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THE FUNCTION OF COURTS IN MAINTAINING CONSTITUTIONAL GOVERNMENT AND INDIVIDUAL FREEDOM*

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Constitutional government and individual freedom are the foundation stones of the American heritage. They are the issues vitally at stake in the world-wide struggle of prolonged duration in which we are currently engaged. This conflict involves two opposing and utterly irreconcilable ways of life, two opposing and utterly irreconcilable ideologies — the one championing and the other repudiating constitutional government and individual freedom. It is therefore fitting to consider the function of the courts in maintaining these bulwarks of the American way of life.

I. MAINTAINING CONSTITUTIONAL GOVERNMENT

Two related problems are presented, the maintenance, first of constitutional government, and, second, of individual freedom. I shall consider them in this order.

What, in the first place, is the function of the courts in maintaining constitutional government? The recent historic decision of the Supreme Court of the United States in *The Youngstown Sheet and Tube Co., et al., v. Sawyer*,[1] affirming the ruling of Judge Pine, which directed the return of the steel industry to its owners, dramatically focused the nation's attention on this far-reaching issue.

Constitutional government has been termed "a government of laws and not of men." In his concurring opinion in *United States v. United Mine Workers of America*,[2] Mr. Justice Frankfurter said:

> The historic phrase "a government of laws and not of men" epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. "A government of laws and not of men" was the rejection in positive terms of rule by fiat, *whether by the fiat of governmental or private power.* Every act of government may be challenged by an appeal to law, as finally pronounced by this Court.

Constitutional government, may I add, involves two essential principles. It must be representative. But representative government is not always constitutional; it may be absolute. To be constitutional government must also be limited. Without such limitations constitutional government cannot exist.

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*An address delivered before the Conference of the Tenth Judicial Circuit in Denver July 18, 1952.

[1] ..... U. S. ....., ... S. C. ..... (1952).

[2] 330 U. S. 258, 307 (1947).

At a time when totalitarianism dominates wide areas of the world, the maintenance of constitutional government is of fundamental importance.

Doctrine of Separation of Powers

You are all familiar with the actions of our Founding Fathers in establishing constitutional government in the newly born republic. "They were setting up," in the words of Charles P. Curtis, Jr.,[3] "a new government to be endowed by the thirteen states and their people with a number of designated and limited powers, naming them and stating explicitly that all not named were retained by the states and the pepole. What is more," Mr. Curtis continues,

> the first eight amendments added a Bill of Rights which forbade the new government to do certain things. It had a floor, below which the powers retained by the states were not to be disturbed. It had a ceiling, above which the essential and inalienable rights of individuals were not to be infringed. Then, too, . . . the new government was divided vertically into three departments, Congress, who were to make all the new laws, the President, who was to execute them, and the Court, who were to fit the new laws into that great body of law and apply them by the process of litigation to the hard particular case.

The intent of our Constitutional Fathers is well expressed by Mr. Justice Brandeis in his famous dissent in *Myers v. United States*:[4]

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

And Mr. Justice Frankfurter said in his concurring opinion in the steel case:[5]

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.

Such then, in broad strokes, was the constitutional government created by our Founding Fathers — a federal government

[3] LIONS UNDER THE THRONE, p. 9 (1947).
[4] 272 U. S. 52, 293 (1926).
[5] *Supra*, n. 1.

endowed by the several states with delegated powers, in which, as every school boy knows, the tripartite division of governmental power was guaranteed by an elaborate system of checks and balances. To understand the whys and the wherefores, one need but refer to the "continuous controversy over the royal prerogative in England of the seventeenth century."

In this connection I quote from the lucid statement in the brief for the plaintiff steel companies in the recent case before the Supreme Court, p. 30:

> The present claim of the Executive to an inherent right to do whatever he considers necessary for what he views as the common good—without consulting the legislature and without any authority under law — is not a new claim. It is precisely that which was made more than three centuries ago by James I of England when he claimed for himself the right to make law by proclamation and asserted that it was treason to maintain that the King was under the law. It is precisely the claim for which Charles I lost his life and James II his throne. Most importantly, it is precisely the claim for which George III lost his American colonies. In short, it was the continued effort of the English Crown to exercise unfettered prerogative that culminated in the War of Independence and the establishment of the United States under the form of government provided in the Constitution.

It was, you will recall, the passage of the English Bill of Rights in 1688 that established finally that the Crown was under the law. Preceding the American Revolution the colonists had their own struggle with George III and his ministers. During this struggle they "appealed constantly to their fundamental rights as Englishmen which had been bestowed by Magna Carta and the English Bill of Rights."

To quote again from the plaintiffs' brief in the Supreme Court, p. 37:

> It was against this background that the Founding Fathers drafted our Constitution. The constitutional debates, . . . reveal with graphic clarity that the delegates had firmly in mind the recent excesses of the English Crown against the Colonies and the long and costly struggle that had been waged by the people of England . . . before the royal power had been circumscribed and placed under the law.

The Role of the Judiciary

What then is the function of the courts in maintaining this constitutional framework? The Constitution gives no clear cut and definite answer. Article III provides that: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Original as well as appellate jurisdiction, the latter

"under such regulations as the Congress shall make" is conferred upon the Court. And Article VI provides that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land, and judges in every state shall be bound thereby." The Fathers of the Constitution did seek to secure the complete independence of the judiciary — the judges could not be removed by the President, nor could their salaries be diminished by Congress. They did, however, leave unsettled what that eminent authority on the American Constitution, Viscount Bryce, termed "a joint in the court's armour" — the number of judges on the Supreme Court, a weakness of which we heard plenty a decade and a half ago. Much is left unsaid in the Constitution concerning the position of the Supreme Court and other tribunals, and perhaps with a nicety of wisdom. Mr. Curtis [6] observes that "The Convention left the Court to its own devices." And that eminent authority, Mr. Justice Holmes said in his dissent in *Springer v. Philippine Islands:*[7] "The great ordinances of the Constitution do not establish and divide fields of black and white."

Thus a delicate and a difficult problem was presented. The words of Mr. Justice Frankfurter in his concurring opinion in the recent steel case are much to the point:

> A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The resolution of the function of the courts has resulted from such "knowledge and wisdom and self-discipline."

A long-time colleague at Columbia, Professor Herbert Wechsler, has written in his article entitled "Stone and The Constitution": [8]

> For whatever the importance of the Supreme Court as the ultimate voice in the ordinary areas of judicial administration, its dominant role inheres in its special position in the American constitutional scheme. Within the range of contested litigation the court sits not alone to expound the law that it is within the province of Congress to change but also, as Chief Justice Stone has put it, to "determine the boundaries and distribution of power under a federal constitutional system."

Much has taken place since the drafting of the Constitution.

Let us return to Professor Wechsler's clear statement: [9] "The special function of the Court in the resolution of constitutional controversies has encountered attack from the beginning, but a cen-

[6] LIONS UNDER THE THRONE, p. 13 (1947).
[7] 277 U. S. 189, 209 (1928).
[8] COL. L. REV. 764, 765 (1946).
[9] *Ibid.*

tury and a half of polemic inspired no uncertainty on the issue in the mind of Mr. Stone." The late Chief Justice wrote in *Law and Its Administration:*[10] "A study of the Federal Constitution and the conditions leading to its enactment" leaves "no reasonable doubt that the doctrine of Marbury against Madison is legally and historically sound." In that famous case,[11] Chief Justice Marshall established the duty of the courts to review action of the government and to keep it within constitutional bounds. That great biographer of the early Chief Justice, Albert J. Beveridge, III, has written that John Marshall thus "set up a landmark in American history so high that all the future could take bearing from it, so enduring that all the shocks the nation was to endure could not overturn it." [12]

In 1929 we find Mr. Stone saying: [13] The "history of the judicial function before the adoption of the Constitution, the language of the Constitution itself in Article VI and the long arm of judicial decision, leave that question no longer debatable." On another occasion the late Chief Justice wrote: [14]

> To have formulated in written language a separation of governmental powers into state and national with specific limitations upon each, as the supreme law of the land, and to have denied to the courts the power to apply that law in the settlement of controversies pending before them, would have been not only contrary to the experience of the colonies but would have involved the performance of the functions of government in confusion and in conflicts of authority which would have imperiled the success of the great experiment.

In his article on "The Common Law in the United States," [15] Mr. Stone wrote:

> Government of a continent of forty-eight states, each making and administering its own laws, together with a central government of limited powers, set over them for limited purposes, making and administering laws of its own within the same territory [has been made] practicable and tolerable [only because] its framework has admitted of the solution of the clashing demands of the interests it has created by judicial decision in conformity to the methods of the common law.

Limitations on Power of Judiciary

But Chief Justice Stone cautioned,[16] that the judicial review "brought to the judicial function a task of peculiar gravity and

[10] Stone, LAW AND ITS ADMINISTRATION, p. 135 (1915).
[11] 1 Cranch 137 (1803).
[12] Beveridge, JOHN MARSHALL, p. 142.
[13] Stone, FIFTY YEARS WORK OF THE UNITED STATES SUPREME COURT, 8 ORE. L. REV. 248, 260 (1929).
[14] Stone, LAW AND ITS ADMINISTRATION, pp. 137-138 (1915).
[15] Stone, THE COMMON LAW IN THE UNITED STATES, 50 HARV. L. REV. 22 (1936).
[16] *Id.* at 21.

delicacy." Recall the words of Mr. Justice Frankfurter in the recent steel case: [17]

> The framers . . . did not make the judiciary the overseer of government. . . . Religious adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public.

Mr. Justice Frankfurter continued:

> The path of duty for this court . . . lies in the opposite direction. Due regard for the implications of the distribution of powers in our Constitution and for the nature of the judicial process as the ultimate authority in interpreting the Constitution, has not only confined the Court within the narrow domain of appropriate adjudication. . . . A basic rule is the duty of the Court not to pass on a constitutional issue at all, however narrowly it may be confined, if the case may, as a matter of intellectual honesty, be decided without even considering delicate problems of power under the Constitution. It ought to be, but apparently is not a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them.

Our judicial system thus exercises a tremendous power and responsibility in maintaining our constitutional government. And thank God it does! The recent exercise of this power in the steel case is lasting proof thereof. The nation eagerly awaited its decision; it respectfully followed its mandate. It will long stand as a landmark of constitutional government. The Executive, in an hour of great crisis and with the welfare of the nation at heart, was prevented from seizing the steel industry, from establishing a precedent that would permit further and greater invasions of individual freedom. The President had based his action on the war powers declaring that an "emergency" existed and that he was the "steward" of the general welfare. Recall the words of Mr. Justice Douglas in this case: "All executive power — from the reign of ancient kings to the rule of modern dictators — has the outward appearance of efficiency." And Mr. Justice Jackson reminded us that:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

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[17] *Supra*, n. 1.

Mr. Justice Frankfurter said in the steel case: "The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government. But in doing so we should be wary and humble. Such is the teaching of this Court's role in the history of the country."

But how has the Court attained this high stature? Mr. Curtis explains it thus: [18] "The clue to the court's power lies partly in the need that the job be done, and partly in the way the Court has done the job." And Chief Justice Stone in his dissent in *United States v. Butler*,[19] pointed out two guiding principles of decision:

> One is that the courts are concerned only with the power to enact statutes, not with their wisdom. The other is that, while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.

Mr. Curtis has pointed out,[20] that

> Time after time, dozens of times, Congress bowed its belief that a measure was constitutional before the Court's belief that it was not, and forsook what it wanted to do out of respect for the Court's opinion that it should not do it. The income tax is but one example. The prevention of child labor is another. Twice Congress proposed to stop it. Twice the Court said no, once in 1916, again in 1922. Congress was willing to wait until the National Labor Relations Act was held valid in 1937.

Federalism, one of the court's functions, calls for consummate statesmanship. But nothing explicit is said about federalism in the Constitution. Rather it is implicit. The powers of the federal government are delegated. All the other powers are reserved by the Tenth Amendment to the states and to the people. The Court had to keep the equipoise. The Court threw its weight against the national threat of the New Deal. When the nation was young, it was the other way about. "It had then to be protected from the powers of the several states."

The Court has done a splendid job. It handled with "knowledge and wisdom and self-discipline" the trying problems of the New Deal. It has recognized that the Constitution is not an immutable document, that its Framers did not provide for stagnation. The courts stand today as the greatest power in maintaining constitutional government.

II. Maintaining Individual Freedom

I turn now to the function of the courts in maintaining individual liberty. Individual liberty, the freedom and dignity of the

[18] Lions Under the Throne, p. 46 (1947).
[19] 297 U. S. 1, 78-79 (1936).
[20] Lions Under the Throne, pp. 45-46 (1947).

individual, underlie the global conflict in which we are engaged. In this era of severe tension, of crisis and hysteria it is imperative that they be preserved inviolate; that in seeking security we do not abandon our precious freedoms. A fairly recent editorial in *The Washington Post* wisely said "that course . . . would be burning down the house of the American way of life in order to get at the rats in it."

May I recall the statement of Mr. Justice Jackson in 1951, in his lecture entitled "Wartime Security and Liberty Under Law," that "the dangers to our liberties . . . are those that we create among ourselves." And may I also bring to your attention the words of General Dwight D. Eisenhower: "All our freedoms are a single bundle, all must be secure if any is to be preserved."

Balance Needed Between Law and Freedom

Mr. Justice Jackson in the lecture to which I have referred has said:

> The essence of liberty is the rule of law. Only when impersonal forces which we know as law are strong enough to restrain both official action and action by private groups is there real personal liberty. Liberty is not mere absence of restraint, it is not a spontaneous product of majority rule, it is not achieved merely by lifting formerly depressed classes to power, it is not the inevitable by-product of technological advance. Freedom is achieved only by a complex but just structure of rules of law, impersonally and dispassionately enforced against both rulers and the governed.

And the late Mr. Justice Rutledge wrote:[21] "I believe in law. At the same time I believe in freedom. And I know that each of these things may destroy the other. But I know too that, without both, neither can long endure." Without constitutional government, individual liberty cannot exist. The steel case was therefore a magnificent victory for the cause of freedom.

The first ten Amendments to the Constitution contain in substance the legal structure of our liberties. These amendments fall into two general classes — some tell how the judicial process shall be managed; others place limitations on the powers of the Congress or the Executive. These, like the Declaration of Independence and the Constitution, date from the eighteenth century. But their ideology is still alive here. They must be read in connection with the fourteenth Amendment.

In regard to the function of the court in maintaining individual liberty, Mr. Curtis[22] has written:

> [this] is different and harder and calls for something more than statesmanship, almost priestcraft. There is certainly something about it that is either religious in a large meas-

[21] Rutledge, A DECLARATION OF LEGAL FAITH, p. 6 (1947).
[22] LIONS UNDER THE THRONE, pp. 50-51 (1947).

> ure or akin to religion. . . . We have not only a government to which some things have been wholly denied. We recognize certain natural inherent rights in man as an individual which we believe no government, municipal, state, or national, may abridge or infringe. Who is going to see to it? This is the other job we expect the Court to do.

In these trying days we would, I think all agree with the statement of Mr. Justice Jackson in the lecture to which I have referred: "I suppose the American people, on whose eternal vigilance liberty ultimately depends, are all well agreed that what they want of the courts is that they both preserve liberty and protect security, finding ways to reconcile the two needs so that we do not lose our heritage in defending it." This is their greatest challenge.

No civilized nation has come closer to the ultimate of freedom for man than the United States. No other nation has achieved a better balance between liberty and authority. But today constitutional government and individual liberty stand at the cross-roads. They face serious external and internal challenge.

The danger to individual freedom is from within as well as without. Fanatical partisans in our midst support our only probable future enemy. We know too well that these misguided persons could in strategic places give valuable aid and comfort to the potential enemy. But, as Mr. Justice Jackson has so clearly pointed out, "probably much greater than their capacity for actual harm is their capacity to arouse fears and hatreds among us. A secret conspiratorial group, even if not very potent itself, can goad the government into striking blindly and fiercely at all suspects in a manner inconsistent with our normal ideas of liberty." I need merely to recall the Civil War and World Wars I and II.

Over the years legal controversy has resulted from those Amendments that primarily are restraints upon the Legislative or the Executive branches of government. For many years the chief sources of litigation were the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, applied as limitations on substantive law. In recent years litigation has succeeded more frequently by invoking the First Amendment. This amendement is now applied to prohibit abridgment by states, cities, school boards and local courts of freedom of speech, press, assembly and religion.

Mr. Justice Jackson has written in the lecture already cited:

> Whatever the defects of our constitutional system of legal liberties, however much the generality of their statement permits uncertain applications and varying interpretations, it can hardly be questioned that they have guided the courts in normal times to a protection of the rights of the individual against the mass, and the citizen against the government, that compares favorably with the conditions of any nation.

But attempts are still being made by the misguided, the unin-

structed and the perverted upon our liberties. Illustrations would be superfluous. And we are not living in normal times.

You are all familiar with the decision in *Gitlow v. New York*,[23] which established that the due process clause of the Fourteenth Amendment imposed some limitations on the states in relation to assembly or speech. The Court said: [24] "Freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." In the words of Mr. Curtis,[25] the Court thus extended "its jurisdiction over personal liberties so that it could reach at will any violation, not only by Congress, but by any governmental action anywhere in the United States, by State, City or town, by anyone acting in an official capacity."

Responsibility of Judiciary

It is the courts upon whom falls the important duty of reconciling the conflicting claims of the States in the enforcement of their criminal laws and the rights of the individual to liberty under the law. A delicate and difficult task is imposed. It must be exercised with "knowledge and wisdom and self-discipline" if individual liberty is to continue. In the recent case of *Rochin v. California*,[26] Mr. Justice Frankfurter said:

> The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions. . . . To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed state of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges. . . . To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude, that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Of all the rights protected by the first ten Amendments that of free speech is most important for guarding our liberties. I shall not discuss the doctrine of "preferred" and "deferred" rights. Fortunately the courts have been particularly concerned about freedom of speech and have taken the view as enunciated by Mr. Justice

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[23] 268 U. S. 652 (1925).
[24] *Id.* at 666.
[25] LIONS UNDER THE THRONE, p. 266 (1947).
[26] ..... U. S. ....., 72 S. C. 205 (1952).

Holmes in *Schenck v. United States*,[27] and in *United States v. Abrams*,[28] that there must be a "clear and present danger" of serious harm to the body politic arising from the speech sought to be prohibited. It is heartening for the prospect of freedom that the Supreme Court has recently declared in *Terminiello v. Chicago*,[29] " . . . a function of free speech under our system of government is to invite dispute." This is in keeping with the tradition of the Court and its concern for its peacetime prerogatives being assumed by the executive under the guise of war powers.

Because of the prominence of the Supreme Court we are prone to forget the significant role of the lower Federal Courts and of the State tribunals. But it is these courts which set the tone of law enforcement and of the public view concerning constitutionality and individual freedom. If our lower courts are intimidated into a denial of these rights and freedoms, then this protective bulwark will crumble and tyranny run rampant in our midst. Dictatorship and statism of some form would surely follow. It is my firm belief that the courts can, if they act swiftly and firmly when key issues arise, be the best protection of our fundamental freedoms. There are those who grant the position of the courts as a bulwark of freedom but nonetheless feel they are not equipped to act in an emergency. I certainly cannot agree with Zechariah Chafee, Jr., when he writes [30] that "The nine Justices on the Supreme Court can only lock the door after the Liberty Bell is stolen."

The success of the courts in protecting rights, however, is largely dependent upon two factors: public opinion and the legal profession. The particular responsibility of the legal profession in the service of the courts is too often forgotten. It is perhaps more than a witticism to say that ours is a government of "lawyers, not of men." There is the elementary fact that lawyers are officers of the courts and that both prosecution and defense counsels have their first responsibility to the supreme law of the land, hence the Constitution. The highest ethics and the highest courage must be part of the legal profession operating on this principle, particularly when the view may be unpopular. Yet fortunately the history of the profession presents an inspiring record of those who have acted constantly in accordance with these concepts of freedom and constitutionality.

So long as the courts can and do continue to function in the manner indicated, so long as they do this with the approbation of public opinion and the support of the legal profession, we can stop the menace of statism and in these difficult times of international tension, prevent the growth of the garrison state. The courts have a body of magnificent principles for guarding freedom, and these taken with recent precedents can and must be the bulwark of our freedom.

[27] 249 U. S. 47 (1919).
[28] 250 U. S. 616 (1919).
[29] 337 U. S. 1, 4 (1949).
[30] Chafee, FREE SPEECH IN THE UNITED STATES, p. 80 (1941).

GIVE YOUR SUPPORT

Constitutional Amendment No. 1 will be on the ballot at the November general election. The provisions of this amendment are non-controversial and its passage will cure three ills now afflicting our judicial department. The measure has the support of both political parties, is endorsed by the District Judges Association and County Judges Association and is a small but vitally important part of the judicial reform program of the Colorado Bar Association. We know of no opposition to this measure but energetic support must be given by every lawyer and lover of good government to secure an affirmative vote on the amendment and to overcome the strong tendency of electors to vote against all constitutional changes. Take time to explain the purposes of this amendment to every voter whenever and wherever an opportunity presents itself. The text of Constitutional Amendment No. 1 and an explanation of its provisions may be found at page 338 of this issue of *Dicta.*

PAMPHLETS ARE NOW AVAILABLE

The Colorado Bar Association has reprinted a large quantity of two pamphlets which have enjoyed tremendous popularity in the past. These pamphlets entitled *"Wills, their importance and why you should have one"* and *"Joint Tenancy—is it wise for me?"* were prepared by the Public Relations Committee of the State Association. Lawyers and banks have mailed these with their monthly statements and have offered them to clients by displays on counters and waiting room tables with very satisfactory results. Any desired quantity of these pamphlets will be mailed without charge to lawyers or to banks able to make a proper distribution of them. The name of any bank distributing these pamphlets will be imprinted upon them for a slight charge. Requests for quantities or samples should be sent to the Secretary of the Colorado Bar Association, 702 Midland Savings Building, Denver 2, Colorado.

CHOATE'S PROVING A NEGATIVE

"A vessel insured was prohibited from going north of the Okhotsh Sea. Within a year, the duration of the policy, she was burned north of the sea proper, but south of some of the sea's gulfs. Defendant set up no loss within the policy. On the way to the court house Choate said to his associates, as they were for plaintiff: 'Why should we prove we were not north of that sea; why not let them prove we were?' The mate was put on to prove the burning within the year and state the loss. No cross-examination followed and the plaintiff rested. The defendant was dumfounded; had no witnesses ready; expected plaintiff would consume two days in proving he was within the terms of the policy. The case lasted an hour and Choate won."—*Reed's Conduct of Litigation,* 150.