

4-1937

## Was Coke Right?

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### Recommended Citation

Seasongood, Murray (1937) "Was Coke Right?," *Indiana Law Journal*: Vol. 12 : Iss. 4 , Article 1.  
Available at: <https://www.repository.law.indiana.edu/ilj/vol12/iss4/1>

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# INDIANA LAW JOURNAL

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Volume XII

APRIL, 1937

Number 4

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## WAS COKE RIGHT?

By MURRAY SEASONGOOD\*

I am very grateful for the kind introduction of your president, and I don't know but what you are going to be in the situation of the woman who went to her lawyer for a divorce. The lawyer said, "You have to have some reason for this divorce. What is the reason you want it?"

"Well," she replied, "that man, he done been over-recommended to me."

All I can say is, your president has referred to the snow and ice, and I hope that my speech won't end your meeting with a frost.

I have talked a number of times in Indianapolis and I am afraid I may now be in the situation of the master of a vessel who was examining a candidate for the position of mate and he said, "What would you do if the wind was blowing twenty-five miles an hour?"

"I would throw out an anchor."

"What would you do if it were blowing fifty miles an hour?"

"I would throw out another anchor?"

"How about seventy-five?"

"I would throw out another anchor."

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\*Address by Hon. Murray Seasongood, of the Cincinnati Ohio Bar, delivered at the dinner of the mid-winter meeting of the Indiana State Bar Association, at Indianapolis, January 16, 1937.

The master said, "Where in the heck did you get all those anchors?"

The prospective mate said, "Where in the heck did you get all that wind?"

We used to have a lawyer at home who would begin his argument to the jury by saying, "I shall now briefly refer to the facts of the case, and then give myself over to general eloquence."

I shall try to avoid doing that, but should like to propound to you the inquiry as to whether Coke was right. I am talking about Sir Edward Coke and asking if his statement that law is the perfection of reason is accurate.

I learned recently that that statement did not originate with Sir Edward Coke, himself, but goes to Cicero's *De Legibus* in which he said that "Law is the highest reason implanted in nature."

I believe there are a great many things in the law that need modernizing and that the attitude of saying that the law is the perfection of reason is wrong in the first place. Like the professor who could not speak of himself without taking off his hat, if we are going to adopt an attitude that everything is all right with the law and it is the perfection of reason, nothing will be modified and improved. But, on the contrary in this era of change, there is a great deal that should be modernized and improved.

Of course, Coke wasn't himself the perfection of reason. He was a curious contradiction, having many great qualities besides his remarkable intellect, and many that were not so desirable.

You probably know of his quarrels with Bacon, "the brightest, meanest, wisest of mankind." Here were two of the wonderful intellects of that time who hated each other with bitter hatred. They aspired to the hand of the same lady. Bacon said of Coke that there were seven objections to him, himself and his six children. Nevertheless this lady succumbed to his offers of marriage, and the two men hated each other for that and other reasons, all through their lives.

Of course, Coke was a very great and profound lawyer. He established the rule in Shelley's case, for which I don't know whether we should be grateful or otherwise to him. When it came his turn, he prosecuted Bacon with a great deal of keen enjoyment for taking bribes. The statement at the time was that "the Coke (they pronounced it 'Cook') was too hot for the Bacon."

In the case of Sir Walter Raleigh—if you read of those trials, you will be shocked at the way he conducted the prosecution against Raleigh—called him "Thou", which seems to have been a terrible method of addressing a person in those days—a very insulting and offensive way of speaking: "Thou art a varlet", "Thou hast an English face, but a Spanish heart", and words of that character. And the conviction wasn't reversed.

On the other hand, he resisted what he thought were the encroachments of equitable jurisdiction on the common law, and then it was Bacon's turn to see that he was relieved of his chief justiceship, which, of course, Bacon was very happy to accomplish.

However, on one occasion at least Coke showed himself to be very heroic. That was when King James I wanted to submit a case in advance to the judges, a case that affected the crown, and hoped to get their favorable opinion in advance, and Coke was the only one of the justices who refused to give any opinion and said to the King, "I will decide this case when it comes before me as beseemeth a judge, according to right and justice."

So, as I say, he was himself a queer kind of mixture of unreasonableness and reasonableness, and his ecomiums on the common law are to be taken having that in consideration.

I don't know how many of you have read Mr. A. B. Herbert's little booklets. One of them is called "Uncommon Law", and one is called "Misleading Cases". They are humorous takeoffs on the procedure in the English courts, and in one he refers to "common sense versus common law".

I don't think that—that is quite just, but there always has

been and still persists, to some extent, a good deal of formalism and legalism in the law which make it especially lacking in adaptation to modern conditions.

It was not until 1898 that a person could testify on his own behalf in England. Indeed there was a long period when the accused was not entitled to have counsel in the case. The idea was that if a person could not testify it was a supposed benevolent protection to that person, because otherwise he might commit himself or say something which would lead to proof of his guilt. It is strange how lawyers went on for years and years, and liberty loving people went on for years and years, carrying on those traditions and allowing them to be rooted out very slowly indeed.

This legalism and formalism in the law was evidenced, for instance, in the case of Thomas A. Becket. Quo warranto, of course, is an action to oust a person from some office he is usurping—and Henry VIII, several hundred years after Thomas A. Becket has been murdered, had an action in quo warranto brought against him for usurping the office of a saint. He was found guilty and his bones were disinterred and scattered about, in execution of the sentence.

I must tell you gentlemen, in case you think that is a very old thing, what happened in our Ohio courts just recently. A county treasurer had the misfortune to have \$5,000 stolen from one of his subordinates, who was negligent, and it was stolen under circumstances that would have amounted to burglary if it had happened in the night season, a breaking and entering into one of the cages where the money was kept. We have a statute in Ohio which allows the county commissioners, if they find the treasurer not to have been negligent himself to exonerate him from the strict liability of the common law (which makes him answerable absolutely for the money entrusted to him, except only for act of God or the public enemy) in cases of robbery, burglary, fire or failure of a bank. We have no common law crimes in Ohio. I don't know if that is true in Indiana or not. All crimes with us are statutory. In the statutes they don't use the word burglary; simply say whoever enters in the night season with

intent, etc., shall be imprisoned in the penitentiary for 20 years or life, whatever the penalty is, without using the word burglary. Our Court of Appeals decided that this statute did not cover this loss because it happened in the day time. Burglary could only, according to common law, be of an inhabited dwelling house in the night season.

Now, that seems to me to be an example of an archaic interpretation of law. Here was a remedial statute intended to cover this thing. And burglary at common law must not only occur in the night season; it has to be an inhabited dwelling house or mansion house, as called in Blackstone, the only exception being, as Blackstone quaintly observes, a church, which is the mansion house of God, so that is an inhabited dwelling house, also.

Our court took the view that it had to be in the night season, and obviously as a county treasurer does not keep his money in his own dwelling house, it could not have meant that; yet by process of legalism, this unfortunate gentleman was obliged to pay this \$5,000, and in this case our Supreme Court refused to take it on the ground of general importance.

It seems to me what courts very often are apt to do is to overlook that maxim of the law: *Cessante ratione legis cessat ipsa lex.*

I was mentioning to your president not so long ago that I was condemned for my sins to be special counsel for the City of Cincinnati in a gas rate controversy, and I was for some time before the Public Utilities Commission in Columbus. There was one thing that the chairman of the Commission and I agreed about, that was an inscription, *Dum loquor tempus fugit.* I said, "Freely translated, it might be 'Dumb speaking takes up time'".

But this formula that you must analyze the reason of a rule of the common law and see whether it is applicable to modern conditions, is one which is applied very helpfully in a number of recent instances.

One to which I refer especially is the case of *Grosjean* against the *American Press Company*, reported in 297 U. S. 233 and decided in 1936, which was the case arising out of

the Huey Long affairs in Louisiana. He tried to tax the press out of existence for opposing him. The holding in that case was that you are not to take the common law of England absolutely as it was. Of course, there is nothing particularly new in that, but another application of it. It can only be taken in so far as it is applicable and suitable to our conditions, and the common law of England that there was at first a censorship before publication and then a censorship after publication which led, of course, to Milton's great outburst, his "Areopagitica", or the right to tax to suppress information was never applicable to our conditions, and could never be applied and it was regarded as utterly unsuitable.

Another case which is very heartening is the case of *Funk vs. U. S.*, reported in 290 U. S. 371 (1933). That case decided the old common law rule that a wife could not testify in behalf of her husband in a criminal case was not suitable in our United States. They reversed the conviction to let the wife testify.

You remember the old rule was partially based on the idea that what the wife did in the presence of her husband she did under compulsion, which led Mr. Bumble, in *Oliver Twist*, to say that "if the law presumes what the wife does in the presence of her husband she does under compulsion, the law is an ass and a bachelor."

Well, at all events, this is a very excellent opinion. No doubt you have read it, but won't mind my referring to it. It was written, I think, by Mr. Justice Sutherland and he says the reason for this old rule has disappeared, the accused can testify himself, and, of course, he is the one who has the most interest in the outcome. If he is allowed to testify, anybody else ought to be allowed to testify, with such comment about his interest as appears to be proper and to be taken into account by the jury.

I think that is an interesting development. But here is a question put in that case, "Why don't you wait for Congress to pass a law and say it is all right for the wife to

testify in behalf of her husband in criminal cases?" Mr. Justice Sutherland said, in substance, "We can't wait that long. We say this is not applicable to modern conditions, and not being applicable, we repeal it, and say she may testify."

Of course, a question arises from the rule of stare decisis, which is an integral part of the common law, if you are going to adhere to the rule of stare decisis. Should you reach the conclusion that any established decision may become unsuitable to modern conditions and overrule it for that reason, that is an interesting deviation, and the rule of stare decisis may be affected by that type of reasoning. But the proposition seems to me indisputable that you can't have old conditions and the dead hand of the past hamper you without making your law a thing unsuitable entirely to the needs of modern life.

It is somewhat astonishing to me that Mr. Justice Cardozo only concurred in the result in that case, and Mr. Justice McReynolds and Mr. Justice Butler dissented from the holding in the Funk case.

Another case that seems to me to be of interest in that connection is a federal case decided in July, 1936, *Hinman vs. the Pacific Transport Company*, 84 Fed. (2d) 755, and involving the old question whether, as we learned, you own property up to the heavens and down to the reverse, or as more elegantly stated, to the center of the earth. The question arose as to whether a man had a right of action against a flying company which permitted airplanes to fly one hundred fifty feet above his land or in some instances to glide within ten feet of it, and he complained he owned the air above his land and this was a continuing trespass.

The court said, in effect, "Where is the sky? Keep going up and you won't reach it. How far up do you want to own?"

They reached the conclusion that that old maxim was subject to modification under present circumstances, that you had only a general and very vague right to the air above your property and only if you showed some necessary use



for it, and only on real interference could there be any cause of action resulting from it.

There is still another interesting case, along those lines, the one recently decided in 1936, *Ninth Bank & Trust Company vs. U. S.*, 15 F. Supp. 951. One of Coke's adages was that there was a possibility of issue if both parents were as old as a hundred years of age. This court, in a tax case, reached the conclusion that where there were women involved who were fifty-seven and sixty-three, that adage was not applicable, and would not apply in a tax case, and although the estate was left for life to a particular person and then to his descendants that the estate had vested in a charity which was the residuary devisee.

Of course, your court in Indiana has rendered decisions (and one of these is cited in the *Funk* case) that seem to be admirably reasoned, if I may say so. That is this case of *Ketelson vs. Stilz*, 184 Indiana 702, decided in 1916.

One of the things I have always rebelled against in the law is this idea that if you take judgment against one tort-feasor or elect to proceed against one tort-feasor, and don't succeed in recovering anything but a judgment, you are still barred by your election and can't proceed against the other tort-feasor, or you can't settle partially with one tort-feasor and proceed against the other tort-feasor.

Your court laid down the rule it is only satisfaction of the judgment against one tort-feasor that bars. Short of satisfaction for injury, why should you invoke this ritualism that pursuing one tort-feasor lets the other tort-feasor escape unharmed?

We have had that go so far in Ohio that where a man was injured in an automobile accident and settled with the man who caused the accident, and later thought he had a case against a physician who mistreated him for his injuries, for malpractice, the physician was joint tort-feasor with the automobile driver who caused the injury, and could not be sued.

We have this technical distinction in Ohio. I trust you don't have it here. It is all right if you take a covenant not to sue, if you want to settle with one tort-feasor and not

sue him, if you want to go against other tort-feasor; but if you don't know law and want to release one tort-feasor without releasing the other, you can't.

Coming back to your Indiana decisions again, you have one which also commends itself very much to me; that is *Fidelity and Deposit Company of Maryland vs. Brucker*, decided in 1933, 183 N. E. 688. The question there was whether the state has a preference in connection with public moneys deposited in an insolvent bank, and whether the surety company that pays for the state is subrogated to the rights of the state.

Now, there is a very well reasoned decision in which your Supreme Court says that the English Common law priority of the sovereign is unsuitable to Indiana. The court mentioned the fact that the Bank of England wasn't established until 1694, and there wasn't any occasion for the King to put his money in any particular bank that might become insolvent, and certainly not to put his money in to get interest on it. Whatever prerogative the King of England may have had, the sovereign in the State of Indiana is the people. There isn't any right of priority as far as it relates to the sovereign or the state in the moneys which they have placed in this insolvent bank for the purpose of getting interest, and so the court need not determine whether the surety would be subrogated to the rights that are owned by the state.

Those, as I say, seem to be very forward-looking decisions and correct rulings and the proper method of approach to these problems.

Mr. Langdell, who had just retired from the Harvard Law School, when I went there, used to tell his class, "Now, we have a comparatively recent case decided by Lord Hardwick in 1754". Of course, that is all right for teaching law, but I do say we have got to keep this thing of the law a living thing adapted to modern conditions, if it is to go on and serve its purpose.

Now, may I make some suggestions as to practice, I don't know your practice here, I don't know how many of you do. I read the advance sheets of the Northeastern Reporter,

at least, I skim through them, and it seems to me that practice in Indiana is a very occult and cryptic affair. You have to watch your step or you will make some terrible mistake that will land you on the sidewalk on the back of your neck.

But I do wonder about one thing, that is if in all the states it isn't possible to shorten the procedural instruments that we have. I suppose you go through the same form in a judgment as we do to make it a solemn affair, "This cause came on to be heard," etc. Why not say, "Judgment affirmed", or "judgment reversed"? You don't have to say in the judgment entry, "Argued by counsel and submitted to the court on briefs, orally, and so on."

The conclusion is, it is reversed or affirmed, and that is enough. You don't have to have a great long summons, citation or mandate extending greetings. Why do you want to be greeted every time you get bad news? It doesn't lessen the blow. Why not just send down the word, "This is reversed", or "This is affirmed"?

Then why not have a statute, instead of putting all covenants and warranties in a deed or in a lease? Why not just have a statute that it is understood that a person by making a deed or making a lease, covenants and warrants thus and so, that these are written in unless they are excluded? For the purposes of recording, typewriting, copying, etc., there will be a simplification and lessening of expense, very much to be desired.

I don't know how far you use the photostat and other modern instrumentalities for recording. We had a great struggle and I took a considerable part in getting the photostat process used in the recording of deeds. It seems to me to be admirable. The possibilities of forgery are eliminated, you get an exact photograph of the particular deed, you eliminate the chance of errors in copying and the recordation is as indestructible as the paper on which it is written. And of course you get your copies in less than no time (whereas it takes considerable time otherwise). The saving of expense, again, which is another feature we should

always be mindful of. There is the burden of expense in all of these things. The lessening of expenses is a material item.

Why do we want to keep on with all this abracadabra that we have in affidavits, "State of Ohio, County of——. ss." What does it mean? What is the sense of putting it in affidavits? What is the sense of having affidavits at all?

You know the story of the business man who was signing a lot of papers. Someone said to him, "You had better read those, they are statements to the bank."

He said, "Oh, are they? I thought they were just affidavits."

Why isn't it enough to say that a written statement is the equivalent of a sworn statement? Why do you have to go before a notary and swear to it, and give the notary 40c or whatever the fee is for saying, "I swear", etc?

Another suggestion I should like to make is use of the mail for the service of process. You don't have to have driving or riding deputies any more, the way you used to have in England. You have a perfectly good instrumentality in the mails. Why shouldn't all process be served by mail, which would probably be a public saving running into the hundreds of thousands of dollars in a state. We have a statute in Ohio which permits it, but it is honored more in the breach than in the observance, except in Cleveland where they serve all of their summons and other process in the municipal court through ordinary mails. Cleveland has a large foreign population and a shifting population, and they have used that without any difficulty in their municipal court. I think the modernization of these things is an essential we must come to.

Many of us are like a friend I have in Cincinnati who is fond of technicalities. He said, "Whenever a case gets to the merits, I lose interest in it." I am afraid we are all a little that way.

Now, take these things: maybe they have no application to your state, but you will pardon me anyway, where both

sides make a motion for instruction, that takes it away from the jury and lodges it with the court; but, certainly in the Federal courts, if you know how to do it, if you say, I move for instruction, but if that is overruled, I want to go to the jury, then you save your opportunity to go to the jury.

Well, all those things seem to me to be unjust advantages, if you do it the right way, or unjust traps if the wrong way. We have these technical pitfalls and, I suppose, are not always above taking advantage of them. Is this right, when we consider the law is an effort to obtain justice to the parties, irrespective of technicalities?

We have recently passed a statute in Ohio saying that no exception is necessary, even to the charge. That is nice for the lawyers. I think you will agree it is a little painful to be excepting, especially painful to stand up in the presence of the jury as our Federal courts make you do and take your specific objections to everything you want to except to. I am afraid I have not been above saying, on occasion, "I have no exception to take, your Honor". That does give the jury the idea if one fellow takes a lot of exceptions, and the other says, "I am perfectly satisfied with the charge", evidently the judge is charging in favor of that one who is entirely satisfied. I don't know why they can't let the jury go out of the room when you take your exceptions. It is no affair of theirs. I suppose it is for the protection of the court, so you won't take so many exceptions as to infuriate the jury.

Another thing, what is the need for terms of court? Why not abolish them? Just snares for the unwary. What is the use to have to file a motion for a new trial within three days, but within the same term of court, and if some fellow doesn't remember that statute and says, "I have three days to file a motion for new trial", and some new term has intervened, he is simply out of luck.

Of course, the difficulty with the new term also is the court loses jurisdiction over the case when the term is ended.

Why shouldn't the court retain his jurisdiction until the appeal is perfected?

Suppose the court can't allow a bill of exceptions after the term is out. The most flagrant case of technical continuation of this old common law stuff that I have been talking about arose and is reported in *Ohl & Company vs. Smith Iron Works*, in 288 U. S. 170. In that case, the federal judge, Lowell, had signed a bill of exceptions, J.A.L. (those were his initials) D. J., and in the Court of Appeals it was moved to dismiss the case on the ground there was no bill of exceptions, that the signing by initial didn't constitute a signing, and that as the signing was void and the term had gone by, they couldn't send it back to have the bill of exceptions or signature corrected. The court decided that it was void, and not merely an error, but completely void and, therefore, the court had lost jurisdiction and that person was out, because the judge signed J. A. L.-D. J.

Fortunately, it got into the Supreme Court of the United States, and Chief Justice Hughes wrote the opinion and was obliged to distinguish a former decision of that Supreme Court in which it had held a signing by initials was not a signature. In the Court of Appeals this Judge Lowell had confessed his ignorance, which was, of course, a very rare thing for a judge to do. I mean those were his exact words, "his ignorance"—awfully decent of him. He said that the trial lawyer had left the bill of exceptions with him and he told the lawyer he was going to sign it; that he put on his initials after the lawyer left, and if there was any fault in it, it was his fault and not the lawyer's. The clerk of the court filed a certificate to the same effect, and that it had been the practice from time immemorial. Yet the Court of Appeals held there was no bill of exceptions because the signing by initial didn't amount to a signature by the trial judge.

Well, Chief Justice Hughes was confronted with this opinion of theirs, of about 50 years ago, where a judge signed by initials, and it was held there was no bill of exceptions.

He rightly thought that kind of thing was obsolete, and that he ought not to allow it. Therefore he distinguished that case on the ground that the judge there had not signed also DJ, District Judge, and that made it entirely different. He allowed the bill of exceptions and said it doesn't have to be sent back to be signed. This was enough of a signature; we don't commend the practice of signing by initials, but say it is sufficient.

I hope you don't think by now I am like that person who couldn't make his speech immortal so decided to make it eternal.

When I was in London some years ago we went to the Central Criminal Court. We went as spectators, I may say, because the general courts were not yet open. One of the under-sheriffs, Mr. Under-Sheriff Deighton, very kindly showed us about. First of all he showed us on the bench a son of Charles Dickens, Mr. Common Serjeant Henry Fielding Dickens, a little wizened old man. It seemed to me most interesting that here was a judge who was sitting at a time when all the things of which his father had complained in Bleak House, Mr. Tulkinghorn, and all those delays in chancery, had all been swept away.

Then he took us also into another room and showed us a judge who held a little nosegay up to his nose, and also on the floor there were herbs. He said, "You know what that is for? That is a survival of the great plague, which was in 1668 or thereabouts, and the judges were given these nosegays to hold to their noses to ward off infection. These herbs were thought to have medicinal value and were strewn on the floor for the same purpose. We have done that ever since. During the war flowers were very expensive, and it was a temptation to do away with this custom, but we decided to adhere to the custom."

I think that is interesting when you consider they have preserved the old forms and ceremonies of law, but when it comes to procedure and improvements in the procedure, they are far in advance of us, having brushed away all this

mossy stuff in their Judicature Act of 1875, and they have made their procedure speedy and free from technicalities of any sort.

I should like to suggest one or two more anomalies that rankle me. These things are impersonal with me. When I first started to practice law I couldn't sleep at night when I thought of injustices. One of the compensations of increasing age and one of its disadvantages at the same time, is accepting injustice. I sleep pretty well now, but nevertheless I put forward these ideas thinking that maybe some time somebody will resolve these things ought not to be that way.

I don't like this doctrine of contributory negligence; that is to say, in its present form. It seems to me unjust that a person who is contributorily negligent, no matter to how slight an extent, if his negligence proximately causes or results in the injuries, is not entitled to recover. I don't think that is just; that isn't the admiralty rule. The admiralty rule is that you apportion the fault and damages are based upon the comparative fault of the respective parties. There is a statute to that effect in 502 Hemingway's Code in Mississippi, and the statutes relating to interstate carriers, the several employers liability acts (45 U. S. C. A. Sec. 51) are like that also. They apportion the fault of the respective parties. Another thing that seems admirable in that law, if there is a violation of statute which is negligence, *per se*, you can't plead contributory negligence in that case or assumption of the risk. (Secs. 53 and 54.) Those seem to me modern statutes and appropriate to conditions as we see them.

I don't know whether you are sufficiently enlightened in your state to allow in cases of condemnation of property for the recovery for expenses as well. With us if your property is condemned, you don't get the value of your property because you can't really get the value of your property unless you employ a lawyer to represent you and experts to testify on values and the compensation to both of them is not allowed



in the recovery. Why not be fair about it? If you are going to take a man's property, let him out whole and let him get his necessary expenses as well as the value of his property.

I have been attempting to teach, for a number of years, the subject of Municipal Corporations, in which I am greatly interested, and I have an article which I venture to ask you to read. I don't want to be like Disraeli, who used to say, "Whenever I want to read a good book, I write one". This article is in *22 Virginia Law Review*, June, 1936, p. 910, and in it I attack the distinction between proprietary and governmental function, which has spread, not alone in the realm of tort but into questions of taxation and numerous other controversies where it has no part. Why not simplify the whole business and say a modern municipality is a public business corporation and ought to have the same rights and duties and liabilities as a private corporation? They have approached very nearly that in England in variety of services performed by cities, and they have approached it to some extent in Oklahoma. They engage in all kinds of business occupation. Why should you have this old rule that the king can do no wrong, which seems to be especially inappropriate in the light of recent events?

Why, I say, should you have so utterly unsuitable and archaic and obsolete a notion, which allows a man, in case his skull happens to be cracked by negligence in operating a street railway owned by the city, to have a money recovery, but if he has the misfortune to get hit by a garbage truck (I suppose the law is the same in Indiana) he can't recover because the city is proceeding in a governmental capacity, and is not liable because the king can do no wrong?

I suggest abolition of the grand jury. Perhaps you will call me a radical. People used to say, "What should we call you after you get out of office?" I said, "I was called so many things while I was in office, I don't care what you call me now."

So, at the risk of being too radical, I still don't think the grand jury is of any particular use. I think it has been largely abolished in England. It is enough if the prosecuting attorney wants to take the responsibility of indictment. It comes up to him anyway and I think that is a survival that should not longer survive.

I like the thing they have in England, of also allowing the Court of Criminal Appeal not merely to reverse, which gives all the advantage to the criminal, but makes him take a sporting chance whenever he takes an appeal. When you appeal from a criminal conviction in England you run the risk that your sentence may be increased instead of decreased. It is optional with the court whether it will set aside the conviction, affirm or lessen or actually increase the sentence. That has a very excellent tendency to keep people from prosecuting appeals after a conviction for the purposes of delay.

I think charitable institutions should be liable as other corporations are. With us, and I suppose with you, they are liable only in the selection of their employees, and not for negligence of their employees. I think that is a rule that could be well laid aside as unsuitable to actual conditions. If a man is giving for purposes of charity, he ought to want to do as much for a person injured by the negligence of someone as for the sick or others who are the objects of his benevolence.

Another thing, I should like to see more recognition in the law of aesthetics. You have one of the landmark cases here, that *General Outdoor Advertising case vs. The City of Indianapolis*, decided in 1930, 202 Ind. 85, 172 N. E. 309, which I have in my case book as a standard case on the recognition of aesthetics as a proper subject of legal protection. I regret to say that our court in Ohio is a standpat court. *Wondrack vs. Kelley*, (35) 129 Ohio St. 268. It is easy to say aesthetics is not a subject of legal protection. It is too intangible to know what is pretty and what isn't; in other words, a person can have legal redress where the injury

is to the nose or ear, but not to the eye by something that is ugly. But I assert aesthetics should be and, increasingly, will be a subject of legal protection.

I won't go into other things I have in mind except one. It would take too long to mention them all—but I do think that Lord Wright wrote a very interesting article which appears in, I think, the June, 1936, number of the *Harvard Law Review*, raising the question whether it might not be desirable to do away with the whole doctrine of consideration as necessary in contracts.

Of course, that leads to any number of inquiries, doesn't it? What is a consideration? Under what circumstances is there consideration, and all of that? Why not cut the Gordian knot? Why not decide the matter and say whenever anybody writes himself down in black and white, he is bound by it; you don't need to go into any question of consideration? Why isn't that right? This is right morally. Why not let law approximate the moral and say you have it legally, and say you haven't a right to say I didn't get any consideration for that promise?

I am afraid by this time you are being reminded of the story about Lord Eldon. Before he became such, he was very successful on circuit, was very much esteemed and they used to have a kind of little mock court in which they would have fun. On one occasion he was asked to prosecute a man who had been on the circuit and made a long and dull speech, and some fellow sitting in the balcony precariously went to sleep and fell out and was killed. So they indicted this lawyer who made this long speech in mock court. Under the deodand law in England, whatever killed a person, locomotive or whatever it might be, was forfeit to the crown. Under the law of deodand you were obliged to describe the thing that had killed the person and the value of it.

Lord Eldon, or Scott as he then was, indicted the orator for killing the man with a certain blunt, dull, instrument, to-wit, a long speech, of no value.

Now, in closing, I remind you that Dickens' young man Guppy used to write love letters without prejudice, and I hope you will accept these scattering suggestions of mine for the amelioration and preservation of our calling, to which we are so dearly attached, as without prejudice and intended to provoke discussion and thought in the hope that some advancement in our profession, from recognizing its imperfections, may perhaps result.