

TO DO JUSTLY



Portrait of Judge Florence E. Allen
presented to the United States Court of Appeals
for the Sixth Circuit, October 15, 1959.
Portrait by Rudolf A. Schatz.

TO DO JUSTLY

BY

Florence Ellinwood Allen

SENIOR UNITED STATES CIRCUIT JUDGE

The Press of Western Reserve University

CLEVELAND, OHIO

Books by Florence Ellinwood Allen

Patris. Published by Horace Carr, Cleveland. Copyright 1908 by Florence Ellinwood Allen.

This Constitution of Ours. Published by G. H. Putnam's Sons, New York. Copyright 1940 by Florence Ellinwood Allen.

The Treaty as an Instrument of Legislation. Published by The Macmillan Company. Copyright 1952 by Kappa Delta Pi.

Copyright 1965 by Western Reserve University.
All rights reserved.

No part of this book may be reproduced except
by permission of The Press of Western Reserve University.
Library of Congress Catalogue Card Number 65-18872.
Manufactured in the United States of America.

Dedication

To the men and women where ever they may be,
who are endeavoring to secure justice
for all mankind.

Preface

*What doth the Lord require of thee but to do justly,
to love mercy, and to walk humbly with thy God.*

MICAH

To be given an opportunity to aid in administering justice is a privilege. To be given this as a woman by the men and women of your state working together is something of a miracle. To be placed then among fine judges in a high federal court is also wonderful. All these privileges have been mine and hence this little book. For to do justly is one of the highest human endeavors, and happy are they who share in it.

Grateful acknowledgment is made to those who have cooperated with me in the preparation of this book; especially to Grace Goulder for her valuable criticisms and suggestions; to Genevieve Torrey Eames, whose tireless effort in helping to sort and organize material has been of inestimable help; to Lyle Ritz, Secretary to Judge Paul Jones of the United States District Court, Cleveland, for his careful checking of the cases cited; and finally to the late Willis Thornton, Director of The Press of Western Reserve University, for his painstaking care and excellent suggestions.

FLORENCE ELLINWOOD ALLEN

Contents

CHAPTER	PAGE
1 The Alphabet—in Greek	1
2 College and Law School	16
3 Woman Suffrage	29
4 First Campaign	39
5 First Judgeship—Court of Common Pleas	45
6 The Black Hand	55
7 Supreme Court Campaign	63
8 Outlawry of War	73
9 Supreme Court of Ohio	79
10 U.S. Circuit Court of Appeals	93
11 The TVA Case	105
12 Lectures in Mexico	114
13 World-Wide Interests	121
14 The Supreme Law of the Land	131
15 Looking Back	143
APPENDIX	
A Speech on the Outlawry of War	153
B The Nuremberg Trial Implements World Law	163
C Address, International Bar Association	176
D The TVA Decision	178

I

The Alphabet—in Greek

WHEN I WAS a little girl of four I climbed onto my father's knee and he taught me a sentence in Greek from the book he was reading—the *Anabasis* of Xenophon. "Cyrus, having his head bare, took his place in the battle." This is my earliest memory.

A year later we children were preparing to celebrate my father's birthday. We had very little money, so we considered how we could give him something that would not cost much. The dining room and bedroom of the little adobe house were separated by a heavy curtain, making an appropriate stage setting. Helen, a beautiful child with long natural curls, was dressed up in some of Mother's clothes. She sat in a large chair and I was placed at her feet. The curtain was drawn aside by Esther, my oldest sister, who always directed us. I then recited the Greek alphabet, and this was our birthday present to our father. It meant more than appeared on the surface, for in order to train me to recite the alphabet, Esther and Helen had to know it themselves. Father said he had never had a more satisfactory present.

My father, Clarence Emir Allen, was a brilliant classical scholar. He read Greek and Latin as most people would read

English, and his interest in the classics continued throughout his life. Dr. Nathan Perkins Seymour of Yale, who had taught Latin and Greek at Western Reserve College in Hudson, Ohio—now Western Reserve University—when my father was a student there, was interested in him. When Dr. Seymour left Western Reserve to go to Yale, Father, who was then head of Western Reserve Academy, was made acting Professor of Greek and Latin at Western Reserve College. Unfortunately, he contracted tuberculosis and was forced to leave Ohio and go west to the mountains. On the advice of Liberty E. Holden, founder of the *Cleveland Plain Dealer*, he decided on Salt Lake City.

No one expected my father to survive, as he was carried into Cliff House at Salt Lake on a stretcher. But thanks to an excellent doctor and his own will to live, he made an astonishing recovery, though one lung was completely destroyed. He was elected County Clerk, studied law and was admitted to the bar. He was elected seven times to the Utah territorial legislature, and later to the United States Congress. He was the first Representative from the State of Utah. He then became manager of mines for the United States Mining Company, mining silver, copper and lead.

Several months after Father's recovery my mother made the trip west with two small girls: Esther, aged three, and Helen, two. It was no easy thing in those days to go from Cleveland to Salt Lake, even though the journey was by railroad instead of by stage coach. At that time through service had not been established and there were frequent changes of connection—at Council Bluffs, at Green River, at Cheyenne. There were no diners on the train, which stopped periodically and gave passengers twenty minutes for refreshments. The meals offered little variety and were hastily served, and more than once Helen had to be hurried to the train, protesting bitterly because she had not had time to finish her ice-cream.

Father returned to teaching at Hammond Hall, one of the New West Congregational Schools. He also tutored young Albert Holden, who had been sent to Salt Lake for his health.

I was born in 1884, in a little three-room house on the Hammond Hall grounds—the first of our family born in Salt Lake. I slept in a trundle bed. Four more children were born during the next ten years; Kate, who died in infancy, Elizabeth, Emir and Jack. There was no water system in the city, and no street cars, but my mother took everything as it came and taught us to do the same.

After my father had taught for some time at Hammond Hall, his health grew worse and the doctor advised a less sedentary occupation. Mr. Liberty Holden of Cleveland owned the Old Jordan Mine in Bingham, Utah, and he gave my father a job as assayer. Father sat up all night reading a chemistry text and went in to the assay office the next morning and assayed. His results were accurate; the company retained him, and the ore that went out from the Old Jordan was marketed according to the estimates in his assays.

While Father was at Bingham we lived in a miner's cabin. We children liked that life. We loved the mine. The men were always friendly to us, some of them, no doubt, remembering children of their own. The cook for the officials and men who wished to board at the mine was a Chinese, Charlie Too Sing. He and his wife thought Mr. Allen was a great man, something like a Chinese mandarin. Charlie often talked to my father about a home in Salt Lake where Father could have some horses. This was most interesting to us because having horses was beyond our fondest dreams. The best we could do on that score was to climb on the mine donkey, Jack, all three of us at once, and ride happily until he put down his head and slid us off. Mother kept the butter in a covered crock in a cool abandoned tunnel of the mine, and we had a delicious feeling of pretended terror when we went into the dark opening to bring it back for dinner.

Father's experience in the mine was later to be of inestimable value. After his election to Congress in 1895 he had a surprising offer from Mr. W. W. Chisholm, owner of the Centennial Eureka Mine in Tintic, a close friend who knew us in the First Congregational Church in Salt Lake. In the Centennial Eureka, because of some geological fault, an important ore body had been lost. The very life of the mine, financially, depended upon locating this ore. Somehow Mr. Chisholm had faith that this Greek and Latin scholar who had learned assaying without technical education, could find the ore. The result was that instead of seeking re-election to Congress Father went to the Centennial Eureka Mine as Superintendent. He did locate the missing body of ore. His only knowledge in this field was what he had gained from his mastery of geology and his experience as an assayer, yet he kept on locating ore bodies, making money for the mine, and being advanced in the work. When he retired he had been for years manager, for the United States Mining Company, of nine mines in Utah and Nevada.

After Father had been manager of the Centennial Eureka for some time, a famous mining expert, John Hays Hammond, came to Salt Lake. At the time Father and his capable superintendent were considering where they would find their next large ore body. Mr. Hammond gave his opinion. Father and the superintendent thought the ore would be in the opposite direction. Mr. Hammond was very set in his views and he proclaimed them loudly to anyone who would listen, including Albert F. Holden, son of the owner of the mine.

Bert Holden was living that year at the mine and was very friendly with the mine staff. He listened to the controversy with interest. Several months later the ore body was found exactly where Father said it would be.

Bert Holden delighted in telling this true story on John Hays Hammond. He repeated it several times in New York

and finally Mr. Hammond protested. "Why do you tell that so often?" he asked. "After all, I didn't know the country." "That's why I tell it," Bert Holden answered. "You didn't know the country and you set your opinion against that of men who did know it, and of course you were wrong." Father named the ore body and always called it the John Hays Hammond Stope.

This mining career proved to be of benefit, not only to our whole family, but also to the workmen. Father had already shown his interest in workmen by introducing and getting passed through the Utah legislature laws that were favorable to wage-earners. Legislation of this kind was almost unheard of at that time. His service was so significant that the workmen presented him with a large gold watch, duly engraved with an acknowledgment of his liberal achievement. As superintendent of the mine he established workmen's compensation before it had become law. He interested himself personally in every case of injury at the mine, and whenever men were injured he planned carefully and intelligently to give them work which they could do without harm to themselves. He also instituted a six-day week, for he would not permit the usual seven-day week with mine work on Sunday.

Among the liberal measures Father supported during his service in the Utah legislature was one called "an act to provide for a uniform system of free schools throughout Utah Territory." He had framed this act, and when it was passed during his third term in office he said, "To obtain this law I had entered the legislature." For this successful effort he earned the title, "Father of the Free Public School System in Utah."

All through his long mining career from 1896 to 1922 Father continued locating ore, but sometimes he met even more difficult problems. The Boxer Rebellion in China had an unexpected repercussion in the Centennial Eureka Mine.

It even threatened old Charlie Too Sing. Suddenly some hot-headed miners who claimed to be stirred up by reports of atrocities committed by the Chinese Boxers, assembled at the shaft head several hundred strong, a number of them armed, for the purpose of lynching Charlie. After putting Charlie in an abandoned tunnel a thousand feet below the surface, Father stayed on top and faced the rioters unarmed. He reasoned with them for hours. Several times he induced them to give up their purpose and turn away, only to have some hot-head lead them back. Eventually the mob dispersed and Charlie was saved.

Another experience with labor trouble was settled more easily. One of the smaller mines in the group Father managed was the Red Bird Mine, high up in Big Cottonwood Canyon. It was far from any town where food supplies could be bought, so the company maintained a boarding house. In general, Father was opposed to making the men live at a company boarding house. He said it always produced abuses; but at this mine there was no other way for the men to be fed. Suddenly a wire came from the Red Bird Mine saying there was a strike there; the men objected to the food. This was hard to believe. Owing to the distance from any town and the difficulty of getting men to go there, my father, who liked good food himself, had concentrated on supplying fresh vegetables and the best meat that could be procured. He insisted on knowing the particular food to which the men objected. To his surprise, it proved to be the eggs. This was incredible, as the company had picked out reliable merchants and ordered them to ship to the Red Bird nothing but fresh eggs. Father inquired what it was about the eggs that the men didn't like. The answer came back that the eggs had no taste. "All right," said Father, "send them cold storage eggs." This ended the strike. The cold storage eggs had a very definite taste.

Father had a theory that children should study the classics early, and he arranged at Hammond Hall for us to begin Latin

when Esther was eleven, Helen ten, and I seven years old. The principal doubted the wisdom of this plan, but when the year ended Esther led the class. In order to make sure we did not fall behind, every night Father sat us down around the old student lamp and we studied our Latin. He did not tell us the answers; he saw that we got them ourselves.

Cicero became real to us when Father was in the Legislature and we could apply the orations against Cataline to his campaigns. In those days most houses in Salt Lake were surrounded by picket fences. We had a large yard to play in and we didn't leave the yard without permission; so we would walk up and down behind the picket fence, shouting, "Allen! Allen! C. E. Allen!" And then we would declaim some of the orations, substituting Father for Cicero and his enemies for Cataline. I am not sure that this got my father any votes, but it warmed his heart.

Much of our life centered around the Congregational Church, the first Protestant church established in Utah. My earliest memory of the church is the small one-room building called Independence Hall, where I was put in the infant class. Father took a great interest in the building of a new church on First South at East 4th Street, and he was for many years a deacon of the church. Rain or shine we assembled for Sunday School and church and took a lively part in the church activities. The father of Harold Stephens—later Judge Stephens—was also a deacon, and Harold and I were in some of the same classes.

As I have said, there was no city water supply or sewage disposal in Salt Lake. Although the canyons from the Wasatch Mountains ringed around the city, discharging an inexhaustible supply of water from the melting snows, the streams had not yet been harnessed for household use. The water was used for irrigation of the city lots. It ran along the streets in deep ditches which were crossed by narrow bridges. Sometimes these little bridges were broken or had been completely demolished

so that the pedestrian was put to a few shifts to get across. It was even harder on anyone with a cart or a bicycle.

After the first year when the three of us entered the Latin class and Esther victoriously led the class, Father was pleased and wished to celebrate in some special way. So he and Mama went down on the little trolley line that had recently been established, thinking they would buy us each a present. For me they had in mind a velocipede. That was the sum of my earthly ambition at the time. In the window of the hardware store on Main Street was a fascinating new machine, the first bicycle for women ever shown in Salt Lake. It was a Rambler Safety Bicycle with cushion tires. They bought the Rambler, somehow got it home on the back platform of the trolley car, and proudly rolled it in. I was in bed and was waked up to ride the Safety in my nightgown around the living room.

The bicycle fitted Esther very well. She was tall and had long arms and legs. I had short arms and legs. By touching the pedal every time it came up I could ride the bicycle, but I could not get on unless I had a fence handy. Luckily Salt Lake was full of fences. When it came to getting off the bicycle I had only to fall off; of course I had to do this wherever a bridge was out over a ditch.

During this time we prospered in a modest way. Father bought a little adobe house on 10th East Street, very near the lower mountains to the east. Almost every night he brought home a book—*Scottish Chiefs*, the Walter Scott novels, Lockhart's *Spanish Ballads*, Bullfinch's *Mythology*. There was great competition among us children for these books and I usually won.

My mother, too, was not forgotten. While she was a pianist of real talent, in the first years in Salt Lake she had no chance to play. There were few pianos in the town and none, of course, in our little adobe house. One afternoon on returning from school, we heard heavenly music floating from the open windows of the house. We rushed in, to find Mother seated before

a piano, a new Weber upright. In our eyes nothing so magical had ever arrived by Wells Fargo Express.

That evening after supper we all gathered around the piano and my mother played. It was so sweet that I put my ear up to the instrument and when Mother stopped playing and went out of the room, I climbed onto the piano stool and touched the keys. I was disappointed to find it didn't sound the same.

My mother, Corinne Tuckerman Allen, was the first girl admitted to Smith College. She played the organ at Smith for three years, both at Chapel and at Commencement. When I studied piano and my teacher gave me the Beethoven Sonatas to bring home, Mother was as excited as a girl. She went through the pages picking out themes or movements as she recognized them, and playing them happily with a remarkably singing tone.

Mother took a keen interest in everything we did and always encouraged us in the little projects we had in our childish clubs. I had to preside once at a public meeting of the Alethian Lyceum, a girls' debating society in the Congregational Church. I was worried about what I should say. Mother said, "Now, Florence, when you make a speech, even a short one, do not begin by apologizing and saying what a poor speaker you are. If you are, they will soon know it. Make your point and sit down."

It was excellent advice and it helped me years later in 1914–1920 in Ohio, when I was making speeches for woman suffrage. In the suffrage campaigns the men in the meetings who were friendly to us would sometimes give us a chance to speak for five, three, or even two minutes. If we spoke more than the allotted time it would hurt the cause, so we earnestly tried to keep within our time limitation. Over and over again I remembered my mother's advice, "Make your point and sit down."

Mother was a leader in the community. Books were important to her, and with the other women she helped to establish

a library which eventually became the free public library of Salt Lake. She was president of the Ladies' Literary Club, regent of the Spirit of Liberty Chapter, D.A.R., and president of the State Federation of Women's Clubs. I remember her making a good speech in the Congregational Church about the achievements of the Woman's Club. She helped to found the Mothers' Congress—later the P.T.A.—and the National Playground Association. It seemed to me she was always immersed in some public undertaking, and yet, when we came home from school she was always there, taking an important part in our lives.

She was an excellent cook. She had not learned to cook until after her marriage, but she soon developed the knack of making everything taste good. I can still remember the flaky crust and the spicy fragrance of her apple pies. She was a good housekeeper, too, and coped efficiently with the problems of raising six children under pioneer conditions. By today's standards of permissiveness she might be considered strict; we were expected to be on time for meals, to sit up straight at the table and to have good manners, but my recollection of childhood is one of love and understanding from my parents and of real devotion among us children.

In many ways, of course, life was simpler then than now. My first allowance was five cents a week, which I earned by making fires in three stoves and cutting the lawn. When I tentatively asked for a raise to ten cents a week, Father laughed and said to Mother, "Florence has struck." After several months I won the strike. Each child was given tasks in keeping with his age and ability, but as mine were chiefly concerned with the outdoor area, I never had much to do with the routine of housework.

In alternate summers we went back to Ohio and to Pennsylvania to visit the grandparents, and then my mother had to take on an increasingly larger group of children for the long and difficult journey. In later years, of course, travel arrange-

ments improved. Father would even get us a drawing-room. It was fun to climb into an upper berth and listen to the song of the rails. Mother always brought a basket of delicious home-cooked food to piece out the hurried and uninteresting meals that were served en route. The railway stations during all this time, even in Chicago, were crude frame buildings painted brick-red, hot and dirty. One breathless summer night we were in Chicago. The station was packed with delegates to some national convention. Jack, the baby, was crying violently. Mother could not get into the women's rest room, so she sat down on the one vacant seat she could find, calmly undressed Jack and put on his nightgown before the face and eyes of the world. I was humiliated to the core, but Jack, of course, stopped crying. He just didn't like his clothes on that hot night.

After his success in the legislature and his good record as County Clerk, Father was looked upon as potential political timber. When statehood was granted to Utah in 1895, he was nominated on the Republican ticket for Congress. He campaigned with Frank J. Cannon, a brilliant member of a famous Mormon family, and with George Sutherland, who later (1922) became a judge of the Supreme Court of the United States. Father was elected, and with Mother and the "Little Three" as we called them—Elizabeth, Emir and Jack—he went to live in Washington. The "Big Three"—Esther, Helen and I—were entered in school at New Lyme Institute, Ashtabula County, Ohio.

The head of this school, which nowadays would correspond to a junior college, was my grandfather, Jacob Tuckerman. Grandfather Tuckerman had begun teaching at the age of sixteen, and in the course of a long career devoted to education he had been superintendent of schools of Ashtabula County, president of Farmer's College at Cincinnati, and principal of Grand River Institute in Austinburg, Ohio. He was a tall, lean man, with a grizzled beard, a strong, handsome face and

deep-set eyes. He loved teaching and often asserted that he "should rather die in harness than to outlive my usefulness," and he did just that. At 73 he insisted on going back to his classes at the Institute before he was fully recovered from an attack of "grippe," and the result was fatal.

Many boys and girls from northeast Ohio came to Jacob Tuckerman's school. We three girls lived in the "ladies' dormitory," while the boys, including my Tuckerman cousins, were housed in the "boys' dormitory."

Grandfather Tuckerman had a wonderful sense of humor and a sympathy and understanding which are still remembered in Ohio. Many years later I had occasion to thank a young lawyer for some kindness he had shown me. He replied, "You don't ever have to thank me for anything. My father attended New Lyme Institute for six months one year and ever since then your grandfather Tuckerman's word has been the law and gospel in my family."

The school, however, was run under the old-fashioned puritanical code, a code which worked particularly well in such a situation. Dancing for teenagers was generally frowned upon at that time in northeast Ohio, and instead of dances each term was opened by a "promenade social." The promenade required the students to come into the large assembly room, pay their respects to my grandparents who were receiving the guests, and then enter the promenade around the room; the boy having on his arm the girl of his choice. The couples walked around and around, with some change of partners. It was as important to the several hundred girls to be asked to the promenade social as to some other girls to be invited to a dance at Yale or Harvard.

In the summer time, while we were in New Lyme, we lived in Grandfather Tuckerman's big, ugly house, with its wide front porch, two parlors and two front doors. When the house was crowded with grandchildren my cousin Lois and I slept in an enormous upstairs room that extended the length of the

kitchen, the summer kitchen, and the woodshed. The only access to this room was through Grandmother Tuckerman's bedroom, and we discovered that no matter how early we might waken and try to steal out, Grandmother was always ahead of us, sitting up in bed and reading the Bible.

We rejoiced in our freedom to roam the surrounding country. It was three miles from a railroad; there were no automobiles and no tramps. We explored the East Wood, part of the forest primeval, where we enjoyed the delicious sense of being in danger; there were swamps there and, for all we knew, quicksand. We went into these swampy places to search for the lady's-slipper and the rare water violet.

Fourth of July was always a wonderful celebration. My cousins, Jacob, Will, Warner and Bryant Tuckerman, sometimes organized a relay of minutemen and fired a gun every hour of the night before the Fourth. Aunt Lillian's family from Connecticut, the five Tuckermans from Cleveland and the seven Allens from Salt Lake gathered together in a jubilant crowd, and my grandfather ordered ice-cream from Cleveland in unbelievable quantities.

Then there came a time in these summers when we went over to northwestern Pennsylvania to see our Allen grandparents at Girard. As a boy, Grandfather Allen had run away to sea. He abandoned the whaler on which he was flogged and cruelly treated, swam to Robinson Crusoe's island, and after quite a long time was picked up by a ship. He worked up to be first mate of a clipper ship and was on the way to captaincy, but his health failed. As he could no longer follow the sea, he returned to Pennsylvania and practised dentistry. He was also a justice of the peace. With his immaculate white beard, his bushy eyebrows, his piercing glance, and his instinctive grasp of a legal proposition, he fitted the part about as well as any judge I have ever known.

Grandfather Allen had quite a liking for me and took me out into the large garden of several acres where I helped him

pick potato bugs off the plants. There was a story about something that Esther and Helen and I had done in Salt Lake that pleased him. Since Father had read us the *Iliad* and *Odyssey* in Bryant's translation, we would sometimes play at the Trojan War. With commendable perspicacity we decided, instead of being Greeks and Trojans who were killed off in the conflict, we would be the gods themselves. Esther selected the part of Juno; Helen chose Pallas Athene. I had wanted that role, but as it was taken, I said, "Very well, I will be Jove." This tickled my father and my grandfather, and when I went down the rows at Girard picking off the potato bugs, Grandfather would call me "Jove." The story went back to Ohio, so that my Tuckerman family thought my grandfather Allen called me "Jo." All of my cousins took up the idea and many of my family still call me Jo.

Summers when we did not go east we began to get acquainted with the beautiful canyons around Salt Lake—City Creek, Red Butte, Little and Big Cottonwood. After we got older we explored the mountains, climbing the peaks that ringed around Salt Lake. Esther planned and led these expeditions. One famous one was a climb up North Black Mountain. Father and Mother went up a canyon with us back of Bountiful and we all slept on the ground. The next morning our parents went home and we children started to climb Black Mountain. The trail had become obliterated. The mountain was right above us so we tried to go straight up. At that point there were beds of chaparral, which in the vernacular is called "hellbrush." It was given this colorful name because it is impossible to go through chaparral by bending it aside as you can ordinary brush, the small oak or aspen. You have to lift your legs straight up and walk over it. After several hours of walking over the hellbrush we were exhausted and almost at the point of giving up. We made our way down to the creek and ate a little lunch, which revived our spirits. Then,

figuring we were right under the peak, we climbed straight up and reached the top at seven in the evening.

We were ten miles from the mouth of City Creek Canyon where we could catch a streetcar home. Luckily the moon came out. The first part of the seemingly endless walk down the canyon we had to follow the sidehill, which meant that we kept falling down into small holes. By the time we reached the road we thought we had never been so tired. I lay down in the center of the road and declared that any wagon could come along and drive over me. But Esther took command and induced me to keep plodding on. By some miracle we caught the last car home. When we wound our weary way upstairs, my mother picked me out as being especially tired. She made a hot bath for me but I could not lift my legs over the edge of the tub, so she pushed and tugged and tumbled me in.

This expedition led to our practising a special exercise for many years in which we alternately lifted one leg after the other as high as we could. We called it the "hellbrush exercise."

College and Law School

MY FATHER WAS both a Republican and a real democrat. As a member of Congress he advocated the establishment of parcel post, which was bitterly fought by the express companies. He introduced a bill to establish postal savings banks along the line used to such advantage in Great Britain. Tom Reed, Speaker of the House, said to him, "We don't want this," and had the bill pigeonholed. That sort of thing often happened under Tom Reed.

At this time all of our Washington family became ill. My brother Emir had diphtheria, Elizabeth and Jack were in bed, and Mother developed blood-poisoning in her leg. Fortunately, the maid and the laundress, both colored, clung to us devotedly, as did the housekeeper who had come with us from Salt Lake. In the midst of all this I had what was supposed to be tonsillitis. It was not acute, so I was put up on the third floor and left to myself. I read Schiller's *William Tell* and made a metrical translation of parts of it. When finally Emir threw off the diphtheria, Mother's blood-poisoning was conquered and we returned to Ohio, my uncle, Dr. L. B. Tuckerman, examined me and said I had had diphtheria without anyone knowing it. Probably this desperate experience with a family normally in the best of health helped Father decide not to

run for reelection to Congress and to go back to our home in Salt Lake.

I was quite happy during the next four years, attending Salt Lake College, the Congregational school which had developed out of Hammond Hall, and studying music with Miss Gratia Flanders.

Miss Flanders was an inspired piano teacher. She had had a wonderful musical training and she gave her pupils a clear conception of musical literature besides training their fingers in the mastery of nocturnes and sonatas. During my years with her I went through a carefully planned course of piano music. We began our study of sonatas with Haydn, passing from Haydn to Mozart and then to Beethoven. At the same time we studied Bach extensively. We started with the *Bach Album*, then the *Inventions*, and last of all the complexities of the *Well Tempered Clavichord* and some of the *Fantasies*. Also, we worked on Schumann, Chopin and Grieg, Scarlatti and the nocturnes of John Field. While I had other good teachers, no one ever opened the field of piano literature as did Gratia Flanders; it was a joy to work with her.

Gratia Flanders was a tower of strength in the community. Many a girl coming to play the piano was given a concept of responsibility in concise sentences that the pupil never forgot. One day I was three minutes late to a lesson. The street cars ran every fifteen minutes, and my car was late. As I came into the studio, Miss Flanders looked at me sternly and said, "Florence, how did this happen?" It never happened again.

At Salt Lake College, which the heads of the New West schools were trying to develop into a college, I had some wonderful teaching from Harriet Congdon, later president of Monticello College in Illinois. Miss Congdon was a remarkable student of the classics. Owing to my father's far-sighted plan of having us read Caesar, Cicero, and Virgil early, I was prepared for college at twelve in both Latin and Greek. Miss Congdon took me on from there. We read Cicero, the *Essays*

on *Friendship* and *Old Age*. Tacitus and his account of the free-thinking German tribes with their peoples' councils and legislatures aroused my youthful enthusiasm. We studied Xenophon's *Memorabilia* with its account of Socrates, and Plato's *Apology*, and Crito on Socrates' trial and death. This might seem like strong fare for a twelve-year-old, but with Father's preparation and Miss Congdon's spirited teaching I was ready for it.

As I look back I am impressed by the importance of a child's early schooling, with the bent he may receive to make his life rich and interesting in the days to come. From my Father most of all, ably seconded by Harriet Congdon, I derived the conception, without knowing it, that these ancient writings were not mere exercises in conjugation and declension; that they described fascinating and all-important periods in history. They gave me a sense of the reach of classical study; its depth, the heights to which it can rise; its possible influence upon our modern thinking. Even today this adds deep pleasure to my existence. When I visited Athens with the International Federation of Women Lawyers, I was advised not to climb the Acropolis as I had suffered various injuries to my knees. But I said, "I must do this for my father," and I made it. As I looked down from the temple to the point where Socrates addressed his judges, I again realized that I owed to my parent the enthusiasm for the classics which even now is an inspiration and a delight.

In 1900 I entered Western Reserve University where I spent the next four years. I was young for my class, sixteen, instead of the usual eighteen years old, and singularly unsophisticated. It was the beginning of a new century and a new era. During this time McKinley was elected and assassinated; Theodore Roosevelt emerged as a national figure; Henry Ford organized his company; and in the outside world Russia and Japan made war.

These events affected me very little. The out-of-town girls

at the University, who resented the dominance of the girls from Central High School in Cleveland, somehow picked me out as a candidate to spear-head their revolt, and without any desire on my part elected me freshman president. I made many mistakes in this office, one of which was to call class meetings too often. I learned right there to prepare my agenda.

Looking back, I do not seem to have been greatly interested in any special branch of learning. In some respects I already had the equivalent of a college education, and no teacher measured up to my father in my opinion. Our family's facility for verse writing came into play. I wrote a little Western Cradle Song which Professor Ashley Thorndyke read to the class and which was copied in one of the magazines of another university. That started me writing verse, and I was made an editor and finally editor-in-chief of the *Folio*, the college magazine.

I enjoyed the dramatics that we produced on the campus, and acted Sir Anthony Absolute in what, from our college history's standpoint, was a star production of Sheridan's *The Rivals*. Lila Robeson, later of the Metropolitan Opera House in New York, was in the cast, and also sang delightfully between the acts. From all over Cleveland people streamed in to see the play. My chief asset as Sir Anthony was that I was stout, vigorous, shook my cane and swore enthusiastically.

But most of all I played the piano, not only every night but in all my free hours. I was exploring the piano literature. I saved up to buy five volumes of Robert Schumann's piano works, one by one; then I sat down in the basement of Clark Hall, roaming through the lovely things that are so seldom played. To read piano programs one would think that Schumann is the *Kinder Album* and the *Carnival*. The *Kinder Album* is, of course, delightful. The *Carnival* is, I think, too highly praised. The *F Sharp Minor Sonata* ranks with the great Beethoven Sonatas, and I say that as one who places the Beethoven piano sonatas in general higher than the Beethoven

symphonies. Just as MacDowell cannot be fully appraised after merely hearing *To a Wild Rose*, but must be judged by the *Sonata Tragica*, so Schumann must be considered in the light of *Kreisleriana*, the *Fantasy*, the two sonatas and the *Symphonic Etudes*, as well as the striking lesser pieces, *Aufschwung*, *Grillen*, *Warum*, *The Forest Scenes*, the *Romances* and the *Novelettes*. Judged by his works which are rarely played, Schumann towers high above most composers for the piano.

Toward the end of my college life I gave evidence of the social independence characteristic of my family. We tend to be interested in social justice and to say so. I was a member of a sorority, but my closing editorial in the *Folio* was an attack upon sororities, calling for their abolition, as I felt they were undemocratic. This editorial probably had little value, but I wrote it out of my sincere convictions.

This interest in social justice has been with me all my life. I resigned the chairmanship of the Democratic Women for Ohio because Newton Baker, Secretary of War in Wilson's Cabinet, advocated compulsory military service and pressed for its adoption. Perhaps I should have stayed in the office and fought compulsory military service from the inside.

My final fling at college was in persuading my class to present as the Class Day play *Sakuntala*, by Kalidasa, the distinguished Hindu poet of the fifth century. This was not a highly professional project on my part. Needless to say, I could not read Sanskrit. All I had was a stilted translation, but I had fun working this translation into metrical verse, and we actually performed it. The leading actor of men's parts on the campus was unable to take part, so it fell to me with my strong voice and energetic, though by no means subtle, acting to play the part of the king. It was a terribly hot day and the play was given in the afternoon. I sweltered in the royal purple robe which we had rented from the costume shop, and wished I had never heard of Hindu drama.

I must have spent some of my time on academic studies, however, for in my junior year at Western Reserve I was elected to Phi Beta Kappa.

Shortly after my graduation my mother and the four younger children went to Berlin, Germany. Esther and I followed a few weeks later and had the thrilling experience of travelling together, unchaperoned, on a transatlantic steamer. This was a bold and exciting adventure for two young ladies in those days. The trip must have been uneventful, for all I remember about it is playing the piano at every opportunity. Mother was interested in pursuing a study in education and welcomed an invitation to speak that year at the International Council of Women, meeting in Berlin. Esther was already a good violinist and Father wished her to study in Europe. He also wanted all of us, including the "Little Three," to know some foreign language. So for the next two years we lived in Berlin, Esther attending the Stern Conservatory, Helen and I the University of Berlin, Elizabeth, Emir and Jack some excellent private schools.

I had hoped to study Spanish at the University, for a professor at Western Reserve had given me a delightful glimpse, not only of *Don Quixote*, but also of Lope de Vega and the modern Spanish novels. But Berlin University had practically no Spanish so I registered for a course in philosophy. This proved to be as dry as dust. I was amazed, also, at the red tape that existed in the University. For instance, as a University student I was entitled to get books at the Royal Library. After presenting one's credentials and applying for the book, one could not get it until the next day. It was impossible to go to the catalog or to the stacks to see what there was on your subject. That was typical of the regimented life in Prussian Berlin.

I did not intend to make music my profession. I was still casting about for a calling to follow, when I was offered the position of assistant to Arthur M. Abell, Berlin correspondent of the *Musical Courier*. What Mr. Abell really wanted was a

combination of concert reporter and stenographer. I knew no stenography, but concert reporting appealed to me and I offered to learn stenography. The stenographic schools in Berlin of course taught German shorthand, not English, so I armed myself with Pittman's Handbook and proceeded clumsily to learn something of the art. I think the only reason Mr. Abell bore with my shorthand was that he decided I could handle the concert reporting. He assigned me many big concerts, especially the piano recitals, as he was a violinist. My criticisms were soon published under my name. At the end of the year I was offered a similar position on the *German Times*, an English newspaper that circulated in the American Colony. I liked this because I could say just what I wanted. In fact, I fear I flowered forth in fine writing.

At the end of our two years in Berlin Mr. Abell offered to treble my salary if I would stay in Berlin. My original salary was only one hundred marks a month—about \$25—and three hundred was quite a raise. However, Mother was so opposed to the idea that I returned to America with my family, and have always been glad that I did.

The night before we landed in the United States I had the most intense feeling of joy I have ever experienced. Later I put this into verse which still expresses my feeling about America. It began like this:

Somewhere within that heavy western mist
There lies my native land;
Almost I could, across the lapse of waves,
Feel her swift, silent greeting.

While I was in Berlin I took part in some recitals. I gave a lecture on Chopin, illustrated by several of the *Preludes* and *Etudes*. During my senior year at college I had played the piano occasionally at Laurel School in Cleveland, one of that city's principal preparatory schools for girls. While I was still in Berlin I had been offered a position at Laurel School and

had accepted it. Now I was also asked to act as music critic on the Cleveland *Plain Dealer*. I could do this work in the evening and handle the school work for Laurel during the day. So I taught Greek, German, Geography, Grammar and American History at Laurel, played every morning in the chapel exercises and lectured to the entire school on the history of music, illustrating my talks at the piano. I also trained the Glee Club and directed the school dramatics. The principal encouraged me in somewhat unconventional projects. In the attic at Grandfather Tuckerman's I had found some Moliere plays. I had the School girls give *The Doctor in Spite of Himself*. As director of the chorus I established a custom, still followed at Laurel School, of having the girls at Commencement march into the church to a processional of the stirring Dutch hymn of thanksgiving, "We gather together to ask the Lord's blessing."

All this was enough to keep one person busy, but I was still eager to study. In my second year at Laurel I began living on the Western Reserve campus and registered for post-graduate courses. I secured a Master of Arts degree in Political Science.

The courses included international law, comparative national government and municipal law. The interest thus aroused resolved my fast-developing psychological conflicts. I had not a good enough technique to become a fine pianist. While my music lectures had been praised, I did not wish to devote my life to musical criticism and lectures on the history of music.

One day a professor said to me, "Why don't you study law?" It came like a revelation from on high. That was what I wanted! The schools of Law and Medicine of my own University were not at that time open to women. I applied at Chicago University and was overjoyed when I was accepted. So I burned my bridges, notified Laurel School and *The Plain Dealer* that I was leaving Cleveland, and went to Chicago, full of hope and determination. As usual, I was over-optimistic

about managing my financial affairs. I was sure I could earn my expenses at the University, and took the first job that came my way—doing housework in a private family. This lasted a week. I decided that kind of work was not for me, if I never completed Law School. Fortunately, I succeeded in obtaining a scholarship, which I paid back by cataloging French and German legal treatises for the University library.

When I entered the Chicago University Law School I was the only woman in a class of around one hundred. For a shy person it was terrifying to have to enter a classroom first while a hundred men stood aside. But I survived the ordeal, and in the school I had wonderful opportunities. I studied under Professor Floyd Mechem, the most scholarly and courtly law professor I have ever known. I had the privilege of studying criminal law under Roscoe Pound. At the close of the winter quarter, to my surprise, I was second in the class. I was amused to be visited at my work in the library by various young men who congratulated me and then told me I had a masculine mind.

At the end of the year, Frances Kellor, then head of the New York League for Protection of Immigrants, induced me to go to New York. At this time immigrants were flocking to this country from Europe and were often victimized by dishonest employers and others who took advantage of the newcomers' ignorance of our language and customs. The League was formed to aid in passing and enforcing laws to protect these strangers, and members were assigned to meet immigrants at Ellis Island and offer them friendly assistance.

Frances Kellor had not yet attained her towering stature as a student of international law and the creator of codes of national and international arbitration used by the American Arbitration Association; but her genuine and fresh approach to the problems which interested me most was so stimulating that I left Chicago to work for the League. Through Miss Kellor's influence I became a resident of the Henry Street

Settlement in New York, where I was acquainted with Lilian Wald, the head of the Settlement, Florence Kelley, the pioneer crusader for labor laws for women, and Caroline Waters, the brilliant and lovely woman whose exhaustive study of nursing facilities in New York gave such impetus to the movement for visiting nurses.

I had expected to attend Columbia Law School, but when I applied I was told that Columbia admitted women to the Law School only in the summertime, so I entered New York University. I have always been glad of that choice. This was the school which, around the middle of the nineteenth century actually established a law class for women, and had given women full privileges in the law school for a quarter of a century. Unlike Columbia and many other law schools, New York University constantly encouraged women law students. The scholarly dean, Frank Sommer, and the dynamic professor, Leslie J. Tomkins, carried out this policy to the fullest. I can never repay what I owe to New York University.

At the very threshold of my work in New York, I suffered a physical catastrophe. My eyes developed spasms of accommodation, resulting partly from the glare of the lights in my years of concert work. To correct this a muscle in one eye had been cut by a Chicago specialist of excellent reputation. The new glasses were mailed to me in New York, but evidently never checked in Chicago with the prescription. In the middle of my first year in New York I could not use my eyes and suffered a virtual breakdown. I then learned that the glasses sent me were of exactly the same prescription as those I had worn before the muscle operation was performed. I had worn them so long that my whole health was affected. I had to resign from my work at the League for the Protection of Immigrants, and temporarily leave the law school.

I was determined to remain in New York, to support myself and to continue my work. To earn some income I applied to the Board of Education of New York for assignment to the

music lectures which were given regularly in the public schools and libraries. The pay was hardly lucrative; five dollars for a lecture in any public school, and ten dollars for a lecture in any library, but I applied just the same. The administrator of the program asked me, "How do you know that you can give an interesting lecture on music; how do you know, for instance, that you can interest children?" "Because I have done it," I said, thinking of Laurel School. So he tested me. He had me visit a large orphanage on Christmas Eve and give a musical lecture. What I did was to describe and play the *Midsummer Night's Dream* music. The children liked it and I began to be regularly employed for the school lectures.

I also obtained engagements for some lectures on current events at Miss Marshall's private school on Park Avenue. This posed a difficult problem, as I did not have the proper clothes to address a select private-school audience. I was living in Greenwich Village with two Cleveland girls, Bertha Miller who was attending law school, and her sister Marie. I had twenty dollars that I could spend on a costume for daytime lectures. Everything was much cheaper then than now, and clothes, we were told, were cheaper in Brooklyn than in New York. So my two pals, who had better taste than I, went over to Brooklyn with me. We selected a black suit with a black velvet collar which we thought really becoming; but alas, it was the year of the hobble skirts! When we got the suit home and I joyously tried it on, I could not sit down in it. I could stand and walk and deliver a lecture, but that was all.

On the day of my first lecture at Miss Marshall's I planned to walk the distance of two miles, to avoid the embarrassment of street cars. I was delayed in starting and had to take the street car after all. Marie Miller was going with me and I said, "Well, the car will be crowded." We waited and waited for the old Eighth Street car and when it came there was not a soul on it. To the amazement of the conductor, Marie and I stood up

in that empty car all the way to Forty-second Street. But the lecture went off auspiciously.

Between music lectures, the current events lectures and other pot-boilers, not to mention the constant help of Bertha and Marie and their aunt who fed me good meals at the lowest possible cost and helped me check my lectures at the library, I managed to maintain myself. I never told my father about this—he would have come to my rescue at any moment. Never was a father more generous, but I felt he had educated me long enough, and it was fun to win this game of earning a living.

In the spring, Maude Wood Park came to New York from Boston and made me local secretary for the College Equal Suffrage Association. This appointment, besides giving me the friendship of Mrs. Park, one of the greatest women of our times, and association with such national figures as Anna Howard Shaw and Carrie Chapman Catt, paid me forty dollars a month. That was a lot of money in those days.

I had gone back to law school by now and was happy to be making progress. Much to my surprise, having fallen out of my first class and being a stepchild, as it were, in the group, I was asked to join a legal sorority. I liked the girls, but one circumstance made me indignant. Martha Gruening, daughter of a famous Jewish physician of New York City, a member of my class and a brilliant and charming person, was not invited to join the sorority. So I refused to join. I said, "When you ask Martha, I will consider it." They never asked Martha, and I never joined.

Meanwhile the woman suffrage movement was active in the Law School. Mrs. Philip Snowden, wife of the British Chancellor of the Exchequer, came out to the Law School to speak. We had drummed up a good crowd for her in the largest lecture room. Mrs. Snowden was a lovely person and a wonderful speaker, so I was horrified when she had closed to hear a man shout at her to explain why women wanted to vote. She gave

a gentle, straightforward answer, and concluded by quoting a charming bit of poetry as to the meaning of individual life and individual expression. Her questioner, who spoke with a distinct accent, shouted at her again. "Yes," he said, "that's just like a woman. You ask her a sensible question and she answers with a piece of poetry."

I was so furious that I rushed to Mrs. Snowden's defense. Later, when we talked it over, I realized how foolish I had been. There was this wonderful woman, a symbol of the inevitable march of progress, of the inevitable granting of political liberty to women. She needed no defense, and neither did we. There we were in the Law School on equal terms with men, and we said to ourselves, if we pass our examinations and are admitted to the bar, no one can prevent us from practising. This was the spirit given us by New York University Law School.

I had little money all through law school, and when it came to Commencement I was bothered because I had no gown. I could not attend the Commencement without a gown. Luckily my sister Esther sent me ten dollars and I rented the best gown I could, but it turned out not to fit me. So my sister Helen and my Law School pal, Bertha Miller, took me behind some large lilac bushes at University Heights and pinned me up with safety pins so the gown would not drop off. I really could not have attended this Commencement if Esther had not sent me ten dollars, and I might never have known just where I stood in my work. Imagine my amazement when I heard my name read out as second in the class. My sister Helen cried.

3

Woman Suffrage

BETWEEN 1910 and 1920 I spent considerable time working for woman suffrage under Mrs. Harriet Taylor Upton of Ohio and Mrs. Carrie Chapman Catt of Washington. I could fit this in with my other work and study, and my heart was in it. As is generally known, the individual states could define the terms of the franchise for voters and a number of states had already given women the full vote prior to 1911. Being given full suffrage by the state also endowed women with the federal vote in that state.

In 1912 I was living in Cleveland at one of the women's dormitories in Western Reserve University. At this time Mrs. Maud Wood Park of Boston visited our campus in order to form a woman suffrage club among the girl students. Mrs. Park believed that the woman suffrage movement would move faster if the younger women, such as college students, were organized in its support, and she was made the general executive of the National College Equal Suffrage League. She visited Western Reserve campus twice and had my immediate support. We rounded up the girls and formed our Campus Suffrage Club, and from then on we were ready to go to work.

In 1910 a large number of amendments to the State Constitution of Ohio had been proposed, one of them granting the

full vote to women citizens. This measure was submitted to the voters in 1912, and Ohio became a Woman Suffrage battle ground. Maud Wood Park came back to the state to take part in the fight.

It was great good fortune that placed Mrs. Park in command during these tense and indescribably difficult years. The woman suffrage lobby was conducted by women without money, at first without political power, seeking the right to vote solely because of the justice of their cause. The financial resources of the woman suffrage leaders were practically nil, and so the women who went to Washington to conduct the campaign paid all of their own expenses. When a mansion called "Suffrage House" was purchased for the use of the lobby in Washington, the workers paid rent, and if a room was vacant it was rented to outside women.

At every turn, whether of elation or discouragement, Maud Wood Park was there with her intellect, her patience, her courage and her persistence—qualities which aided her even more than her phenomenal beauty and high-bred charm—pressing the justice of the measure, taking exactly the right steps to secure it.

For she was beautiful. As Inez Haynes Irwin, classmate of Mrs. Park, wrote of her, "She not only had extreme regularity of feature and exquisite blond coloring, but she had that look of caste, or race, without which beauty, however great, can never be extreme beauty. As I look back on our days together, it seems to me that I was always admiring the length, breadth and height of her mind, the simplicity and elegance of her spoken expression." And she had that other God-given aid to a speaker—a lovely voice. As Mary Dewson said, "Maud Wood Park's voice was clear and musical as a silver bell."

Mrs. Park influenced me in ways of which I was not aware, and always to my advantage. Sometimes the influence had its humorous side. Mrs. Park gave so much help in Ohio that when Massachusetts had its suffrage campaign in 1915, the

Ohio women decided to send a speaker to Massachusetts. I was picked for this mission. I never had my mind much on personal appearance, although I did appreciate the beauty and presence of Mrs. Park, so I was ready to go without much thought as to how I should look or what I should wear. But as I was to represent Ohio in Massachusetts, Minerva Brooks, Chairman of the Woman Suffrage Party, and Grace Treat, Executive Secretary, decided that I must appear to better advantage than usual and that they would make me a dress. This compelled me to stand up for the better part of two days. The dress literally was made on me. I would never have consented if I had not wished to do credit to Mrs. Park. So I stood up and the girls slashed and basted and sewed together what was, I had to admit, a striking black dress with flowing lines. Charles Brooks drove us to the train that was to deliver me in Massachusetts. The dress was not quite finished, so Grace and Minerva sewed up the last seams in transit and threw the needles out of the window.

The next night I was to speak at Faneuil Hall, and I thrilled to the thought that my small voice was to be raised in that historic place in support of freedom for women. I arrived early and took an aisle seat fairly near the front. Two women were sitting in the same row and pretty soon one of them said, "Who is speaking tonight?" Her companion answered, "A young woman lawyer from Ohio and an actress." The conversation proceeded. "Who is this young woman in black sitting at the end of the row?" "I am not sure, but I think she must be the actress." Then I knew that the girls were right; that the black dress was right, and that at least in that regard Mrs. Park would not be discredited.

In 1911 while I was in New York studying law, Mrs. Park had made me her assistant secretary. She turned over to me the correspondence with college suffrage leagues throughout the country and also had me plan the schedule of her speaking engagements. I was glad to do this, for I loved a timetable. The

only time that Mrs. Park ever objected to any office work I did for her was that in planning her speaking trips I arranged for her to take a train at 6:30 A.M. It was a difficult connection, used in order to reach some important town in the middle west. It did not seem early to me, but on Mrs. Park's protest against the time I managed to start her off two hours later and achieve practically the same result.

I then began under Mrs. Park's tutelage to go out into the state and organize local counties. She inaugurated a schedule which eventually compelled me to make ninety-two speeches in eighty-eight counties of Ohio. I was usually alone, but this work of course gave me a fine acquaintance among forward-looking Ohio women.

Mrs. Park taught me that my main duty was not merely to speak but to organize the women in the locality I was working. My first task was to get acquainted with Ohio women. In small towns I called on them personally and usually would announce a meeting in a day or two and ask them to attend. In one pleasant little town there was a beautiful courthouse befitting the county seat. I asked permission to use this for my meeting. After extensive calling on the women I went to the lovely auditorium and waited for the audience. Two women appeared. It was my policy to begin meetings on time, so I began on time with the two women and talked for about forty minutes. They seemed interested and were sorry that I did not have a better audience. They said the women were canning and otherwise occupied with strenuous housework. They believed I could get the women to come to a later meeting, so I promptly reserved the courthouse assembly room two weeks from that day, announced a meeting and went back to the county seat at the appointed time. Again I waited in the auditorium and this time three women appeared. Two of them were the original two. So strictly on time I began to speak about suffrage, and because two of them were the same women I had to reconstruct my entire speech in order not to repeat it.

This experience was unusual, but I always had all sorts of problems. There were many difficulties in planning how to meet the women; how to arrange a program, to have an audience, to get acquainted with them and convert them to the great cause.

Once I was assigned to debate the woman suffrage question with Lucy Price, an attractive girl who, it was said, was being paid a large salary by wealthy anti-suffragists who were opposed to having working women enfranchised. These people understood all too well that when working women got the vote an increase in wages would follow. It was Lucy's commission to oppose the woman suffrage campaign throughout the state, and she proved to be effective and adroit. Her principal argument was that women did not want the vote so why impose it on them? She had figures which seemed to support this, the damaging part of her argument.

When Mrs. Upton assigned me to debate with Lucy, presumably because I was an incipient lawyer, I expected that the usual routine would be followed and that I should, since I opened the argument, have a brief period of rebuttal at the close, as is the rule in debates. But I was not accorded this privilege. So when a final debate with Lucy was arranged, to take place in the Cleveland Grays Armory and to be presided over by President Thwing of Western Reserve University, I said I would not participate unless Lucy agreed to give me the usual rebuttal. She consented with great reluctance. In the five minutes' rebuttal I felt I disposed of her arguments. But she protested so many times that I had been unfair, somehow including President Thwing in her indictment, that after besting her (I thought) in fair fight, I had to write letters to the papers, explaining that the rebuttal was given by express agreement. The outcome was that Lucy had the last word, in spite of the contract.

This was an illustration of another problem faced by the

suffrage worker—what to do when the antis called you by a short and ugly name?

One valuable lesson I learned in the woman suffrage movement was to take advantage of every circumstance which would get me a hearing. The unconventionality of the situation made no difference. When invited by a circus manager at Ottawa, Ohio, to speak in the circus tent I promptly accepted, made my speech short and to the point and was roundly cheered. If an educational institute was meeting in the summertime, as often was the case, I sometimes had a chance to become part of the educational program. At Sidney, Ohio, I spoke before a band concert and was asked to continue after the concert was over. When Rose Bower, who was with me, held forth outside the hall with her cornet and whistling, she helped me greatly in my electioneering.

Sometimes I met real opposition. It was arranged in the vicinity of Caldwell that we would have a suffrage meeting in the Barnhart School. When I asked at the hotel how to get to the school, the hotel keeper deliberately tried to send me in the wrong direction, but the local women set me right so that I made the meeting as planned.

The president of the National College Equal Suffrage League was Dr. M. Carey Thomas, the brilliant but despotic president of Bryn Mawr College, who differed with Mrs. Park, the real leader of the group, as to important policies. At the great suffrage convention in Philadelphia around 1912, I saw Dr. Thomas attack Mrs. Park so violently that her stinging words brought tears to Mrs. Park's eyes. This was in the morning before the meetings began. I dared to support Mrs. Park.

That evening I was listed for a five-minute speech at the convention and Dr. Thomas was to preside. I knew this would be difficult for me. At first I thought Dr. Thomas intended to omit me, for the program went on and on without my being called. At last I heard her announce, not my name, but that the audience would hear from "a young woman from Ohio." Then

Dr. Thomas turned toward me and said, "And I forget your college." This was absurd, for President Thwing, of Western Reserve, had a daughter at Bryn Mawr and I knew he had spoken of me to Dr. Thomas. I was furious. I leaped onto the stage and shouted, "Western Reserve University!" That was lucky for me. Several of the previous speakers had gentle, and for such a large meeting, inadequate voices. The audience—part of it—had gone to sleep. When I shouted, "Western Reserve University," they woke up and listened. After the meeting Dr. Thomas, who had never heard me speak, said, "I did not realize you spoke so well."

We lost our campaign to win full suffrage, but we decided to try other hopeful lines. One of these was to secure municipal suffrage in charter cities. East Cleveland, which was establishing a new government, was chosen for the trial, and I was sent out to induce the city to write woman suffrage into the charter.

I held frequent meetings with the Charter Commission and finally it adopted a provision granting to women the suffrage on all municipal affairs. They could vote for candidates and seek office themselves. Newton D. Baker, a national authority on constitutional law and always friendly to us, disagreed with our plan. He thought that, in view of Article V, Section 1 of the Ohio Constitution, which described the elector as "male," all women were by implication excluded from the right of suffrage, including municipal suffrage, and that no city could grant us that right. However, several Ohio decisions, one supporting the right of women to vote on school affairs, seemed to support us strongly. Also, *Scown v. Czarniecki*, 264 Illinois 567, announced by the Supreme Court of Illinois, decided our precise question in our favor. The doctrine established by the Illinois case was that the state legislature, if endowed by the state constitution with all powers of local self-government, could enfranchise women as to any office not created by the constitution. Under the Ohio Constitution municipalities were endowed with all rights of self-government. The East

Cleveland Charter Commission considered that all rights of self-government included the right to designate who should be municipal electors, and had given this right to women in the Charter. The city had then adopted the Charter. The Board of Elections refused to permit women to vote in the next municipal election and we brought a mandamus action in the Supreme Court of Ohio to compel them to let us vote.

Meanwhile the campaign of President Wilson for reelection had intervened. I was an admirer of Wilson and had agreed to campaign for him in the West. I was in Montana covering the huge stretches of that state in Wilson meetings when I was notified that our East Cleveland case was set to be heard before the Supreme Court of Ohio in two days. There was just time to reach the hearing in Columbus if I caught a train from Great Falls, Montana, that evening for Chicago. I held my last Wilson meeting in Montana and dashed for the train. Of course we had capable lawyers in Ohio who could present the case if I were not there, but I had carried the whole proceeding from start to finish in East Cleveland and the women wanted me to argue it. I had learned in law school that in order to hold a railway for damages for failure to follow a schedule—that is, for failure to be “on time”—the injured party must give specific notice of what his injury would be if the schedule were not followed. So I told the conductor that I had to argue a case in the Supreme Court of Ohio and that if this train was on time it would be worth a thousand dollars to me. He was skeptical; but then Edna Perkins and the Cleveland women began sending me wires in care of the train, and the conductor decided there was something in my story. The train leaped ahead, making up time, and we drew into Chicago exactly on the dot.

I had wired Alice Greenacre, who had preceded me in Chicago University Law School, and Greta Coleman, one of the DuPont family and a member of the same Law School, that I was coming through to argue a woman suffrage case in Colum-

bus, Ohio, and I wanted certain law books so I could review the question over night. As I hurried through the wicket Alice and Greta met me with a suitcase full of books. I grabbed the suitcase and dashed for my train. I spent the night reviewing the legal questions.

The next morning at the Supreme Court in Columbus I did not need to refer to the books; once started, I was full of the facts and the law. In closing I said I wished I had more time. Judge Maurice Donahue leaned down from the bench and said, “Take five more minutes.” I never knew until I sat for eleven years on the Supreme Bench of Ohio how exceptional that permission was. The case was decided for us April 5, 1917. Newton D. Baker, with his usual graciousness, said this showed that the by-products of democracy were sometimes more important than the products. Soon after this case Columbus and Lakewood had woman suffrage provisions written into their city charters.

The women then turned to a different line of effort. Going back to *Scown v. Czarnecki*, we realized that the office of presidential elector is a nonconstitutional office; it is established by state statute, and if we could pass a law giving women the right to vote for presidential electors, we would have them voting for president. A number of states had, in fact, secured the presidential franchise on this theory. James Reynolds, a firm friend of the woman suffrage movement, introduced our bill. I did much legal work in connection with this, and took part in the hearing before the Ohio Senate, April 25, 1917, which resulted in the passage of the law. The Ohio State Journal wrote an editorial praising my speech at this hearing, which cheered me very much.

After the law was passed, our enemies instituted a referendum against it. Many of the signatures on the referendum petitions were fraudulent. Countless numbers of them were written in similar green ink and evidently by the same hand. The suffragists instituted lawsuits in six counties to throw out

these petitions. As to the vast majority of the petitions attacked we were successful, but we had not thrown out enough of them in time to prevent the election. On the referendum the majority vote was against the woman suffrage bill and we lost the right to vote for president which the legislature had given us.

The whole experience in the suffrage movement was so stimulating and I met such fine women in Ohio—Harriet Taylor Upton, Elizabeth Hauser, Minerva Brooks, Rose Moriarty (authority on municipal law and workmen's compensation), Edna Perkins and countless others—that after I graduated from Law School I came to Ohio to practice law.

This battle for the rights of full citizenship is a matter of such ancient history that we are inclined to accept the privilege of the vote as if we had always had it, forgetting what we owe to the hard-working and courageous women who devoted their lives to this cause. Many years later I had the opportunity to repay this debt in small measure. I was supremely honored in 1952 to be invited to deliver an address in honor of Susan B. Anthony on the day that her bust was received for installation in the New York University Hall of Fame.

Counting names and
examining signatures
on petitions for the
women's suffrage law,
1912; (l to r)
Florence E. Allen,
Elizabeth Hauser,
Greta Coleman.



The Allen sisters.
Front row (l to r):
Esther, Elizabeth,
and Florence;
standing: Helen.



Speaking on suffrage at Public Square, Cleveland, 1918.



4

First Campaign

IN 1919 I was appointed Assistant County Prosecutor of Cuyahoga County. I was the first woman in the country to hold such office.

This, of course, was prior to the granting of suffrage to women. In this position I received a broad education in the trial of criminal cases. My immediate superior was the Honorable Stephen M. Young, now United States Senator for Ohio.

Senator Young performed a fine task in supervising the disposition of criminal cases. The system in the office was that the Assistant Prosecutor should be given the files of any case a few minutes before it was to be tried, and then he must go ahead without delay and try it—house-breaking, burglary, larceny, embezzlement, pocket-picking, carrying concealed weapons; whatever it might be. If a very serious charge such as murder or highway robbery was involved, ample time was allowed for preparation. Senator Young was very watchful, constantly moving to prevent delay. I could not have had a better experience to fit me for a judicial career.

After several months trying cases I was put in charge of the Grand Jury of Cuyahoga County where I was responsible for preparing the indictments returned. During my first year we drew up 823 indictments.

The Grand Jury was composed mostly of retired police officers of a superior type. They were not, however, favorable to this innovation—a woman in charge of the proceedings. I could feel the unfriendly atmosphere, but this gradually passed away. At Christmas the Grand Jury gave presents to the woman interpreter and myself. Each of us received a beautiful pair of white gloves, and the secretary of the Grand Jury made a little speech of presentation. He said, "I viewed a woman lawyer and prosecutor with apprehension. My fears were unfounded. She did as good as any of the men and better than some. May her shadow never grow less." As I look at what my looking-glass now reflects, I fear this friendly wish has been fulfilled.

After I was elected to the Court of Common Pleas, I continued in charge of the Grand Jury to the end of the year. In the last term, September 8, 1919, to the end of December of that year, the Grand Jury returned more than 1100 indictments. At the close of its report to the presiding judge, the Grand Jury gave me an unexpected commendation. It praised the efficient manner in which I "elicited the testimony of witnesses without spending unnecessary time on non-essentials."

All of these experiences were valuable. The woman suffrage campaigns had given me a chance to work for human rights, a personal knowledge of seventy counties of the state, and the friendship of a wonderful group of women all through Ohio. In the East Cleveland case and the presidential suffrage cases I had the rare opportunity of crossing swords with good lawyers in defense of the beliefs to which my heart and soul were dedicated. And now I was to have another amazing experience in my election as Judge of the Court of Common Pleas. This occurred November 6, 1920, ten weeks after the United States Constitution had been amended to enfranchise women. It was the first election in Ohio in which women voted, except on local matters, and for the first time a woman was elected to judicial office.

While working as attorney for the Cleveland Woman Suffrage Party, I sometimes thought if we got the vote I would run for the legislature. But until the ratification of the woman suffrage amendment to the United States Constitution, women in Ohio and many other states did not have the vote. In the summer of 1920 the suffrage amendment had been duly passed by the Congress and ratified by thirty-five states. Ratification by one state was still required. The amendment was before the Tennessee legislature but the outcome was uncertain. When Tennessee finally ratified on August 24, 1920, the measure became part of the national constitution.

As the Tennessee decision drew near, friends in the Woman Suffrage Party asked me to run for a common pleas judgeship. There were various difficulties; for one thing, it was too late in the year to enter the party primary. In Ohio, however, judges quite often—because of the non-partisan character of the office—secure a nomination by petition. That seemed to me the right way to surmount this particular hurdle. But a large number of names were required on a nominating petition, and each name had to be the personal signature of an elector. "If I run," I asked, "will you help me secure the signatures on the petitions?" The women said they would.

Tennessee ratified the amendment. Women not only could vote, but more—they could become candidates for public office. In mid-August, 1920, I announced my candidacy for judge of the Court of Common Pleas.

As assistant prosecutor I was in charge of the grand jury of Cuyahoga County. That was a big task, for in just one term the grand jury might return as many as eight hundred indictments, which I, as grand jury prosecutor, had to frame. If I resigned I could not support myself during the campaign. I must campaign and at the same time carry on my work. Obtaining the petitions which had loomed as such a task, in this case proved a relatively simple problem. A friendly printer printed my petitions without charge. Later I learned that Tom

Johnson, the much-loved mayor of Cleveland and a good friend of the suffrage cause, had told this printer, "Joe, when I am gone take care of the women." He certainly took care of my campaign.

The next problem was to get persons to circulate the petitions and secure the individual signatures. This was easy because members of the Woman Suffrage Party carried the petitions. Many of the charming, tactful suffragists got men to carry them, also. Mrs. C. W. Stage, wife of Cleveland's beloved Billy Stage, Law Director of Cleveland; and Mrs. John Stockwell, granddaughter of Rufus Ranney, Ohio's distinguished early jurist, took my petitions throughout the city, getting men and women to circulate and sign them. They visited every police station and made friends with the police. In a little diary which covers those days I find a note saying, "Detectives Ruff and Francke took petitions." These were two of the finest detectives on the force. The women got two thousand signatures within a day or so and my nomination was complete.

Then I began to think about organization. Elizabeth Hauser, one of the truly magnificent leaders of the woman suffrage movement, said, "Don't have an organization. You don't need one. The area is small and we can cover it easily." We went ahead on that basis. Miss Zara DuPont, nationally known member of a distinguished clan, handled the innumerable details, but we had no manager.

Then followed an intensely busy time. I worked at the grand jury, prepared indictments, handled arraignments in court, and then went out late in the afternoon and made speeches all over the county. On a typical day, after leaving the grand jury, I visited a meeting on the Western Reserve University campus, a lodge hall, women lawyers, the Advertising Club, women's clubs and schools. Other people covered many meetings in my behalf. I had been a Democrat but had resigned a Democratic committee position because I believed

any judgeship should be completely non-partisan. In this campaign Burr Gongwer, chairman of the county Democratic committee, spoke in my favor. Meanwhile I had powerful Republican friends. Rose Moriarty, later a member of the Ohio Industrial Commission, and Ohio member of the national Republican committee, planned my campaign. Ben Karr of the *Cleveland Leader*, a well-known Republican, wrote an editorial endorsing me.

Judge Willis Vickery of the Court of Appeals of Ohio gave me an out-and-out endorsement. A committee of forty-eight was formed, not to manage, but to sponsor the campaign. It included some of the finest people in Cleveland. Walter Flory, head of the Cleveland Bar Association; and Herman Nord, another lawyer of standing who later became a U. S. ambassador, both spoke for me in meetings. The streetcar union had previously selected me to represent them in arbitration. They backed me throughout, as did the Railway Brotherhoods. The labor men particularly liked it that I told my age when I was heckled in open meeting on whether I was old enough to be a judge of the Court of Common Pleas. The Business and Professional Women, the newly formed League of Women Voters, and influential women's groups generally, supported me. The *Farm Journal* took my picture in my own cornfield and ran five stories. Many churches let their women's groups hold meetings in the church advocating my election.

Every Cleveland paper—*The Plain Dealer*, *The Leader*, *The News*, and *The Press*—gave me repeated and outspoken backing, both in the news and in editorials. *The Press* said, "Make it unanimous;" *The Plain Dealer* gave my record. No woman could have been elected to such high office without the friendship of the press.

All of this sounds personal and yet it was not personal. I was the beneficiary of the entire woman movement. Susan B. Anthony and her generation, Harriet Taylor Upton and Elizabeth Hauser of Ohio, gave me not only the right to vote

but the right to run for office. They had also achieved another important result. Two decades of newspaper editors in Ohio had been educated to the justice of the woman suffrage cause. So when Tennessee ratified and I ran for judge, fair-minded men were in the editors' chairs.

Thanks to all these forces, without organization, without money, without experience, I led the field of ten judicial candidates in Cuyahoga County in 1920.

The following August I took a short vacation with my old law school friend, Bertha Miller, and we set out to climb Mount Katahdin, the highest mountain in Maine. Under the law of that state anyone who tramps through the Maine woods must have a guide. I engaged a guide who met us at Bangor and led us up a fairly even trail to the foot of the mountain where we camped for three days. The rain fell in torrents and the guide made us a little hut out of branches which eventually allowed the rain to drip through the roof. Suddenly the sun came out and we simultaneously said, "Let's climb the mountain."

There was one high stretch in a rock chimney where the guide helped me to climb up and we stood on the Knife-edge, a narrow rocky path several miles long at the extreme edge of a precipitous cirque. In spite of my weight and sex this had no terror for me. We had often crossed just such paths in the Oquirrh Mountains around Salt Lake, so I just walked on happily across the ridge. When we landed on the other side, the guide looked at me and said, "When I saw you, I said, gosh, that woman will never go over the Knife-edge." This somewhat dubious commendation was quite as pleasant to me as the climb itself.

It also reminded me of the prophecies of defeat which attended my campaign for the Court of Common Pleas. In that case, too, I had crossed the Knife-edge.

5

First Judgeship—Court of Common Pleas

NO SOONER WAS I elected than the other judges of the Court of Common Pleas decided a divorce division of the court should be established with me in charge of it. This did not appeal to me. I did not care to spend my life hearing and deciding divorce controversies. Since I was unmarried, I thought these eleven men, most of them married, were better qualified than I to carry their share of this burden. In my campaign I had discussed certain measures that should be taken in the criminal court, where the delay and inefficiency of the Common Pleas Court, operating as it then did through twelve judges without a coordinating head, affected not only private rights but the public interest so involved in every criminal case. Erie Hopwood, managing editor of the *Cleveland Plain Dealer*, had always been a friend, so I called him up, explained the situation, and said I did not wish to be shunted into a branch of court work for which I was no more fitted than the eleven other judges, involving problems which I had never discussed in my campaign. He said, "Why should you do that?" He was a man of few words and his reaction made me sure I was right. I issued a statement

to the papers saying I would not accept such an assignment, and that particular project died aborning.

During my campaign I had issued a platform. This was in condensed form, as it was printed on a little card bearing my picture which was my only campaign material. The women distributed this card in many parts of Cuyahoga County from house to house. My platform included law enforcement, justice for all, business methods applied to the courts, efficient work by public servants, respect for law, order, and the courts, and moral standards functioning in government. When I was elected I endeavored to carry out this platform. An excellent opportunity soon arose to apply business methods in the courts and at the same time to maintain respect for law, order, and the courts.

As I ascended the criminal bench one morning and looked down at the usual array of persons before the court, I saw an unusual sight. The defendant, who normally might have come from jail looking not too spruce, was dressed in a well-fitting suit, his trousers neatly pressed. He was smiling and debonaire.

This was a robbery case. The prosecuting witness who claimed to have been robbed, in contrast to the defendant was down at the heels, dirty, unkempt, with large dark circles under his eyes. I could not understand why the usual positions were reversed; the accuser looking like a defendant and the defendant looking like an accuser. I examined the file and understood the reason. The defendant had not been in jail; he had been out on bail more than three months, walking the streets a free man.

But the prosecuting witness had been committed to jail and had lain for one hundred and one days during the mounting heat of summer in the antique jail of the Cuyahoga County Court House waiting for the case to be tried! He was held under the statute which enables the courts to hold material witnesses in jail either for their safety or for fear they will abscond. The jury promptly found the defendant guilty. It

was a clear case. But the verdict could not compensate the prosecuting witness for what he had undergone. What a sad conception of law, order and the courts he must have carried away from the proceedings!

This travesty occurred not because anyone wished to do an injustice. It was clearly a case of inefficient administrative organization. When the defendant secured bail, it was reasonable and fair to have his case scheduled for trial later than those where the defendants were in jail. So, with all the other bail cases, his case was pushed toward the end of the list. But it was not reasonable and fair that the accuser should be made to suffer. This concerned the person who had been robbed, as well as the robber, and yet no consideration was given to the prosecuting witness who remained in jail.

I realized it was essential that the assignment clerk and the prosecutor's office be notified, when the case was filed, that a prosecuting witness was held in jail, so his case could be put at the head instead of the end of the list. I called in the clerk and the county prosecutor and we talked it over. After that time, during the months when I presided in the criminal court, in all such cases a notation was put on the file, "Prosecuting witness in jail," or "Witness in jail." The prosecutor then set the matter for speedy trial. During those months this particular injustice never occurred again.

However, in our court we had twelve trial judges trying cases, civil and criminal, without any administrative head of the court. There was no chief judge directing the operation. An efficient and upright assignment clerk operated as best he could, but no one was in command. The judges rotated from the criminal to the civil court. After my period in the criminal court was over and I went to the civil court, a judge who had not had my particular experience took charge of the criminal cases. He had never sat on the bench and seen before him a prosecuting witness who had

been held three or four months in jail. I supposed that the rule which I had established, having operated for some time, would automatically be respected, but it fell into the discard. Soon I saw in the paper that a prosecuting witness had been released from jail after being held there seventy days.

About this time the community manifested an unusual interest in the court's administration. One could see here the influence of the women voters. The women's interest was keenly aroused because for the first time they were serving on the jury and also because they saw a member of their sex sitting on the bench. They had elected me and in a way that made them feel a special ownership in the Court of Common Pleas. This is a real reason for having competent and upright women serve as judges. When women of intelligence recognize their share in and their responsibility for the courts, a powerful moral backing is secured for the administration of justice.

The women at once saw the absurdity of the situation in which twelve judges of the Court of Common Pleas were operating in Cuyahoga County without any administrative head. They saw to it that this was taken up by the press, by the church associations, and by public-spirited clubs. The Woman's City Club of Cleveland had a court committee which did militant work on the question. It organized a mass meeting at a large theater in which all the great women's organizations of Cleveland—the Federation of Churches, the Catholic and Jewish women's groups, the Federation of Women's Clubs, the Business and Professional Women's Club, the patriotic societies and others—were represented.

Meanwhile a survey of the Cleveland courts had been instituted by the Cleveland Foundation, with Dean Roscoe Pound of the Harvard Law School directing the investigation.

Whenever I spoke in Cleveland, as I often did, I told the story of the prosecuting witness held in jail as an illustra-

tion of our lack of judicial business administration. This situation was fully considered and listed in the survey as being one of the results of lack of organization in the courts. It was plain that a head was as necessary for the Court of Common Pleas as for any important business. A bill was framed providing the legislative authority for a chief justice to administer the Common Pleas Court in any county having more than one judge. It was feared that this bill might not pass, for the many agricultural counties of Ohio had little understanding of the Cleveland situation. But the women throughout the state joined forces with the metropolitan press and the churches, and the bill was carried. A definite increase in efficiency resulted.

About this time I had an interesting encounter with Dean Roscoe Pound. I had always admired Dean Pound as a teacher, but the four women in Chicago University Law School when I was there felt he discouraged us in our wish to practice law. He thought it was no field for a woman. During the survey of the Cleveland courts, I attended a luncheon at which Dean Pound made a challenging speech. I felt I should speak to him after the luncheon and yet I hesitated to approach him and reveal that I was now a judge. However, I made my way to the speaker's table, stood before him and started out, "Dean Pound, you will not remember me." This stung him; his memory was of course phenomenal. He said, "I remember you perfectly; you're Miss Allen." Walter Flory, one of the leaders of the Cleveland bar, said, "Judge Allen is presiding in the Court of Common Pleas." Dean Pound said, "Oh! You're the woman! Plunker votes, I fancy."

I had to laugh at this. Unquestionably so-called plunker votes had aided me to lead the ticket. Persons who voted for me and for no one else on the list of ten candidates had deprived other candidates of possible votes. On later occasions Dean Pound showed me friendship and courtesy,

but this was his accolade to me when I was starting to be a judge.

In the criminal courts there are always certain critical problems that do not exist in civil courts. One of these is the matter of bail. It is required by law to give bail and it is right that a man not condemned should be granted bail. However, excessive delay often occurs in bail cases and apart from giving the accused a chance to jump his bail and get away, this delay hinders the ascertainment of truth, which is the real purpose of judicial hearings. If the case is delayed so that an important witness dies, or moves out of the jurisdiction, or simply forgets the facts of the case, the ascertainment of truth is correspondingly impeded. The complete answer is to try cases immediately. Then the defendant is not unduly held in jail, nor does he have so easy an opportunity to leave the jurisdiction. The ascertainment of truth is attained in the highest degree.

An example of the possibilities inherent in the careless granting of bail was shown in one of the cases which I tried, involving three joint defendants charged with murder. When I looked over the files I found that the three defendants had been out for some months on bail. We set the case for immediate trial, picked up the defendants, gave them a hearing, and the jury found each one guilty of second-degree murder. I often asked myself whether these men would have remained in Cleveland if they had had any idea that the case would really be tried soon.

It was borne in upon me in all this experience that politics should have no connection with the courts. While I was appointed Assistant County Prosecutor under a Democratic administration, I had secured my nomination for judgeship by independent petition. Unquestionably, Newton D. Baker and Burr Gongwer, the heads of the Democratic county organization, were friendly to me. But it was

the women—Democrats, Republicans, and independents—who made my campaign and elected me.

Baker, who was a lawyer of outstanding eminence and later became Secretary of War under Wilson, had real respect for the courts and did not interfere in court administration. Some less eminent members of the party felt differently. They reasoned that I had been appointed Assistant Prosecutor by the county political organization and that I should pay attention to an influential member of that organization when he desired some specific court action. Whenever an intimation of this kind came to me I ignored it. Shortly after my election I was told that a certain Democratic ward leader said, "This Florence Allen is the worst thing that ever happened. You go into her court and ask her for some usual favor and she pays no attention to it. She hardly knows who you are and if she did, it would not make any difference." I thought after all this was testimony that I was carrying out my platform. "Justice for all," I thought did not mean, "Justice for Democrats; justice for Republicans." It meant justice so far as we could secure it for every person who came before the court.

I also endeavored to carry out the planks in my platform that called for "efficient work by public servants," and "business methods applied to the courts." In the twenty months that I sat in the Court of Common Pleas, I did work. In my opinion business methods and efficiency cannot be obtained without work in the courts any more than in any other operation. Whatever the future of automation you cannot apply push-button methods to the human problems which make up the controversies that come into the court. Even economic questions of vast complexity, such as patent cases, inevitably affect human life for better or worse. So judges have to work.

From January 1, 1921, to September 1, 1922, I disposed of 892 cases. This included 579 trials actually heard, civil and criminal. The criminal cases included three first-degree

murder trials, one second-degree trial, and the trial of the then Chief Justice of the Municipal Court for perjury. I was reversed three times (about $\frac{1}{3}$ of 1% of cases disposed of), but sustained in all of the important cases.

I thought that we should continue criminal court through the summer, in order that defendants who were awaiting trial might not be held over the summer months. I proposed this to my colleagues but they did not like the idea. I then traded my civil term and vacation period with a judge who was assigned to criminal work and I cleaned up practically all the criminal cases in which the defendants were in jail awaiting trial in the summer of 1922.

It would be impossible to review all of the interesting and stimulating incidents which occurred during the next two years when I was a judge in this trial court of general jurisdiction, legal and equitable, civil and criminal. The judges of the Court of Common Pleas showed me every consideration, though some of them no doubt had been shocked by the idea that a woman might sit with them as a judge. They gave me both friendship and cooperation.

There was one occasion, however, when we differed in a matter of administrative judgment and the story came to an interesting conclusion. An extremely loquacious woman bailiff was employed by the court. She seemed to lack discretion and I tried not to use her in any serious matter. As women were now being called extensively for jury service, it was decided to appoint a woman to be in charge of all such prospective jurors, and this talkative woman bailiff applied for the job. It carried a small increase in salary and a certain amount of prestige, so she proceeded to sew up different groups of the twelve judges who were to vote on her nomination. When the matter came up in the judges' meeting, I said I could not vote for her. They asked me why and I said she had too little discretion. The judges asked for specific instances but I had nothing which would amount to evidence;

my conclusion was simply my judgment of her character as shown by her extreme loquaciousness. The judges thought I was harsh. Some politics entered in and she was elected. She was put in charge of the women who were hearing an extremely important criminal case and the next thing we knew she had talked to one of the witnesses in the case and tried to swing her testimony in favor of the defendant. This was tampering with the administration of justice and was an extremely serious offense. She was immediately relieved of her position and Judge Maurice Bernon, one of our finest judges, said to me, "The next time you are opposed to a woman for service in the court, I shall support you."

One case which gave me trouble was an embezzlement case. The defendant plead guilty; he had no previous record and his employer and his fine wife pleaded with me to suspend the sentence. The amount embezzled was five thousand dollars. At that time we had no department for investigation of character and environment of the prisoner to aid the judge in giving proper sentence—always the most difficult part of a criminal case, harder even than proving the defendant guilty.

I felt favorably inclined toward suspending sentence on this man on condition that he made all possible restitution. His wife came in and gave up some valuable jewelry. His lawyer, one of my former colleagues in the prosecutor's office, assured me that all that was left of the stolen money had been returned, and the employer did not contest this. It seemed as if this first offender probably would go straight. I therefore issued an order suspending sentence.

Then the thieves fell out. The stolen money (nearly the full five thousand dollars) had been deposited in a savings account under an assumed name, and the savings bank book had been given to the lawyer for the defense, in whose possession it was at the time he assured me that all possible restitution had been made. Since this lawyer had a long

service record in the prosecutor's office, I thought turning the matter over to that office would probably get me nowhere. I revoked the order suspending sentence and ordered the embezzler to the penitentiary. I held the lawyer in contempt of court, ordered him to pay a fine and gave him a short jail sentence. The Court of Appeals of Cuyahoga County reversed this holding, on the ground that the fraudulent actions had not been committed in my presence and therefore were not subject to summary judgment for contempt. However, the Cleveland Bar Association soon tried and suspended the lawyer. I still think that the misrepresentation of the embezzler and his lawyer was certainly made in my presence, but over the years I have come to agree that the contempt process should be seldom used by judges.

The unanswerable argument against the propriety of a judge's using summary powers in contempt proceedings to punish someone who had offended both the law and the judge is that too often it is the judge who feels especially injured, and he will act personally, or seem to. There are, of course, clear cases where a judge must act to preserve decorum in the courtroom, but controversies which involve findings of guilt that could be made the subject of indictment and regular trial should not, in my opinion, be handled only by the judge, who in contempt proceedings acts as combined judge, jury and executioner. The judge would not be human in such cases as this if he did not decide that the offender was guilty. It is salutary that the Supreme Court has definitely curtailed the power of judges in contempt proceedings.



Ohio Supreme Court, 1930.



Judge Allen in her chambers at the Federal Building, Cleveland, about 1940.

Judge Allen at the piano, about 1949.



6

The Black Hand

THE MOST dramatic case tried before me was that of Frank Motto, who was charged with first-degree murder. This was the first time in the United States that a woman had presided in a murder case with women sitting on the jury.

I was conscious of the intense scrutiny to which I was subjected, not only throughout Ohio, but in the whole country, in the conduct of this case in which one dramatic incident followed another.

This was a payroll robbery murder. Motto was the head of a lawless gang which was later proved guilty of many robberies and a number of murders across the country. They had planned a stickup at the time the payroll of the Sly-Fanner Manufacturing Company was being transferred to the plant. The gang shot and killed both Sly and Fanner, two highly reputable men, and escaped with the payroll. Motto was apprehended in California, brought back, and tried in my court.

As we started the trial a number of unwholesome-looking characters began to file into the courtroom. Their suspicious appearance and number caused the police to take a hand. A number of the men were searched and found to be carrying

loaded revolvers. They were charged with carrying concealed weapons, put in jail, and the trial proceeded peacefully.

The jury was composed of ten men and two women, and it promptly selected a fine woman as its foreman. It was reported to me that the Motto gang, in addition to their other activities, made a practice of terrorizing men and women, especially those of Italian birth. One day a letter was delivered to me at the Court. It was written on dirty, smudgy paper and had no signature. My name was at the top of the page and every member of the jury was listed below. The letter said, "The day Motto dies, you die." On the smudgy paper were printed several black outlines of a hand.

I was too young to be scared. It amused me. I showed the letter, more as a matter of curiosity than anything else, to one of my friends on the police force. He was not a bit amused. He said, "Now you have to have protection." This seemed to me unnecessary, but the police insisted, and assigned men to guard the houses where the forewoman and I lived. Now and then I woke up at night and went to the window to look out. Sitting on the stoop below me I would see the figure of a policeman watching all night long.

After a long and tense trial the jury went out to consider the verdict. Word was brought to me that the jury had found Motto guilty of murder in the first degree without recommendation of mercy. Under Ohio law, if the jury in a first-degree murder case fails to recommend mercy, the sentence is death. This was the first time in the United States that a woman judge had to impose the death sentence. I did not enjoy this task, but I went into the court prepared to do my judicial duty. The forewoman of the jury arose and in a dignified and collected manner delivered the verdict. I looked over the jury after I had announced the sentence and I saw in the corner of the jurybox a man crying as if his heart would break. He had joined in the verdict and evidently considered it just, but he was so moved at ordering

the death of a fellow human being that he could not keep back the tears.

I have often been asked whether women are not sentimental and emotional in the performance of jury duty. My answer is that sometimes they are and many times they are not, and that the same is true of men. As we all know, men and women tend to express their emotions in different ways. Men are more likely to swear than women, and women are more likely to cry than men, but whether it is a man or a woman, the human being is an emotional creature—and in this case the woman delivered the verdict without evident emotion, while the man was weeping violently.

During the summer I moved to another house in the same vicinity, where I lived for some months with a friend. That was the summer when my campaign for election to the Supreme Court of Ohio was instituted. We rented the upper part of an old-fashioned, roomy house, and so I had no concern about leaving my friend alone while I covered the state with an intensive speaking campaign. Several times, as I returned periodically to Cleveland, she said to me, "I keep hearing someone around this house at night." I dismissed this from my mind as it seemed natural that now and then people should walk near the unfenced house.

In the fall the higher courts of Ohio, including the Supreme Court, upheld the conviction of Motto and he was executed. In November of that year I was elected to the Supreme Court of Ohio and prepared to move to Columbus, the Ohio capital, to take up my residence there. In the basement of our Cleveland house we had lockers which had to be cleared out in preparation for my moving. When we went down into the basement to do the sorting, we found outlined on the basement walls a number of black hands. So apparently there had been a real effort to terrorize the lady judge. However, though Motto had died, the forewoman, the jury and I did not die on that day. We went on living.

My most important case in the Court of Common Pleas involved the former Chief Justice of the Municipal Court of Cleveland, Judge William McGannon, who was tried for perjury. Judge McGannon in his early career had won credit at the bar, and had been advanced to head of the Cleveland Municipal Courts which under Ohio law exercise a broad and important jurisdiction, both civil and criminal. Unfortunately the Judge had become involved with a disreputable crowd which enjoyed a close connection with the court that handled innumerable cases of violation of the Volstead Act. During the increasing scandal which resulted, a certain Harold Kagy was shot and killed on the night of May 7, 1920, at Hamilton Avenue and East Ninth Street in the downtown section of Cleveland. Judge McGannon and James Joyce were friends of Kagy and had been driving with Kagy in McGannon's car around midnight, just previous to the shooting.

Joyce was tried for the murder of Kagy and acquitted. Chief Justice McGannon was then charged with the same murder. The jury disagreed, and a second trial was held, in which the jury found Judge McGannon not guilty. In his second trial for murder Judge McGannon made sworn statements at variance to facts testified to by other witnesses. As a result the Cleveland Bar Association demanded that Judge McGannon surrender his office.

Soon after this, Judge Bernon, who had presided at the first McGannon trial, and Judge Powell, who had presided at the second one, appeared before the Cleveland Bar Association and urged that body to investigate what the two judges called "wholesale perjury" in the two McGannon trials. The Bar Association undertook the investigation. An able attorney of the highest standing was appointed by the Bar to be special assistant prosecutor. A number of indictments were returned, not only against Judge McGannon but also against others charged with inducing, securing or giving false testi-

mony in McGannon's behalf. Verdicts of guilty were eventually entered in a number of these cases.

I was closely connected with these matters because I was the Common Pleas Court Judge assigned to the Criminal Branch. The McGannon situation and connected cases constituted an attempt to influence and destroy the administration of justice.

One of the early trials for perjury was that of Nick McCaffery, an alibi witness for Judge McGannon in the first trial. While this case was pending, Kitty Chambers, the woman bailiff whose appointment I had opposed, approached two women jurors in behalf of McCaffery. They were about to be assigned to sit in the McCaffery case. Both of the woman jurors made affidavits to the effect that Kitty Chambers had asked them to talk to some of the women on the jury in McCaffery's favor and tell them to "stick to it as was done in the McGannon case." These affidavits were filed in contempt proceedings against Miss Chambers. She was suspended and later discharged.

Another problem meanwhile had been created by Delia McInerney. She had persuaded Joseph Johnson to testify as an alibi witness in favor of McGannon at the McGannon murder trial. He pleaded guilty and Mrs. McInerney was therefore indicted and convicted of subornation of perjury. It transpired that Mrs. McInerney had tried to talk to four women members of the jury which was trying her own case. So Judge Baer raised the figure of Mrs. McInerney's bail from ten thousand dollars to twenty-five thousand and she was temporarily in jail.

Still another problem was posed on May 26, when a woman tentatively accepted as a juror in the McGannon perjury case was accused by Kitty Chambers of having said that she, the juror, would get five hundred dollars from an organization to which she belonged if she sat on the jury in the perjury case and McGannon was convicted. The juror did not

deny this, but refused to name the organization. I repeated Kitty Chambers' story categorically and asked the woman whether she had made the statement. She said yes, but again refused to name the organization. This constituted a serious offense. She had sworn in her examination for the jury that she had talked to no one about the case. Now she admitted having talked to Miss Chambers. She had stated that she knew of no reason why she could not be unprejudiced toward McGannon, and then admitted having a five-hundred-dollar reason for being prejudiced. I sentenced her to jail for ten days and fined her fifty dollars.

We proceeded with picking the jury in the McGannon perjury case. Everything seemed satisfactory until June 9, 1921, when two witnesses declared that one of the accepted jurors had made remarks prejudicial to Judge McGannon. I discharged the whole jury and we began to select a new one.

When the jury was secured a day was set for trial. Judge McGannon did not appear. He was at some sanitarium and submitted statements of two doctors to the effect that he was too ill to be tried for two or three months. I appointed two physicians of highest standing to examine Judge McGannon. They reported that he was physically able to stand trial, and we proceeded.

The crucial issue of fact in both the murder and the perjury cases was whether Judge McGannon, who admitted that he had been driving with Joyce and Kagy shortly before the fatal shooting, had, as the Judge asserted, left his automobile at Euclid and East Ninth Street in Cleveland, so that he was not present at the scene of the shooting—Hamilton Avenue and East Ninth Street—at about midnight of May 7th.

In the first murder trial Miss Mary Neely testified that she saw Kagy, McGannon and Joyce at Hamilton Avenue and East Ninth Street on the night in question, that she saw McGannon pull "something shiny" and saw a shot fired. Several witnesses swore that McGannon was at the scene of the shooting. The jury stood ten to two for conviction, but

after it had been out for forty-eight hours the jury was discharged for failure to agree.

McGannon was again brought to trial on the murder charge, this time before Judge Homer Powell. Shortly before the trial began Miss Neely met with Judge McGannon at the Hotel Mecca. During the trial she testified very evasively. She repeatedly answered the prosecutor's questions with, "I forget," or, "I don't remember." Instead of saying that she saw Judge McGannon at East Ninth and Hamilton Avenue on the night of the murder, she said she saw "a man." After being out twenty-four hours the jury found the Judge not guilty.

In the perjury trial before me Miss Neely again appeared and testified that she saw Judge McGannon with Kagy at Hamilton Avenue and East Ninth Street at the time charged and saw the Judge pull something from his pocket and heard a shot ring out. She said that Judge McGannon at the Hotel Mecca offered her up to five hundred dollars in one hundred dollar bills to change her testimony as to seeing him at the scene of the shooting, and that she refused.

Two former reporters for one of the large Cleveland newspapers testified in the perjury trial that one of them had received over one thousand dollars from Judge McGannon for services in the second murder trial. The services rendered, they said, consisted partly in trying to get Mary Neely to admit she had perjured herself in the first murder trial. McGannon denied all the material statements of Miss Neely and the reporters. I charged the jury that they should consider only the facts as presented in the case. "With the dispensation of mercy," I said, "you have nothing to do. You are the ministers of justice and not of mercy. The administration of mercy is a function that belongs to the Governor of the State, aided by the Board of Pardons.

"The law must be obeyed. Violations of the law must be punished, and you as jurors would be unfaithful to your

trust if you should return a verdict of acquittal in this case if the facts demand a conviction of the prisoner.

"It is equally important that innocence should not be punished. You were impanelled, not for vengeance, but to serve the ends of public justice, and you would be disloyal to your obligations if you should find the prisoner guilty when you had a reasonable doubt of his guilt."

The jury evidently believed the State's witnesses in their testimony at the second trial. They applied my charge and found the Judge guilty of perjury.

It grieved me to deliver this sentence, but I believed that judges are not above the law, and that a court should say so.

Judge McGannon was given an opportunity to speak, and protested his complete innocence.

"Judge McGannon," I said, "a court has never been faced with a more disagreeable duty than that of sentencing a man before whom the court has practiced as a lawyer.

"However, our personal feelings cannot be permitted to prevent us from performing our duty. I have this to say: Judges cannot think that they are above the law. They must be subject to the law the same as private citizens.

"Judges know the law as well, or better, than private citizens. Judges ought to know the spirit of the law, which demands that all tell the truth in a court of justice, judges as well as private citizens.

"How old are you, Judge McGannon?"

"Fifty-five," replied Judge McGannon, his hands folded before him.

"The court hereby sentences you to the Ohio state penitentiary, one to ten years."¹

¹ In 1924 an application was made to have the judge allowed to leave the Penitentiary because of serious illness. The application was supported by the prison physician and by the State Board of Clemency. It was granted and Judge McGannon was released on January 5, 1924. He died on November 17, 1928.

7

Supreme Court of Ohio Campaign

IN 1922 a general state election was held in Ohio in which we voted for Governor and state officers, including judges of the state Supreme Court, which is the court of last resort in Ohio. Late in the summer of that year a judge of this court decided to run for governor and resigned from his position on the bench. This left an unexpected vacancy to be filled by the voters at the November election. Everyone had supposed that the Judge would run for reelection to the court and of course would be elected. Several of my friends, the first being Stephen M. Young, suggested that I run for the Supreme Court. This would require a state-wide campaign through eighty-eight counties, and while I was hesitating as to entering the race somehow it was noised about that I was seriously considering the matter. Some men said the idea was preposterous; that I was much too young. So again I called up Erie Hopwood of the *Cleveland Plain Dealer* and said I was considering running for the Supreme Court. In his laconic way he said, "Why not?" Then I talked to Newton D. Baker about it. In spite of some dissatisfaction among the Democrats when I ran for Common Pleas judge

without entering the party primary, Baker had always been friendly to me. He dismissed the objection as to my youth with the statement that people had always thought he was too small and too young to do the things he had tried to do. Since I had the approval of two men of remarkable experience, I announced my candidacy the next day. The *Cleveland Plain Dealer* endorsed me. This was followed by friendly publicity and endorsement in the *Scripps* and many other Ohio papers.

There ensued a campaign such as I have never seen. I was the first woman to have been elected a trial judge, and I was the first woman in the country running for election to a court of last resort. This had both advantages and disadvantages. Some people considered it impudent for me to aspire to such high office, but the very bigness of the fight gave me unusual and on the whole fair and favorable publicity. A unique feature of the campaign was the spontaneous marshalling of political power in a group of women theretofore without a vote and somewhat untrained in political work. When I announced my candidacy women all over the state who had known me in the woman suffrage fight wrote in or telephoned to ask what they could do. Ohio believes in the non-partisanship of judges, and while all Ohio judges are elected, their names are carried on an independent judicial ballot containing no party designation. The names of the candidates are listed alphabetically, and regularly rotated to ensure fairness of the election. I decided to secure my nomination by petition as I had in the campaign for the Court of Common Pleas. That had been fairly simple where the office involved covered only one county. But the Supreme Court of Ohio functioned in eighty-eight counties, and nearly twenty-one thousand signatures would be required.

How could I get so many signatures? For several months I had no organization. I simply had nominating petitions, each carrying spaces for one hundred signatures, printed and

delivered to women who asked for them. A friend who taught at Laurel School placed petitions in nearby counties through women leaders who distributed them throughout the county areas. About this time an effort was made to repeal the non-partisan provisions of the judicial elections act. It was defeated and I did not have to face that particular hazard.

My father and mother were visiting me that summer, and Father, who had frequently won elections in Utah, helped to mail out the petitions and gave me valuable counsel on many points. He advised me not to reveal how many signatures I had secured at any given time. The women put the petitions into practically every one of the eighty-eight counties, and the local women in the counties obtained over forty-two thousand signatures.

In Ohio at this time the petition method of nomination was often used, and money was paid for the work of securing signatures. Not one cent was paid for collecting any of our signatures. Any doubt as to my nomination being approved by the Secretary of State was dispelled when he announced that since we had twice as many signatures as necessary, we were entitled to a place on the ballot.

Late in September, 1922, Susan M. Rebhan, a capable and gifted organizer then associated with the Y.W.C.A., came into the campaign and organized a committee which included some of the finest men and women of Cleveland. But up to September 23d the work on the petitions was done by women who spontaneously volunteered their help. The women out in the state also arranged speaking engagements for me in many counties, and whenever my court was not in session I spoke all over Ohio, explaining my platform and emphasizing the non-partisanship of judges.

As I had no party support, either Democratic or Republican, I knew that I must rely on myself to keep in touch with the electors. At first when I was invited to address some school, church, or other gathering, I would carefully work

out my ideas and have at least an abstract of them typed so that I would not be misquoted. Sometimes I supplied myself with little summaries of some speech I considered important. It seemed, however, that no one but myself was interested in my copies, so I began to omit them. Once in a while, apparently, something I had said ad lib would strike the fancy of the press and would crop up all over the country. On one occasion I mentioned what a valuable contribution the "old maid" has made to society, the community and the family, and I must have become quite enthusiastic on the subject, for I met that story wherever I went.

I went to Athens for a summer convocation at Ohio University, arriving at 2 A.M. I visited the towns on the Ohio River—Ironton, Portsmouth, Marietta. I had to speak at Kent Normal School, now Kent State University, forty miles from Cleveland, at 9 A.M. As I was just learning to drive my Model T Ford, I arose and left my home at 5 A.M. in order to be sure of arriving in time.

The Republicans were upset because many Republican women served on my committee and were working for me throughout the state. Mabel Walker Willebrandt, the first woman to be appointed U.S. Assistant Attorney General, came out to Ohio from Washington at the behest of the National Republican Committee and pointed out to the Republican women the error of their ways. At a large meeting in Cleveland, in which ironically I sat at the speakers' table close to Mrs. Willebrandt, she stressed the importance of undeviating loyalty to the party, and the inference against me was made very plain.

Mrs. George Gordon Battelle of Columbus, chairman of the Woman's State Republican Committee, attacked my candidacy. Her attitude was that no Republican woman could properly support me. But this reacted in my favor. Mrs. Ivor Hughes and Dr. Alice Johnson, both of Columbus, resigned from the Republican Committee. Mrs. Malcolm McBride of

Cleveland protested to Mrs. Battelle, and declared her, Mrs. McBride's, support of me. Mrs. George Meekison of Napoleon, Ohio, was sent quantities of literature from the Republican Committee, picking out my candidacy for attack. Mrs. Meekison put the literature in her basement where, as she said, "It won't hurt anybody." The volumes of publicity that this opposition produced, with increased emphasis on the non-partisanship of judges under the Ohio system, unquestionably helped the campaign.

While we were sending out the petitions the women started to form so-called Florence Allen Clubs. We adopted this device in many counties, and the clubs assisted in obtaining newspaper support. When some of the fine women in a county gave out their names as members of a Florence Allen Club, the local and county papers became friendly. In Toledo Eva Epstein Shaw, a brilliant lawyer, formed a Florence Allen Club which admitted both men and women. It charged dues of one dollar and had some one hundred and fifty members working actively in Lucas County. Its campaign expenses were \$132.65.

The women in Franklin County had a Florence Allen Club and their own headquarters in the center of Columbus. At the end of the campaign Florence Allen Clubs had been formed in sixty-six counties and organizations of men and women were working for me in seventy-nine of the eighty-eight counties of the state. When I look back upon my complete lack of party support, it seems amazing that this campaign should have been successful. Since I was nominated by petition, the Democratic Party did not endorse me and often opposed me. They had two candidates who had entered the party primary and had been nominated for the Supreme Court. The Republican Party was extremely hostile, and did everything possible to keep the Republican women from working for me. Of course, my having recently campaigned for woman suffrage gave me an enormous advantage. There

was hardly a county in Ohio where I had not stood on the steps of the courthouse or talked in some church on behalf of the enfranchisement of women. So I had friends everywhere. Moreover, they were not merely well-wishers; they were capable workers. They had made house-to-house canvasses before they got the vote, and now with the consciousness of political power they went forward joyously to make a house-to-house canvass for me. The only literature I had was my little card bearing my picture and my platform, and I kept the same platform in all my judicial campaigns.

The press meanwhile was giving me excellent support. The *Cleveland Plain Dealer*, all of the three Scripps papers, the *Akron Beacon-Journal*, and many county periodicals gave full space to my platform. However, without the quiet and state-wide work of the women and many men in all the counties, we could not possibly have won. The politicians thought the campaign was absurd, but when the votes were counted, we had a majority of 48,108. This was remarkable, as the defeated candidate was General Benson W. Hough. He was one of the popular leaders in World War I, the Commander of the Rainbow Division, a man adored by his troops. He had the gift of making friends, plus the whole-hearted support of the Republican state machine. For the victory I thank the friendly press and the men and women of the entire state.

My experience in the prosecutor's office and in the trial court also had helped me. I had learned the evil effect upon a crowded court calendar of the delays, excuses, and non-appearance of attorneys and litigants when their cases were called. I had started the very first day as a judge to insist upon promptness. A juror was late and I told him that the court must open on the minute. I notified the lawyers that if any attorney was not in court at the specified time to represent a defendant to whom he had been assigned, I would at once assign another attorney. This notice was effective. When a

lawyer sought unjustified delay, I rejected the application. The public approved. The *Cleveland Press* ran a feature purporting to be written by "Moses Cleveland" and addressed a note to me.

To Judge Florence Allen

Dear Judge: I approve your action in putting in jail litigants who do not appear in court when ordered. Send their lawyers with them.

Moses Cleveland

When I refused to handle all the divorce cases in the whole court, the *Cleveland News* made this amusing editorial comment (Jan. 1, 1921):

May it Please Her Honor

We certainly never expected to live long enough to hear a spinster decline appointment as a judge of a court of marital relations on the ground that she was ignorant of the subject.

My own attitude toward work and my insistence that the lawyers carry out their obligations drew favorable notice in the state as well as in Cuyahoga County. The wide-spread perjury uncovered in the McGannon case and the existence of an organized murder gang, as disclosed in the Motto case, were not forgotten and gave the women an excellent example of what the criminal courts, when properly administered, can do to protect the citizens.

There is a school of thought today which says that the main purpose of the criminal law is to rehabilitate the criminal. This is an important aim, but the all-important purpose of the criminal law is the protection of the community. Criminal law is established primarily to prevent murders, kidnapping, highway robbery, and other offences against the individual and the state. Never until the criminal law is enforced as strictly as it was fifty years ago shall we have pro-

tection from gangs in the subway, on the streets, and actually in the homes of law-abiding citizens.

As often is the case, a number of homely circumstances assisted my campaign. That I was the granddaughter of Jacob Tuckerman helped enormously. Also, it helped that my father was the first baseball player in Ohio to pitch a curve ball on a college team. The curve had just appeared in New York City, and Papa who was playing semi-professional ball with the Erie team was introduced to the curve by the New York pitcher, who slaughtered the Erie batters. My father induced the New York pitcher to teach him the curve, and came back to Western Reserve College with the new technique in his own fingers.

The Reserve boys were exultant until old Professor Potwin, physics expert, said that as a matter of physical law a curve could not be pitched. The boys persuaded the professor to try out the proposition. He wore a little shawl around his shoulders in the chilly October weather, and they persuaded him to stand just that way at home plate in the baseball field. My father threw a ball straight at Professor Potwin, and it went around him. The professor admitted that the curve was possible, and the Reserve team challenged Oberlin. They gave Oberlin a smashing defeat and went on to play the principal college teams in Ohio, beating them all. John Barden of Painesville, who was the catcher when Father pitched, and who later was chairman of one of my campaign committees, said that anyone who saw Emir Allen pitch a curve gave me a vote automatically. There was no reason in it, but as a practical matter there was a political advantage in that curve.

So once more, in 1922, I won my campaign. It was the first time in history that a woman had been elected to the highest court in any state. *The New York Times*, the *Washington Herald*, and other national papers spread this fact on their pages and even noted it in editorials.

The same thing was essentially true of my later campaign for re-election to the Supreme Court. We were better organized in 1928. Susan Rebhan did a fine piece of work in the various counties. We obtained 100,000 signatures on our nominating petitions and we won the election by 350,000 votes. But essentially it was the same factor which produced this astounding result—the state-wide friendship of Ohio men and women through all these thirteen years.

My election to the Supreme Court of Ohio necessarily changed my life in some ways, as I was obliged to live in Columbus.

I owned sixteen acres in Lake County near Cleveland, on which and from which I walked during my weekends. It was lovely woodland, with large tracts of maples, beeches and tulip poplars. The roads were unpaved and I enjoyed ten or fifteen miles with the good ground under my feet on an easy Saturday.

There was only a tumbledown shack on the land, so I never lived there in the early days, but rented quarters in Cleveland. There was no difficulty, therefore, about moving to Columbus for a six-year term. My father had retired and he and Mother were coming to live with me. I bought a comfortable old house near the Supreme Court and we settled down to family life again. I obtained a good old piano and almost every night I played for two or three hours—easy but lovely things—and my parents loved it. Father said he had received from his children as good a musical education as any man he knew.

We had always been a devoted and close-knit family. We developed our individual interests as we grew up, of course, and went our separate ways, but the family feeling was still there. We were told that when my brother Emir was dying in France in World War I he said, "I'm not going to die; I'm going home to my mother."

When my sister, Dr. Esther Allen Gaw, was appointed

Dean of Women at Ohio State University she came from Mills College in California and we all lived together. It was a happy time. But eventually we lost our parents and still later, when I was appointed to the federal Circuit Court of Appeals, it was necessary to move once again, to Cincinnati.

As is usual in Federal Courts of Appeals, our judges were required to attend the regular sessions of the court in the central city of the circuit. This required meeting in Cincinnati at regular intervals, and at the close of each session we were expected to return to our respective states and work on the opinions assigned to us. A cousin of mine who had lost her parents had lived with me in Cleveland, and we rented half of a roomy old house in Cincinnati to use in our regular trips to the Court. This was fine; I had my piano and a yard which we enclosed for our three cocker spaniels. Later the house was sold and I had to travel to Cincinnati alone while my cousin cared for the cockers at the country place to which we had moved just before Pearl Harbor.

We patched up the old tumble-down house and because of the great material shortages were only able to attach a room when we could obtain a little lumber and some carpenters. The land had been neglected for many years and nature had taken over. We were surrounded by briars and the house had been added to by patches, so we called it the Briar Patch.

8

Outlawry of War

ANOTHER INTEREST had loomed larger through the years and had a deep influence upon my later life and work. I had always been interested in international law, and in studying that subject I had become increasingly aware that there was little substantive law between the nations. There were laws about ambassadors and consuls, rules about the three-mile short limit, and in the Hague Convention certain laws about war; but there were no laws *against* war. International law around 1908 in substance provided that a nation might kill men in war neatly with a smooth kind of bullet, but not untidily with what was called a dum-dum bullet. It was legal to kill a man in war, but not in some ways to kill him cruelly. To sum it up, there were no Ten Commandments between the nations.

I had early been impressed with this lack, and while giving current events talks in New York City (1911-1913), I had repeatedly stressed the need of substantive international law. So when Mr. Salmon O. Levinson of Chicago, a high-minded and able lawyer, took up the cudgels for what he called the "Outlawry of War" I became a member of his committee, along with Col. Raymond Robbins and Miss Elizabeth J. Hauser. This interest was intensified by family tragedies. In

the First World War my brother, Clarence Emir Allen, Jr., was killed in action on the first day of the American Offensive in France. My second brother, John Alban Allen, died after his return from France of injuries received in active service. Both were Yale graduates, brilliant, able and honorable. This showed me as nothing else could what war really means.

This tragic situation is not limited to America alone. It means the wiping out of the finest young men of any nation at war, the flower of the race, men trained for future leadership, before they have had a chance to make their contribution to their countries and the world. It means the draining of the life-blood of civilization. More than ever it seemed essential to establish law between nations; to substitute law for war. This seemed to me the highest endeavor in which anyone could engage.

Immediately after my election to the Supreme Court of Ohio I was asked to speak at the historic Congregational Church in Columbus, Ohio, made famous by Washington Gladden. Senator Theodore Burton of Ohio and I were the speakers. I spoke of the "Outlawry of War." At the close of the meeting Senator Burton said, "You know, the way you present it, maybe it would be possible." In the same year I spoke in Des Moines, Iowa, at the national convention of the newly-formed League of Women Voters. There I shared the platform with Herbert Hoover, then Secretary of Commerce. There was such a crush at the meeting that Secretary Hoover and I had to go over to a second building and address an overflow audience. In those days there was no public address system.

The speech at Des Moines and one which I delivered at Hot Springs, Arkansas, to a national convention of the Y.W.C.A. were, I believe, the first addresses on this subject made to any national convention in the United States. Viscount Cecil of England also spoke at the Des Moines convention, but on a different day. He was interested in the

reports of my address and asked me to see him in New York. I met him there, and Viscount Cecil—a sincere lover of peace—tried to convince me that the Covenant of the League of Nations outlawed war. He quoted the text of the Preamble to the effect that the League was being formed "to eliminate war," but I replied that as we both knew, being lawyers, the Preamble was no part of the Covenant. While the instrument itself imposed deterrents upon the making of war, it did sanction the use of armed force between members of the League, and this was a major reason why the League failed.

I was not opposed to the League of Nations. I wanted it to succeed. It would have been more likely to succeed if the United States had entered the League. During the time that the movement to outlaw war became important, advocates of the League opposed the outlawry of war because it called for action not proposed by the League of Nations. One of the distinguished persons who resented the emergence of the outlawry idea was Carrie Chapman Catt. Mrs. Catt had been friendly to me, had invited me to speak at important national conventions, and always greeted me with interest and affection. She had formed a league of the important women's organizations with the express purpose of studying the Causes and Cures of War, and a mass meeting of the group was held in Washington on January 18, 1925. Mrs. Catt invited me to address the meeting, but she told me I could not discuss the outlawry of war; that Dr. James Shotwell of Columbia would discuss that subject. Shortly before the meeting the program was published and Dr. Shotwell's name was not listed. The program indicated that no one else was to discuss outlawry, and I had been forbidden to talk about it.

A famous British general, Major General O'Ryan of the United States Army, and I were the speakers. I sat through the early part of the program depressed beyond measure with the thought that this magnificent meeting was not to hear

how necessary it is that the nations subject themselves to the basic moral law, "Thou shalt not kill."

Major General O'Ryan spoke just before me and in the course of his otherwise admirable address he went out of his way to attack at some length and with considerable misunderstanding the movement to outlaw war. When he finished I turned to Mrs. Catt and said, "Now I do have to discuss the outlawry of war." She said, "Yes, you may." The speech I gave was reprinted in the Congressional Record without my knowledge by Senator Robinson of Arkansas; and Frances Parkinson Keyes made the following comment in *Good Housekeeping* magazine:

The final speaker of the afternoon was Judge Florence Allen of the Supreme Court of Ohio, the first woman ever appointed to such an office. She possesses the "gift of tongues" to an extraordinary degree, and held her audience spellbound from her first to her last word. Her introduction, in which she greeted and described each organization represented, was a masterpiece of brevity no less than of compliment; her legal definitions and arguments were as clear as they were thoughtful; her statement that the old slogan, "The state can do no wrong," must change to "The state shall do no wrong," rang with conviction; her assertion, "The women in this room can do this thing," (end war) exalted every woman present to the determination to be worthy of that expression of faith.¹

It was because of my devotion to this cause that in 1926 I made a grave political mistake. Newton D. Baker sent word to me through Judge Maurice Bernon, Baker's chief representative, advising me to run for a seat in the U. S. Senate. Atlee Pomerene, the incumbent, had won the hostility of the women leaders in Ohio by his bitter, discourteous and sarcastic opposition to their efforts to secure woman suffrage.

¹ This speech is reprinted in the Appendix.

Now the women were voting and I myself had been elected to the Court of Common Pleas and to the Supreme Court of Ohio by a majority of 48,000. Senator Pomerene, perhaps with the women's vote in mind, had announced that he would not run for re-election in 1926, and Baker, head of the Democratic Party, said that I could win. The Republican candidate was Frank Willis. It seemed to me that in a legislative position I could do more for outlawry of war than in a court, and I decided to adopt Baker's suggestion. I notified him of my decision, and he promptly had the Democratic Party endorse me for nomination at the primary. Pomerene, having announced three times that he would not run, changed his mind, and shortly before the date set for the primary announced that he was a candidate for re-election. Baker then asked me to release the Democratic Party from its endorsement and I did so.

I wished to pull out of the contest after the about-face of Baker and the Democrats, but the countless friends who were actively working for me thought it would be cowardly to withdraw. They also thought I might possibly be nominated. The primary vote was close, but Pomerene won the nomination. He was defeated in the election, and so he also had made a political mistake. In my case the voters did not seem to care. They had elected me to the Supreme Court of Ohio, and they re-elected me to that Court in 1928 by a majority of 350,000.

Echoes of this victory reached as far as England, whence came the following letter from Viscountess Astor, the American-born woman who had become the first woman member of the British House of Commons:

Taplow, Bucks.

Cliveden.

January 18th, 1929

Dear Judge Allen:

I have been waiting to write you with "myne owne hande," to congratulate you on your wonderful victory.

I broke all rules when I telegraphed you that I hoped you would win, but in my opinion there are a great many rules which women will have to go on breaking!! You don't know how pleased I am and how proud we all are of you.

Why not come over to England for a little change? There is nothing more important than that England and America should get to know and to understand each other, and we can't know each other if we don't see each other!!!!

With love and congratulations to the people of Ohio.

Yrs. Aff.,

Nancy Astor

At about the same time I made another and more serious mistake—this one a matter of friendship. I foolishly signed some notes as accommodation maker. Not a cent of profit from the investment contemplated would come to me; I was asked to sign the notes merely to give credit to two friends.

Suddenly the crash of 1929 occurred and the venture in question failed. The makers of the notes both died, completely insolvent, and I was left to carry the burden. Several very good friends, including two fine lawyers, helped me in the ensuing negotiations. Other good friends released certain obligations so that I did not have to pay the full large sum. Some of the creditors accepted a reduced amount; but even so, it took me ten years to pay off the balance.

9

Supreme Court of Ohio

THERE ALWAYS is an adjustment when a new member enters a court. This was particularly true when I entered the Supreme Court of Ohio. I was the first—and up to the present time—the only woman in the United States elected to a court of last resort.

We heard the cases in the usual routine on that first day and then we went out to consider them. We sat around a huge table in the large conference room. I was aware of a certain uneasiness among the men and all at once I had an inspiration. "While I don't smoke, myself," I said, "I shall be delighted if any of you will do so whenever he wishes." There was a sigh of relief. One judge drew out his pipe, another lighted a cigar, and we proceeded under less strain.

Of course there had been opposition in the court itself to my election. One of the men particularly outraged by the result was a fellow judge, James Robinson. He was a high-tempered man, a good lawyer and a good judge, but distinctly opposed to women in professional life. As time went on we became good friends and in my second campaign, while Judge Robinson did not support me, he did not oppose me. That was a victory.

In the Supreme Court of Ohio we were presented with a

fascinating array of questions. The problem was no longer, as Newton D. Baker used humorously to describe the run-of-the-mine civil case, "Whose cow was it?" nor who had perpetrated a burglary, a highway robbery, a murder, or who was at fault in a divorce case.

In addition to ruling on private controversies or criminal cases, the Ohio courts were now entering new and unexplored domains of the law. Ohio was in the flower of her development as one of the mighty industrial states of the mid-west. She was the state in which many of our steel plants were concentrated. She was to be the center of the machine tool, the rubber, and the glass industries.

In 1912 sweeping changes had been made in the state constitution to take care of the pressing needs of our new businesses and industries. Workmen's compensation, which had been voluntarily established by my father in Utah around 1900, had only just been set up in Ohio. The entrance of the automobile into our economy, with the consequent uprise of motor, bus and trucking companies, presented huge problems. These companies operated at first wholly without governmental regulation, and so in the areas of transportation new laws were required. Processes of manufacture in the metal trades concentrated in Ohio were highly speeded up as we entered this era. Accidents were mounting and society began to pay a tragic toll for its mechanical progress.

Meanwhile the cities were bursting at their seams and becoming unwieldy with increase of population and the growing social problems arising from inadequate housing and intermingling of the races. Under the old laws a municipality was a creature of the state. Its field of operation was so sharply limited that the city could not properly deal with its own peculiar problems.

In 1912 the voters amended the Ohio constitution by adopting a home rule provision which freed cities by giving them "all powers of local self-government." These and other

new constitutional amendments resulted in the enactment of far-reaching and novel legislation. Consequently, in the Supreme Court of Ohio, during my eleven years of incumbency, we construed statutes in which the field had rarely been clarified by previous judicial decisions. Some of these laws revamped the financial structure of the schools, some applied new bases of taxation, and some established new rights and liberties. I had the privilege of writing some of these important decisions.

My first case in the Supreme Court held that the City Manager Plan which had just been adopted by the Cleveland electors, including proportional representation, was valid and constitutional.¹ The voters later abolished the City Manager Plan and returned to the system of ordinary municipal elections; but our case was the first judicial decision in the United States to hold that a city under a constitutional grant of independent municipal power could adopt the radically different system of voting and counting embodied in proportional representation. The case was scrutinized, also, because it had been written by a woman; and the decision met with approval. An unidentified friend wrote a review of the opinion and sent it to me. Parts of the comment are as follows:

"The writing of Supreme Court opinions by women lawyers has begun. . . . the handing down of the first such decision caused a moderate amount of newspaper publicity in Judge Florence Allen's home town, but hardly by reason of her writing it." The writing of supreme court decisions by women, it would seem, lost all its ominous and unusual aspects before it began.

"One suspects that Judge Allen enjoyed writing the decision and so adding to the list of those which declare that the Ohio constitution means what it says when it confers the powers of local self-government upon cities. There is a sureness of tone and judgment in the discriminations of law

¹ *Reutner v. City of Cleveland*, 107 O.S. 117 (1923).

which the decision lays down; there is an abundance of quotation and citation of prior cases, but not an overload . . . When she had disposed of all the questions of law involved, she added one sufficient paragraph about intent:

“After all, is not the purpose of the home rule amendment to the constitution exactly this, that progress in municipalities shall not be hampered by uniformity of action; that communities acting in local self-government may work out their own political destiny and their own political freedom on their own initiative and in their own way; and with this purpose in mind, should not the enactment of political alterations in the structure and substance of a charter government be given every possible presumption of validity? There is a presumption that an enacted statute is valid. Not less should there be a presumption that changes enacted according to law in the organic constitution of a home rule city be valid.”

“May all judges who have not a readable style of their own emulate that of Judge Allen! She writes with ease . . . She avoids involutions and convolutions when she constructs a sentence, and the force of her reasoning is not thereby diminished. She perceives necessary distinctions, and sets them forth without confusion . . . She quotes authorities with rare discrimination, being content . . . to omit as many cases as possible, so long as she uses well the few which contribute most powerfully to the solution of the problem in hand. These are substantial merits, and for them the state can easily suffer the splitting of a single infinitive, and the ousting by a pertinacious “will” of a single “shall” from its rightful place.”

I also wrote decisions involving great social and political problems in the following fields:

1. SCHOOLS. We held that it was constitutional for the legislature to apply funds raised in one school district to the

needs of other school districts in the same county.¹ Another school case held that if a Board of Education in a school district fails to provide sufficient school privileges, including public transportation, for all the youth in the district, the County School Board must supply such facilities.² Also I wrote the decision upholding the law which created a retirement fund for teachers.³ I was glad I could take part in these adjudications and help strengthen the public school system which, next to the home, is the basis of our American life.

2. THE POWER OF MUNICIPALITIES. One reason for the inefficiency and the corruption of American city government as described by James Bryce had been that the municipality was controlled by the state legislature. It could not act to protect itself and its citizens. The new constitution of Ohio (Article 18, sec. 53) provided that cities should have “all powers of local self-government.” The Supreme Court of Ohio accordingly held that under the new constitution a city had the power to zone its whole territory in the interest of public health, safety and public morals (*Pritz v. Messer*).⁴ I wrote this decision, as well as that of *City of Youngstown v. Kahn Bros. Building Co.*,⁵ decided the same day, which held that the zoning restriction there involved was invalid. This latter case was a block restriction. The court held that since the zoning regulations construed in the Kahn Bros. Building Company case applied only to a fraction of the city, the ordinance had no reasonable relation to the public health, safety and welfare, and the provision that an apartment house could

¹ Board of Education of Silver Lake Village School District v. Korns, Auditor, 107 O.S. (1923).

² State ex rel Masters v. Beamer Board of Education of Carroll County, 109, O.S. 133 (1923).

³ State ex rel Retirement Board of Teachers' Retirement System v. Kurtz et al, 110 O.S. 332 (1924).

⁴ Pritz v. Messer, 112 O.S. 628 (1925).

⁵ City of Youngstown v. Kahn Bros. Building Co., 112 O.S. 654 (1925).

not be erected within a district of private residences was unconstitutional. Also, we held that villages and municipalities had power to establish and maintain utilities such as light and power plants, a power they had not enjoyed prior to the enactment of the amended Ohio constitution.

3. LABOR. We held that labor picketing unaccompanied by physical violence, abuse, intimidation or any form of coercion was lawful and could not be enjoined.¹

4. TAXES. In addition to the ordinary questions of taxation constantly arising in the state, we dealt with laws laying taxes upon a totally new transportation system which covered the country with incredible speed. A law was passed taxing commercial trucks according to their horsepower and gross weight. Senator Robert Taft, who was then practicing law in Cincinnati, thought this was clearly unconstitutional. I wrote the decision holding it valid.²

5. QUESTIONS FOR THE JURY. In any reviewing court many cases are decided in effect by whether the case is or is not submitted to a jury. The finest judges I have known rely heavily upon the jury. I wrote some interesting opinions turning upon this question. In one case the owner of some horses turned them loose into a field next to a much travelled highway. The field was defectively fenced. A horse strayed onto the highway and collided with an automobile. The lower court held as a matter of law that the owner of the horse was under no obligation to maintain the fence, and held him not liable. We held it was a question for the jury whether the owner could anticipate the accident;³ we reversed the judgment and remanded the case for trial by jury. In another case the management of a baseball company permitted its team to practice close to the unscreened section of the grand-

¹ La France Electrical and Supply Co. v. Int. Brotherhood of Electrical Workers, 108 O.S. 61 (1923).

² Fisher Bros. v. Brown, Sec. of St., 111 O.S. 602 (1924).

³ Drew v. Goss, 112 O.S. 485 (1925).

stand between the two games of a double-header. A spectator sitting in the unscreened portion of the grandstand was hit. We held it was a question for the jury whether the management was guilty of negligence.¹

6. WORKMEN'S COMPENSATION. The new workmen's compensation law authorized the Industrial Commission to assess the damages due an employe or his dependents in case of death or injury, and to order the employer within ten days to pay the amount determined. This was a hotly-contested provision. I wrote the decision holding the penalty valid upon the authority of *Fassig v. State*,² which held the entire section involved constitutional.

Probably as tense a conflict as I had to deal with during my eleven years in the Supreme Court of Ohio was presented in *Ohio Automatic Sprinkler Company v. Fender*.³ This important case arose out of the fact that Hannah Fender, employed as operator of a punch pressing machine, caught the thumb of her left hand under the press and it was amputated. She sued her employer on the ground that it had violated the General Code of Ohio which required employers to "guard all saws, woodcutting, woodshaping and all other dangerous machinery."

The constitution of the State of Ohio as revised in 1912, in establishing the workmen's compensation system, provided that laws might be passed taking away any and all rights of action or defense from employes against employers, but that no cause of action should be "taken away from any employe where the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of any employe." This new statute enacted in accord with the revised constitution gave the employe a right to receive compensation for in-

¹ Cincinnati Baseball Co. v. Eno, 112, O.S. 175 (1925).

² Fassig v. State, 95 O.S. 232 (1917).

³ Ohio Automatic Sprinkler Co. v. Fender, 108 O.S. 149 (1923).

jury, disease or death, regardless of his own negligence. It also protected the employer from lawsuits based on simple negligence, but not from suits by the employe for the employer's willful act or violation of law contributing to or causing the injury.

The trial court directed a verdict for the defendant upon the ground that there was no evidence that the employer failed to comply with a lawful requirement; it held in effect that the obligation to "guard dangerous machinery" was not such a requirement. The Court of Appeals of Mahoning County reversed the judgment of the trial court and the Supreme Court of Ohio admitted the case for hearing.

The legal questions were complicated by the fact that the Supreme Court of Ohio in three recent cases had previously held that laws similar to the one involved did not impose "lawful requirements" upon the employer. In each of these cases the court had voted four to three in favor of the defendant company, holding that the provisions of the statute merely required a general course of conduct, embodying general duties and obligations of care and caution.

In the Automatic Sprinkler Co. case our court voted four to three to reverse the three preceding cases. We held that the statutory duty resting upon the owner and operator of a shop or factory to guard all dangerous machinery was not merely the common law duty of the employer to use all reasonable care to prevent injury to his employes. We held that the statute embodies a positive injunction to guard all dangerous machinery.

This case was not only right but it prevented sweeping mis- marriage of justice along a vastly increased industrial front. It was never intended by the Ohio constitution that under the Workmen's Compensation Act the employe should not be able to sue his employer in cases of positive violation of law, but the Supreme Court of Ohio, by its three decisions which we reversed in the Sprinkler case, had held just that. I was proud to have written this decision.

Another case, while in some respects distressing, had its humorous aspects. This was *Snedaker v. King*,¹ an action brought by the wife of Homer King against Jessie L. Snedaker. Mrs. King, the mother of four children, charged Miss Snedaker with alienation of affections, and prayed for an injunction to prevent Miss Snedaker from visiting or associating with Homer King. The judgment of the trial court, which ruled correctly in many respects in favor of the wife, went on at length and in solemn language to forbid Miss Snedaker to go near Homer King at his home or anywhere else; to write, speak or in any way communicate with him; to do any act preventing Homer King from giving to his wife his love, affection, companionship, conjugal relation, etc.

Our court thought that the trial court had been drastic indeed. We affirmed the injunction but modified the form. I felt that something more should be said about the sweeping order, so I wrote a concurring opinion. Greatly to my surprise, this opinion was extensively quoted by professors in law schools throughout the country. The combination of the interesting case and of a woman judge delivering herself of outspoken views as to how to handle a triangle was too much for the law professors to resist. I wrote in part:

"ALLEN, J., concurring. No one who views the marriage contract from an ethical standpoint can have sympathy for the plaintiff in error [Miss Snedaker]; however, I concur in the per curiam opinion of the court for the following reasons:

FIRST. While it is true that any injunction is enforceable only through contempt proceedings, it is also true that this particular order is unusually difficult of enforcement. The ordinary injunction involves a prohibition . . . against doing some act which will involve . . . third parties; hence proof of the violation of the order may usually be readily secured. In this case the injunction affects two people only. . . . Proof of the violation of this particular order will depend, at least

¹ *Snedaker v. King*, 111 O.S. 225 (1924).

largely, upon the testimony of those particular two people. Under these circumstances it is difficult to see how the court can enforce the injunction granted herein without attaching a probation officer permanently to Miss Snedaker and Mr. King.

SECOND. The order passes all bounds in its lack of limitation. Under this order, what is Miss Snedaker to do if she passes Mr. King upon the street? Must she cross the street in order not to go "near him . . . at any place where said Homer King may be?" Or may she stay upon the same side of the street and pass him? Under such circumstances may she say "good morning" to him, or in so doing will she be violating the order that she is not to communicate with King "by word?"

THIRD. This injunction should not issue because an order which forbade a man and woman to see each other or to speak to each other under the facts herein set forth, merely adds fuel to the flame. If the wife is to be assisted in her fight for a rehabilitated home, action should not be taken which will almost inevitably make wrongdoing even more alluring to her husband. . . .

"It is significant to note that the judgment against Miss Snedaker has not been reversed; the injunction only has been dissolved. Upon the facts found by the trial court, Miss Snedaker's action is still branded in this court. To add thereto a judgment which, from the perversity of human nature, would tend to defeat rather than accelerate the reconciliation of the husband and wife seems unwise."

Now and then an embarrassing case fell to my lot, and these were usually highly interesting. This was true of *State ex rel Turner v. Marshall*.¹

This decision grew out of four actions filed in Darke County, Ohio, against three banks of Greenville, county seat of Darke County, and against former members of the Board

¹ State ex rel Turner v. Marshall, 123 O.S. 586 (1931).

of Education of Darke County, to recover interest alleged to have been withheld on deposits of school funds made in 1922. In each of these actions affidavits of prejudice were filed against the Judge of the Court of Common Pleas of Darke County. An application made to the Chief Justice of the Supreme Court of Ohio, whose duty it was to rule on such matters, to assign another judge to hear the cases was denied by the Chief Justice.

A petition was filed against the Chief Justice of the Supreme Court praying that he be ordered to assign another judge to hear the cases. It was his duty to do this if clear prejudice was indicated.

The affidavits of prejudice alleged that the Darke County judge, prior to his election, was a member of the firm which "is counsel for one of the banks, and represents two individual defendants, that the judge is beneficiary of a considerable bequest under a will, the executors of which are the cashier and president of the bank in question. . . . and that, by reason of his close social and business connection with such defendants, and with the law firm . . . the four actions being defended as a group, the trial judge cannot sit impartially in the case." In his counter affidavit the trial judge denied prejudice, bias or interest, but did not deny the material facts as to the social and business relationship between himself and the defendants, set forth by the plaintiffs.

Four of the Court considered that clear prejudice existed and voted that the writ should be allowed. Two dissented. I was one of the majority of four and the case fell to me.

I wrote three sentences allowing the writ. I pointed out that:

"Under the ramification of the social and business interests conceded to exist between the judge of the Court of Common Pleas and the defendants. . . . anyone, whether consciously or unconsciously, would have a natural inclination to prejudge the several cases."

Judges Jones, Mathias, and Robinson concurred in allowing the writ. Judges Day and Kinkade dissented. Marshall, Chief Judge, did not participate. My diary notes that the Chief Justice was very angry.

Another case in which the ramifications were complicated and interesting was *State ex rel Bowman v. Board of Commissioners of Allen County*.¹

I wrote the original opinion in this case, in which six of us concurred, Judge Jones dissenting. The case held invalid bonds issued to provide funds for a sewer system in a small area contiguous to Lima in Allen County. The bonds authorized a general levy upon all taxable property within the county. The sewer construction involved conferred no direct benefit to property in the county remote from the improvement. We held, six to one, that the Commissioners had grossly abused their power by establishing a sewer system where there was not a present population sufficiently large and compact to cause a present menace to health from lack of such a system. We held it was a gross abuse of discretion for the Commissioners to establish a sewer system outside a municipality, in a sparsely-inhabited district, to promote a private enterprise, or where there is no substantial menace to health; that a court of equity could enjoin the construction any time before the issuance of negotiable bonds to provide funds. And although the bonds were in the hands of innocent holders, we held them invalid because of the gross abuse of discretion of the County Commissioners.

This judgment was announced during the great depression of 1929. Every financial interest in the state considered the judgment both erroneous and financially upsetting. A rehearing was secured, and the financial interests appeared in such strength that four of the judges changed their votes. Judge Jones had originally dissented and according to judicial practice should have been assigned to write the opinion now

¹ *State ex rel Bowman v. Board of Commissioners of Allen County*, 124 O.S. 174 (1931).

that the result had changed. But the Chief Justice wrote the opinion after assigning it to himself.

Judge Robinson and I retained our original views, considering that the innocent taxpayer should not be mulcted for the innocent bondholder.

Another interesting case was a forerunner of the problems that still beset us in both state and federal law. Ohio State University for many years had admitted colored students. Doris Weaver, a Negro, had been duly admitted to the University and was in her fourth year of the work required toward securing a degree in home economics. The course provided for the students to live for part of the fourth year in a home-management house maintained by the University, in which the girls were given an opportunity to cook and dine together and to put their theoretical knowledge to use. To take care of the increasing demand the University had prepared two houses for this service, connected by a roof over an enclosed passage-way. When Doris Weaver was admitted to this part of the course she did not designate or have a roommate. One of the houses was full, and she was assigned to live with a white instructor in the second house. Being angry at this decision, she then sought a writ of mandamus to compel the University trustees to "grant her residence in the home management house as the same is usually conducted, and to make all the advantages, facilities and privileges thereof available to her without discrimination against her in any respect on account of her race and color."

It was not denied that full educational privileges had been extended to Doris Weaver by the University, nor was it claimed that she was excluded from the life of the group except by sleeping in the second house. The writ was denied upon the ground that purely social relationships cannot be regulated by law and that no constitutional right had been violated.¹

¹ *State ex rel Weaver v. Board of Trustees of Ohio State University*, 126 O.S. 290 (1933).

Another hotly-contested case was that of *State ex rel United District Heating Co., Inc., v. State Office Building*.¹ The Heating Co. had made the low bid on a state building contract which had been refused on the sole ground that the Heating Co. was not a union shop. A writ of mandamus was prayed upon the ground that the low bidder was entitled to be awarded the contract regardless of the closed shop feature. We allowed the writ. A leading newspaper commenting on this case said that I "defied the lightning" in my vote.

These two decisions, the Weaver case and the office building case, were eminently just. But when I was nominated to the United States Court of Appeals these two decisions were the main factors used in an attempt to defeat my confirmation.

When I was in college at Western Reserve University we were seated alphabetically in classes, so I had the pleasure during the first year of sitting next to a very nice colored girl, Mary Brown, who later became a member of the Cleveland Board of Education. During the attacks made on me because of my vote in the Weaver case, Mary came to Columbus and I explained the matter to her. I said, "Mary, if you had been in that situation in the University and working for your Home Economics degree, what would you have done when you were assigned to live under all the same conditions as Doris Weaver in the University House?"

"Why, Florence," she said, "I would have stayed right there and graduated and made it easier for some colored girl to follow me."

¹ *State ex rel United District Heating Co., Inc. v. State Office Building Com.*, 125 O.S. 301 (1932).

IO

U.S. Court of Appeals

IN THE MIDST of my many personal problems I did not contemplate with great enthusiasm going through another election when my Supreme Court term should expire in 1934. Some of my newspaper support naturally had slipped away when I ran for other than judicial office, but I still had many active supporters. Though I could count on a goodly number of the 100,000 signers of my petitions in 1928 and a large part of my 350,000 majority, I was reluctant to devote the necessary time and effort to campaigning.

Suddenly Hon. Smith Hickenlooper, Judge of the United States Court of Appeals for the Sixth Circuit, died, leaving a judicial vacancy in the court. My friends suggested that I should fill the vacancy. When I campaigned for Woodrow Wilson in the far west, my director in the speaking campaigns was the Hon. Homer Cummings, who had become U. S. Attorney General, and charged with the duty of scrutinizing the integrity and ability of candidates for judicial office. By a strange coincidence, Judge Harold Stephens, a life-long friend from Salt Lake, was working under Attorney General Cummings. When my name was suggested for appointment the Attorney General sent for copies of numerous opinions of

mine and carefully examined them. As a regular part of this procedure, also, the FBI looked into my record.

Distinguished American women who worked in my behalf included Mary Dreier who helped form, and then supported and maintained the National Women's Trade Union League; the brilliant scholar of Chicago University, Dean Sophronisba Breckinridge; Frances Kellor, who framed the code still used on American arbitration; and Harriet Elliot, Dean of the Woman's College of the University of North Carolina. They induced many influential persons to write to the President, Attorney General Cummings, and Senator Bulkley about my record.

It was the privilege of Senator Robert J. Bulkley to nominate the new judge for this particular court. On March 6, 1934, my name was presented to the Senate by Senator Bulkley. On March 14 the Judicial Committee of the Senate approved the nomination, and on March 15th the Senate unanimously confirmed it. On my birthday, March 23d, I was notified that the commission had been signed. I received it March 27, 1934, and thereupon sent to the governor my resignation from the Supreme Court of Ohio.

Former Justice John H. Clarke of the United States Supreme Court sent the following wire to Senator Bulkley:

As the daughter of my college classmate I have had an especial interest in Judge Florence Allen and have noted carefully her judicial career. I think her opinions equal if not superior to any others coming from the Ohio Supreme Court in recent years. You know of course of her thorough education and judicial methods. With the full knowledge of the requirements of a judge of the Circuit Court of Appeals I wish to cordially commend Judge Allen as in all respects equal to them and eminently fitted to fill the vacancy in the Sixth Circuit with satisfaction to the public and credit to the appointing powers.

My opponents, who at that time included Newton D.

Baker's firm, sent an attorney from Detroit to oppose me in Washington. Thereupon Judge Will P. Stephenson of our Supreme Court, who had begun association with me as an opponent of all women lawyers and judges, went to Washington to support me. His verdict, quoted by International News Service was, "There is no Court too big for Judge Allen." Coming from Judge Stephenson, the unqualified endorsement was considered as carrying uncommon significance, because he frankly admitted that at one time he was opposed to the idea of a woman Judge of the Supreme Court of Ohio.

After I had been sworn in and had taken my place with the Court, the women lawyers of Washington gave a delightful luncheon in my honor. In closing, Attorney General Cummings addressed the gathering. He said, "Florence Allen was not appointed because she was a woman. All we did was to see that she was not rejected because she was a woman. She had won her place by hard work, by a forward-looking attitude toward people and toward law."

With these happy good wishes I entered on my work in the United States Court of Appeals for the Sixth Circuit, comprising Ohio, Michigan, Kentucky and Tennessee. It was the first and I regret to say the only appointment in history of a woman to such a high Federal judicial position.

My life in the Federal Court began under a certain restraint which was removed in an unexpected way. The Court was composed of four judges, Presiding Judge Charles Moorman of Louisville, Judge Charles C. Simons of Detroit, Judge Xenophon Hicks of Tennessee, and myself. Three of us always sat in hearing the cases.

None of the judges favored my appointment. I am told that when it was announced one of them went to bed for two days. However, both Judge Moorman and Judge Simons wrote, congratulating me. Judge Hicks did not write, and I noted the omission with some concern as it indicated that he was strongly opposed to a woman on the Court.

But after all I was used to sitting in court, and I was not

particularly apprehensive. I had sat eleven years in the highest court of Ohio, and the task of being a federal judge could not be markedly different. I had learned that judges who were at first opposed to women officials accepted us when we handled our work steadily and conscientiously. Also, I had early learned the importance of keeping up with my docket and disposing of my cases. This had been taught me by example when, as an assistant county prosecutor, I worked several months under Judge Frank Stevens of the Court of Common Pleas, Cleveland, who demanded that all attorneys keep abreast of their work.

It was a truth that had been impressed on me in a spectacular way when in 1924 I visited London and spent some days in the Old Bailey Court, the famous British criminal tribunal. During this year the American, Canadian and English Bar Associations met together in London, and I thought a Judge of the Supreme Court of Ohio should attend this meeting. I had the great pleasure of taking my father with me.

The London meeting was a wonderful event at which the members of the British Bar showed us the highest friendship and hospitality. I decided to spend my time visiting the Old Bailey Court. I had letters of introduction to a King's Counsel and other attorneys who introduced me to the Judge.

This happened to be the first day of the term, a day when the court opened with special ceremony. I was asked if I would like to meet and to walk in with the procession which would, on this particular day, open the court. I was delighted, and was conducted to a large room where aldermen, clerks, and other officials and functionaries were assembled. As I stood there and was introduced, someone stepped up, put a small bouquet in my hand, and said, "This is the Posy." I wondered what that meant and then I observed that everyone in the room held similar bouquets. It seemed surprising that we should open Court with a bouquet; and when I learned

the reason I was still more surprised that the custom had persisted so long. For the use of the bouquet is a tradition. The Old Bailey was in the slum center of London and the officials, I was told, held bouquets in order to offset the stench of the area. It seemed to me an odd bit of legal ceremony to have been retained through modern times.

Then the cases began to change my critical mind. There was a first-degree murder trial in which we in Ohio would have taken a week or two to get a jury. The British court impaneled a jury within a few moments. A carefully-chosen list of jurors was tapped for the jury, and both counsels accepted it. The trial itself, owing to the elimination of the foolish and time-consuming objections in which our courts spend so much of their energy, was finished that same day, instead of a week or ten days later. I said to myself, "It is absurd that they still open Court with a bouquet, but after all, we have infinitely much to learn from these British courts. They do an incredible piece of *work*." I never forgot that lesson, and what it taught me of the constant requirement that the court dispose of its cases promptly.

In the first session after my appointment to the United States Court of Appeals I asked one or two pertinent questions, and in the conference after the cases I expressed myself in the normal way. During all this time Judge Hicks seemed to avoid looking at me. At the very last he did look at me, and I thought, "That's a victory." We went on from there, I feeling my way, and asserting myself little except in the matter of voting.

All at once, as often happens in the surprising turns of life, what seemed a disadvantage proved to be a benefit. The courthouse where we sat was old and dark and the elevators were extremely slow and crowded, so sometimes I used the stairs. One day I was going down the stairs, as I had just missed an elevator. Suddenly I found myself rolling down the worn, uneven steps. Luckily I came to a stop on a broad, flat

area, but I landed squarely on my nose and mouth. I picked myself up and reached the court office. The clerk secured an immediate appointment for me with a skillful oral surgeon across the street. He removed one tooth, one-half of another, and bandaged my battered face.

I went back to the court where I knew my mishap had been reported to the Presiding Judge who was a fine Kentucky gentleman. I was assigned to sit the next day in a big Detroit bank case. A number of lawyers in this case were already on trains for Cincinnati. The Presiding Judge said, "You can't possibly sit; we'll have to postpone the case." I was aghast at this decision. It was during the latter part of the great depression, and to delay this case and send back to Detroit a number of lawyers who were already under way to Cincinnati, seemed a step to be avoided at all costs. I said, "Judge Moorman, I am quite aware how I look, but if I am willing to sit are you not willing to let me, rather than postpone this case?" He finally agreed, and the next morning with my chin bound in adhesive tape and bandages I helped to make the quorum of the court.

Judge Hicks, who had seemed to avoid me, looked at me then and always afterward. I know now that he became my real friend when I took this common sense decision. Some time later he remarked, regarding an opinion I had written, "That's a damn fine opinion." I felt I had joined the club.

In the federal court we were constantly presented with cases quite different from the state cases. The federal courts, under the Constitution, have jurisdiction in all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or to be made; in all cases affecting ambassadors, other ministers and consuls; in cases of admiralty and maritime jurisdiction; in cases to which the United States shall be a party; cases between a state and citizens of another state; between citizens of different states; be-

tween citizens of the same state claiming land under grants of different states; and between a state or its citizens and foreign states, citizens or subjects.

In addition, the Constitution empowered the Congress to establish courts inferior to the Supreme Court. Such federal courts are given jurisdiction in many suits regardless of the amount in controversy, and also have jurisdiction under statutes enacted by Congress dealing with particular subjects such as patents, copyrights and trademark law; suits against trusts and monopolies; suits in immigration matters; bankruptcy suits; cases under the postal laws, internal revenue, etc.

I sat in interesting cases along these lines and often wrote the decisions. There was a case holding a defendant guilty of advising a young man not to register under the Selective Service Act. One decision held a defendant guilty of making false and fraudulent representations in order to procure execution of Federal Housing Authority credit applications for obtaining a loan.

There were many liquor cases in which the defendants claimed that the seizure of a still was illegal for lack of "probable cause" justifying the search.¹ In our opinion we held that the presence of a copper colon and machinery used in illicit liquor manufacture, plus the smell of the mash, established probable cause.

The Federal Trade Commission Act, which was passed in an effort to control false and deceptive advertising in interstate commerce, required constant implementation by the federal courts. It was soon applied to prevent a correspondence school from in effect representing that government jobs would be given its students. Here the very name of the company—Civil Service Training Bureau—created an impression of governmental association.

¹ Cardinal v. U.S., 79 F.2d 825 (1935).

A spectacular decision in this line was that of *Koch v. Federal Trade Commission*,² which affirmed a judgment ordering the Koch Laboratories to cease and desist from disseminating false and misleading statements as to the therapeutic properties of their medicinal products.

The Koch Company was found by the Commission to have represented directly or by implication that their product, "Glyoxylide," was a veritable wonder drug. It professed to be effective in the treatment of "any type or stage of cancer, leprosy, malaria, coronary occlusion or thrombosis, multiple sclerosis, arteriosclerosis, angioneurotic oedema, obliterative endarteritis, asthma, hay fever, dementia praecox, epilepsy, psoriasis, poliomyelitis, any type of allergy or infection, abscess of the prostate gland, septicaemia, and insanity." Its product "B-Q", the company claimed, constituted an adequate treatment for all infections and their sequelae, including gonorrhoea, salpingitis, sinusitis, meningitis, infantile paralysis, septicaemia, streptococcus sore throat, pneumonia, undulant fever, malaria, coronary thrombosis, the allergies, diabetes, cancer, arthritis, and the degenerative diseases." In addition, their preparation, "Malonide Ketene Solution" was "beneficial for the allergic diseases, infections, diabetes, cancer, double pneumonia, osteomyelitis and postoperative meningitis."

The Commission in its findings sustained the allegations of the complaint, held that the advertisements issued by the petitioners violated the Federal Trade Commission Act, and ordered that the advertisements be discontinued.

These findings were sustained by the evidence presented in our court. It was shown that no biopsy was taken in connection with many cases said to involve malignant tumors. The advertising material had been distributed to others besides members of the medical profession and was not accompanied by the formula showing quantitatively each ingredient

² *Koch v. Federal Trade Commission*, 206 F 2d 311 (1953).

of the drug advertised. The court held that these requirements were vital, and that their absence deprived the petitioners of the protection afforded such transactions by compliance with the Federal Trade Commission Act. The order of the Federal Trade Commission was affirmed.

The court went far afield in the case of *Devine v. Patterson*,¹ for we had to review results of investigations in three states. The plaintiff charged that he had been substantially damaged by accusations which had resulted in an indictment for violating laws of the United States by making false representations in negotiating the transfer of oil properties in Texas and a gasoline plant in Illinois.

The plaintiff had been acquitted in the criminal trial, and filed suit against the prosecuting witness. In the Federal District Court trial the jury gave the plaintiff \$500 compensatory damages and \$1 punitive damages. The only question raised in our court was the amount of the damages.

At the trial the plaintiff testified that his actual expenses of defending the prosecution consisted mainly of attorneys' fees and travelling expenses and was more than \$19,000. This was not disputed. The defendant did not testify, and no evidence was introduced controverting the plaintiff's testimony. Extensive investigations were held in three states and numerous lawyers were consulted.

Since the verdict was less than the amount of the damages shown and not disputed, we reversed the order of the District Court, set aside the judgment and remanded the case for a new trial on the issue of damages only. This seems to me an eminently fair decision.

There were innumerable tax cases. In *Wexler v. Com. Int. Rev.*² the Tax Court had found a deficiency which it ordered the taxpayer to pay. The taxpayer had a racing stable and made bets on horse racing. He claimed that his profits were

¹ *Devine v. Patterson*, 242 F 2d 828 (1957).

² *Wexler v. Com. Int. Rev.*, 241 F 2d 304 (1957).

much smaller than the Tax Court found. But unfortunately he destroyed the records of his stable expenses after the controversy arose. Applying the rule that the taxpayer has the burden of proving the Tax Court wrong in its finding of a deficiency, we affirmed the judgment.

The Auto Club of Michigan v. Commissioner was an interesting case. The Auto Club contended that part of its income was exempt from taxation under Section 103 (a) of the Revenue Acts of 1932 and 1936, which provided exemption for "clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of which inures to the benefit of any private shareholder." Two Commissioners, in 1934 and 1938, held the income exempt. The Auto Club was organized as a non-profit organization, had no capital stock and had never paid dividends. The Commissioner in 1945 changed his ruling on the ground that the principal activity of the Auto Club was not for pleasure or recreation, but was to render a commercial service in promotion of many activities on behalf of the motorist. We affirmed the decision.

Patents were an early problem. The Sixth Circuit Court of Appeals, embracing as it does the area which includes Detroit, Grand Rapids, Cleveland, Akron, Toledo, Springfield and Cincinnati, was alive with patent activity. The area was called the center of the machine tool industry of the United States.

I soon realized that my assignment for sitting did not include any patent case—possibly because I was a woman—and I decided to face the issue. I requested Judge Moorman to let me sit in a patent case. This irked him somewhat. He said it was the first time he had ever been asked to assign a judge to a particular case. I said, "Judge Moorman, I am asking not to sit in a special case, but not to be excluded from a class of cases. You know nothing about me, my family and my education. My father is a manager of nine mines for the

United States Mining Company and I have been familiar with some industrial situations that many women know nothing about." Judge Moorman then assigned me to a patent case, and assigned me to write the opinion. He concurred in the opinion, and Judge Simons concurred in the result.

After that I wrote many opinions in patent cases, a number of which the Supreme Court affirmed or refused to review. I was particularly privileged to have written the decision in *Cold Metal Process v. Republic Steel*.¹ In this case we reviewed litigation that had lasted over twenty years, and approved judgments holding patents valid which eliminated a technological block in the method of rolling steel in thin strips, and thereby ended the litigation.

The federal decisions at this time adhered strictly to the doctrine of not interfering with the state courts and decisions. Thus *Sexton v. Barry*² involved a lawsuit which had been decided against Sexton by the Probate Court and the Supreme Court of Ohio. We held that the case was simply an effort to obtain a retrial of a state suit that Sexton had lost, and that we had no power to grant his petition.

In *Niepert v. Cleveland Illuminating Co.*³ the question presented was the liability of the corporation for an accident caused by its pier, unlighted, which extended 1200 feet into Lake Erie. The plaintiff's wife was killed in a nighttime collision with the pier. It was conceded that the lighting was not adequate. The plaintiff, operating the boat, was well aware of the existence and extent of the pier, and had passed it twice in the day immediately before the accident. We applied the common law of Ohio, and held that because of contributory negligence there could be no recovery.

One relaxation that I enjoyed from the taxing work of the court was occasionally speaking at colleges and universities.

¹ *The Cold Metal Process Co. v. Republic Steel*, 233 F.2 828 (1956).

² *Sexton v. Barry*, 233 F. 2d 220 (1956).

³ *Niepert v. Cleveland Electric Illuminating Co.*, 241 F. 2d 916 (1957).

I not only gave individual lectures but in some cases I was invited to give a group of lectures, usually on the U.S. Constitution. I did this for instance at Vassar, Scripps and Bryn Mawr. At Smith I was introduced by President Neilsen as "Not a daughter, but a granddaughter of Smith." Thus gracefully Dr. Neilsen acknowledged my mother's historical opening of the list of students at Smith.

In my study I was impressed repeatedly with the fact that the United States Constitution was drafted as and intended to be an instrument for freedom. Following these lectures I wrote a book, *This Constitution of Ours*, which concentrated on this conception. It received some remarkable notices in the press from *The New York Times*, *The New Yorker*, and *The Washington Sunday Star* as well as from my Ohio papers. Also without my knowledge, Dr. Harlan Hatcher, now President of the University of Michigan, who was then professor of English at Ohio State University gave a very full and friendly review of the book in the *Columbus Dispatch*. In the course of this review he said, "Florence E. Allen has written a brave book that will make every man and woman, every boy and girl more erect in spirit for the reading. . . . The combination of Judge Allen and the Constitution could not be improved, and the result is a little masterpiece glowingly written. The style is crisp and tight but vibrant with its high subject. . . . Judge Allen is specific. She rules that 'children of the United States should memorize the Declaration of Independence, the Preamble to the Constitution, the Gettysburg address, the multilateral pact for the renunciation of war and the first amendment to the Constitution.' . . . And like a master essayist, she returns again and again to her paramount thesis: 'Liberty cannot be caged into a charter and handed on ready-made to the next generation. Each generation must recreate liberty for its own times. Whether or not we establish freedom rests with ourselves.' Judge Allen had certainly done her part toward this high estate."

II

The TVA Case

AN INTERESTING task I had to handle as a federal judge was that of occasionally presiding in certain three-judge cases. Of these, the Tennessee Valley Authority case was the most important and attracted nation-wide attention.

The question in the TVA case, broadly presented, was whether the Federal Government if specifically authorized by Congressional statute might erect dams and reservoirs and take other authorized action within the watershed of a navigable interstate waterway for the purpose of controlling and preventing destructive floods, regulating and controlling interstate commerce upon such a waterway, and creating and marketing electric energy as an incident to the activities described. We held that such action complying with statute was constitutional.

The bill in equity which instituted the proceedings was filed in a Tennessee chancery court May 29, 1936, and removed to the United States District Court of the Eastern District of Tennessee June 15, 1936. The three-judge statute was not then in existence, and the case was handled with careful consideration by Judge John J. Gore of Tennessee, down to October, 1937.

On August 24, 1937, the U.S. Congress passed an act providing that no interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution, or setting aside in whole or in part any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States, shall be issued except upon hearing before three federal judges, one a Circuit Judge, and two District Judges.

The complaint, filed by eighteen power companies, prayed for relief against the TVA Act of 1933 as amended, and so the three-judge act directly applied. The TVA Act created an agency to carry out the provisions of the statutes as to the use and improvement of the Tennessee River, and the Agency and its chief officers were joined as defendants.

The petition sought an injunction to prevent the defendants from carrying out the provisions of the statutes, on the ground that their acts violated the U.S. Constitution. It sought to prevent the sale of electric power, the purchasing, constructing or acquiring of electric generating plants, and distribution lines, and the selling of electric energy except that to be produced at Wilson Dam. It sought to enjoin the further construction of TVA dams being built in the Tennessee Valley, the construction of new dams for which Congress had made appropriation, and the operation for generation or sale of electric power of all TVA dams built and to be built. Coercion, fraud and conspiracy were charged on the part of the defendants, and also on the part of Secretary Harold L. Ickes, Public Works Administrator. The answer denied the material allegations of the petition. On application of the power companies three federal judges were designated to hear the case.

Because the three-judge statute was enacted August 24, 1937, the TVA case was not only my first three-judge case, but it was also one of the early cases arising under the new law. I discuss it here because of the new and highly-important doc-

trines involved and discussed, because of its bearing on vital questions as to making rivers navigable and exercising flood control, as well as generation of electric power—all affecting situations in several states—and also because of the widespread interest throughout the nation.

It was not normal that the duty of presiding in this tremendous three-judge case should be assigned to the youngest member of the Circuit Court. Judge Hicks of our court was disqualified, as his family was related to an officer of a power company. Judge Moorman, our Presiding Judge, was increasingly ill with the disease of which unfortunately he soon died. Judge Simons, an exceedingly able judge, was a close friend of the chief attorney for the power companies, and felt he should not sit. Judge Moorman then appointed me to sit and hear the case with Judge John D. Martin and Judge John J. Gore, both of Tennessee. When Judge Moorman told me of his decision he said, "They say you are not big enough for this case. You are big enough for any case."

I felt some perturbation at the magnitude of the assignment, but I replied, "Judge Moorman, that's enough for me. I'll go down to Chattanooga and give my whole self to carrying out this duty."

On arriving in Chattanooga my cousin and I rented a furnished cottage on Lookout Mountain. I then started my daily walks with our two cocker spaniels in that lovely woods. We were soon adopted by a German police dog named Fritz. If other dogs, during my morning walk, bothered the cockers, Fritz just ran them off the mountain.

The ramifications of the case were many and complicated. The plaintiffs emphasized this by the filing of extremely long motions, intended to delay the hearing. A motion for *subpoena duces tecum*, 132 pages long, prayed for many records which our study revealed to be irrelevant, incompetent and inadmissible. The plaintiffs sought the production of minutes of the Agency which "discuss" or "consider" numer-

ous possible actions with reference to the sale of electric power. We held, rightly, that the pronouncements, policies and programs of the TVA and its directors did not give rise to a justiciable controversy, unless they resulted in definite action constituting real or threatened interference with the plaintiffs' rights, and that evidence of speeches, releases to the press, circulars and statements made by directors or employes of the TVA were incompetent.

We held in general that evidence of speeches, negotiations, discussions with and reports to TVA from other national agencies were not admissible. But it required the study of hundreds of pages of briefs and documents, and hundreds of pages of legal reports in order to make proper rulings.

We opened court on November 15, 1937. We ruled almost at once that we would not take the deposition of Secretary Ickes. Each one of us read the papers filed that day, including briefs, at night. This often meant hours of study. Every following morning we met in conference an hour before court opened, in order to handle these applications made the previous day, filed and refiled in slightly different form. On November 22 we granted certain requests of the power companies, made in the *subpoena duces tecum* motion, and denied in general the extensive applications for the production of claimed evidence. On November 29 we filed a detailed and formal order, completely disposing of these introductory matters.

One of the applications we denied was that which asked us to have extensive testimony taken before a Special Master who would report to us, of course much later, as to his conclusions. In our ruling of November 29 we pointed out that since we had decided against the referral of the case to a Special Master, and would hear it ourselves, we would insist, in our own consideration, "upon most complete cooperation from the attorneys, and would require stipulations in every possible instance." Any point not contested we insisted

should be stipulated, and these rulings definitely advanced the hearing. We thus eliminated at the outset the production of incompetent testimony, the long delay of a second reference, and the useless dragging on from Washington of Secretary Ickes.

It was at once a fascinating and a gruelling experience, involving intense study of about 1100 exhibits, and thousands of pages as to the Mississippi flood situation, acre-feet of flood control, and all the various phases of problems seriously raised by the individual characteristics of the Tennessee River. It was shown that the Ohio River and its tributaries, including the Tennessee, is the principal feeder of the Mississippi floods, and that the Tennessee contributes materially to the flood crest at Cairo, Illinois. The flood flow of the Tennessee, because of the high precipitation in its area (47-51 inches per year), is almost double its drainage territory, as found by the three-judge court and stated in detail in the opinion. The dams on the Tennessee River and its tributaries are used and planned to be an integrated coordinated system for the combined purposes of navigation, flood control, and the other expressed purposes of the Act. The power companies failed to show unconstitutionality of the TVA statute or its operation.

Later I was told by Emily Newell Blair, Chairman of the National Women's Committee of the Democrats (an intelligent and reliable person), that an important representative of the power companies told her the companies had filed these initial motions in order to obstruct and confuse the hearing. They hoped to so weary the court through the necessity for extra study imposed by the sheer weight of their material that we would get rid of the burden, at least partly, by referring it to a Special Master. Mrs. Blair added that the power company representative confided in her that when we ruled so promptly, giving unassailable authority and sound reasoning for our denial of the motions, the companies decided

that particular strategy was useless, and abandoned it. This then was the opening of the TVA case which took seven weeks to try.

From my brother judges I received the fullest cooperation. Judge Martin, known all over the country for his integrity and learning, and Judge Gore, for many years an excellent trial judge, joined with me to hear and decide the case fully and fairly.

Mrs. Franklin D. Roosevelt had long known of me through my association with the fine women at Henry Street Settlement, and she was always cordial and friendly to me after my appointment to the Federal Court. During the hearing on the TVA case she asked me to supper at the White House. I felt that I should not leave Chattanooga while the case was in progress, even in face of the unwritten law that a White House invitation is a command. I telephoned Mrs. Roosevelt, thanked her, and explained why I could not come.

All of a sudden my name was mentioned to fill an existing vacancy in the United States Supreme Court. I did not then nor ever expect such an appointment, and I regretted that the matter should come up at this particular time. Mrs. Roosevelt stated then and later that she could see "no reason why a woman should not be appointed to the Supreme Court," and also said she believed appointments should be made "on the basis of a person rather than of sex."

Justice Stanley Reed was appointed to fill this vacancy, and this resulted in an evidence of striking thoughtfulness from Judge Gore. The morning Justice Reed's appointment was announced, as we filed into the courtroom Judge Gore whispered, "Now smile!" I had no idea what he meant but I smiled automatically, and so the reporters knew I was not disappointed.

During my judicial career my name was suggested at various times for other high positions, such as member of the first Peace Commission after World War I, Attorney General,

and even (by the National Federation of Business and Professional Women) for President of the United States. I generally thanked my nominators for their confidence, but said I was not a candidate for the office.

After we had heard the testimony for seven weeks I was practically ready with an opinion. Toward the close of the case I found myself unable to sleep, and often got up at night to work over the opinion. When it was written I said to Judge Martin, "This opinion is ready in rough draft. I shall be glad to rewrite it with whatever corrections you and Judge Gore make, and to file it as a *per curiam* as being written by the court." "No," said Judge Martin, "I want to see at the top of that opinion, 'Allen Circuit Judge.'" This is the way it appears; *Allen Circuit Judge 21 Federal Supplement, Tennessee Electric Power Co. v. Tennessee Valley Authority—Affirmed by the Supreme Court, 306 U.S. 118.* (See Appendix D.)

When the findings had been carefully drawn and the opinion had been checked we were ready to hand down the case. Because of the great public interest in the proceedings we decided to read the opinion. President Marion Park of Bryn Mawr had wished to consult me about some lectures I was to give at the College, and had stopped in Chattanooga to see me, so I invited her to attend. Anticipating a crowded audience, we went to the courthouse an hour early. Even at that time we could hardly get through to my office. My law clerk said he never could have got in, but he called out, "I'm Judge Allen's law clerk," whereupon a man behind him said, "I'm her cousin."

So then we read the opinion for a full hour in that tense and crowded courtroom and the TVA case left the three-judge court and passed on to Washington.

On the day we left Chattanooga I walked with the cockers in the morning on Lookout Mountain. Dusty, a sensitive, lovable little dog, looked around and sniffed the air. She

actually hesitated to come when I called her. She seemed to be thinking, "Do I have to leave this beautiful place?"

I felt the same way.

After the TVA case was over Mrs. Roosevelt at a White House function made a point of telling me she regretted that I had not been appointed to the Supreme Court. I said I had not expected the appointment and did not feel bad, and thanked her for her interest. Later in her column, *My Day*, she expressly nominated me for the office.

In March, 1939, William O. Douglas was appointed to the Supreme Court. On March 24 Drew Pearson's column, *The Daily Washington Merry-Go-Round*, carried an item headed FLORENCE ALLEN, stating that, "Some of the newshawks who had predicted Judge Florence Allen's appointment to the Supreme Court were left high, dry and gasping when Douglas' name was sent to the Senate.

"What they didn't know was the manner in which Judge Allen's name was eliminated. It was true that for a time President Roosevelt considered the Ohio jurist. But some of those who favored Douglas showed Attorney General Murphy the list of cases in which she had been reversed by the upper courts.

"In this respect Judge Allen's record perhaps is worse than any other prominent federal judge's."

This was absolutely false. In the five years that I had sat on the U.S. Court of Appeals I had been reversed once upon a question not raised in brief or argument in the Court of Appeals. In my eleven years in the Supreme Court of Ohio I had been reversed twice. I wrote the opinion in one case which was reversed in the Supreme Court of the United States, Justice Holmes and Justice Brandeis dissenting. These dissents, written by such uniformly respected judges, in the opinion of many lawyers would raise a reasonable inference that the case was rightly decided by the Supreme Court of Ohio, and wrongly reversed.

These were the reversals of 16 years. In fact, I had been reversed less often in that five-year federal period than several great judges in a similar period, who were reversed at times just because they were so great.

All of these figures were readily obtainable. Since the *Merry-Go-Round* item was published throughout the country after Justice Douglas was appointed, the malice behind the article was evident. They meant to kill me off forever.

On May 9, 1939, Attorney General Murphy wrote the following letter to a friend of mine:

Thank you for your letter calling to my attention the statement in the *Washington Merry-Go-Round* column regarding Judge Florence Allen.

The list of reversals referred to in this statement is unknown to me. No such list had been shown to me and I greatly regret that Judge Allen has been placed in an unfavorable light. On many occasions I have expressed my high regard for her ability and qualifications for judicial work.

(Signed) Frank Murphy

I2

Lectures in Mexico

IN 1930 I was invited to attend a seminar in Mexico City to be held under the auspices of the Federal Council of Churches and to be directed by Dr. Hubert Herring, chairman of the Committee on Cultural Relations with Mexico. The program was to include many representatives of the Mexican government and people.

Relations between the United States and Mexico had never been based on understanding. The Mexican war, vigorously opposed by Abraham Lincoln, had certainly not improved our position with the Mexicans. The new Mexican Constitution, adopted in 1917; and Secretary Kellogg's note of June 12, 1925, stating that the Government of Mexico "is on trial before the world," and that we could not countenance violations of her obligations and failure to protect American citizens, had added to the tension. The American press in general supported the Mexican Government in its position that it would not accept any interference contrary to the sovereignty of Mexico.

The Mexican Constitution, Article 27, affirmed the national ownership of subsoil deposits and provided that all property might be disposed of only for reasons of public utility and with indemnification. As construed in Mexico this

provision authorized altering the distribution of land owned by foreigners as well as by Mexicans.

In the period before the Constitution of 1917, vast oil lands had been acquired by wealthy American interests. The chance of redistribution, plus a provision for indemnification which took no account of the market value of land held by foreigners, and the provision that only Mexicans and Mexican companies have the right to acquire ownership in lands, waters and their appurtenances, or to obtain concessions to develop mines, waters or mineral fuels in Mexico, and requiring an agreement not to invoke the protection of foreign governments as to such property, infuriated American oil men, who claimed Article 27 was invalid as being confiscatory and destructive of vested rights.

To obviate the increase of these tensions the Federal Council of Churches favored the idea that leaders of American thought, not only legal and financial but also educational in the broadest sense—journalists, writers, heads of colleges—should visit Mexico in a group and setting which would facilitate friendship rather than controversy.

Leading writers, such as Mary Austin, Paul Kellogg and others of like stature, were at the first meeting that I attended. The Mexican Government was represented by brilliant and capable officers, and I felt proud to be a member of such a meeting.

Part of it all was a heart-warming experience in Oaxaca, the southern town a day's journey from Mexico City. Dwight Morrow, our U.S. Ambassador to Mexico—1927 to 1931—had pointed Oaxaca out to me on the map and told me not to miss going there.

Oaxaca is the home of the Zapotec and Mixtec Indians, and dedicates itself to the Advancement of the Indian Race—a challenge which is inscribed on a handsome structure near the center of the town. I had left the party to study this inscription. All at once I heard feet running. My travel com-

panion arrived out of breath. "Oh, hurry!" she said. "They are introducing you out there and you are *here*." I hastened back to the group and just caught my introduction, "La Honrada Justiciada Florence Allen de la Suprema Corte del Estado de Ohio."

I felt abashed at having delayed their proceedings, so when the Oaxacans asked me to address their state teachers' meeting across the street, I said I would. They told me the speech would be translated. I worried about that as I walked up the steps of the old Aztec palace where the teachers were meeting and then in a flash we arrived and I was introduced. It was a terrible moment, as I saw those bright eyes turned upon me. But I began. "I have seen," I said, "out on the mountainside a statue to Juarez, the great Liberator of Mexico who put all Mexico even the Church under the law. But behind Juarez there was some teacher who had taught him and made him what he was. And I have seen in Mexico City statues to other great men who organized Mexico's forces for the attainment of government and freedom, but behind them was always some teacher who taught them and made them what they were."

The speech was supposed to be translated, but it did not have to be. I saw the smile come to their lips and the light into their eyes, so I stopped there. It was unnecessary to talk longer; the Mixtec Indians and the American understood each other.

After that I worked with the Committee for several summer sessions, lecturing on the Monroe Doctrine and Problems of the Caribbean. It was one of the privileges of my life. It did include memorable acquaintance with lovely country—with a sweep of mountains and width of valley new even to a Utahn. It did include quaint pictures like that of barefoot Indians in Oaxaca sitting in the biting cold of evening, oblivious to everything but the strains of *Aida*, played by the Oaxaca band. It did include incidents of the hospitality of the

people, and histories of the romance of its tradition warming one's heart from day to day.

But there was more than that. After all, when before this bi-national effort had there been a movement, sponsored by people of different faiths and all classes of society, in an effort to understand the problems of countries not their own?

When you participated in a group which discussed the Monroe Doctrine, the agrarian problem of Mexico, the Caribbean situation, intervention as practiced by the United States in Latin America, the disestablishment of the Mexican Church—all set forth in searching questions and intelligent comments, you understood that you were dealing not with dilettantes, but with persons seeking the truth as to relations between Mexico and the United States.

The Mexicans carried their part of the debate with eloquence and scholarly preeminence. Ramon Beteta, Estaban Ruiz, a justice of the Supreme Court of Mexico, the Minister of Education and other high Mexican officials participated. The freest opportunity was given for expression. In a religious debate both Catholics and Protestants were heard. On the question of labor both the government and the Mexican unions had speakers.

I had the privilege of discussing American traditions as to the use of war power by the executive, and how the American people had lately compelled the renunciation of intervention in Mexico. I quoted President Lincoln's message to the Mexican Government:

For a few years past the condition of Mexico has been so unsettled as to raise the question on both sides of the Atlantic whether the time has not come when some foreign power ought, in the interest of society generally, to intervene—to establish a protectorate or some form of government in that country and guarantee its continuance there. You will not fail to assure the government of Mexico that the President neither has, nor can ever have,

any sympathy with such designs, in whatever quarter they may arise or whatever character they may take on. The President never for a moment doubts that the republican system is to pass safely through all ordeals and prove a permanent success in our own country, and so be recommended to adoption by all other nations. But he thinks also that the system everywhere has to make its way painfully through difficulties and embarrassments which result from the action of antagonistic elements which are a legacy of former times and very different institutions. The President is hopeful of the ultimate triumph of this system over all obstacles as well as in regard to every other American State; but he feels that those states are nevertheless justly entitled to a greater forbearance and more generous sympathies from the Government and people of the United States than they are likely to receive in any other quarter.

I, myself, speaking partly to Mexicans, showed how Lincoln's declaration was followed by other presidents, and how Theodore Roosevelt's wholly unauthorized action toward Colombia when, as he himself correctly said, he "took the Canal," was repudiated by the American people. Theodore Roosevelt's famous corollary, in which he warned that "in cases of flagrant wrongdoing the Monroe Doctrine might force the United States to the exercise of an international police power," followed though it was by executive acts which put Haiti, Nicaragua and Santo Domingo under the control of the United States from 1912 on, was never concurred in by the American people in general. As early as 1917 when Secretary Kellogg issued his famous warning that Mexico, because it had enacted a revolutionary constitution, was on trial before the world, Kellogg was condemned by the press throughout the country. As the controversy went on the whole body of the people protested. University professors, powerful women's groups, church organizations, opposed Secretary Kellogg's policy. The Senate unanimously recommended arbi-

tration with Mexico. Sheffield, the U.S. Ambassador, who had strongly opposed arbitration, was replaced by Dwight Morrow, and peaceful negotiations began to take place.

President Hoover withdrew the Marines from Nicaragua and paved the way for withdrawal from Haiti. President F. D. Roosevelt announced the Good Neighbor Doctrine and in 1934 secured the abrogation of the Platt Amendment to the Cuban Constitution which had allowed the United States to intervene in Cuba.

It was salutary that the Mexicans should know this history, and also should be reminded that the United States had cooperated with Mexico in securing the amicable settlement of numerous claims against the United States on behalf of Mexicans and numerous claims against Mexico on behalf of citizens of the United States.

The facts were that in 1862, Secretary Seward, writing to Corwin, the American Minister to Mexico, said, "I find the archives here full of complaints against the Mexican Government for violations of contract and spoiliations and cruelties practiced against American citizens."

These complaints were included in the 1017 complaints on behalf of U.S. citizens which were adjudicated, together with claims of Mexicans against the U.S., covering the period from February 2, 1848 to February 1, 1869. It was agreed that the decisions of the commission set up to handle these cases should be final. The claims were for illegal imprisonment, seizing of property, false arrest, sale of steamers, robbery, etc., and for murder. The claims on behalf of U.S. citizens aggregated \$470,126,613.40; \$4,125,622.20 were allowed. The claims of Mexicans against the United States amounted to \$181,661,891.15; \$150,498.40 were allowed. Out of 1017 American claims 580 were decided with the concurrence of both Mexican and American representatives.

It is impossible to over-emphasize the importance of this work as an instance of the perfect feasibility of settling vexa-

tious international difficulties by application of the principles of equity and justice.

It is also impossible to over-emphasize the importance of aiding the public-spirited citizens of countries whose peace is endangered by international tension of real significance to know and appraise the facts which create the tension.

This was the great task, excellently performed for a number of years by the Committee on Cultural Relations with Mexico.

13

World-Wide Interests

IN THE YEARS from 1948 to 1956 I had the privilege of attending several world-wide conferences of organized lawyers, such as the International Bar Association, the Inter-American Bar Association, and the International Federation of Women Lawyers. At the International Bar Association I presented an address on Peace through Justice, and I also represented the women lawyers at the plenary opening session at The Hague in 1948. I said,

"The women lawyers are not only proud to participate in this great meeting; they also deeply realize their responsibility and that of lawyers everywhere. Never did a legal organization come into being at a time of more critical need. For, in addition to the cruel loss of life, the enormous toll of suffering and the destruction of irreplaceable natural resources, an even more terrible loss has been suffered by the peoples of the world. That delicate thing called faith—faith the substance of things hoped for, the evidence of things not seen, out of which springs trust between man and man and nation and nation—faith has been destroyed. We cannot re-establish faith among the nations unless we substitute law for war. We cannot establish and implement law among the

peoples unless we do justice in international relations. Without justice there can be no lasting peace.

"It is a good omen that we meet in The Hague at the Palace of Justice where for so many years the Permanent Court of Arbitration handed down important decisions in which nations and men had confidence. The Netherlands may be proud that it was host to such a court. The world believed in the integrity, the detachment of the court and, because justice by and large was done there, the world had increasing faith in international arbitration. Despite the excellent record of the Permanent Court of International Justice in the cases which it handled, unfortunately the League of Nations did not avail itself to the fullest of its services. But now, both in the United Nations and in informal groups such as this, a genuine advance is seen. There is a demand, now being carried out, that international law be developed along substantive lines such as those laid down by the Advisory Committee of Jurists in 1919, and that the Court of International Justice be used. The Charter of the United Nations actually instructs the organization to use the court.

"In this formative period lawyers have a significant part to play. They understand the need of governmental structures that will offer both legal and other more flexible methods of amicable adjustment for international disputes. They know, for instance, that the informal processes of the arbitral tribunal are of great assistance where rights of nations are involved. Lawyers, therefore, should see to it that the Hague Tribunal (the Permanent Court of Arbitration) should be fitted into the international system and increasingly used along with the International Court of Justice. Lawyers know that executive bodies tend to usurp even judicial power, that the usurpation of judicial functions is possible in the United Nations and that lack of judicial safeguards when an executive acts judicially is bound to create injustice. They know

that the Security Council may by-pass the International Court of Justice and that governments may and on occasions have by-passed the United Nations. Lawyers must guard against and help to prevent these dangers. The system of private warfare was abolished by the upgrowth of law. The upgrowth of the international judicial process will eventually eliminate war. The lawyer is an indispensable instrument in this process. For it is not an emotional exaggeration to say that atomic time is running out. In a vital sense what this group does to erect the standard of peace through justice may determine the future of the race."

I served as chairman of the International Bar section of Human Rights for several sessions, presiding at meetings in London, Madrid and Monte Carlo. I also spoke at the Inter-American Bar Association in Detroit.

The schedule of the International Federation of Women Lawyers always included conferences with women lawyers in the principal countries through which we passed. This great organization was founded by Rosalind Goodrich Bates, an able trial lawyer of Los Angeles, and one of the world leaders in women's movements. Rosalind was a woman of rare eloquence and perception. She always answered the welcome of the governments and lawyers wherever we held a meeting with a short and glowing statement exactly appropriate to the time, the place, and the history of the country. I never knew her to fail.

Rosalind must have had a broad working knowledge of present world history to make speeches at once so similar and so different, and so exactly apropos. To her tolerant, realistic, and enlightened leadership we owe the fact that in 65 countries working women lawyers now are affiliated with the Federation.

The conventions of the International Federation of Women Lawyers were always arranged so that they would be held immediately after those of the International Bar Association,

and in the same country. Thus we had the advantage of attending two legal world meetings in the same summer without extra travel. So at The Hague we met for the first time Rosalind Bates and other women lawyers who were proceeding with their national program, and then and in subsequent years we attended the conventions.

In 1950 our convention was held in Madrid. An interesting incident was that Rosalind and I were allowed to visit the Women's Prison in that city, through the efforts of a Spanish woman lawyer. This lawyer's father and brother were assassinated by the Revolutionists when Alphonso was ousted. Although she was a Royalist and one of the Franco party, she got permission for Rosalind and me to go to the prison, a thing which was usually refused. Political prisoners as well as other offenders were housed there.

The woman lawyer was in prison herself a year, and said that after her release she had been constantly pressed to denounce people whom she did not even know. She was quite young at the time, and said she suffered untold anguish from the pressure brought upon her to denounce people, and for that reason she felt sympathetic with our desire to look into the question of the political prisoner.

Rosalind Bates was born in El Salvador and spoke excellent and fluent Spanish. The prison was several miles outside Madrid. It was physically good; clean, well-lighted and airy. The women sewed and made various articles for sale, and they were allowed to keep a little of the proceeds for themselves. Some went to their families on the outside, and the rest was for the "gold fund," which was supposed to be for the prisoners when they were released. But the chances were that the political prisoners would never get out.

Sentences for other than political prisoners could be lightened by good work and good behavior, and by securing a certificate from the religious instructor. Women who at the time of being committed had children under the age of six

years, or who had children born after they were committed, were allowed to keep them in the prison. Many children stayed until they were six. There was a nursery for children and they were cared for by nurses, but their mothers might be with them at various times. The standards here were exceptional, and the inmates, many of whom had been in northern prisons, said that this Madrid place was excellent by comparison.

Rosalind talked to one woman, a political prisoner, who was teaching sewing. She was a bright-looking person, in for a 26-year sentence because, she said, her sweetheart, a Revolutionist, fled to the hills. Another, an old woman with white hair and fiery eyes, said she did not know why she was there. She had been given a sentence of 30 years. Rosalind insisted on seeing the record of this woman's case, and it simply said that she was a "known assassin of the Revolution." No specific charge against her was stated. Another woman, serving a long sentence, said that she had bought several chickens said to have been stolen, and they charged her with being connected with the Communists. None of these women had been tried. Those accused were considered guilty, and almost never given an opportunity to prove their innocence.

Franco's niece, also a lawyer, accompanied us to the prison.

As an incident to my office as co-chairman of the Human Rights Committee I often had to preside at local meetings dealing with this subject. In spite of the new birth of public interest among the educated women of the various countries, now and then we were confronted by a lack of experience with parliamentary law. For instance, I spent a day in Rome, dealing with resolutions offered by highly educated women lawyers and law professors of the eternal city. One of these resolutions was voted down. The Roman women were indignant and kept trying to reopen the question by emphatically restating all their original arguments. I was compelled over and over to rule some scholarly woman completely out of

order, as the resolution was no longer before the meeting. Nothing but the pressure of the general convention program freed us from the dilemma of having highly estimable lawyers insist on speaking as long as each one wished, even though the proposition they advocated was not before the meeting for consideration.

This was an instance of the lack of practical experience among women—and at times the men who were attending the conference were equally impractical. A good example of this occurred in Madrid when as chairman of the Human Rights Section I was trying to infuse a little common sense into the platform arrangements for the meetings. These meetings were held in a huge formal room with a high platform at the rear for officers of the section, with monumental chairs placed at the very back of the platform, far removed from whatever audience would come, if any. My father had always told me to get close to my audience, and that worked. The voters liked to hear and see the speaker. In this Spanish room, as arranged, probably the audience could neither hear nor see the chairman or any speaker on the platform.

So on the first day a half hour before the meeting I laboriously pulled all the large chairs down to the front of the platform. I was called out of the room for a few minutes and when I returned I found that the chairs had all been shoved to the back again, so I repeated my effort and placed them within hearing distance.

I proceeded with the meeting, gratified that the audience could now, if it wished, hear and take part. All at once a Spaniard arose and said in faultless English that this was all wrong—that I as chairman should have my station back at the wall, and the secretary and other officials should likewise be ranged in the rear in the original order. I explained why I had changed the setting. I said we could all hear better if we were closer together, and that made participation in the discussion more possible. I added that it helped us, even if it

was “informal.” The objector answered, “But the Spanish are a very formal people,” and angrily left the room. We went on and had a successful meeting.

Another important gathering was that of the International Federation of Business and Professional Women, held at the Guildhall in London in 1950. This was the first time in history that any organization of women had been permitted to meet in the Guildhall. Princess Elizabeth (now Queen Elizabeth II) had interceded for us and we were given the coveted permission.

The Honorable Margaret Hyndman, KC, of Canada, and I were selected to acknowledge a toast, “Men and Women Working Together in Partnership.” It gratified me to be making an address in this historic hall. When the public announcer said, “Hear ye, hear ye, keep silence before Judge Florence Allen,” I realized that I had indeed been given a rare honor. Lady Nancy Astor sat beside me and encouraged me with her lovely presence.

I also addressed the International Federation of Women Lawyers at sessions in Madrid, Norway, Finland, West Germany, Istanbul, and Tokyo. Some of the countries visited were just recovering from the cruelties of Nazi occupation; some from an overthrow of government.

The International Federation represented an unusual effort and performed a world service hardly equalled by any similar organization. After the first and second world wars the women of the world were awakening to the needs of the international community. But women generally had not the wherewithal to travel even to highly important meetings. The International Federation, as Rosalind Bates saw it, must go to them and must perform several distinct services.

1. It must visit the women in every important country.
2. Its program in every country, among other subjects of world interest, must always include and consider the legal needs of women, children and the family.

3. It must so far as possible hold conferences with the leading women in every country through which it travelled.

Because this was consistently done, the Federation grew in influence, enlarged its membership to 65 countries, and was awarded non-governmental status at the United Nations, where we have a permanent representative.

The war with Japan was so recent that we had to obtain military permission to travel there. I spoke in the Supreme Court chamber under the friendly sponsorship of Chief Justice Tanaka of the Supreme Court of Japan, who opened his address with a greeting to me as a judge of the U.S. Court of Appeals.

Japan, a former enemy, in 1946 under the requirements of the Potsdam Declaration, had completely altered her administrative and organic law, making the government more truly representative of the people. Under the new Constitution the Emperor is now compelled to have the advice and counsel of the Cabinet in matters of state, to appoint the Prime Minister designated by the Diet, and to appoint the Chief Justice designated by the Cabinet.

Our Japanese hosts had prepared an excellent program. Scanning it I was amazed to see that some twenty speeches by Japanese women lawyers were to precede my speech. Each of the girls was to explain some point of Japanese law. I knew by experience what an expenditure of time twenty speeches, even though short, would mean. To my further amazement the speakers went ahead, in flawless English, taking a minute apiece and no more.

As a demonstration of cooperation and control it was superb, and all the more so because these girls had only recently been authorized to practice law. The courtesy of the Chief Justice, and of the whole proceeding, warmed our hearts.

Turkey seemed to need no help from us in organizing her women. Apart from the beauty of the country, with Istanbul sparkling like a jewel above the Bosphorus and Ankara

ringed round with mountains and gentle valleys, the women themselves were amazing. They were highly organized, spoke several languages fluently, and were extremely intelligent; entirely self-sufficient in the best meaning of the word.

But after we had enjoyed their indescribable hospitality and gazed upon the wonders of the Sultan's jewels (not shown to everyone), and the impressive beauty of the mosques with their hundreds of minarets, we were received by the President of the Republic, courteous and dignified. Suddenly he turned to me and asked whether women judges were a help in administration of the law. I answered that if they were qualified in training, experience and character, they certainly were. I later learned that the President had appointed two women lawyers to high judicial position.

We thought at times in those years that our presence really helped our sisters in the law. The Thai women were a gentle and hospitable group who practised the tenets of that high-minded Buddhism which the U.S. has seemed willing to have attacked in South Viet Nam. They told us that women lawyers were recognized as clerks in Bangkok, but did not receive promotions. When we called at the Ministry of Justice upon the Chief Judge of the Supreme Court and the Presiding Judge of the inferior courts of Thailand, we mentioned our surprise that women lawyers should not be better treated in such an advanced country. Later the two women specifically concerned told us they had been promoted.

In Palestine we were confronted by a complex situation arising out of the shifting of international controls. Palestine for hundreds of years had been subject to the Ottoman Turks, but after the victory of the Allies over the Turks in 1918 a mandate was created by the League of Nations for government of the area (1922-1923) and it was assigned by the League to Great Britain.

The territory was occupied partly by Jews and partly by Arabs. A proposal made by the General Assembly of the United Nations for partition of the territory had been ac-

cepted by the Jewish agency and rejected by the Arabs. The British mandate expired in 1948 without peace having been established, and with hostilities violently expressed existing on both sides. When on May 14, 1948, the Jewish State was proclaimed for Palestine by the United Nations, the Ottoman law had expired, the British law then expired, and Jewish Rabbinical law came into force within the territory. In 1950 we saw the Rabbinical court preside over a divorce case. It had jurisdiction in domestic cases, and incidentally, we were told, kept no records.

An important rabbi met us at the airport near Jerusalem, but we were warned not to shake his hand. A rabbi could not, under Rabbinical law, touch a woman's hand. We were informed by a leading woman lawyer of difficulties encountered by married women, and by women generally, under Rabbinical law. Typical of this was the requirement that a woman whose husband had died must marry his brother. Rosalind and I were asked by the Jewish women to discuss these matters wherever we spoke. Many fine Jewish women, we were told, were totally unaware of the hardships imposed upon women in Israel by Rabbinical law, which they said was less liberal to women than either the British or the Ottoman law.

We both took up these questions at a luncheon tendered us in Jerusalem by the men of the Bar Association; also we spoke at a large affair in Tel Aviv at which all the principal women's organizations were represented. Women of influence were present from London, western Europe and the United States. Some of them were contributing substantially to the financial needs of the new Jewish state.

The results of our advocacy cannot be measured in statistics. But we were informed that women in Israel shortly afterwards succeeded in having the principal discriminations against their sex eliminated. Also, our chief informant and aid in the preparation of our speeches, Judge Hembda Mozes, was given the public recognition to which she is so highly entitled.

I4

The Supreme Law of the Land

IN 1952, Kappa Delta Pi, an honorary society in education, invited me to write a book on a subject of my choosing, and to deliver an address based upon the book at its annual banquet to be held in Lansing, Michigan, at Michigan State College. The Educational Forum of the society had already published two brochures of mine dealing with international questions and I felt honored by this invitation.

Since the United Nations Charter, completed in 1945, had been adhered to by the United States, it seemed timely to discuss some question connected with this new international organization, and I chose the title, "The Treaty as an Instrument of Legislation."

I was aware that the UN, like the old League of Nations, had no legislature, and that legislative action by the UN membership would inevitably be secured through submission of treaties to be accepted and ratified by the individual nations. I was also aware that the Constitution of the United States, Article VI, Paragraph 2, provides that treaties made under the authority of the U.S. are the "Supreme Law of the Land," binding upon the judges in every state.

This is not the rule in force generally throughout the world. On the contrary, under the law of the great majority of civilized countries, a treaty adopted is simply a contract or compact between the governments involved. It requires further legislative action to make it a law binding upon the citizens. Thus in England, a treaty that involves a charge upon the English people, or a change of the law in England, can be given effect only by an act of Parliament. The Constitution of France excepts from the definition of treaties various broad classifications of law dealing with the personal rights and the property rights of French citizens, and specifically provides that "treaties modifying French national legislation, commercial treaties, and treaties that involve national finances" shall not be final unless they have been ratified by an act of the legislature.

Treaties in the United States do not require an Act of Congress in order to become final. They become, when ratified by the Senate of the United States, on a par with a federal statute. In effect they repeal existing statutes in conflict with them. For this reason the adoption of treaties is a matter of serious concern to our country.

The UN Charter, Article II, Section 7, expressly states that it does not authorize the use of intervention by the UN in matters that are essentially within the jurisdiction of any state. This proper restriction applies only to the UN and not to the Specialized Agencies, such as the World Health Organization, the International Labor Organization, and numerous other powerful agencies recognized by Article 57 of the UN Charter. These agencies under the Charter are associated with the UN, but they have a large measure of autonomy and a decentralized system. They and their member nations write their own constitutions and their own regulations, and if legislative action is wished they operate by treaty. They are not bound by Article II, Sec. 7, of the UN Charter and they frequently disregard the provisions as to intervention in the

domestic jurisdiction of the various countries in violation of the spirit of this article.

For example: The Food and Agriculture Organization has adopted a regulation in which it assumes to decide what court or body shall determine disputes concerning the interpretation of the FAO Constitution. The International Labor Organization has established a Commission of Enquiry empowered to find facts and in case of dispute, order what action shall be taken by any offending member state. These two provisions perhaps explain why so little international work is done by the International Court of Justice. The agencies by-pass the Court and do not avail themselves of its competent service.

Any administrative agency has a natural but always dangerous tendency to increase its own power. This has appeared—as shown—even in such a wholly excellent agency as FAO.

With reference to the ILO, it is well-known that this organization was associated with the League of Nations and has worked with a high degree of efficiency and devotion for over forty years.

The history of the ILO, because of its sustained period of effort, is particularly instructive. As may be seen from reading the titles of the ILO conventions submitted to the countries of the world, much of the subject matter tends to encroach upon the domestic jurisdiction of the member states.

While the Maritime Conventions, dealing with pay, hours, vacations and accommodations of ships' crews, etc, are necessarily international in scope, the majority of the other ILO conventions apply largely to domestic affairs of member nations. These include labor clauses in public contracts, protection of wages, fee-charging employment agencies, the right to organize and bargain collectively. If the United Nations presented these conventions to member governments for ratification, such ratification might violate the spirit of the principle, stated in Article II, par. 7, withholding from the

United Nations the right to intervene in matters essentially within the domestic jurisdiction of any member nation. But these conventions are framed and submitted not under the Charter of the United Nations, but under the constitution of the ILO, which contains no such prohibition.

When ILO conventions are forwarded to the United States, they are submitted both to the State Department and to the Department of Labor for a report, and in many cases are not recommended by either department or ratified by the U.S.

The convention does not go into force unless it is ratified by the requisite number of member states. The ILO constitution at no point requires that member nations ratify conventions adopted by the conference; however, if the pressure of the ILO to secure ratification continues, mounting influence will be brought to bear to push through ratification of these treaties—most of which are of purely domestic content—regardless of reservations and objections. For instance, there may be renewed efforts to secure submission to the U.S. Senate, for advice and consent to ratification, treaties which have not been recommended by the State Department.

The Director General of ILO, in his 1949 Report, said, "The organization's efforts to achieve universality must be unrelentingly pursued. It must continue to proceed in insuring that its work is of the utmost practical value to all States members and not merely to certain groups among them." He urged that governments, employers, and workers in various countries should allow nothing to "distract their attention from the imperative task of securing the ratification and application of the Conventions adopted by the Conference year after year."

This view of the functions of the ILO ignores the right of any member to refuse to ratify a convention submitted. Universality is not required, and in view of all the variations in conditions among member nations, in many instances it is inadvisable.

Certain subjects which the ILO considers require "universal" treatment are better handled by regional or bilateral treaty. Among these is the situation of the migrant worker. The problem of the United States in this field is not created by the migrant worker from India or the Orient. It is created by the migrant worker from Mexico. Because of this the United States and Mexico have made several bilateral agreements far better suited to the needs of the particular situation than treaties covering workers from the whole world.

That the ILO had endeavored to secure universal ratification in cases where the conventions were not really applicable to every local situation is plain from the record. An example is that of Switzerland which, in its letter of May 30, 1939, to the Committee of Experts with reference to the Forced Labor Convention, stated that it had adhered to the convention "for purely humanitarian reasons." It also stated that Switzerland had no type of forced or compulsory labor and described the effort made to secure ratification regardless of the applicability of the convention as follows: "in fact, the Committee on the Application of Conventions, at the 20th session in 1936, stated in its report: 'In the same order of question is the problem of what have been known as ratifications of principle. . . . For example, the ratification by an advanced non-colonial country of the Forced Labour Convention may be held to advance the principle of universality.'"

Under any ethical view it would be proper to call to account members which have ratified conventions but failed to comply with them. In such a case the ILO Governing Board may refer the matter to a Commission of Enquiry which is empowered to find facts and order that action be taken by the offending state.

This supervisory machinery covers only members which have ratified the conventions in question. However, two additional powerful leverages are supplied to compel a member state to ratify conventions which have merely been proposed

and to which it objects. Article 19 par. 5 of the ILO constitution requires each member to submit any convention which has been adopted by the conference to its appropriate authorities within eighteen months for the enactment of legislation or other action. If the convention is ratified, the member must communicate that fact to the Director General and take action to make the convention effective. The all-important new provision is that even if the convention is not ratified each member government must report to the Director General at intervals as requested by the Governing Body upon its law and practice with regard to matters dealt with in the convention, "stating the difficulties which prevent or delay the ratification of such convention."

It is at this point, when the member state has reported that it has not ratified (and of course the difficulties which prevent its ratifying may include unwillingness to ratify), that the president of the Governing Board of the ILO declared in the 1949 conference such a nation should be "called up before the bar of public opinion."

In addition, the ILO has established a fact-finding and conciliation commission on Freedom of Association to which it has appointed nine members, former judges. This fact-finding association is to hear "charges of infringement of trade union rights." Whether or not a nation has ratified the convention in question, pressure may be brought by this quasi-judicial body.

The Director General's Report of 1949 assumes that there is an obligation upon ILO members not only to implement conventions which they have ratified but to ratify conventions which have been adopted by the conference. He says, "There is no quick or easy solution to the problem of ratifications, but the exploration of its multiple aspects would be much advanced if the delegates would contribute freely of their views and experience on how implementation of international

labor legislation can be furthered, particularly in their own countries."

This statement indicates a misconception as to the basic difference between proposing a convention and ratifying it. While the conference of the ILO votes formally upon the conventions, the framing of the convention and its approval by the ILO conference does not bind the members of this specialized agency and force them to ratify the convention. The approval of the convention by the conference simply results in submission of the convention to the member states which may or may not ratify it.

The ILO is an excellent example of the importance of the treaty question to the United States, particularly because of our peculiar provision making treaties the supreme law of the land. If the United States were to ratify all of the conventions offered by the ILO, it might be amending or possibly repealing parts of its already extremely liberal social legislation.

An excellent illustration is found in the ILO Convention on Fee-Charging Employment Agencies. This convention, as is the case with many ILO conventions, has not been submitted to the U.S. Senate (as of 1952) for advice and consent to ratification, but it might be submitted in the future. As originally drawn, this convention required that private employment agencies should be abolished as soon as public employment agencies could be established; on the theory that a more impartial and cheaper service would be given the worker by public than by private agencies. But the 1949 revision gives the member states the option of eliminating fee-charging employment offices or of regulating them in strict and detailed ways.

If the United States should ratify a treaty providing for the elimination of certain forms of private business, it is questionable whether such a treaty could be enforced without violating the Fourteenth Amendment of the United States

Constitution. Since the recommendations accompanying the proposed convention, as amended in 1949, again urge the elimination of private fee-charging agencies, the ILO should be informed of the possible invalidity, under the United States Constitution, of any treaty abolishing existing private agencies.

If the United States adhered to an ILO convention simply to regulate fee-charging agencies on a national basis as required by the amended convention, another constitutional question would be raised. While some private employment agencies doing interstate business are subject to federal regulation, under United States law private employment agencies have long been held to be in general subject to the control and regulation of the states. Practically all of the states and the District of Columbia have on their statute books laws regulating private employment agencies. These valid laws might conflict with the treaty proposed by the ILO.

Another proposed ILO convention on the organization of employment service requires each member to establish a national free employment system "under direction of a national authority." But we have in the United States a long-established public employment system, set up in 1933, ramifying through the entire country and operating under a merger of national and state financing and control. The Federal Government contributes funds for this service allocated on the basis of population, and the State contributes an equal amount. The local administration is in the hands of the states, subject to federal regulations. It is a question whether we could adhere to this proposed convention without interfering with our own extensive federal and state system.

The ILO convention on Freedom of Association and the Right to Organize includes an article which would necessarily make some member states hesitate to ratify the convention. This is Article 8, which reads as follows:

1. In exercising the rights provided for in this Conven-

tion workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Under this article a member state which ratifies this convention apparently agrees (1) that the labor law of the land in no way conflicts with the ILO convention, and (2) that the Congress or Parliament will never pass and the Executive never enforce a law conflicting with this convention. Such a provision might well be held unconstitutional by U.S. courts.

The convention concerning Labor Inspection in Industry has no international features. It requires the ratifying states to maintain a system of labor inspection not only in industrial plants but also in commercial work places. The inspectors provided for in the convention are authorized, subject to any rights of appeal which may be provided by law, to make orders to individuals or to plants requiring alterations to be carried out within a specified time or requiring measures with immediate executory force in the event of imminent danger to the health or safety of workers. In view of the extensive statutory provisions, both federal and state, in our country, establishing various kinds of inspection affecting safety of employment, it might be considered that the ordering of alterations or of important measures by the inspectors was not compatible with our own system of law. It is certain that this convention relates to purely domestic concerns and is not a proper subject of treaty.

The ILO proposed convention Concerning Social Policy in Non-Metropolitan Territories raises a question of supreme importance. It relates wholly to "non-metropolitan territories for which any member has or assumes responsibilities, including any trust territories for which it is the administering authority." It prescribes for all such territories policies con-

trolling economic development, public health, housing, nutrition, education, welfare of children, status of women, social security, standards of public services and general production, along with matters which are properly included in labor legislation. It demands that efforts be made to avoid the disruption of family life and to improve the standards of living of agricultural producers. The provisions as to migrant workers are not limited to interstate migration. The convention covers migration of groups or tribes from their homes within a given country to industrial centers within the same country, as well as migration from one country to another. Each member of the ILO which ratifies the convention "undertakes that the policies and measures set forth in the Convention shall be applied in the non-metropolitan territories for which it has or assumes responsibilities, including any trust territories for which it is the administering authority. . . ." Among the policies which the members undertake to apply for agricultural producers are the following:

- (a) the elimination to the fullest practicable extent of the causes of chronic indebtedness;
- (b) the control of the alienation of agricultural land to non-agriculturalists so as to ensure that such alienation takes place only when it is in the best interests of the territory. . . .

If the United States were to ratify this convention, it would be compelled to apply these and other sweeping provisions to the sparsely settled islands of the Pacific which constitute the trust territory of the United States. But these all-inclusive provisions as to social policy in non-metropolitan territories would have very little application to this particular part of the globe.

The Director General of ILO in his 1949 report said: "Today the role of the organization as to an international parliament has become generally accepted." As he said, the

organization "has been moving constantly in the direction of full and genuine universality."

The serious implication of the submission of this particular treaty is that the ILO looks upon itself as the legislature for the world in all world matters. Apart from the fact that the ILO has been given no mandate from the nations to perform such an all-extensive function as to legislate for the trust territories, it is not the proper instrument to regulate such relationships. The management of trust territories certainly presents international features; but obviously these matters should be and are being handled by the United Nations.

It seems unfortunate that a world organization with a record of definite achievement, which has raised labor standards throughout the world by processes of information, education, wide contact, and technical aid, should by its emphasis on compulsory legislative processes lessen its influence and leadership. Detailed law cannot properly be drafted by this specialized agency to cover highly different situations in each of sixty nations; in addition many of the ILO conventions invade the domestic field in which each nation rightly is supreme.

Perhaps the greatest danger inherent in the situation as we see it in operation is that the whole set-up, the drafting of treaties not by the state departments of the governments concerned but by remote commissions not answerable to the peoples, the pressure to secure ratification, the creation of quasi-judicial bodies to hear charges of violation, places the administration of important world problems in a government of men, not of laws. The bureaucratic official is the vital factor in drafting the treaties which invade the domestic life, in pressing the treaties to ratification so that they go into force, and then in pursuing the nations with a multitude of reports, with investigations, and with charges of violation in order to secure "universality" of law throughout countries

in which the entire background, political, religious and social, is so different that universality as a practical matter can never be achieved.

I have always supported the United Nations. Many times I have called attention in public speeches to the fact that the United Nations is our one world organization dedicated to the attainment of world peace, and that this requires us to give the United Nations constant cooperation. But this does not mean that we should not give it the all-important service of constructive criticism in order that in helping to establish peace and world justice we may at the same time maintain independence and freedom. It would help instead of hurting the United Nations to have the United States enact a constitutional amendment and other appropriate legislation which would require that a treaty be approved by both houses of Congress before it becomes the supreme law of the land. It would help instead of hurting the United Nations to call attention to the encroachment by certain specialized agencies upon the field of domestic legislation in the treaties they submit to the United States Senate for ratification. It would help instead of hurting the United Nations if illumination of these specific questions resulted in a movement by the United Nations to remedy its lack of control over the specialized agencies.

The hopeful attention of mankind is centered on the United Nations. It was created by a heart-weary world which needs friendship and counsel, not interference and trouble-making regulations. Surely it is essential, in order to establish world peace, not only to create world organization but also to establish justice and to maintain independence for every nation. These ends will never be attained in the absence of constructive criticism.

15

Looking Back

AS I LOOK BACK, my life impresses me as one of hard work and many rich rewards. Foremost among the rewards I count the deep and lasting friendship of many fine men and women. Certain occasions, too, stand out in my memory and are worth mentioning, not primarily because of the personal satisfaction they gave me, but mainly because they mark the advance of women in the great profession of the law.

In 1948 the women graduates of New York University Law School instituted a movement to finance a scholarship fund which should be named the Florence Allen Scholarship Fund. In this connection a dinner was held at the Waldorf-Astoria in New York on November 8, 1948.

Mrs. Franklin D. Roosevelt was asked to be chairman for the dinner. She was then in Paris in connection with some phase of her work as United States Delegate to the General Assembly of the United Nations. She replied that she was sorry she would not be home before November 8th. She suggested that she be Honorary Chairman for the dinner, and forwarded a message to me, entitled, "Tribute to a Judge."

Her name was carried on the program as Honorary Chairman, and the Tribute was read at the dinner. It was as follows:

It would have been my great pleasure to attend the testimonial dinner given at the Waldorf-Astoria in New York City by the New York University Law School in honor of my good friend, United States Circuit Court of Appeals Judge Florence E. Allen.

Judge Allen is the only graduate of the school to achieve this eminence of being on the bench of the United States Circuit Court of Appeals, as well as being the only woman ever to hold such a high judicial office.

A room in the university's new law center, which will be built on Washington Square in New York, will be dedicated to her. Half of the money for this dedication was raised by an alumnus committee under Judge Dorothy Kenyon.

It is fitting and only natural that a room in this famous law center should be dedicated to a woman since this was the first law school, founded in 1835, to open its doors to women students. Some 800 women have been graduated from it since 1891.

Since I first met Judge Allen, I have had great respect and great admiration for her, and though I am unable to attend the dinner given in her honor, I send my good wishes.

I would like to add, that if a president of the United States should decide to nominate a woman for the Supreme Court, it should be Judge Allen.

She will be a nominee with backing, on a completely non-partisan basis, of American women who know her career and her accomplishments.

I was also gratified to receive a letter from Judge Learned Hand, who in the opinion of countless lawyers and judges was the outstanding judge in any court in the United States. He was a member of the committee and attended the dinner, and later wrote me as follows:

Dear Judge Allen:

You were very kind to write me as you did on the 29th.

I have for long had a high regard for you and if I had not been so pressed I should have been very glad to accept the invitation which I got to speak, but speaking has become for me now so difficult that I avoid it in all cases when I possibly can.

The turn-out for you was altogether deserved. You have made a unique place for yourself and I congratulate you.

Sincerely yours,
(Signed) Learned Hand

My lifelong friend, Harold Stephens, Chief Judge of the Court of Appeals for the District of Columbia, presided at the dinner, and another friend, Dr. Elizabeth Lee Vincent of Cornell University, also spoke. The friendship shown me at every step of the proceedings I shall never forget.

I had just returned from a trip to the countries devastated by the Nazis. I made a short speech called "Peace with Justice" in which I stressed the obligation of the lawyer toward helping to establish peace. This speech, in part, is reprinted in the Appendix.

In 1952 I had the supreme distinction of being designated to receive the bust of Susan B. Anthony, when it was placed in the Hall of Fame at New York University. This consummation of our work for woman suffrage was an event of which we could all be proud, and I was thrilled by the opportunity of expressing what women the world over felt for this incomparable woman.

Susan B. Anthony died in 1906 and I never had the privilege of knowing her, but I felt, and still feel, that we have enjoyed the suffrage and other rights for so long we tend to forget that only the valiant efforts of this pioneer and others like her made it possible for us to secure them. I told of Miss Anthony's Quaker upbringing and training; her education; her first teaching job at Hardscrabble, N.Y., for \$2.50 a week and board. I told of her courage to speak out when it was

unheard-of for a woman to open her mouth in public, and how she endured humiliation and ridicule. I reminded my listeners that she had been arrested, jailed and fined for voting in an election in Rochester, although her lawyer, a former judge of the Court of Appeals, had told her she had a legal right to do so.

In conclusion I said, "Like Moses, Susan B. Anthony only looked upon her Promised Land but she led us to the gate. . . . There is no answer to the determination of the human spirit to attain a great end when suffering, humiliation, hardship and death are simply not considered; and so Susan B. Anthony herself exemplified her ringing statement that failure is impossible."

Also in 1960 New York University, as a crowning distinction, bestowed upon me the Albert Gallatin Award. This was the first time that the beautiful medal had been presented to a woman, and to be included among such recipients as Dr. Ralph Bunche and Dr. Jonas Salk, was indeed a great honor.

After twenty-five years in the U. S. Court of Appeals and ten years in the highest court of Ohio I retired from active service. Under the federal statute now in force a judge may retire from active service at sixty-five, if he has served ten years. Most federal judges, however, serve for a longer period, and I was seventy-five when I decided to retire.

A federal judge is appointed for life. Retirement does not affect his judicial authority and he still is authorized to sit in cases to which he is designated if he wishes to do so. His office is that of Senior U.S. Circuit Judge.

The crowning event of my life was connected with my retirement, which I had tendered to President Dwight D. Eisenhower, and which he accepted with some kindly words. I then was informed that the National Association of Women Lawyers, together with many other friends, both men and women, was planning to present a portrait of me to the Court of Ap-

peals. Rudolf A. Schatz, an artist of distinction, had agreed to do the work, and he desired to arrange for sittings.

Meanwhile the court was carrying on sittings of its own in which I took active part, so we gave Mr. Schatz a good recent photograph, gave him an ample interview in order to see what I really looked like, and that concluded the sittings. The portrait was beautifully done and the court work was properly concluded.

The portrait presentation was preceded by a dinner given in my honor by the Cleveland Patent Law Association, at which Mr. Justice Stewart of the U. S. Supreme Court came to add some words of commendation. Then on October 15, 1959, the court gathered in Cincinnati for the presentation. The Justices present were Hon. Thomas F. McAllister, Chief Judge, Hon. Charles C. Simons, Hon. John D. Martin, Hon. Shackelford Miller, Jr., Hon. Lester L. Cecil and Hon. Paul C. Weick. The hearing room was crowded with spectators. A number of Bar Associations, including Cleveland and Cincinnati, were represented. My whole court was present, and also (which warmed my heart!) part of my family. This meant much to me. In general my family had never been present to rejoice with me when I received an honorary degree and a pleasant citation from some great college or university. At such times I had been alone.

But now my niece Keenie, whom I had educated after the death of her father, was there with my namesake, her daughter Florence Allen Hill. Early in the morning my niece Betty Sloane Bretz arrived from Missouri. My sister, Dr. Esther Allen Gaw, emeritus Dean of Women of Ohio State University, unveiled the portrait. So the family was there rejoicing with me and, of course, my own court was witnessing to twenty-five years of friendship.

Maurine Abernathy of New York in a beautifully phrased address explained the significance of the celebration to women

lawyers and to women everywhere. Mr. Alton E. Purcell, President of the Cincinnati Bar Association, expressed the warm good wishes of the Association. The tribute of my old friend Senator Frank Lausche, who made the presentation, touched me profoundly, especially when he said, "Judge Allen has always possessed strength of body, mind, and ethics. She did not fold her hands and acquiesce in wrongs. She stood up, spoke out, and fought against entrenched wrong. . . . The dominant force of her life has been love of the law. She has become a legend in it.

"Distinguished members of this court, humbly yet proudly I present this portrait of Judge Allen to this Court of Appeals, reverently believing that it will serve as an inspiration in the future to litigants, lawyers and judges in what an exemplary and devoted life can mean."

Judge McAllister, in accepting the portrait for the court, was equally cordial: "The Judges of the United States Court of Appeals for the Sixth Circuit are proud of Judge Allen; proud of serving with her in this court in the administration of justice; proud of the renown she has brought to this court and, more than that, proud of having her number us among her friends, for we think of her always, first, with affection as a comrade and a friend. . . .

"The heart and mind of Florence Allen will flame for generations as a beacon for thousands of young women who will take their rightful places in government, in the practice of the law, and in judicial service—and lawyers and judges yet unborn will read the words she has written, in the endless, ever-old and ever-new quest for justice."

It was with understandably deep emotion that I made my reply at the close of the proceedings.

I have no words to express my feeling due to the fact my senior Senator of the State of Ohio should come here and speak for me; that my Court should be here to accept

this portrait; that my Chief Judge should speak in such eloquent phrases of my humble service; that Mrs. Abernathy, representing the women lawyers of the nation, should be here from Washington. All these things comfort me as I end my active service in this court which I love so much.

I have been thinking, all these days, all these weeks, all these years, what a privilege it has been to sit on this particular bench. A host of memories throng upon me. Judge Moorman with his courtly distinction; Judge Hicks, whose warmhearted humor and sound judgment made him, as it were, an Abraham Lincoln of the Sixth Circuit; Judge Simons, whose broad understanding, objective viewpoint and constant striving for justice make his opinions at once a precise and eloquent and imperishable part of our whole law. I have thought that over and over these past years reading Judge Simons' decisions.

As time went on, I had the privilege of associating with Judge Martin, who has served the courts in a way perhaps unequalled. He has dedicated his vast learning and experience to the whole country, serving in his vacation time in many district and circuit courts throughout the United States, aiding them in clearing up their dockets; Judge Miller, whose wide learning and scholarly approach I soon found was matched only by his devotion to the Court and its high aim.

Judge McAllister, our Chief Judge, whose colossal output in the Emergency Court of Appeals during wartime, and for years thereafter, was carried on at the same time that he was writing for this Court, as always, opinions of high learning and social significance. Think of the privilege of associating with such judges. We had here—we have here—the rare judicial team of the United States, for which no effort has ever been too great if it helped the Court.

Many intelligent persons think that the main function of the courts is to settle controversies. It is a main function. But *the* main function is much higher. "What doth

the Lord require of thee but to do justly, to love mercy, and to walk humbly with thy God." That's a standard that we used at least to aspire to follow. It is the standard which we still must follow. What doth the Lord require of judges but to do justly.

Here during all these years we have had a Court which is as fine an instrument for obtaining justice as there is in the whole country. And, after all, the attainment of justice is the highest human endeavor. I am proud to have been a member of this Court.

Thank you from the bottom of my heart.¹

Great changes in the status of women have come about in the world and in our country since the day when I was admitted to Chicago University Law School. With the winning of the vote women gained the right as well as the duty to assume their part in public and professional life, to stretch their minds and their ability to serve humanity. All professions are open to them. Women have served with credit to themselves and to all women on municipal councils, state legislatures, and in the Congress of the United States. They have represented their country as ministers and ambassadors. Women judges have sat, not only in juvenile courts, but in courts of extensive municipal and county jurisdiction, in a state court of last resort, in various Federal courts, the Tax Court, the Customs Court, and District Court, and the United States Court of Appeals.

This is a time when we have to raise our sights and re-appraise opportunities all along the line. In the present world crisis it is hardly fitting to satisfy ourselves with the fact that women today may enter lucrative employment in one of the time-honored professions. As we consider national and international situations we realize that the woman lawyer is needed by America and by the world as never before.

She is needed by the country, for her training enables her

¹ A transcript of the Portrait Presentation was printed in 278 Federal Reporter 2d Series, pp. 5-17 inc.

to join with men in teaching citizens and particularly the youth coming on, the meaning of the Constitution of the United States. When our forefathers declared in the Preamble (the first written statement in history as to the purpose of erecting a government), that the United States was being founded "to establish justice" and "to secure the blessings of liberty for ourselves and our posterity," they were not using idle words. They were using words that Americans must understand. Justice is not, as certain people believe, a system under which they get what they want. Justice is a system under which they get the thing that they are entitled to, and others are entitled to receive the same. Liberty does not mean license to commit cruel murder "for kicks;" liberty means that you and I live unregimented, unrepressed, unbrainwashed, with freedom to choose our calling or profession, to choose our place of living, to choose our friends, with the right to develop ourselves just as plants grow in the sun. Some Americans have forgotten these simple but basic truths. The lawyer is needed to help call Americans back to the fundamentals, both through his own integrity and idealism and by his teaching.

And what does this situation open up for the woman lawyer? It opens up a mighty privilege and opportunity. We should accept this challenge with eagerness and courage because of the wide-spread movement in the world to attack the ethical basis of law. The extent of this challenge is not realized.

Those of us in free countries who have devoted ourselves to the profession of law inherit glorious traditions upheld by principles which lie at the very base of civilization. Nothing so marks off the man from the beast; nothing so demonstrates the divine element in humanity as the desire for justice found in ancient peoples, in remote tribes and in civilized countries of the world. It has been voiced by prophets, legislators, and judges for many centuries. This desire for justice demonstrates the ethical basis of law. Why did the Ten Commandments

declare "Thou shalt not kill;" because it is wrong to take human life. As Andrew Jackson, one of our presidents who was also a judge, used to charge his juries, "Do right between these parties. This is what the law always means."

Since the time of Hammurabi and since the bringing of the Ten Commandments down from Mount Sinai, civilization has realized that there must be law in order to protect the rights of individuals, the family and the community. Certain basic principles have developed. One of these is that we shall secure justice more completely under a rule of law than under a rule of men. Another is that individuals shall be equal before the law. Most important of all, the law in its gradual development has always expressed an ethical purpose.

In these days, when we see the ethical basis of law attacked, when we see government of men, not of laws, government which openly repudiates the equality of men before the law, their right to personal freedom, their right to work at whatever calling they choose, when, in a word, the principles of justice are discarded in powerful countries, we, as lawyers, face a specific challenge. It is not enough for us to enjoy employment in a lucrative, learned and honorable profession. It is not enough to practice law ethically. We have to help teach the coming race the ethical basis of law. We have to fight as lawyers against the movement to abolish the conception of right and justice which lies at the basis of civilization.

A great public service is demanded of lawyers and laymen today. Unless lawyers inspire the coming generation with a conception of the ethical basis of law, our precious freedom built up through the centuries will inevitably be destroyed. The ethical basis of law implemented in the free countries is the real defense against Communism. And to the protection of this ethical system of law every member of the Bar, man and woman, and every true American is called. This is today at once our challenge and our mighty opportunity.

APPENDIX

A

Speech on the Outlawry of War Delivered at the Conference on Causes and Cure of War January 18, 1925

SOMEWHAT CONDENSED

[*Introduction by the chairman, Mrs. Carrie Chapman Catt.*]

Members of the participating organizations and friends: While I listened to the splendid expositions by the distinguished military officers, I have been wishing that I had the force and eloquence to take advantage of this opportunity to address delegates from such groups, from the American Association of University Women, those women who have had the training that a hundred years ago was denied to women the world over; from the Council of Women for Home missions and the Federation of Women's Boards of Foreign Missions of North America, the women who believe that the ethics and philosophy of Christ ought to be put into practice in our daily life; from the General Federation of Women's Clubs, that splendid group which links together so many organizations with such a vast field of cultural and civic activity; from the National Board of the Young Women's Christian Association, which beneficently directs the activity of the young womanhood of the entire nation; from the national Council of Jewish Women, with such a heritage of law-making

behind them that they well may be proud and we may be well proud to have them affiliated with us in this gathering; from the National League of Women Voters, a league which includes in its membership many men, a league which believes that every vote must be intelligently cast and that every woman and thereby every man must be made an intelligent voter; from the National Woman's Christian Temperance Union, that fighting group which first said that the evil of the open saloon must go in America; and last but not least, the National Women's Trade Union League, the group of women who do work with their hands so well competing with labor in the open market that they force the world to give them an honest living.

When we think of the ramifications of these organizations, their territorial extent, the numbers which they represent, can we underestimate the power which resides in this particular group? And, more than that, it is significant that this is a group of women; but not because the war problem is primarily a woman's problem; women suffer hideously in war and so do men; every boy who lost his life in the World War had the greatest human right denied him. We find these truths to be self-evident—that all men are endowed by their Creator with certain inalienable rights, rights that cannot be taken away, rights that cannot be given away—the right to *life*, liberty and the pursuit of happiness.

And we are here as a group to make a new Declaration of Independence, to say that henceforth we will be independent of the curse of war; that we hereby demand that the tyranny of the most colossal evil that the world has ever seen shall cease. And, my friends, it is significant that this is a woman's gathering because while men suffer with women in war and while men work magnanimously with women to do away with war, as the presence of these distinguished speakers evidences, the fact does remain that woman's task is peculiar with regard to the abolition of war. We have to teach the human race that ethical standards can be set up and maintained between nations as well as between individuals. Women have to teach the coming generations that the rules of right and wrong can be applied to every group; that there is no situation in which the law of justice cannot and does not function if applied. Women have to teach the coming race that this

thing is not impossible; that law can be substituted for the use of armed force in the settlement of international difficulties. In the long run, my friends, over and above and behind and underneath all the plans which will be urged here for the cures of war, and I probably am in accord with them all, the fact remains that you and the women of the world who believe that this evil can and must be abolished, have to go forth to change the conviction in men's minds that war is legal and sanctioned and necessary; and that is primarily a task for women.

And then, too, women have another peculiar responsibility in this matter. Women have within them that thing that Benjamin Kidd calls the power of developing the emotion of the ideal, that power of working for something which they see not, something which they only hope and dream will come to pass. Thousands and thousands of women in this country joined the ranks of those who demanded that liberty should be given to women as well as to men and died before we ever had the vote. That kind of spirit within women reaching out over the long years comes perhaps partly from our physical nature and partly from the long, sad training of the ages which has compelled us to achieve a masterly self-control. That power makes it possible for us to sacrifice and renounce and work for something which will not, immediately, be accomplished. And of course, my friends, in spite of advances which have been made in our lifetime in the peace movement, you and I know that it will be a long, hard process and that years and centuries will go by before the peace structure will finally reach the completion which we hope for it.

Now, this emotion of the ideal present in women makes us perhaps see with clearness certain fundamental facts, because we are looking forward not to a temporary advance but final consummation. We look forward to a great thing. Because of that perhaps we see more clearly certain practical aspects of the situation, and we wonder, as women, how it comes about that government spends so little money and such little effort for making peace and so much money and so much effort for making war. We say to ourselves that if centuries ago the finest minds had been gathered together to erect peace instead of to keep war machinery well oiled, perhaps by now the peace structure would have been built. We say to our-

selves that if in 1500 A.D. the energies of the races had been poured into substituting law for war the World War would never have been fought. And we say too that we demand substantial steps toward peace. We care little just how it is done. Women are not particular as to who does it; they are not particular as to who gets the honor of the achievement. They are not particular as to the name by which implementation of the peace movement is called, but women want war branded and made disreputable; they want its use made criminal; they want the sanction taken away from war, and they want the orderly, peaceful processes of enactment and adjudication substituted for war. They want, in a word, law, not war.

And just because we have within ourselves this mighty power, the emotion of the ideal, this power which is essential for winning causes as colossal even as this, we confront particular dangers. It has been said here in America since the women got the vote that we ought to be used mainly as a channel for engendering enthusiasm. And, my friends, creating enthusiasm is worthy for certain objects, but let us scrutinize the object. Let not these groups, let not these fine groups act as cheer leaders in a huge game in which they do nothing but the cheering.

And we face other pitfalls. I shall speak particularly of one this afternoon. It presents correlative dangers. We face the danger of thinking that we can help to do away with war without actual knowledge, and we face the correlative danger of thinking that we can be of no use in eliminating war unless we are experts. I shall first speak of the need of actual knowledge. We must not emotionalize. Every step we take; every measure we demand must be based upon our *knowledge of actual facts*.

Let me illustrate very simply with regard to the subject which is to be considered by you in this Conference, the codification of International Law. Now, there are some people who think that the codification of International Law would have great weight in doing away with war, because they think that if law could be gathered together governing the conduct of nations, then, we would have laid the ground work for orderly adjudication of international disputes. If codify means to enact, then I agree that the codification of international law is very necessary; but codification in its usual sense, in the sense in which lawyers use it, does

not mean to enact law. It means to make a compilation, to make an orderly, systematic assemblage of laws already existing. However, there is practically no important substantive international law existing and enforced by the courts with regard to the conduct of nations. Take the latest books on international law—Scott or Stowell or Munro, and look through those text books as to how courts have enforced international law, and you will look in vain for any case which has held any nation guilty of the crime of making deliberate, pre-meditated, aggressive war. You will look in vain for any case which finds any nation guilty of stealing, guilty of extortion, or guilty of oppressive acts to other nations. I may perhaps see the lack of such decisions more than some other people because of my legal experience. I have presided in a number of murder trials, and sometimes I ask myself how, when I was sitting in a trial court, I could ever have impaneled a jury, or how the jury could have convicted the accused, or how the accused could have been sentenced by the court, if there had been no law making murder a crime.

I wish to explain here very simply what to me the phrase, outlawry of war, means. It does not mean that the enactment of law making war a crime will of itself prevent war. I believe in securing peace by all means, and I do not pin my faith to one method only, but, my friends, how can we enforce a law before we declare the law? The first step in law enforcement is the declaration of the law. You lay down a moral basis upon which you begin to enforce moral law. And, my friends, I repeat that I do not believe that the mere enactment of law making war a crime would, of itself, stop war; but I am at a loss to understand how the world court or the Hague court or any tribunal which is constituted can brand the making of war illegal and disreputable so long as we recognize and tolerate and sanction the making of war. In other words, what the world needs in addition to machinery for enforcement, in addition to the world court, in addition to some kind of permanent continuously-operating international organization, is to declare moral law as applicable between the nations. The world needs to lay down a ten commandments between the nations: "Thou shalt not war; thou shalt not steal; thou shalt not oppress."

And by whom can this law be laid down? It can be laid down

by treaty. It can be laid down by conference; it can be laid down by the League of Nations.

Other law must follow, the law defining crimes between nations just as those crimes are defined between individuals. Suppose you were to cut out of the law of New York State, or Ohio, or California, the laws making murder and arson, rape and burglary crimes; as a result the whole bottom would drop out of the moral fabric of the state; you would lose the very basis upon which all law is built. The first step in law enforcement is to declare the law. This law could be declared by the League Court or the world court, if they could lay down the law.

Now, in an arbitration legal or ethical principle is not laid down. Arbitration simply decides the case. It decides who wins, but not who is right or wrong. The League Court is bound by a similar provision in the statute creating it. Article 59 of the statute states, "The decision of the court has no binding force except between the parties and in respect to that particular case."

And so, my friends, the League Court cannot lay down law. I believe in adhering to the League Court because it can interpret law; because it can adjudicate cases which come within its jurisdiction, but we shall have to have law, not codified but enacted, declaring the primary crimes between nations before we can properly go forward to enforce that law. Sometimes when I think of the task which has been demanded, the thing that we have asked of the World Court, and the Hague Court, and the League of Nations—to ask them to prevent war, when up to this time in the history of the whole so-called Christian world, the whole civilized world has tolerated and sanctioned war,—it seems to me that we have been asking an impossible thing. The sanction must be taken away from war before we can enforce provisions against war.

And now, the women of this country demand that this be done; they demand that war shall no longer be sanctioned; they demand that the use of war as a means of settling international disputes be abolished; they demand that other methods of settling international controversies be adopted. Some people say this is impossible. Why, my friends, human history shows that this is the next step in our social development. There was such a thing as

war between individuals. There was private warfare between individuals; private warfare has been abolished. There was warfare to determine legal questions. Men used to go out and fight to determine the titles of land in what was called the "wager of battle." That has been abolished. The duel which clung so long and so persistently has gone with the advance of civilization. Shall we say that men, men who swim beneath the sea in boats and who climb the sky in airplanes, are incapable of applying to themselves in groups the same law which they applied to themselves as individuals?

Now, I want just a second before I close to speak to you of the other danger which we face, the danger that we shall think we know too little to assist in solving this problem. I was interested to read the other day the account of a speech made by a distinguished officer for whom I have the highest regard. He said that pacifism in the United States was rampant because of the "women's insatiable desire to mix in things which they do not understand." He said that we do not understand war because war is a question of mathematics and of science. Of course, I do not know whether this distinguished officer said what is ascribed to him, but the fact remains that that view exists. It is true that science does go into the making of war. I could not calculate the trigonometric formulae which are said to be necessary to the direction of the shots from one of our great modern guns; I think very few men could. Science, of course, governs all of the law of chemical specifications; science governs military tactics; science must always come into play when war is made, but the question of keeping out of war, the question of maintaining peace, the question of establishing peace is not a question of science and mathematics; it is a question of establishing moral principles between the nations as law, enforceable as law, and that is a thing which is not a question of the parabola or the momentum or the velocity of a gun shot.

And then, on the other hand, there are some people who think we cannot help to establish peace because there is so much to know about the peace question. If we are to understand everything with regard to the workings of the League of Nations, to the treaty relations considered and acted on by the Senate; with

regard to the World Court, and the workings of the Pan-American Union, we shall have to have some expert knowledge; we must have much more expert knowledge than we have. No woman's club or organization in this country ought to go further without having one member, a committee of one, to read the substantial proceedings of the League of Nations documents, to keep in touch with things that are going on in the Senate, to be posted upon our relations, particularly with South America and Central America and the Caribbean, and to report back to her own club. But after all, the basic policies which underlie the making of peace are not difficult of comprehension. Any ordinarily intelligent person can understand them. In fact, never until the ordinary person, the non-expert voter is taken into the confidence of the peace expert, never until that time can America take her place among the leaders in the peace movement of the world.

I remember there was a great meeting held once at the Masonic Hall in Cleveland at which Mrs. Catt spoke. Will Erwin had told us what would happen to the world in the next world war; that war would be directed against the whole civilian population; that the advance of chemical warfare would make the next war something undreamed of. Mrs. Catt had some scholarly address to make, and instead of making it she threw down her manuscript and came down into the center of the stage and called upon the women of the United States to end war. That call we are still hearing. I suppose I have quoted one hundred times something which she said that night. We don't always have Mrs. Catt with us in Ohio so we have to quote her. She said, "The women in this room can do this thing; the women in this room can do this thing." And when she said that she said something truer than she knew. For Mrs. Catt had seen just such a movement grow from a meeting in a little room; she had seen the woman suffrage movement start when women had no training, no education, no money, nothing but the inherent rightness of their cause; she had seen it sweep over the whole civilized world in her lifetime. The women in this room can do this thing; the women in this room can do anything which is right and just, my friends.

Think of the colossal absurdity that we should have lived to this year of our Lord, 1925, and the slogan for nations during all

this time until very recently has been, "The State can do no wrong." We have to change that slogan; we have to write new laws; we have to say, "The State *shall* do no wrong." And that thing can be done for America by the women in this room. We have mighty odds against us; we have mighty interests and mighty powers against us; we have something, on the other hand, to inspire us. The boys, you know, went out and met six times their number in the day of the first advance, six times their number of the crack troops of Europe, and sent them reeling back in their tracks. They fought for a number of things, but they fought principally because they thought that war would end war. If we have any conception of their sacrifice we will never let that standard fail; we will make this war the war which did end war.

All over the world the forces of human affection are working with us. Sometimes I get upset over the international situation, but I heard something this summer which I intend to keep before me as a symbol of the hope we have. A friend of mine did war work in Italy and France and Germany, and has all the decorations that it is possible to have. This summer she visited all her little villages and she personally investigated and proved that the incident occurred which I am about to tell. At Mont Faucon in France, which was so shelled that nothing but a remnant was left of the town when the Armistice was signed, a man came and knocked at the door of a little cottage. A woman came to the door and he asked if she was the woman of the house. He spoke a queer kind of French but she understood him. She said, "Yes," and he said, "Perhaps you won't want to talk to me because I am German." She said, "Go on, Monsieur." He said, "I had a son who was killed in the war. He was killed near here and buried somewhere near here; I came over as early as I could to hunt for his grave and I could not find it. I thought perhaps I could find some cottage where I could stay all night and go on in the search, but probably because I am a German you won't want me to stay."

And then she answered, "Monsieur, I had a son who was killed in the war, killed fighting for France; your son was killed fighting under orders, and I suppose he was killed doing what he thought was right; shall anyone say that as between a father who lost his son in battle, and a mother who lost her son in battle there is a

gap that cannot be bridged? Come in, Monsieur, and stay this night." I do not know how many of us could rise to that height. The great forces of human affection, the great love of fathers and mothers for their children the world over are fighting this battle. The women in this room can do this thing; they can do it because it is everlastingly, eternally right. There is no situation in the world in which the rules of right and wrong can not function. There is no group in the world to which the laws of right should not apply, and you and I have to face this problem in this Conference and go out to teach the race that we will have law, not war.

B

The Nuremberg Trial Implements World Law

Reprinted from *The Educational Forum*, May, 1947

Amid the chaos of the post-war period, with its record of twenty million dead, of starvation, ruined homes, broken lives, the continuation after peace of the concentration camp, one gain we thought had been made. For the first time in history men who instigated and entered upon a world war and committed unspeakable crimes against humanity during that war, have been tried at Nuremberg under humane legal process, receiving as fair a hearing as Anglo-Saxon courts afford. This we thought was an advance in the effort to substitute law for war. But distinguished lawyers, including a prominent United States Senator, disagreed. They claimed that the trial was unfair, unauthorized by law, *ex post facto*, contrary to the guarantee of the United States Constitution, and a blot forever upon our country's good name.

I

What, after all, is the significance of the Nuremberg war trial? Is it a farce and mockery, or does it constitute a milestone in world progress? To the solution of these questions this article is addressed.

Mr. Justice Jackson, in his great report to the President upon *The Legal Basis for the Trial of War Criminals*, pointed out that the aim of the trial was to apply law to acts which if done individually would indubitably constitute crimes. He based his con-

clusion that applicable international law exists for trying the accused squarely on the Briand-Kellogg Pact, which had been adhered to by 63 nations, including Germany and Japan, prior to the Second World War.

The Geneva Proctol of 1924 for pacific settlement of international disputes, signed by the representatives of forty-eight governments, had already declared that "A war of aggression constitutes . . . an international crime." In 1927, the 8th Assembly of the League of Nations, in a unanimous resolution adopted by the representatives of forty-eight nations, including Germany, made the same declaration. At the sixth Pan American Conference in 1928, the twenty-one American Republics unanimously adopted a resolution stating that "war of aggression constitutes an international crime against the human species."

Mr. Justice Jackson in effect concluded that these declarations culminating in the Briand-Kellogg Pact, were far from being mere unenforceable statements of aspiration. As Secretary Stimson said of the Briand-Kellogg Pact, "it means that war has become illegal throughout practically the entire world. . . . It is no longer to be the principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing. . . ."

In the Briand-Kellogg Pact, the signatory powers solemnly declare "in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another," and "agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

The significance of the treaty is that it enacted new law for each of the signatory powers. It cut away the right which nations have hitherto had under international law to resort to war in any cause. The principal significance of the Nuremberg trial is that it enforced the new world law established among the nations, that the making of aggressive war is an international crime. The revolutionary character of this achievement is evident when we consider that prior to the enactment, from 1924 to 1928, making aggressive war an international crime, the making of war in gen-

eral was legal and sanctioned; and this fact was universally recognized in international law.

I discussed this subject shortly after the promulgation of the Pact (December, 1929, *The Survey-Graphic*). The considerations there presented are increasingly important, and will be used in substance here.

War is "a contest between nations or states, carried on by force, whether for defense, for revenging insults and redressing wrongs, for the extension of commerce, for the acquisition of territory, for obtaining and establishing the superiority and dominion of one over the other, or for any other purpose." This definition from Webster properly emphasizes the almost complete lack of limitation in general international law of the purposes for which and the circumstances under which war might rightfully be undertaken, until after World War I. The Hague Convention of 1907, with its prohibition of the employment of force for the recovery of contract debts, the Bryan treaties providing for investigation of disputes not actually submitted to arbitration, and further providing that the parties involved agree not to declare war during such investigation, and the Covenant of the League of Nations, imposed certain deterrents upon the making of war, but recognized in final analysis, the ancient right of the sovereign to make war. The Locarno Treaties of 1923 and 1924, the Geneva Protocol of 1924, and the Briand-Kellogg Pact of 1928, were the first international covenants in which resort to war was renounced by the nations. Prior to the enactment of these covenants, international law during the nineteenth and the early part of the twentieth century had recognized all international wars as being legal and sanctioned.

Up to our era, that part of international law which dealt with the subjects of war was devoted mainly to the so-called "laws of war" and for the most part ignored the treatment of subjects necessary to be dealt with in the establishment of peace. The development of the laws of war, as described by John Bassett Moore, had been in the direction of establishing and extending the observance of the distinction between combatants and non-combatants; the protection against destruction of property not militarily used or in immediate likelihood of being so used; the aboli-

tion of the confiscation of private property, except so far as for special reasons confiscation was still permitted at sea, and the definite assurance as to the states not party to the conflict of the right to continue their commerce with one another and subject to prescribed limitations also with the warring powers.

In other words, up to World War I, the important rules of international law were *about* war, and not *against* war. There were explicit rules embodied in treaties as to how war should be made, but there were, except for the rule as to collecting contract debts, no rules forbidding resort to war. An example of the so-called law of war was Lieber's Code for the Practice of Armies in the Field, adopted by the Union Army during the Civil War. The Hague Convention of 1907 amplified the rules of "humane warfare" and gave them recognition among the civilized nations. While the Convention recognized the right of killing and injuring the enemy, it imposed limitations upon the right. This treaty prohibited the employment of poison or of poisoned arms, the killing or wounding of an enemy who had laid down arms, the declaration that no quarter should be given, the employment of enormous projectiles, or material of a nature to cause superfluous injury, the attack or bombardment of towns, villages, habitations or buildings which were not defended. It also directed that in sieges or bombardments all necessary steps should be taken to spare as far as possible buildings devoted to religion, art, science, charity, historical monuments and hospitals.

The development of the airplane and the use of poison gas modified the possible application of these rules. In an air raid, how can a bomber avoid superfluous injury? When poison gas is used in air raids, noncombatants in the area affected cannot possibly be saved.

The rules of humane warfare had their value. However, the rule which says how you shall kill in war recognizes the right to kill in war. What the peoples of sixty-three nations instituted in the Briand-Kellogg Pact was the enactment of law which forbade the killing of men in war, just as the killing of individuals had long been prohibited. Under the rules of so-called "humane warfare" killing was sanctioned if done neatly, with a smooth bullet, and not with a dum-dum bullet. It was proper to kill certain people in war, but not to kill certain other people in war. The under-

lying principle of all these rules was the legitimacy of the right of the sovereign to make war, as Webster says, "for any purpose," or as George Grafton Wilson, professor of international law at Harvard University, states in his Handbook of International Law, "to obtain the end of the state."

II

The revolutionary change achieved in international law by the treaties and resolutions culminating in the Briand-Kellogg Pact needs to be re-emphasized in order to be properly appraised. In 1920, international law unanimously legalized the making of war. Hall, in the eighth edition of his great work on international law, says: "International law recognizes war as a permitted mode of giving effect to its decisions," and that international law "has no alternative but to accept war, independently of the justice of its origin, as a relation which parties to it may set up if they choose." Lawrence, in discussing offensive and defensive war, says, "But these are moral questions and international law does not pronounce upon them."

Phillimore points out that the redress for the infringement of right in international law becomes of necessity an appeal to arms, for "war is the terrible litigation of states." Phillimore speaks of the "terrible code of war." He says that "the necessity of war and the loss related to it are a consequence of the depraved nature of societies, just as the necessity of the criminal law of a society is a consequence of the depraved nature of the individual." Wilson says that "war implies the right of the parties legally to exercise force against one another," and points out that from the political point of view, "the object is to obtain the end of the state, from the military point of view, the object is to secure the submission of the enemy."¹

¹ Authorities quoted or referred to: Hall's International Law, 8th Ed., Oxford Press; Lawrence's The Principles of International Law, 4th Ed., D. C. Heath & Co.; George Grafton Wilson's Handbook of International Law, 2d Ed., West Publishing Co.; Commentaries upon International Law, Phillimore, T. & J. W. Johnson; Texts of the Peace Conference at the Hague, 1899 and 1907, James Brown Scott, Ginn & Co. For a brilliant and exhaustive discussion of the legal basis of the trial see The Nuremberg War Trial and Aggressive War, by Sheldon Glueck, Alfred Knopf.

These quotations from representative authorities on international law throw into sharp light the legality of the war system prior to World War I. The right to make war for any purpose has been, since the upgrowth of the great nations, the prerogative of the sovereign either expressly admitted or tacitly recognized by every writer on international law as it actually exists. It was abolished by the Briand-Kellogg Pact. But it is said that the Pact did not justify the Nuremberg trials; that it did not establish sanctions, and that the law making individuals responsible for the violation of the law against aggressive war was not declared until after the acts were done. This is the basis of the attacks upon the trials that were made by a number of high-minded lawyers and publicists. This contention is answered by the mere statement of the treaties and declarations that have been set out before in this article. Between 1923 and 1928 there were declarations adhered to by practically all the civilized world, to the effect that the making of aggressive war was a crime against the law of nations. Germany adhered to the resolution of the Assembly of the League of Nations in 1927, and was one of the sixty-three nations which adhered to the Briand-Kellogg Pact in 1928. In the Weimar Constitution, promulgated in 1919, Germany enacted a provision making international treaties the law of the land. While the Weimar Constitution was entirely ignored by the Nazi Party, so that it became a dead letter, it was never repealed, and this provision was actually in effect during the transactions which led up to the Second World War. The Briand-Kellogg Pact, therefore, was a part of German law at the time the alleged criminal acts were done. The Nuremberg trial is, of course, the first instance in which this law has been enforced, but this fact should not militate against its legality nor against the support given it by law-abiding men throughout the world. There was, sometime in the dim past, before the age of Hammurabi circa 2000 B.C., a first trial for murder, and when that was held, in whatever informal way, law began to be implemented by enforcement.

III

Trials similar to the Nuremberg trials had been proposed after World War I, in order to hold accountable the men who planned

that war. But only a few, and those trials of underlings, were held. The movement came to nothing. During the late war, however, on October 25, 1941, President Roosevelt and Prime Minister Churchill made simultaneous statements with respect to the inhuman acts committed by the Nazis, and Churchill declared that retribution for these crimes must take its place among the major purposes of the war. At a conference held in London on January 13, 1942, nine European governments, Belgium, Czechoslovakia, France, Greece, Luxemburg, the Netherlands, Norway, Poland and Yugoslavia, took note of the declaration of President Roosevelt and Prime Minister Churchill, and declared that they placed among their principal war aims the punishment, through the channel of organized justice, of those guilty and responsible for the war crimes. Soviet Russia and China acceded to this declaration.

To this end, the four great powers, after Germany had been conquered, agreed upon a charter for an international military tribunal which was to try those charged with major world crimes. The charter defined the crimes over which the court has jurisdiction, and before the trials nineteen other nations adhered to the charter. But the crimes defined had all long previously been condemned by international law. Among the crimes defined was that of "crimes against peace. Namely, planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." The defendants were indicted, therefore, and found guilty, not only for their countless acts in violation of the rules and customs of war, but for planning, preparing, initiating and waging wars of aggression which were also wars in violation of international treaties.

The fairness of the trials after the era of political murder and drumhead execution of the past six years is a great contribution to the rehabilitation of standards of judicial conduct throughout the world. This was accomplished in face of the fact that judges speaking three different languages, accustomed to systems as diverse as the English and the Russian, were compelled to create their own rules of procedure. Their success in doing this may

rightly give us hope for international co-operation along many other lines in the future. We may properly be proud that under the leadership of distinguished Americans, Mr. Justice Jackson, Judge Francis Biddle, and Judge John J. Parker, as well as Lord Justice Geoffrey Lawrence, president of the Tribunal; M. Donnedieu de Vabres, long a professor of international law at the University of Paris, and General Nikitchenko, the Russian representative, and other outstanding jurists who participated in the trials, such an atmosphere of impartiality was created that many of the accused stated that the trial was fair.

All of the accused received a copy of the indictment thirty days before the trial. They had counsel of their own choice, paid for under arrangements made by the military court. What might be called a defense organization was set up to secure for the accused the documents they needed and to have them translated into English, Russian, French and German. Unless copies of documents relied on by the prosecution were furnished to the accused, or were actually read in their presence, they were not considered in evidence.

We are indebted to one of Judge Parker's scholarly addresses for the description of the earphone system which made certain that the accused would understand all testimony and every statement against them, regardless of the barrier of language.

"Every person in the court room was provided with earphones and a dial upon which he could indicate the language that he desired to hear. Microphones were so placed that every word spoken by witnesses, counsel or the court was carried to a battery of interpreters, who translated it into the four languages of the Tribunal, so that each person in the court room heard through the earphones the translation that he desired. A Russian lawyer would thus ask questions in Russian of a German witness who would reply in German; but the witness would hear the German translation of the question and the lawyer would hear the Russian translation of the answer, I would hear the English translation of the question and answer, the French judges would hear the French translation, and the Russian judges the Russian translation. Four court reporters made stenographic reports of the translations in each of the four languages; and, in addition, there was mechanical

recording by both electric wire and wax disc devices of everything that was said in the court room."

The accused, in every instance, were allowed to take the stand and testify, and also to make statements not under oath. When we contrast all of this procedure with the things that were done in Nazi Germany under the guise of judicial trial, we realize that the very atmosphere of Nuremberg must have come like a cleansing wind sweeping away the corruption of judicial process which had gone on in Germany for the preceding decade.

IV

The record of the trials is a mine of information. The authentic history which it gives of the crimes shown to have been committed on such an unprecedented scale should have enormous moral effect. In the volumes already printed, one can read the callous proposal of a Nazi official that 100 Jewish bankers and lawyers in Paris be executed because the attempts on the lives of members of the German armed forces were continuing. In sober itemized reports we visualize the looting of ancient libraries and art museums, private and public. It is told how on trains returning to the Ukraine with enfeebled and sick laborers, who had been attracted to Germany by offers of well paid war work men and women were maltreated, babies born on the train being thrown out of the windows. It is revealed that of 3,500,000 prisoners of war, all but 600,000 were dead. The formal order is detailed, stating that fliers and parachutists landing in Germany are to be "arrested or liquidated." The abolition of the trade unions and Masonic orders, and the decrees abolishing teaching of religion are here fully authenticated, to be read by coming generations. Here can be read the decisions under which leading trade unionists, and other, humbler citizens whose only crime was that they were opposed to war, such as the "Bibel forscher," were ordered to be taken into protective custody in the concentration camps.

Detailed accounts are given of the decision to use inmates of concentration camps for experiments to determine the effects of high altitude flights upon the human body. The official in charge reports that he assumes complete responsibility for securing

"asocial individuals and criminals who deserve only to die" for these purposes. Of course countless inmates of the concentration camps were political prisoners and not, in the ordinary sense of the word, criminals at all. Pastor Niemoeller was such an inmate. For the purpose of the experiments the subjects were immersed in freezing water. When the brain stem and back of the head were also chilled, fatalities occurred, and when a certain temperature was reached, "the experimental subjects died invariably."

It is reported that so many Jews suicided at Buchenwald that a notice was reiterated through the loud-speaker telling each Jew who intended to hang himself to put a piece of paper in his pocket with his name on it so that the record might show just who had taken his own life.

The statement of the official who was Commandant of Auschwitz from May 1, 1940, until December 1, 1943, is given. This man also testified at the trial. He estimates in the statement "that at least 2,500,000 victims were executed and exterminated there by gassing and burning, and at least another half million succumbed to starvation and disease making a total dead of about 3,000,000. This figure represents about 70% or 80% of all persons sent to Auschwitz as prisoners, the remainder having been selected and used for slave labor in the concentration camp industries. Included among the executed and burnt were approximately 20,000 Russian prisoners of war. . . . The remainder of the total number of victims included about 100,000 German Jews, and great numbers of citizens, mostly Jewish from Holland, France, Belgium, Poland, Hungary, Czechoslovakia, Greece, or other countries. We executed about 400,000 Hungarian Jews alone at Auschwitz in the summer of 1944."

He continues:

"The 'final solution' of the Jewish question meant the complete extermination of all Jews in Europe. I was ordered to establish extermination facilities at Auschwitz in June, 1941. At that time, there were already in the general government three other extermination camps: Belzek, Treblinka, and Wolzek. . . . I visited Treblinka to find out how they carried out their extermination. The Camp Commandant at Treblinka told me that he

had liquidated 80,000 in the course of one-half year. He was principally concerned with liquidating all the Jews from the Warsaw ghetto. He used monoxide gas and I did not think that his methods were very efficient. So when I set up the extermination building at Auschwitz, I used Cyclon B, which was a crystallized prussic acid which we dropped into the death chamber from a small opening. It took from 3 to 15 minutes to kill the people in the death chamber depending upon climatic conditions. We knew when the people were dead because their screaming stopped. We usually waited about one-half hour before we opened the door and removed the bodies. After the bodies were removed our special commandos took off the rings and extracted the gold from the teeth of the corpses.

"Another improvement we made over Treblinka was that we built our gas chambers to accommodate 2,000 people at one time, whereas at Treblinka their 10 gas chambers only accommodated 200 people each. The way we selected our victims was as follows: we had two SS doctors on duty at Auschwitz to examine the incoming transports of prisoners. The prisoners would be marched by one of the doctors who would make spot decisions as they walked by. Those who were fit for work were sent into the Camp. Others were sent immediately to the extermination plants. Children of tender years were invariably exterminated since by reason of their youth they were unable to work. Still another improvement we made over Treblinka was that at Treblinka the victims almost always knew that they were to be exterminated and at Auschwitz we endeavored to fool the victims into thinking that they were to go through a delousing process. Of course, frequently they realized our true intentions and we sometimes had riots and difficulties due to that fact. Very frequently women would hide their children under the clothes but of course when we found them we would send the children to be exterminated. We were required to carry out these exterminations in secrecy but of course the foul and nauseating stench from the continuous burning of bodies permeated the entire area and all of the people living in the surrounding communities knew that exterminations were going on at Auschwitz.

"We received from time to time special prisoners from the

local Gestapo office. The SS doctors killed such prisoners by injections of benzine. Doctors had orders to write ordinary death certificates and could put down any reason at all for the cause of death.

"From time to time we conducted medical experiments on women inmates, including sterilization and experiments relating to cancer. Most of the people who died under these experiments had already been condemned to death by the Gestapo."

These are an infinitesimally few of the highlights revealed by the record of the Nuremberg trials as to the inhumanities practiced in connection with this war.

Surely the introduction of these authentic documents under the orderly processes of trial, with the right of the accused to challenge them in cross-examination, is not only an advantage to future students of the period, but also a warning to high malefactors of state.

V

But the incomparable achievement of the trials is that they constitute the implementation of the Briand-Kellogg Pact. This is a mighty advance on what seemed the almost insurmountable path of substituting law for war. The law against war was enforced at Nuremberg. It held accountable the high statesmen who instituted the war. And this is, at bottom, the basic purpose of criminal law—to hold men accountable for their evil deeds. Can any one doubt that the deliberate plotting and instituting of world war was of all their evil deeds the most terrible? As stated by the Nuremberg Tribunal, "To initiate a war of aggression is not only an international crime; it is the supreme international crime, differing from other war crimes only in that it contains within itself the accumulated evil of the whole."

"Woe unto the world because of offenses," quoted Lincoln in the Second Inaugural, "for it must needs be that offenses come; but woe to that man by whom the offense cometh!" The men by whom the offenses of the last war came were tried at Nuremberg. And again we repeat Lincoln's quotation and paraphrase his prophetic words: "Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. And if

God willed that the war should continue" until the aggressor countries were completely broken, and the men by whom the offense came should finally suffer the highest penalty known to the law, then, "as was said three thousand years ago, The judgments of the Lord are true and righteous altogether."

C

Address Delivered at The Plenary Session of The International Bar Association The Hague, Holland, August 16, 1948

The women lawyers are not only proud to participate in this great meeting; they also deeply realize their responsibility and that of lawyers everywhere. Never did a legal organization come into being at a time of more critical need. For, in addition to the cruel loss of life, the enormous toll of suffering, and the destruction of irreplaceable natural resources, an even more terrible loss has been suffered by the peoples of the world. That delicate thing called faith—faith in the substance of things hoped for, the evidence of things not seen, out of which springs trust between man and man and nation and nation—faith has been destroyed. We cannot reestablish faith among the nations unless we substitute law for war. We cannot establish and implement law among the peoples unless we do justice in international relations. Without justice there can be no lasting peace.

It is a good omen that we meet in The Hague at the Palace of Justice where for so many years the Permanent Court of Arbitration handed down important decisions in which nations and men had confidence. The Netherlands may be proud that it was host to such a court. The world believed in the integrity, the detachment of the court and, because justice by and large was done there, the world has increasing faith in international arbitration. In spite of the excellent record of the Permanent Court of International Justice in the cases which it handled, unfortunately the

League of Nations did not avail itself to the fullest of its services. But now, both in the United Nations and in informed groups such as this, a genuine advance is seen. There is a demand, now being carried out, that international law be developed along substantive lines such as those laid down by the Advisory Committee of Jurists in 1919, and that the Court of International Justice be used. The Charter of the United Nations actually instructs the organization to use the court.

In this formative period lawyers have a significant part to play. They understand the need of governmental structures that will offer both legal and other more flexible methods of amicable adjustment for international disputes. They know, for instance, that the informal processes of the arbitral tribunal are of great assistance where rights of nations are involved. Lawyers, therefore, should see to it that the Hague Tribunal (the Permanent Court of Arbitration) should be fitted into the international system and increasingly used along with the International Court of Justice. Lawyers know that executive bodies tend to usurp even judicial power, that the usurpation of judicial functions is possible in the United Nations and that lack of judicial safeguards when an executive acts judicially is bound to create injustice. They know that the Security Council may by-pass the International Court of Justice and that governments may and on occasions have by-passed the United Nations. Lawyers must guard against and help to prevent these dangers. The system of private warfare was abolished by the upgrowth of law. The upgrowth of the international judicial process will eventually eliminate war. The lawyer is an indispensable instrument in this process. For it is not an emotional exaggeration to say that atomic time is running out. In a vital sense what this group does to erect the standard of peace through justice may determine the future of the race.

D

The TVA Decision

Complainants have filed a bill in equity praying for relief against the operation of the Tennessee Valley Authority Act of 1933, as amended 48 Stat. 58, 49 Stat. 1075, 16 U.S.C. § 831 et seq, 16 U.S.C.A. § 831 et seq. The bill joins as defendants the Tennessee Valley Authority, the agency created by the Congress to carry out the provisions of these statutes, and Arthur E. Morgan, David E. Lilienthal, and Harcourt A. Morgan, who are the chief executive officers of the Authority and constitute its board of directors.

[1] The complainants are nineteen companies generating, transmitting and distributing power within Tennessee, Alabama, Mississippi, North Carolina, South Carolina, Kentucky, Virginia, West Virginia, and Georgia, one of which, the Georgia Power Company, has been enjoined from participating in this action by the United States District Court for the Northern District of Georgia. *Georgia Power Co. v. Tennessee Valley Authority*, 17 F. Supp. 769. This decree has been affirmed by the Court of Appeals for the Fifth Circuit. 89 F.2d 218. For this reason we give no consideration to alleged competition of the Authority with the Georgia Power Company.

The complainants are in general owned by holding companies, as set forth in the findings of fact. They are all taxpayers, citizens of and authorized to do business within the states in which they operate, and none of them claims to operate under any exclusive franchise.

The bill cannot be summarized within the appropriate limits for a trial court's opinion. In addition to its seventy pages of pleading and sixty-five pages of exhibits, it contains within the

bill itself much that is argumentative, repetitious and immaterial to the legal questions presented. It charges coercion, fraud and conspiracy on the part of the defendants officially and individually. It charges that Secretary Harold L. Ickes, Public Works Administrator, has joined with the Authority in certain coercion and conspiracy against the legal rights of these complainants. The argumentative matter and conclusions which we deem immaterial are so interwoven with allegations bearing upon the legal questions presented that it is impossible to extricate them. The same statement is true of the prayer. Paragraphs h, i, l, o, p and q of the prayer are considered by the court to have no relation to this case under *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, at page 324, 56 S.Ct. 466, 472, 80 L.Ed. 688, which held that such matter presents no justiciable controversy. It suffices, therefore, to say that in its essential and material features the bill seeks a decree holding that the Tennessee Valley Authority Act of 1933, as amended, and the acts done by the board of directors thereunder officially and individually, violate the Constitution of the United States. It seeks an injunction restraining the defendants, their agents and employees, from carrying out the provisions of the statute with reference to the sale of electric power, from purchasing, constructing or otherwise acquiring electric generating plants, transmission lines or distribution lines, or from selling electric energy, except such energy as may be produced at Wilson Dam, "to the extent the production and sale of power at Wilson Dam has been held legal." For practical purposes this bill seeks to enjoin the further construction of TVA dams now in process of construction in the Tennessee Valley, the construction of new dams in such valley for which specific appropriation has been made by Congress, and the operation for generation and sale of electric power of all TVA dams built and to be built.

[2] The answer denies the material allegations of the bill. Only one of the affirmative defenses requires special mention. The defendants claim that certain of the complainants are estopped to deny the constitutionality of the TVA statutes because of extensive purchases of power from the Authority. These purchases were made under the contract of January 4, 1934, by which certain complainants contracted with the Authority to transfer

to the Authority their plants, lines, equipment, customers and franchises within certain counties within Mississippi and Alabama for a valuable consideration and upon the condition that the Authority would not operate within those states outside of the counties specified. The properties have been transferred and the contract to date has been fully performed. The court has ruled in favor of the complainants on this contention, and has held that the record presents no essential difference from the situation covered by the ruling as to estoppel in the Ashwander Case, *supra*, 297 U.S. 288, at page 323, 56 S.Ct. 466, 472, 80 L.Ed. 688, and therefore this question will not be discussed.

After a trial which consumed about seven weeks, in which approximately 1,100 exhibits were offered, the material issues in the case as briefed, argued and outlined in the actual testimony are defined as follows:

(1) Whether the Authority is engaged in acts constituting in law malice, coercion, and duress, to the injury of complainants.

(2) Whether the Authority and the individual defendants have conspired with Secretary Ickes and the Public Works Administration to induce municipalities and co-operative associations through loan grant agreements from the Public Works Administration to set up their own distribution systems and to coerce them into executing contracts for purchase of TVA power by threat of denial or cancellation of such PWA loan grants.

(3) Whether the acts of the defendants are authorized by the TVA statutes.

(4) Whether the act itself is unconstitutional and void, and the acts done under it are illegal because the Congress is not empowered either under the interstate commerce clause, article 1, § 8, or under the national defense powers, article 1, section 8, of the United States Constitution, to enact the TWA statutes.

(5) Whether the generation of electricity at the TVA dams is unlawful because it is inconsistent with the regulation of interstate commerce, with flood control, with the improvement of navigation on a navigable river, and with purposes of national defense.

(6) Whether the method of disposition of electric energy authorized by the TVA statutes is appropriate and constitutional under the power to dispose of property belonging to the United

States conferred upon the Congress by section 3 of article 4 of the Constitution.

Each of the dams constructed, in process of construction, and proposed for the TVA system, while varying somewhat in use, as hereafter set forth, is a unit of an integrated multiple-purpose project, the system being designed for co-ordinated use of the full benefits of the river along the line of navigation, flood control, national defense and power development. Wherever water falls, power is created, and one of the express purposes of the TVA statutes is that hydroelectric power so created shall be sold to assist in liquidating the cost of the project. This is in line with the general development of the conservation movement from 1908 to the present, as it relates to streams. See National Waterways Commission Report, Senate Document 469, 62d Congress, Second Session, Appendix I, pages 27, 52, 61, 82, 85, 87; Statement of Chairman of Federal Power Commission, House Document 395, 73d Congress, Second Session, page 54; Report of National Resources Board, pages 263, 264. Similar provisions as to river projects have been embodied in previous legislation. In 1912 a statute was enacted authorizing the Secretary of War to provide, in navigation dams, in order to make possible the economical future development of water power, such foundations, sluices, and other works as may be considered desirable for the development of such power. Act July 25, 1912, § 12, 37 Stat. 233, 33 U.S.C.A. § 609. The Boulder Canyon Project Act of 1928, 45 Stat. 1057, 43 U.S.C.A. § 617 et seq., provided for a multiple-purpose project for irrigation, flood control, improvement of navigation and generation of power. As fully appears from the opinion in *Arizona v. California*, 283 U.S. 423, 51 S.Ct. 522, 75 L.Ed. 1154, navigation on the Colorado River was negligible in comparison with navigation on the Tennessee River under the record in this case. Though navigation on the Colorado River had ceased, the project of reclaiming its navigability was held by the Supreme Court to establish the constitutionality of the multiple-purpose project, including the generation and sale of power.

TVA Project

Pursuant to the TVA statute as amended and to subsequent related enactments, the Authority has constructed and is planning

to construct seven high dams on the main channel of the Tennessee River, and certain dams on its tributaries. The Tennessee River is formed by the confluence of the Holston and French Broad Rivers in the east-central part of Tennessee. It flows south-westerly across the eastern part of Tennessee into Alabama, westerly across the northern part of Alabama, northerly between Alabama and Mississippi, and across the western part of Tennessee and Kentucky, and empties into the Ohio River near Paducah, Kentucky. Its length is 652 miles, and its drainage basin is 40,600 square miles. It has eight principal tributaries. The main stream dams, including Wilson, which was constructed previous to 1933, are as follows:

(1) Gilbertsville, on which preliminary investigations are in progress, located in Kentucky about 22 miles from the mouth of the river.

(2) Pickwick Landing Dam, under construction and almost completed, located in Tennessee about 206 miles from the river's mouth.

(3) Wilson Dam, now in operation, constructed by United States Army engineers and transferred to the Authority under the TVA Act, located at Muscle Shoals, Alabama, about 259 miles from the river's mouth.

(4) Wheeler Dam, construction of which was begun by the United States Army engineers and completed by the Authority, located in Alabama about 15 miles above Wilson Dam and about 275 miles from the river's mouth. This dam is now in operation.

(5) Guntersville Dam, under construction, located near Guntersville, Alabama, 349 miles from the mouth of the river.

(6) Chickamauga Dam, now under construction, located near Chattanooga, Tennessee, 471 miles from the mouth of the river.

(7) Watts Bar Dam, on which preliminary investigations are in progress, located in Tennessee about 530 miles from the mouth of the river.

(8) Coulter Shoals Dam, on which preliminary investigations are in progress, located in Tennessee 602 miles from the river's mouth.

The tributary dams are Norris, completed and in operation, located in Tennessee on the Clinch River about 79 miles from the

mouth of the Clinch and about 647 miles from the mouth of the Tennessee, and Hiwassee Dam, now under construction, located in North Carolina on the Hiwassee River about 75 miles from the mouth of that river and about 560 miles from the mouth of the Tennessee River.

A third tributary reservoir, Fontana, on the Little Tennessee River, is recommended by the Authority, but the Congress has made no specific appropriation for this suggested dam. While Wheeler and Norris are the only dams built by the Authority which are completed and in operation, they co-ordinate in use with Wilson at Florence, Alabama. They release water to Wilson, and thus aid in the generation of power at Wilson. Wilson Dam was built under the national defense powers of the Congress, as held in *Ashwander v. Tennessee Valley Authority*, *supra*. While the constitutional authority to dispose of electric energy generated at Wilson Dam is not and cannot be questioned, its present use in combination with Norris and Wheeler, and its future use in conjunction with Guntersville, Chickamauga and Hiwassee, all of these dams being upstream from Wilson and each being part of an integrated system built for the combined purposes of navigation, flood control, power and national defense, has immediate bearing on this case.

The importance of the Tennessee drainage basin has been recognized for over a century and repeated acts of Congress have provided for the canalization of different parts of the river. A canal with locks throughout the length of Muscle Shoals opened to navigation in 1834 fell into disuse. Another Muscle Shoals canal was completed about 1891. The Rivers and Harbors Act of 1890, 26 Stat. 426, provided that the Colbert Shoals section should be improved by a lock and a canal. In 1913 the Hale's Bar lock and dam, completed by private interests, provided a canalization of 33 miles of the river below Chattanooga. The Widow's Bar lock and dam below Hale's Bar was completed in 1926. Wilson Dam provided a canalized waterway for 15½ miles from Muscle Shoals. Lock No. 1, immediately below Wilson Dam, was completed in 1926.

These projects were in general unrelated and unco-ordinated. This was the situation when a comprehensive survey of the Tennessee basin was ordered in five successive Acts of Congress from

1922 to 1928, resulting in the reports contained in House Document 328. This document contained an exhaustive report by the district engineer and comments thereon, together with recommendations made by the division engineer, the board of engineers for rivers and harbors, and the chief of engineers. It set forth alternate plans for securing a depth of nine feet in the main stream, that is, an improvement for navigation only, and also a plan for the development of the river and its tributaries for purposes of flood control, navigation and power. The suggested plan for the improvement of navigation only involved in one of its phases the building of 32 low dams which would provide a nine-foot navigable channel, but would have no value either for flood control or power.

House Document 328

The complainants vigorously assert that House Document 328 recommends the low dam plan, as distinguished from the TVA plan. It is of little assistance in this phase of the controversy to rely only upon the recommendations of the various engineers, without studying the text (House Document 328, pages 1-25). As to the report of the district engineer, of which the chief of engineers said "There has never been presented to Congress a more thorough and exhaustive study", the board of engineers for rivers and harbors, in its conclusions on the various projects presented, stated that "The construction of the storage reservoirs" (on the tributaries) "described in this report would have a favorable effect in reducing floods on the Tennessee River and on the lower portions of its tributaries" (p. 23). It declared that "The improvement of the Tennessee from its mouth to Knoxville by a series of low movable dams without power development would have practically no effect on floods" (p. 23). It also said, speaking of low-lift dams, that "Such a waterway would be inferior to the high-dam developments and would not permit the economical development of power" (p. 13). The board of engineers pointed out that in addition to having no value whatever for flood control, the 32 low dams, though less expensive to construct than the high dams, provided a navigation channel inferior to that of the high dam plan.

It stated its opinion that the river "has large potential value as a means of transportation and that its improvement to a depth of nine feet would ultimately make it an important feeder to the Ohio-Mississippi system" (p. 20). It concluded that "It is evident that the full utilization of the resources of this river for the public benefit requires its improvement by means of high dams built for the joint development of power and navigation."

These extracts show that consideration of the bare recommendations, apart from the conclusions expressed, are misleading. In the recommendations the division engineer disagreed with the district engineer who drew the report, as to his estimate of the amount of benefit to navigation. The board of engineers disagreed on certain points with the division engineer, and the chief of engineers, in certain matters, disagreed with all of his subordinates. But the projects actually recommended by each of these engineers were not in essential features the same as those embodied in the TVA statutes. They provided for the development of the river by private interests, or by a combination of private interests and the Government.

In order to carry out this policy, the Rivers and Harbors Act was passed in 1930, 46 Stat. 918, 927, 928, extending to private interests on certain conditions the right to develop the rivers by a series of high dams in co-operation with the Government. No private interest availed itself of the opportunity and in 1933 Congress delegated the task to an agency of the Government.

The program adopted by the Authority, in its main features, and the choice of the sites for the various dams follow the broader multiple-project plan outlined in House Document 328 (p. 43), commended by the board of engineers of rivers and harbors, as superior to the low dam plan. This multiple-project contemplated the erection of seven high dams in the main stream (in addition to Wilson, which had already been built), and reservoirs on the tributaries.

Uses of the Dams

The dams on the tributaries, as outlined in House Document 328, and as shown in the evidence, are used and to be used for flood control, water regulation, power and purposes of national

defense. Of the completed dams, Norris is so constructed as to be able to retain the entire flood waters of the Clinch in flood season, and was in fact so operated in 1936 and 1937. In 1936 it averted a probable flood at Chattanooga. It also generates power. Releases of water from Norris in the dry season are now used for regulation of stream flow so as to maintain a seven-foot navigable channel throughout the summer. Similar releases will be necessary until the entire series of main-stream dams as planned has been completed. Wheeler backs the water of the Tennessee into a slack water pool providing nine-foot navigation to Gunter'sville. It generates power and has a surcharge usable for flood control. It is uncontradicted that the releases from Norris and Wheeler, and from Hiwassee, Gunter'sville and Chickamauga, as planned, create and will create extra head for continuous water power at Wilson, and thus aid in the national defense. Cf. *Ashwander v. Tennessee Valley Authority*, supra.

Of the dams under construction, Gunter'sville, Chickamauga, and Pickwick Landing are essential to the maintenance of nine-foot navigation. Each of these dams is equipped with electric generators and has a substantial surcharge usable for flood control. Hiwassee, on a tributary, will be used mainly for flood control and power, and for aiding Wilson Dam with water releases at dry season. Until the project is completed it will assist in regulating stream flow, thus improving navigation. Gilbertsville, while authorized by Congress, has only been investigated and surveyed. The plans for this dam have necessarily been delayed because of its size and because of the difficulty of locating suitable rock foundation. It is reasonably estimated that Gilbertsville, when completed, will supply over 4,000,000 acre feet of flood storage, and it is the most important of the series for flood control on the Ohio and the Mississippi. The Tennessee contributes materially to the flood crest on the Ohio at Cairo. Its flood flow is almost double its drainage area in relation to other feeders of the Mississippi, because of the high precipitation in the Tennessee Valley which varies from 47.5 inches per year at Knoxville to 51.2 at Paducah on the main stream. The Ohio with its tributaries, including the Tennessee, is the principal feeder to the Mississippi floods. All of the TVA dams, on both the river and the tributaries,

are used so far as constructed, are planned, as shown by the official TVA reports, and are required under the statute, to be employed as an integrated co-ordinated system for the combined purposes of navigation, flood control, power and national defense.

Conspiracy, Coercion and Unlawful Competition

[3, 4] The bill charges a conspiracy to injure or destroy the complainants' business, to compete unlawfully, to breach the complainants' existing contracts with their customers, to compel and coerce complainants to sell their plants at distress figures. It charges that the TVA has conspired with and practiced coercion upon municipalities and co-operatives to compel them to set up their own distribution systems for the purpose of selling TVA power at retail. If the record had substantiated the allegations of the bill, grave questions would have been presented. But these allegations have not been established. None of the complainants has sold its property except those covered by the contract of January 4, 1934, a contract entered into at arm's length and not even challenged by complainants as unfair. Since complainants have not sold, they have not been coerced to sell their properties, and the negotiations for sale presented in this record do not evidence acts deemed coercion under settled legal principles. No malice in law is shown on this record. The motive of officials who execute a law is immaterial, even though accompanied by a wrongful purpose. *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 145, 57 S.Ct. 407, 410, 81 L.Ed. 562.

Unlawful Competition

[5] Neither has unlawful competition been proved. The attempt to show that the Authority has endeavored to persuade complainants' customers to breach their existing contracts for purchase of power from complainants has totally failed. In every case where any of complainants has lost a customer to the Authority, the cause has been not unlawful competition, but the lawful allurements of substantially lower prices. In every such case the change of relationship has occurred at a time when no contract with any of the complainants was in existence. In fact, it is shown that the TVA does not serve the complainants' customers with direct serv-

ice except as to industrials and "ceded areas." Thus the municipalities now served by the TVA in Tennessee,—Dayton, Pulaski, and Dickson,—each generated its own power or purchased power at wholesale from a non-utility prior to the time when the TVA started selling them power. The positive statement is made by officers of the Mississippi Power & Light Company, the Franklin Power & Light Company, the Holston River Electric Company, the Birmingham Electric Company, the Carolina Power & Light Company, the Appalachian Electric Power Company, the West Virginia Power Company, the Kingsport Company, the East Tennessee Light & Power Company, the Tennessee Eastern Company, and by the Southern Tennessee Power Company, that the TVA neither serves any of the customers of these utilities direct, nor any wholesale customer by whom distribution is made to any of these utilities' former customers. The TVA serves certain cities and customers formerly served by the Alabama Power Company, but all of these customers are situated or reside within certain counties called the "ceded area." In the agreement of January 4, 1934, the Alabama Power Company contracted that its lines should be sold to the TVA within that area, and that the TVA should serve within that district and nowhere else in Alabama. The TVA is serving nowhere else in Alabama except with this area. The Mississippi Power Company has made a similar contract with the TVA, and the TVA is not serving outside of the "ceded area" in Mississippi except to municipalities which previously maintained their own generating and distribution systems. No fraudulent attempt has been made to secure complainants' markets. Whatever compulsion exists is the inevitable compulsion exercised by the fact that a competitor sells at lower rates than complainants. But if the operation of the TVA is legal, the complainants have no legal right not to be subjected to such competition even though it curtail or destroy their business. *Alabama Power Co. v. Ickes*, 58 S.Ct. 300, 82 L.Ed. —, decided January 3, 1938.

Conspiracy with Public Works Administration

[6-8] The complainants allege that the defendants have conspired with the Public Works Administration to finance the construction of duplicating distribution lines and systems in various municipi-

palities and co-operatives for the purpose of using TVA power and selling that power at rates so low as to constitute competition destructive to complainants' business. Numerous contracts are introduced in evidence between the Public Works Administration and municipalities and co-operatives, providing for the financing of electrical distribution projects. The power is being sold, or is contracted to be sold, to these municipalities and co-operatives at wholesale by TVA.

The facts do not establish a conspiracy. It is not questioned that loans were made within the provisions of the Public Works Administration statute, 40 U.S.C.A. § 401 et seq. The validity of that statute is not attacked in this proceeding, and we therefore assume that it is valid. The acts done by Secretary Ickes and his subordinates have been done under the purview of the controlling statute. Their acts are presumed to be valid. Where no fraud, malice, or coercion is shown, co-operative action by two groups of public officials in administering the provisions of two statutes, does not constitute conspiracy. The decisions relied on by complainants with respect to unlawful concept, plan or design, involve a plan either to commit an unlawful act or to commit acts otherwise lawful with the intent to violate a statute, or commit an unlawful act. Cf. *Swift & Co. v. United States*, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518. The acts done by the officials of the Public Works Administration in co-operation with the officials of the TVA, as shown by this record, were done with the intent to carry out the provisions of the Public Works Administration statute; the acts done by the TVA in co-operation with the Public Works Administration were done with the intent to carry out the TVA statute. Intent to execute a valid and existing law is not evidence of illegality. As to the transactions of the Public Works Administration, no evidence of conspiracy is presented.

Coercion upon Municipalities and Co-Operatives

[9] Certain officials and employees of the TVA gave information, counsel and encouragement to municipalities and co-operatives at the request of such municipalities and co-operatives with respect to the general feasibility of setting up distribution systems for TVA power. The decision on such matters was made by the

municipality or co-operative concerned. Under the statutes of Alabama, Tennessee and Mississippi, hereinafter cited, both municipalities and rural co-operatives are authorized to construct generating plants and distribution systems for the purpose of creating and distributing electric energy. Georgia has a similar statute concerning co-operatives. These cities and co-operatives were free to obtain information and counsel from any source. In each case the decision of the municipality involved was made either by the citizens at an election, or by its duly elected officers. The decision of the co-operatives involved was made by its lawful representatives. Presentation by the Authority of facts as to TVA rates and contracts for power given to citizens or officers of a city or rural co-operative at their request do not constitute intimidation or coercion.

Damage

[10] The record shows that the sales of every one of these complainants and the proceeds of these sales have reached an all-time high in recent years. Several of the most important complainants have recently extended their lines, built new plants, and acquired new equipment. The Authority concedes that it sells, or intends to sell, power at substantially lower rates, residential, industrial, and rural, than those of the complainants, and that some displacement of service will result. 250 miles is the distance within which electricity can feasibly be transported from each of the dams. As a result of the lower TVA rates, cities which formerly purchased power from some one of the complainants have taken steps to finance the construction of distribution systems, or have negotiated with the power companies to purchase the existing systems of the power companies, in many instances securing financial aid from the Public Works Administration with the express purpose of selling TVA power through the systems thus acquired. The city of Memphis has issued bonds for this purpose, and under the contract which the city has signed with the Authority, the Memphis Power & Light Company will be deprived of its greatest outlet. A similar proposition has been made, but not yet carried through, in Knoxville. If the arrangement is consummated, the Tennessee Public Service Company and the Caro-

lina Power & Light Company will each be deprived of one of its most profitable customers. A similar situation exists in Chattanooga. The rural co-operatives distribute TVA power, but for the most part they reach areas not formerly served by these complainants. The Monsanto Chemical Company of Alabama discontinued certain of its operations at Anniston, Alabama, heretofore served by the Alabama Power Company. An affiliated company, Monsanto Chemical Company of Delaware, set up a substitute plant at Columbia, Tennessee, near a source of its raw material, using power purchased from TVA. The Volunteer Portland Cement Company failed to renew its contract with Tennessee Public Service Company and, instead, entered into a contract with the Authority, a contract since assigned to the city of Knoxville.

In view of the inevitable effect of the lower rates of the TVA within this area, and the economic necessity forced upon the complainants of lowering their rates to meet the competitive rates of the Authority, we conclude that the record presents evidence of substantial future damage to these complainants. But such damage constitutes *damnum absque injuria* unless sales of power by the TVA are unlawful. *Alabama Power Co. v. Ickes, supra.*

We find in this record no coercion, conspiracy, malice or fraud on the part of the defendants. None existing, the operation of the Authority is lawful unless (1) the defendants are exceeding their statutory authority or (2) the statute is unconstitutional.

Compliance with the Statute

[11, 12] Section 9a of the statute, as added by Act Aug. 31, 1935, § 5, 16 U.S.C.A. § 831h--1 reads as follows:

"The Board is hereby directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the Board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof, and the Board is further authorized, whenever an oppor-

tunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power as in this chapter provided, and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority."

It is the principal contention of the complainants that this statute is a sham, pretense, and fraud, and these dams as built and planned cannot and will not be operated within the statute. We therefore consider the actual operation of the dams.

In Water Bulletin No. 1, dated June 30, 1936, adopted by the TVA Board, it was ordered that the reservoirs of the Authority be operated "First, to serve as navigation channels and maintain navigation depths in the reaches of the river below the reservoirs; and Second, to reduce the magnitude of flood peaks below. Requirements for the control of malaria and temporary needs of construction shall be given due consideration. So far as consistent with the above procedure, as much water power available at the dam shall be converted into electricity as is feasible."

The complainants contend that this order is a sham, and that none of the dams can be or will be operated in compliance therewith. They direct a particular attack upon Norris, which is now completed and in operation. However, Water Bulletin No. 2, dated June 30, 1936, ordered that until further notice water be released from Norris reservoir so as to maintain as nearly as may be a constant flow at Florence, Alabama, of 15,000 c. f. s. The evident purpose was to maintain a constant and sufficient stream flow for Wilson Dam. This and succeeding water bulletins, which are in evidence, outlining the same general policy, have for one of their main purposes the increase of continuous water power at Wilson. Hence, operation of the dams above Wilson is clearly constitutional under the national defense powers of the Congress.

With reference to the general operation, a resolution of the TVA Board, adopted July 1, 1936, created a committee on water control operations, consisting of the chief water control planning engineer and the chief electrical engineer, which committee was and is authorized to prepare general regulations as to the control of water through the operation of reservoirs. The regulations are

transmitted to the general manager in the form of bulletins, and at times of flood or emergency, oral instructions are also given. Woodward, the chief water control planning engineer, testified that he prepares these bulletins and that none is issued without his approval. He stated that he was guided in his operations by the statute, and that the constant flow of 15,000 c. f. s. was maintained at Florence, Alabama, for the purpose of securing the necessary navigable depth in the river. Karr, electrical engineer at Norris, testified that if the limited instructions given to him for operation were such that he had either to violate the instructions or to leave a city without power, "some one would have to go without power temporarily." Woodward testified that he permits the use of the water for power, and in special cases, if extra water is wanted, it is given extra consideration. It is uncontroverted that the water control planning engineer is in direct charge of the regulation of water flow, and also that he regulates water flow from Norris primarily for navigation and flood control.

It appears that in actual operation there is a seasonal drawing down of Norris Dam so that extra storage space may be available during the flood season. Norris was actually operated during the flood of 1937 to reduce the crest on the Tennessee River and to reduce the crest on the Ohio at Cairo. The complainants' expert Kurtz was familiar with the fact that Norris was so operated. Power is produced at Norris. The defendants introduced detailed testimony as to the full amount of TVA power presently produced, the available facilities for generation, the possibilities for future generation, the present load and the load now contracted for.

Complainants urge that the estimated future TVA load set forth in the various TVA reports, and the load it may reasonably be expected to acquire because of its substantially lower rates, will demand that the dams built and to be built be operated in violation of the statute and not (as required in section 9a) in the primary interest of navigation and flood control. But this point is completely refuted by the numerous TVA contracts which are in evidence and are described in the findings of fact.

These contracts generally contain a clause relieving the Authority of any obligation to supply power when prevented by fire,

accident, breakdown, act of God, or any other causes beyond the Authority's control. Substantially all of these contracts contain the following provision: "Subject to the provisions of the Tennessee Valley Authority Act of 1933 as amended, the parties hereto agree as follows * * *." Under the familiar rule, this provision reads the statute, including its mandatory requirement that the dams and reservoirs be operated primarily for flood control and navigation, into every one of these contracts. Under the contracts with the Arkansas Power and Light Company, the Victor Chemical Works, the Aluminum Company of America dated July 20, 1937, and with the Electro-Metallurgical Company, which are contracts both for firm and secondary power, the Authority is expressly relieved of obligation to supply power when service is interrupted or suspended by reason of floods or back-water caused by floods.

Reading these contracts in conjunction with the statute and the general resolution governing water control above described, it is evident that the long-term contracts of the Authority strongly corroborate (1) the sincerity of the resolution and water bulletins establishing the system of water control in the interest of flood control and navigation; (2) the testimony of Woodward and Karr; (3) the uncontradicted facts as to the principles applied in the actual operation of the dams. The overwhelming weight of the testimony supports defendants' contention that the mandatory provision of the statute that navigation and flood control be given primary consideration both at the other dams, built and planned, and at Norris Dam, is at all times scrupulously followed and that the statute is neither violated nor exceeded.

Constitutionality of TVA Statute must be Determined

Since no fraud, coercion, conspiracy or malice is shown, and since the Authority has acted within the provisions of the statute under consideration, unless the statute itself is unconstitutional the dams are lawfully erected, the energy is lawfully created, and the water power is the property of the United States. *Ashwander v. Tennessee Valley Authority*, supra. It therefore is essential to the decision of the case pleaded in the bill to determine the constitutionality of this statute.

The Statute

The complainants contend that the statute was enacted primarily for power purposes, and that flood control, navigation, and national defense are incidental and merely a cloak for the unlawful purpose of permitting the government to enter the power business. The defendants contend that the statute was passed and that dams were erected and are under construction, or were authorized, for the purpose of combined flood control, navigation, and national defense; and that the installation of generators, the creation of power and its sale, have been authorized by the Congress as an incident to the exercise of constitutional powers.

National Defense

[13, 14] Article 1, section 8, clause 1 of the Constitution of the United States, provides that the Congress shall have power "to * * * provide for the common Defence and general Welfare of the United States."

In pursuance of this power it may make all laws which shall be necessary and proper for carrying into execution the national defense powers. An express purpose of the Tennessee Valley Authority Act is that of maintaining the properties owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of national defense. The amended Tennessee Valley Authority Act, § 17, Title 16 U.S.C.A. § 831p, provides that "The Secretary of War, or the Secretary of the Interior, is hereby authorized to construct * * * a dam in and across Clinch River in the State of Tennessee, which has by long custom become known and designated as the Cove Creek Dam, together with a transmission line from Muscle Shoals, according to the latest and most approved designs, including power house and hydroelectric installations and equipment for the generation of power, in order that the waters of the said Clinch River may be impounded and stored above said dam for the purpose of increasing and regulating the flow of the Clinch River and the Tennessee River below, so that the maximum amount of primary power may be devel-

oped at Dam Numbered 2 and at any and all other dams below the said Cove Creek Dam."

In compliance with this provision, Norris Dam was built and is being operated to create an extra head of water power at Wilson Dam. This means that constitutional authority to construct Norris exists in addition to the congressional power to authorize the construction of this dam under other clauses of the Constitution of the United States.

Navigation and Flood Control

[15] The Constitution of the United States, article 1, § 8, cl. 3, provides that the Congress shall have power to regulate interstate commerce. Commerce includes navigation. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23. Congressional control of navigable waters embraces flood control.

The statute on its face repeatedly stresses navigation and flood control. The purpose clause of the act reads:

"To improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals in the State of Alabama, and for other purposes." 48 Stat. 58.

The first section of the enactment, 16 U.S.C.A. § 831, creates the Authority for the purpose of maintaining and operating properties owned by the United States in the vicinity of Muscle Shoals in the interest of the national defense and "to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins." The board of the Authority is given power, section 4(j), as amended, 16 U.S.C.A. § 831c(j) "to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams * * * will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on

the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins." Other sections in which the purposes of navigation and flood control are stressed are sections 13, 18, 23, and section 26a, as added by Act Aug. 31, 1935, § 11, 16 U.S.C.A. §§ 831l, 831q, 831v, 831y—1. The most important section is 9a, 16 U.S.C.A. § 831h—1, heretofore quoted, which governs the operation of any dam or reservoir, in the possession and control of the board, and requires the board to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. Numerous specific provisions of the statute relate to the generation and sale of electric power for the purpose of assisting in liquidating the cost of these projects, but all of them are limited and controlled by this general provision in section 9a.

Under the statute, therefore, the generation of electric energy is specifically required to be incidental to the exercise of constitutional powers under the interstate commerce clause, and the operation complies with this requirement. The record shows that the dams are adapted by their construction to combined use for flood control and improved navigation, and to generate electricity. All experts agree that the pondage at each of the dams on the main river and also at the storage dams on the tributaries can be drawn down, and that space thereby made available is capable of being used to store flood waters in the rainy season. It appears from the uncontroverted testimony that the erection of the main-river dams will create a nine-foot navigable channel. We find from the weight of the evidence that Norris has been used for the purpose of controlling floods. These facts are not controverted, except by opinion evidence.

Certain expert witnesses, in answer to hypothetical questions, stated that the dams might be operated for the primary purpose of power. Thousands of pages of testimony and numerous exhibits were introduced to show that Congress might have adopted a better plan than the TVA Unified System. Experts equally qualified testified to the contrary.

The court is of opinion that the relative value of these various plans is immaterial, since it has been established that the TVA project is reasonably adapted to use for combined flood control,

navigation, power and national defense, and that in actual operation the creation of energy is subordinated to the needs of navigation and flood control.

In short, the contention that the statute and the unified project authorized therein are a sham and pretense is without foundation. It cannot be disputed that the river is navigable and that it occupies a strategic position with relation to floods, both within its own drainage area and on the Ohio-Mississippi. We are not at liberty to conclude that the river is not susceptible of development as an important waterway, nor that it cannot be regulated so as to assist substantially in the control of floods in the alluvial valley of the Mississippi as well as practically eliminating local floods on the Tennessee River. *Ashwander v. Tennessee Valley Authority*, supra. Norris will create additional power for use for purposes of national defense at Wilson. Hence, we are not at liberty to conclude that the Congress has not undertaken this specific development for purposes within its constitutional powers, nor that the construction of these high dams and reservoirs along the lines proposed is not an appropriate means to accomplish these legitimate ends. Cf. *Ashwander v. Tennessee Valley Authority*, supra. The dams and their power equipment, both constructed, under construction and authorized, must be taken to have been authorized, constructed and planned in the exercise of the constitutional functions of the Government.

Interference with States' Rights

[16] Complainants contend that the TVA statutes constitute an unlawful interference with the police power of the states because they regulate the rates of utilities which themselves are subject to state regulation. The statute does not fix, nor purport to fix, the complainants' rates. But the contention is that the lower rates of the TVA will inevitably force complainants to lower their rates, and also that the TVA in its operations is not subject to the police power of the state.

The Authority operates within four of the nine states in which these complainants do business, namely, Tennessee, Alabama, Mississippi, and Georgia, its contracts with cities and co-operatives in Tennessee, Alabama and Mississippi being authorized by

express legislation. All municipalities in these three states have the statutory power to own and operate electric distribution systems. General Laws of Mississippi 1936, c. 185; Carmichael Act, Alabama Code Supp. 1936, § 2001 (1) et seq.; Public Acts of Tennessee 1935, c. 32, Tennessee Code, § 3708 (1) et seq. In Mississippi, Tennessee and Alabama, municipalities are expressly authorized to contract for TVA power and to make agreements with TVA as to resale rates. Chapter 271, General Laws of Mississippi 1936; chapter 37, Public Acts of Tennessee 1935, Tennessee Code, § 3708 (96) et seq.; Alabama Code Supp. 1936, § 687 (62). In Mississippi, Tennessee and Alabama, non-profit membership corporations such as rural co-operatives may operate electric systems, purchase from TVA, and make contracts as to re-sale rates. This is also true in Georgia, where the North Georgia Membership Corporation is alleged to compete with the Tennessee Electric Power Company. Chapter 184, General Laws of Mississippi 1936; Chapter 231, Public Acts of Tennessee 1937, which is an amendment of the Electric Membership Corporation Act of 1935, Pub. Acts 1935, Ex. Sess., c. 32; Alabama Code Supp. 1936, § 687 (18) et seq.; Georgia Laws 1937, p. 644.

The Supreme Court of Alabama has upheld the validity of the Carmichael Act, section 2001 (1) et seq., Alabama Code Supp. 1936, in *Oppenheim v. Florence*, 229 Ala. 50, 155 So. 859. The similar act relating to co-operatives was sustained by the Supreme Court of Alabama in *Alabama Power Co. v. Cullman County Electric Membership Corp.*, 234 Ala. 396, 174 So. 866. In Tennessee the Supreme Court has upheld the right of the cities of Memphis and Chattanooga to buy TVA power and to establish their own electric systems under special laws. *Memphis Power & Light Co. v. Memphis*, Dec. term, 1936, 112 S.W.2d 817; *Tennessee Electric Power Co. v. Chattanooga*, Dec. term, 1936, 112 S.W.2d 385; *Tennessee Public Service Co. v. Knoxville*, 170 Tenn. 40, 91 S.W.2d 566.

The actions which the complainants attack are authorized by the states themselves. It is strange doctrine that acts authorized by a sovereign state constitute interference with its sovereign rights because of the fact that they are also authorized by the Federal Government. We think that deliberate co-operation between the

state and the United States, authorized in each case both by the state legislature and by the Congress, constitutes no abdication of any state right.

[17] Moreover, no state has intervened as a party in this proceeding to protest that its laws are violated by the TVA, and no regulatory commission is a party to this action. These complainants are not authorized to object on behalf of the states. *Georgia Power Co. v. Tennessee Valley Authority, D.C., 14 F.Supp. 673, 676.* Questions of the conflict of the TVA statute with the sovereign power of the states are not properly raised until the interested parties are before the court. *Georgia Power Co. v. Tennessee Valley Authority, supra.* The TVA statutes do not violate either the Ninth or the Tenth Amendment to the Constitution of the United States.

[18, 19] Since the United States has acquired these dam sites and constructed these dams legally, the water power, the right to convert it into electric energy, and the energy produced constitute property belonging to the United States. *Ashwander v. Tennessee Valley Authority, supra.* This electric energy may be rightfully disposed of by the United States through the action of the Congress, under section 3 of article 4 of the Constitution of the United States. *Ashwander v. Tennessee Valley Authority, supra.* Since floods frequently recur, and the needs of navigation are continuous, hydro-electric power generated at dams which control floods and improve navigation is continuously created, and the Government may adopt any appropriate constitutional means of disposing of the property. It is not limited in such disposition to a few, or to infrequent transactions. This is the inevitable logic of the *Ashwander* decision, *supra*, 297 U.S. 288, at page 315, 56 S.Ct. 466, 468, 80 L.Ed. 688, in which every kind of electric facility, many miles of distribution and transmission lines and continuous and permanent operation were called in question because the contract attacked in that case was the contract of January 4, 1934, in which certain of these complainants, for valuable consideration, ceded sixteen counties to the TVA for electric service.

[20] While the Government, in selling property of the United States, performs many functions that would be performed in the

operation of a private business trading in similar property, inasmuch as the energy sold is created at dams lawfully erected within the Federal power, the Government in performing these functions is not entering into private business. It is merely using an appropriate method of disposing of its property. The Government may sell land belonging to the United States in competition with a real estate agency, carry parcels in competition with express companies, and manage and control its thousands of square miles of national parks even as a private company. The Government has an equal right to sell hydro-electric power, lawfully created, in competition with a private utility. There is no constitutional authority which denies the Government the right to seek a wider market (*Ashwander v. Tennessee Valley Authority, supra*), and the transmission and distribution lines erected are a proper facility for conveying the property of the United States to the market. The creation of the Authority is appropriate. The disposition of the energy is continuous and constant, and it is appropriate that a continuing agency be created in order to carry out this legitimate federal function.

We conclude that, since none of the complainants claims to operate under an exclusive franchise, no fraud, malice, coercion, or conspiracy exists; since the Authority is not exceeding its statutory powers, and since the statute is constitutional, the competition with these complainants is lawful. It follows that the holding in *Alabama Power Co. v. Ickes, supra*, recently decided, squarely applies. These complainants have no immunity from lawful competition, even if their business be curtailed or destroyed.

A decree will be entered denying the injunction sought, dismissing the bill of complainants, and taxing costs against the complainants. Findings of fact and conclusions of law will be filed.

