely on bare acronyms (such as F.O.B.) — especially considering that foreign courts and arbitrators in the international context

may interpret such shorthand terms unfavorably to your client.

Governing Law

Freedom of Contract and Need for Choice of Law

In common law and civil law countries, contracting parties generally may select (as a term of the contract) the law to be applied to their contract and the issues arising therefrom.[10] Contracting parties may choose among optional legal rules (e.g., the CISG) but may not exclude the applicability of mandatory legal rules (e.g., criminal, tax and property laws). Having chosen an optional legal framework, the contracting parties generally may derogate from those chosen legal rules in their international sales contract. The parties' choice of law generally will be upheld unless: (a) a reasonable or substantial relation does not exist between (i) the state of the chosen law and (ii) the parties or their transaction; or (b) it violates an applicable, compelling public policy; or (c) the consent of one or both of the contracting parties was fraudulently or mistakenly obtained.[11]

If contracting parties to an international commercial transaction do not select an applicable law, the legal standards applicable to their contractual disputes may be uncertain and possibly conflicting. The absence of uniform international rules for conflicts of laws and the disparate conflict-of-law doctrines of different countries (and of different jurisdictions in a single country such as the United States) underscore the practical need for buyer and seller to provide expressly in their international sales contract the law to govern their transaction.

United Nations Convention on Contracts for the International Sale of Goods (CISG)

The CISG, a multilateral treaty among thirty-four countries,[12] is one optional body of international commercial law that contracting parties may choose. The United States ratified the CISG on December 11, 1986, and it became effective in the United States on January 1, 1988. Very little judicial gloss on the CISG by United States courts has been made.

Subject to express exclusions, the CISG, as United States law, applies to international contracts for the sale of goods between parties whose places of business are in different states which are party to the CISG.[13] Contracting parties, however, may exclude the application of the CISG or derogate from its provisions.[14] In practice, a contracting party should determine whether the CISG would be applicable to its anticipated international contract. For example, the CISG would not apply to a contract between a U.S. party and a party whose place of business is in England because England is not a party to the CISG. If the CISG would be applicable to the anticipated contract, the contracting parties then must decide whether to (a) exclude its applicability, (b) have it apply wholesale or (c) choose to apply but derogate from it in their contract.

The CISG has been described as generally consistent with the substantive approach of the Uniform Commercial Code.[15] Although the CISG is substantively similar to the U.C.C., they are not the same. For example, the CISG differs from the common law and U.C.C. on certain issues relating to the formation of a contract. The CISG (Article 14(2)) treats general advertisements as merely invitations to make offers whereas the common law treats them as acceptable offers. A reply to an offer which purports to be an acceptance but contains additional, material terms would be a rejection of the offer and constitute a counter- offer under Article 19(1) of the CISG but would be an acceptance, with certain exceptions, under Section 2-

207(1) of the U.C.C.

Guideline No. 4: Rules are Meant to be Spoken. To avoid the ambiguities of the CISG, the uncertainties arising from conflicting laws and the application of laws unfavorable to the party's interests, the contracting party (or its legal counsel) should compare optional substantive laws (with a view toward their effect on the international commercial transaction) and determine which set of legal rules would suit its interests best.

Generally contracting parties may allocate the risks of their international sales as they see fit.

Here, use of foreign legal counsel for a substantive comparison of laws is usually helpful and often necessary. Once the contracting party identifies the law favorable to its interests, it should attempt to expressly choose it as the applicable law of its international sales contract.

Force Majeure

Force majeure refers to an event usually beyond the control of the contracting parties which interrupts, and excuses, contractual performance. Force majeure clauses in contracts traditionally have been confined to natural events such as earthquakes, floods, hurricanes and other "acts of God." In modern commercial practice, it is common to include events other than "acts of God" in force majeure clauses. For example, a force majeure clause may be designed to cover political events (such as wars and blockades), economic events (such as strikes and boycotts) and social events (such as civil disturbances). Too often, however, force majeure clauses are regarded as boilerplate and not negotiated by the contracting parties.

Guideline No. 5: The Force Should Be With You. Force majeure clauses, like other significant terms of the international sales contract, should be negotiated to protect the contracting party from unacceptable risks. These clauses are important to the allocation of risks between contracting parties and should be considered negotiable. If the parties fail to provide for force majeure in their contract, they may face the uncertain application of a legal doctrine to their situation by an unsympathetic court.

Risks arising from a party's unique circumstances should be considered. For example, in a petroleum import transaction, buyer's ability to receive and store petroleum at its marine terminal is critical to its commercial purpose. That buyer may attempt to have included in the force majeure clause of its import contract events beyond its control causing inability to receive the imported petroleum at such terminal. An exporter of petroleum, on the other hand, may want to include in the force majeure clause of its export contract events beyond its control causing it to lose its petroleum supply source for its exports.

Force majeure clauses commonly provide that an event of force majeure merely suspends contractual performance by the affected party for so long as the event or its effects continue, but does not terminate the contract itself. While the contracting parties generally are free to choose whether force majeure will sus-

pend contractual performance or terminate the contract itself, it is important to analyze the force majeure clause in consideration of the party's particular commercial objectives and acceptable levels of risk. Thus, for example, a buyer who purchases goods for resale to its customers may not want a force majeure event affecting seller's supply source to excuse seller from delivering the goods. Rather, a buyer in that case would want seller to be obligated by the terms of their contract to either allocate the goods during a shortage caused by such an event or obtain an alternative supply of the goods (e.g., the spot market) to fulfill seller's contractual obligation to buyer.

In addition to a list of specific excusing events, a contracting party should consider including a "catchall" provision in the force majeure clause. An example of such a catchall is: " . . . or any other cause or impediment whatsoever (whether or not of the same class or kind as those set forth hereinabove) beyond its reasonable control and which could not be overcome by reasonable due diligence." Such a provision defines excusing events as those which are not only beyond the reasonable control of the affected party but also reasonably insurmountable. Use of a reasonableness standard in the force majeure clause is often acceptable to both buyer and seller because they regard it as objective and fair.

Sometimes narrow exceptions are expressly provided in the force majeure clause. For example, seller in an international sales contract usually does not want force majeure to excuse buyer's payment obligations under the contract. Thus, seller may want the force majeure clause to expressly exclude such payment obligations (e.g., "Except for the obligation of buyer to make payment hereunder, ..."). Of course, the ability to successfully negotiate one-sided provisions usually depends on the contracting party's relative bargaining power.

Guideline No. 6: What Is Good For the Goose Is Good For The Gander. The alert buyer will flag such an exception and argue instead for mutuality. As a compromise, the contracting parties may agree to omit any such one-sided exceptions from the force majeure clause, thereby having it apply equally to both buyer and seller.[16] This bespeaks the practice that contract negotiation often leads to mutuality of certain terms, i.e., that they apply uniformly to both buyer and seller. Uniform applicability of key contractual terms (such as

force majeure) also is important to maintain goodwill and a trusting relationship between the contracting parties.

Commercial Impracticability and Frustration Doctrines

Common law has developed doctrines of commercial impracticability and frustration. These doctrines generally excuse contractual performance where (a) an event necessitates a method of performance fundamentally different from what the contracting parties contemplated and (b) it would be unjust to require the affected party to perform.[17] These doctrines are theoretically amorphous, and their judicial application is not entirely certain or predictable. In fact, courts rarely apply these doctrines to excuse contractual performance. As one commentator noted, English courts today are reluctant to apply these doctrines, and American courts are even more reluctant to excuse contractual performance on this doctrinal basis.18 Thus, if contracting parties want to allow certain events to excuse contractual performance, they should negotiate an appropriate force majeure clause rather than rely on legal doctrines of commercial impracticability and frustration, which are reluctantly applied.

A commercial transaction for the international sale of goods involves a variety of "international" considerations. An understanding of the foreign party, its business customs and the legal-political-social framework in which it operates is often important to negotiating and structuring the transaction. In addition, international institutions and treaties, such as the CISG, may play a role in the transaction. Moreover, because of international differences and distances, the involvement of reliable third parties such as banks, carriers and inspectors is usually necessary. In this international commercial context where buyer and seller conduct business at a distance and rely on intermediaries, contracts are essential.

The international sales contract is key to this type of transaction. It should define clearly the trading relationship between the parties by allocating the responsibilities, liabilities, costs and rights associated with the international sales transaction. Although shorthand trade terms such as F.O.B., F.A.S., C.I.F. and C. & F. may be useful, they should not be relied on exclusively. Those terms, as explained above, have only limited meanings and may have different meanings in different countries.

They do not themselves express all the commercial and other terms of an international sales contract.

Accordingly, the contract specifically should provide for delivery, risk of loss, payment and transportation of the goods or at least incorporate a set of trade terms, such as the Incoterms, which clearly define these issues. Contracting parties also should specify the law to govern their contract and transaction. Although the CISG may be applicable, the parties may derogate from its terms or choose not to have it apply. In any event, legal counsel should compare optional laws to determine which is most favorable to the client's commercial objectives and overall business interests.

Contracting parties also should consider negotiating a force majeure clause to manage certain risks which may affect their transaction. They may consider tailoring the force majeure clause to their particular circumstances and providing some form of catchall. In short, contracting parties (or their legal counsel) should ensure that the "international" context has been properly considered and that the international sales contract clearly provides for the commercial and other terms of their transaction.

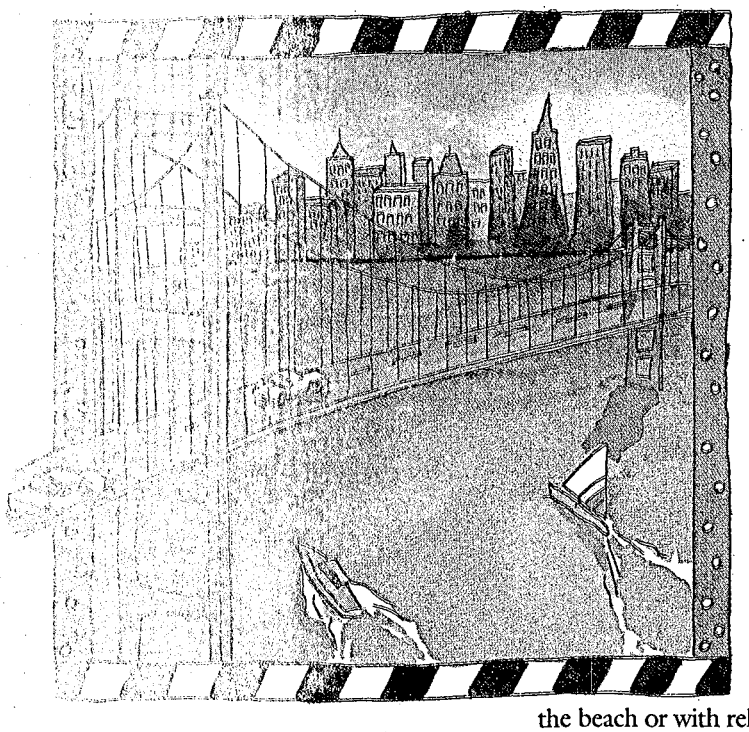
*This article is adapted from the author's presentation at the Bar Association symposium on International Commercial Transactions which was held last year at the Hotel duPont in Wilmington, Delaware. ◆

Constraints of space make it impossible to include the author's extensive footnotes, but the numbers to these footnotes appear. The full footnotes will be available upon request to the offices of this magazine

Edmond Ianni

BRUCE M. STARGATT

Time Travel: Now is Better



It was 30 years ago that I went to my first ABA meeting. My curriculum vitae was short. I had finished law school in 1954, married Barbara, been admitted to practice in New York and Washington, worked for a few months for a law firm in Washington, gotten called into the Air Force, and served with MATS in Dover for two years, during which I had taken the Delaware bar. We liked Delaware. Instead of going back to Washington, I got a job practicing law in Wilmington.

In those early years our idea of a vacation was to pile the kids (we had three between 1955 and 1961) into the car for a weekend at the beach or with relatives. Barbara and I had not been away together overnight without the children since the first was born.

Then in 1962 I caught the announcement that the annual meeting of the ABA would be that August in San Francisco. San Francisco. City of song and story. Neither my wife nor I had been west of the Mississippi. We were at last in a position and a mood to get away without the kids. Perfect.

Even now I can remember the anticipation of it. And, as vividly, the disappointment.

I should have had an inkling early on. When the hotel list came in from the ABA, we had immediately returned the appropriate form. We asked for a reservation at the Fairmont, which was then reputed to be a fine hotel (it still is), and was the site of some of the meetings. When the confirmation came back from the ABA it was not for the Fairmont, but for a hotel (motel?) called the Jack Tarr.

If I were asked now where the Jack Tarr is, or even *if* it is, I couldn't answer. But when we arrived in San Francisco that August of 1962, the Jack Tarr was a long way from the Fairmont, and a longer way from the nice accommodations we expected. That got us off to a bad start with the ABA. From there on it went down hill.

The meetings were dull. There were hospitality suites which were inhospitable to the uninvited, and cocktail parties which were open only to the select. The attendees appeared to us to be cliquish and unfriendly. The highlight of the convention was a dinner Barbara and I had with my (very) senior partner, H. Albert Young, and his lovely wife Anne. The Youngs could not have been more warm and gracious, as were they always. But we ended up feeling that it was a long way to go for a pleasant dinner.

The discomfort of that convention in San Francisco 30 years ago is with me even now. Wanting to get involved, but not knowing how. Feeling like a stranger in a strange land. Wondering why the hell I had even gone.

Nomination to House of Delegates

Over my years at the bar, before and after 1962, I took an active interest in the Delaware State Bar Association. But I did not attend another ABA meeting from 1962 to 1992. Part of it was the press of business. Most of it was the lin-

The discomfort of that convention in San Francisco 30 years ago is with me even now.

Illustration by Bonnie Matthews

gering after-taste of the ABA 1962 meeting in San Francisco.

Then, last year, Harvey Rubenstein, with the concurrence of the Executive Committee, asked me to serve as the DSBA representative to the ABA House of Delegates. It was a position I wanted. The opening had come about as a result of Howard Handelman's elevation to the ABA's governing body, the important and prestigious Board of Governors. Victor Battaglia, who had been DSBA delegate, moved up to Howard's position as state delegate. That left Victor's chair empty. I had gotten interested when a lawyer for whom I had high regard, Bill Paul of Oklahoma, told me he aspired to the ABA presidency. I thought that by becoming a delegate I could help him. That turned out to be naive. I now know, but did not know then, that the nominating committee of the House of Delegates picks the candidates. The House rubberstamps them. So my rekindled interest in the ABA was for what turned out to be the wrong reason! But the die was cast, and I had actually enjoyed my overnight stay at the House's midyear meeting during February in Dallas. Now it was August and here we were again, 30 years later, going to our second San Francisco ABA meeting.

Pebble Beach (Pause for a travelogue)

South of San Francisco is a great golf resort called Pebble Beach, where the U.S. Open was played in July. We are both golfers, Barbara a very good one (14 handicap) and I a mediocrity (22 handicap). (I was going to write "a happy mediocrity." But why lie?) We decided to stop at Pebble Beach before going up to San Francisco.

Pebble Beach is located on the Monterey Peninsula, two or three hours south of San Francisco. If you're in that part of the country, don't deprive yourself of the thrill of seeing it. The Monterey Peninsula is a gift of nature. Like the rest of the Central and Northern California coast, the ocean is deep blue, boiling and heaving with small and then large waves. The jut of the land into the ocean has bent the trees and brush to the wind, giving it a wild, enchanted look. Beauty to captivate the eye and enrich the soul.

The Pebble Beach complex itself is a large, commercial resort. Greens fees, while possibly a bargain to Japanese tourists who have a yen for the game, are stratospheric by our standards. Despite the cost, there is no shortage of golfers in line to tee off. To get a starting time, advance notice is required. Our travel agent had arranged for a golf package, which, while not cheap, was less exorbitant than would have been the cost had we paid separately for accommodations and greens fees. Our room was very large and comfortable. It featured a working fireplace, with wood, which was replenished every night. (If you go, take a heavy sweater as the nights and early mornings, even in August, are quite cool.)

The golf course was not as intimidating as we had thought. We had watched on TV as Tom Kite chopped his way to victory a few weeks earlier through knee-high rough in gale winds. By the time we arrived the lion was tranquilized. The rough was of normal proportions, and the wind a gentle breeze. As is often the case at resort golf courses, the golf was very slow. The round at Pebble Beach took close to 6 hours. (We also played a round at Spanish Bay, a few miles north on the Peninsula. It was less crowded.) We were in no rush. The stop-and-go pace gave us a chance to appreciate the magnificent environment.

I am indifferent to squeals of pain by persons obliged to pay premiums to insure themselves against the consequences of their own negligence.

A dining recommendation. One of the nights we were at Pebble Beach I asked at the front desk to recommend a place for dinner. We were interested in a restaurant with good food and, at least as important, a view of the ocean. A reservation was made for us at a restaurant called Rocky Point, about 25 minutes South of Pebble Beach on Route One, the road that runs along the coast. It was perfect. The restaurant is on a hill steeply sloped above the ocean, so that with a window table the illusion is of ship-board dining. And the food was hearty, and well-portioned. Not nouvelle California, those pretty little plates which seem to say "Look at me, a carrot and pea." If you're in the neighborhood and can reserve a window table, give Rocky Point a chance.

San Francisco - ABA 1992

After three nights at Pebble Beach, we drove back up to San Francisco. Over the years since 1962 we have been to San Francisco many times, and have stayed at most of the good hotels. This time we had made reservations at the Clift. It is an older hotel, run by the Four Seasons chain. We decided to stay there because it's a block away from the Hilton, the huge hotel at which the convention was headquartered, and which we were therefore content to avoid.

You will not be surprised to learn that we felt more comfortable at the ABA meeting in 1992 than we did in 1962. It was not simply that we had graduated from the Jack Tarr. All attendees got plastic badges with their names imprinted. On my badge were stripes proving that I was a member of the House of Delegates and Past President of my State Bar Association (like an old soldier's campaign ribbons). Whether it was because these credentials were on display, because I was thirty years older, or because I was myself more comfortable and secure, or because the ABA had itself changed, the atmosphere seemed friendlier.

I've briefly reported in *In Re:** about the highlights of the business at the House of Delegates meeting. This, in a less organized way, will provide some added impressions:

Women and the ABA. When I went to the ABA meeting in 1962 there were no women lawyers visible to me. This is because there were not many women lawyers, and those few who did attend probably felt as left out as I did.

Now women are active at every level of the national bar, and it seems a certainty that very soon the ABA will have a female president. Nowhere was the emerging leadership of women lawyers more apparent than in the debate over whether the ABA should take a pro choice stance on the abortion issue. There were great arguments made by both men and women lawyers on both sides of the debate. But the women lawyers favoring the right to choose combined the skills of superb advocates with a special passion.

Perhaps the same forces which have opened the profession to women have made the ABA more liberal. My impression of the ABA in 1962 was that it was

dominated by Herbert Hoover Republicans. In the years since the pendulum has swung back toward center, or maybe a little left. The result is, I think, that the ABA has become more representative of the bar generally.

CLE. Anyone attending an ABA annual meeting will be taken by the diversity and quality of the CLE programs. Because the House of Delegates overlapped some of the CLE sessions, I got to attend only three sessions.

"The Trial of the Century" was a splendidly conceived mock trial of Lee Harvey Oswald. I had time only to watch the openings, which were remarkable for the graphic recreation by computer of the fateful motorcade.

A second program I attended was entitled "Accountants' Liability," and dealt with the explosion in awards against accountants. While I am generally indifferent to squeals of pain by persons obliged to pay premiums to insure themselves against the consequences of their own negligence, there clearly is more than a cry-wolf crisis on the horizon for accounting professionals. Auditors for public companies are at growing risk to creditors, stockholders, and regulators for huge amounts, such that insurance companies are increasingly reluctant to underwrite the risk. As with other liability crises, this will run its course. but not without considerable pain and dislocation to the accounting profession.

The last of the CLE sessions I attended was entitled "Value Billing." The panel consisted of lawyers from large and small firms, and in-house corporate counsel. The consensus was the alternatives to hourly rate billing need to be found. Hourly rate charging, the argument goes, is conducive to time wasting, and worse.

When I started to practice law in 1954 with a "large" 16 person firm in Washington, D.C. (then Arnold, Fortas and Porter, now Arnold & Porter), hourly billing was at its very beginning stages. Time was kept on little slips of paper, stored in the file, and totaled on adding machine tape when the time came to bill. I'm hazy on this, but I think that $50 an hour was the top rate, and mine was $20 per hour. (While this seems low, the firm didn't lose money on me. I was earning $5,000 a year, which for us then was an ample living.)

When I came to Wilmington in 1956 to work for H. Albert Young, we had no hourly cases. While things might have been different at the "big" firms (the largest of which, as I remember, had eight lawyers), for the small practitioners hourly charging was not the rule. The more usual practice was to say to the client, "Here's what I did for you. This is what I think's a fair fee. This is why. What do you think?" My impression is that many small businesses and individuals still prefer that approach. The ordinary person is repelled by the idea that there is a $20 charge (say) for every 10 minutes which a lawyer records as attributable to a matter.

One of the "Value Billing" suggestions was that to better service their clients, even large corporate clients, should be using their ingenuity to develop and propose contingent fees. And ideas were suggested as to how this could even be done on the defense side. To my ear this "new" proposal is laced with subtle irony. When I started to practice, the "establishment" bar looked down on the plaintiffs' personal injury lawyers. One of the reasons was the contingent fee arrangement, which allows for rewards to the successful lawyer. Now, it seems, corporate America is beginning to understand that a contingent fee contract, which puts the lawyer at risk, tends better to assure the economical handling of a case. The wheel turns.

"Laws Miserables"

There is an extraordinary phenomenon obvious to every visitor returning to San Francisco after a few years' absence. The hills get steeper. I remember the first time I walked the six

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HANDS ON MY TIME*

Like most lawyers I know, time is much on my mind. I keep track of it in the office, watch it to be sure I'm not late (or too early) for a plane or train, and tremble at the thought of getting to an argument after the Court takes the bench.

While it's true that all time pieces are trying to say the same thing, I have an informed prejudice about what I wear on my wrist.

First, while time is a mysterious dimension, of this I am sure: Time is circular. We rise, sleep, and rise again. As the earth turns, so does the clock. I'm uncomfortable in the presence of a digital time piece. It defines the moment, but does not remind of what went before or what is to come. Give me a round watch, with hands that rotate.

Second, I'm baffled as to why anyone would wear a wind-up watch. Quartz watches require virtually no attention, and keep perfect time.

Finally, I find the thought of spending more than $20 or $30 for a watch much like passing up a generic aspirin for the privilege of paying three times as much for Bayer. I wear a Timex wrist watch. It costs around $20 ($25 minus a 20% discount) at Happy Harry's. It has a clean, white face with black hands and large numbers that are easy to read even without the magnification of my bifocals. It looks fine, and works as well as a watch can work. If something were to happen to it on the racquet ball court, or golf course, the loss would cause no grief. Why does anyone feel the need to spend hundreds of dollars for upscale names (like Rolex)? Do you?

*With apologies to the estate of Vincent Youmans

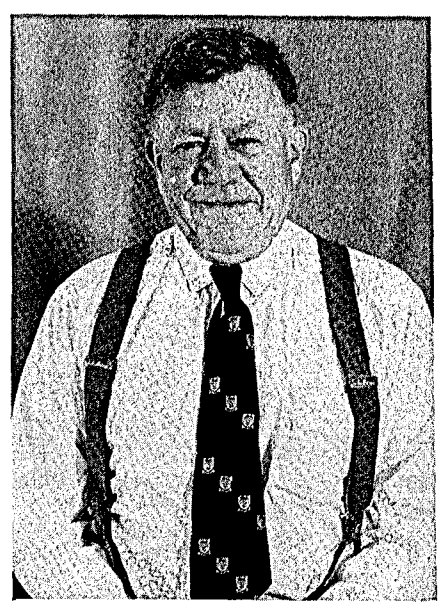
PRICKETT

Continued from page 25

that Ned and Mr. Priscott can appeal, can they?" Of course: that explained Ned's wan smile.

Then my father said, "Well, and what did you really learn?" I recounted my glowing admiration for Mr. Warrington's tour de force: he had asked only nine questions in cross-examination and won the case by a rousing closing. My father smiled: "I do not wonder that you are impressed with Everett's virtuoso style. As I told you, there is no one at the Delaware Bar who is better with a jury, as you yourself have just seen. You have, however, failed to understand Everett's crafty strategy. Prissy, as Everett called Mr. Priscott, himself ruined the case for the plaintiffs. Also, Everett got you to scrap endlessly with Mr. Priscott over the details. Ned never had a chance to control the case. I assure you Ned would never have handled the case ineptly if he had not had to defer to his out-of-town counsel whose case it was. But, young man, nine times out of ten, and particularly in substantial litigation, Ned's careful preparation on the law and the facts will pay off. Ned's six black notebooks with the tabs that you now deride because you were present when Ned's colleague managed to lose a small inconsequential personal injury case evidences an orderly approach and system that will succeed in substantial litigation in the years to come. Before you go and try to win a jury trial by asking only nine questions or banging on counsel tables with a rule during closing, think carefully about the contrasting styles you have just seen. Mark my words: Ned will surely become one of Delaware's ablest trial lawyers. Everett Warrington is certainly a colorful trial lawyer from Sussex County. But, unfortunately, Everett Warrington has wasted his gifts and his life: he will leave no lasting mark in Delaware legal history. He tries cases like this one mostly for his own fun and to pass the time away. No, indeed, you would do far better to model yourself on Ned than to try to ape Everett's firehouse style. Also, you would do well to read Thucydides so that you know what the reference to 'an expedition to Syracuse' means the next time it comes up."

As always, my father was right. (In those days, we did as we were told.) I have tried ineffectually to follow in Ned's footsteps. Thus, I have indeed read Thucydides with pleasure and edification. But out of affectionate respect and remembrance for Everett F. Warrington, Esquire, I sometimes wear red suspenders on Tuesdays. ◆



William Prickett

STARGATT

Continued from page 43

or eight blocks from Union Square up Mason Street to Nob Hill. The incline was no more than a pleasant exercise. This August it was more like an aerobic challenge.

Barbara and I puffed our way up the hill to get to the Mark Hopkins for the performance of a show called "Laws Miserables," put on by the Lawyers' Club of San Francisco. It was worth the work. The Lawyers Club, drawing on members, staff, and families, has created and staged original productions since 1967. (I knew I'd like the humor when I read in the program the name of their first show, "Maim.") This year's production consisted of a series of 27 original numbers, voice accompanied by piano, poking fun at judges, lawyers, and the administration of justice. The subjects included a judicial retention election ("Retain Judge Thompson"), lawyer advertising ("Looking for a Lawyer") and dress ("Fashion Statement"). The show played to a full house. It was deflating to judicial and lawyer pretention, without being malevolent. It was the sort of show a group of Delaware lawyers would, I think, have the talent and wit to produce, had they only the time and desire.

"Laws Miserables" in a sense captured my impression of the 1992 meeting. It was irreverent, and entertaining. I don't think anything like it would have been a welcome part of the program of the 1962 convention. The good old days were not all that good. Now is better.

* The monthly put out by the Delaware State Bar Association. ◆

Bruce M. Stargatt

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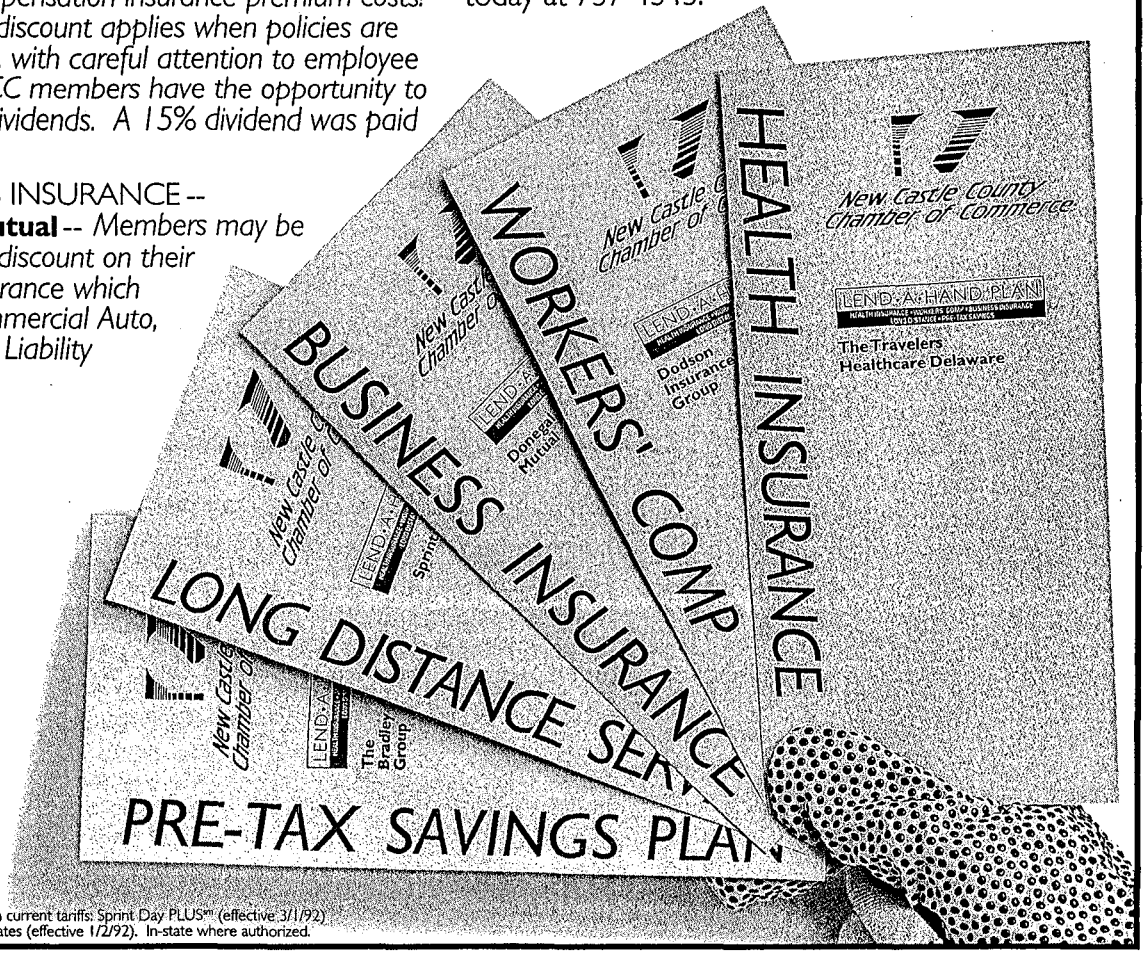

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