

FRANZ KAFKA

TRIALS & TRIBULATIONS

AN ABSURDIST CASEBOOK

PRÁVNICKÁ FAKULTA HRADNÍ UNIVERZITY

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Before the Law stands a doorkeeper on guard. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. 'It is possible,' answers the doorkeeper, 'but not at this moment.' Since the door leading into the Law stands open as usual and the doorkeeper steps to one side, the man bends down to peer through the entrance. When the doorkeeper sees that, he laughs and says: 'If you are so strongly tempted, try to get in without my permission. But note that I am powerful. And I am only the lowest doorkeeper. From hall to hall keepers stand at every door, one more powerful than the other. Even the third of these has an aspect that even I cannot bear to look at.'

Franz Kafka, *Der Prozess*

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Preface

This book presents cases and other material for use in a course on the legal process. Topics covered include arbitrary and capricious procedures, cruel and unusual punishment, and devil's advocacy.

Most of the materials reproduced here are in the public domain; excerpts from copyrighted materials are included for teaching purposes under the fair use doctrine. Materials have been redacted to omit passages not pertinent to the learning objectives. Judicial opinions have also been “cleaned up”^[1] for ease of reading.

Following the typographical style of **Edward Tufte**, this book uses sidenotes and margin notes in place of traditional footnotes or endnotes. These appear in the right-hand margin, avoiding the need to jump through hyperlinks or scroll to the note text. Numbered sidenotes^[2] are used for footnotes in the source materials (with original note numbering indicated in parentheses). Unnumbered margin notes, in **green sans-serif typeface**, are used for editor's comments.

Links to cross-referenced pages or external online material are indicated by red-colored text, e.g. **U.S. Department of Labor**.

1. See Jack Metzler, **Cleaning Up Quotations**, 18 J. App. Prac. & Process 143, 154 (2017)

2. This is an example of a sidenote.

This is an example of a margin note.

Chapter 1: Devilish Advocacy

1. Serving Satan

U.S. ex rel. Mayo v. Satan and His Staff, 54
F.R.D. 282 (W.D. Pa. 1971)

Weber, District Judge

Plaintiff, alleging jurisdiction under 18 U.S.C. § 241, 28 U.S.C. § 1343, and 42 U.S.C. § 1983 prays for leave to file a complaint for violation of his civil rights *in forma pauperis*. He alleges that Satan has on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and has caused plaintiff's downfall.

Plaintiff alleges that by reason of these acts Satan has deprived him of his constitutional rights.

We feel that the application to file and proceed *in forma pauperis* must be denied. Even if plaintiff's complaint reveals a *prima facie* recital of the infringement of the civil rights of a citizen of the United States, the Court has serious doubts that the complaint reveals a cause of action upon which relief can be granted by the court. We question whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district. The complaint contains no allegation of residence in this district. While the official reports disclose no case where this defendant has appeared as defendant there is an unofficial account of a trial in New Hampshire^[3] where this defendant filed an action of mortgage foreclosure as plaintiff. The defendant in that action was represented by the preeminent advocate of that day, and raised the defense that the plaintiff

Are the plaintiff's allegations sufficient to state a claim for deprivation of constitutional rights? See *Ashcroft v. Iqbal*.

On what basis might the the court have personal jurisdiction over the defendant?

3. Devil v. Webster, 666 F.Supp. 1313 (D.N.H. 1936).

was a foreign prince with no standing to sue in an American Court. This defense was overcome by overwhelming evidence to the contrary. Whether or not this would raise an estoppel in the present case we are unable to determine at this time.

Would issue preclusion apply here?

If such action were to be allowed we would also face the question of whether it may be maintained as a class action. It appears to meet the requirements of Fed.R.of Civ.P. 23 that the class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, and the claims of the representative party is typical of the claims of the class. We cannot now determine if the representative party will fairly protect the interests of the class.

We note that the plaintiff has failed to include with his complaint the required form of instructions for the United States Marshal for directions as to service of process.

For the foregoing reasons we must exercise our discretion to refuse the prayer of plaintiff to proceed in forma pauperis.

It is ordered that the complaint be given a miscellaneous docket number and leave to proceed in forma pauperis be denied.

2. Cases affecting ambassadors, other public ministers and consul

The Devil & Daniel Webster

**Stephen Vincent Benet, Saturday Evening Post
(Oct. 24, 1936)**

It's a story they tell in the border country, where Massachusetts joins Vermont and New Hampshire.

Yes, Dan'l Webster's dead—or, at least, they buried him. But every time there's a thunder storm around Marshfield, they say you can hear his rolling voice in the hollows of the sky. And they say that if you go to his grave and speak loud and clear, "Dan'l Webster—Dan'l Webster!" the ground 'll begin to shiver and the trees begin to shake. And after a while you'll hear a deep voice saying, "Neighbour, how stands the Union?" Then you better answer the Union stands as she stood, rock-bottomed and copper sheathed, one and indivisible, or he's liable to rear right out of the ground. At least, that's what I was told when I was a youngster.

You see, for a while, he was the biggest man in the country. He never got to be President, but he was the biggest man. There were thousands that trusted in him right next to God Almighty, and they told stories about him and all the things that belonged to him that were like the stories of patriarchs and such. They said, when he stood up to speak, stars and stripes came right out in the sky, and once he spoke against a river and made it sink into the ground. They said, when he walked the woods with his fishing rod, Killall, the trout would jump out of the streams right into his pockets, for they knew it was no use putting up a fight against him; and, when he argued a case, he could turn on the harps of the blessed and the shaking of the earth underground. That was the kind of man he was, and his big farm up at Marshfield was suitable to him. The chickens he raised were all white meat down through the drumsticks, the cows were tended like children, and the big ram he called Goliath had horns with a curl like a morning-glory vine and could butt through an iron door. But Dan'l wasn't one of your gentlemen farmers; he knew all the ways of the land, and he'd be up by candlelight to see that the chores got done. A man with a mouth like a mastiff, a brow like a mountain and eyes like burning anthracite—that was Dan'l Webster in his prime. And the biggest case he argued never got written down in the books, for he argued it against the devil, nip and tuck and no holds barred. And this is the way I used to hear it told.

There was a man named Jabez Stone, lived at Cross Corners, New Hampshire. He wasn't a bad man to start with, but he was an unlucky man. If he planted corn, he got borers; if he planted potatoes, he got blight. He had good enough land, but it didn't prosper him; he had a decent wife and children, but the more children he had, the less there was to feed them. If stones cropped up in his neighbours's field, boulders boiled up in his; if he had a horse with the spavins, he'd trade it for one with the staggers and

give something extra. There's some folks bound to be like that, apparently. But one day Jabez Stone got sick of the whole business.

He'd been plowing that morning and he'd just broke the plowshare on a rock that he could have sworn hadn't been there yesterday. And, as he stood looking at the plowshare, the off horse began to cough—that ropy kind of cough that means sickness and horse doctors. There were two children down with the measles, his wife was ailing, and he had a whitlow on his thumb. It was about the last straw for Jabez Stone. "I vow," he said, and he looked around him kind of desperate—"I vow it's enough to make a man want to sell his soul to the devil. And I would, too, for two cents!"

Then he felt a kind of queerness come over him at having said what he'd said; though, naturally, being a New Hampshireman, he wouldn't take it back. But, all the same, when it got to be evening and, as far as he could see, no notice had been taken, he felt relieved in his mind, for he was a religious man. But notice is always taken, sooner or later, just like the Good Book says. And, sure enough, next day, about supper time, a soft-spoken, dark-dressed stranger drove up in a handsome buggy and asked for Jabez Stone.

Well, Jabez told his family it was a lawyer, come to see him about a legacy. But he knew who it was. He didn't like the looks of the stranger, nor the way he smiled with his teeth.

They were white teeth, and plentiful—some say they were filed to a point, but I wouldn't vouch for that. And he didn't like it when the dog took one look at the stranger and ran away howling, with his tail between his legs. But having passed his word, more or less, he stuck to it, and they went out behind the barn and made their bargain. Jabez Stone had to prick his finger to sign, and the stranger lent him a silver pin. The wound healed clean, but it left a little white scar.

After that, all of a sudden, things began to pick up and prosper for Jabez Stone. His cows got fat and his horses sleek, his crops were the envy of the neighbourhood, and lightning might strike all over the valley, but it wouldn't strike his barn. Pretty soon, he was one of the prosperous people of the county; they asked him to stand for selectman, and he stood for it; there began to be talk of running him for state senate. All in all, you might say the Stone family was as happy and contented as cats in a dairy. And so they were, except for Jabez Stone.

He'd been contented enough, the first few years. It's a great thing when bad luck turns; it drives most other things out of your head. True, every now and then, especially in rainy weather, the little white scar on his finger would give him a twinge. And once a year, punctual as clockwork, the stranger with the handsome buggy would come driving by. But the sixth year, the stranger lighted, and, after that, his peace was over for Jabez Stone.

The stranger came up through the lower field, switching his boots with a cane—they were handsome black boots, but Jabez Stone never liked the look of them, particularly the toes. And, after he'd passed the time of day, he said, "Well, Mr. Stone, you're a hummer! It's a very pretty property you've got here, Mr. Stone."

"Well, some might favour it and others might not," said Jabez Stone, for he was a New Hampshireman.

"Oh, no need to decry your industry!" said the stranger, very easy, showing his teeth in a smile. "After all, we know what's been done, and it's been according to contract and specifications. So when—ahem—the mortgage falls due next year, you shouldn't have any regrets."

"Speaking of that mortgage, mister," said Jabez Stone, and he looked around for help to the earth and the sky, "I'm beginning to have one or two doubts about it."

"Doubts?" said the stranger, not quite so pleasantly.

"Why, yes," said Jabez Stone. "This being the U. S. A. and me always having been a religious man." He cleared his throat and got bolder.

"Yes, sir," he said, "I'm beginning to have considerable doubts as to that mortgage holding in court."

"There's courts and courts," said the stranger, clicking his teeth. "Still, we might as well have a look at the original document." And he hauled out a big black pocketbook, full of papers. "Sherwin, Slater, Stevens, Stone," he muttered. "I, Jabez Stone, for a term of seven years—Oh, it's quite in order, I think."

But Jabez Stone wasn't listening, for he saw something else flutter out of the black pocket book. It was something that looked like a moth, but it wasn't a moth. And as Jabez Stone stared at it, it seemed to speak to him in a small sort of piping voice, terrible small and thin, but terrible human.

"Neighbour Stone!" it squeaked. "Neighbour Stone! Help me! For God's sake, help me!"

But before Jabez Stone could stir hand or foot, the stranger whipped out a big bandanna handkerchief, caught the creature in it, just like a butterfly, and started tying up the ends of the bandanna.

"Sorry for the interruption," he said. "As I was saying—"

But Jabez Stone was shaking all over like a scared horse.

"That's Miser Stevens' voice!" he said, in a croak. "And you've got him in your handkerchief!"

The stranger looked a little embarrassed.

"Yes, I really should have transferred him to the collecting box," he said with a simper, "but there were some rather unusual specimens there and I didn't want them crowded. Well, well, these little contretemps will occur."

"I don't know what you mean by contertan," said Jabez Stone, "but that was Miser Stevens' voice! And he ain't dead! You can't tell me he is! He was just as spry and mean as a woodchuck, Tuesday!"

"In the midst of life—" said the stranger, kind of pious. "Listen!" Then a bell began to toll in the valley and Jabez Stone listened, with the sweat running down his face. For he knew it was tolled for Miser Stevens and that he was dead.

"These long-standing accounts," said the stranger with a sigh; "one really hates to close them. But business is business."

He still had the bandanna in his hand, and Jabez Stone felt sick as he saw the cloth struggle and flutter.

"Are they all as small as that?" he asked hoarsely.

“Small?” said the stranger. “Oh, I see what you mean. Why, they vary.” He measured Jabez Stone with his eyes, and his teeth showed. “Don’t worry, Mr. Stone,” he said. “You’ll go with a very good grade. I wouldn’t trust you outside the collecting box. Now, a man like Dan’l Webster, of course—well, we’d have to build a special box for him, and even at that, I imagine the wing spread would astonish you. He’d certainly be a prize. I wish we could see our way clear to him. But, in your case, as I was saying—”

“Put that handkerchief away!” said Jabez Stone, and he began to beg and to pray. But the best he could get at the end was a three years’ extension, with conditions.

But till you make a bargain like that, you’ve got no idea of how fast four years can run. By the last months of those years, Jabez Stone’s known all over the state and there’s talk of running him for governor—and it’s dust and ashes in his mouth. For every day, when he gets up, he thinks, “There’s one more night gone,” and every night when he lies down, he thinks of the black pocketbook and the soul of Miser Stevens, and it makes him sick at heart. Till, finally, he can’t bear it any longer, and, in the last days of the last year, he hitches his horse and drives off to seek Dan’l Webster. For Dan’l was born in New Hampshire, only a few miles from Cross Corners, and it’s well known that he has a particular soft spot for old neighbours.

It was early in the morning when he got to Marshfield, but Dan’l was up already, talking Latin to the farm hands and wrestling with the ram, Goliath, and trying out a new trotter and working up speeches to make against John C. Calhoun. But when he heard a New Hampshire man had come to see him, he dropped every thing else he was doing, for that was Dan’l’s way. He gave Jabez Stone a breakfast that five men couldn’t eat, went into the living history of every man and woman in Cross Corners, and finally asked him how he could serve him.

Jabez Stone allowed that it was a kind of mortgage case.

“Well, I haven’t pleaded a mortgage case in a long time, and I don’t generally plead now, except before the Supreme Court,” said Dan’l, “but if I can, I’ll help you.”

“Then I’ve got hope for the first time in ten years,” said Jabez Stone, and told him the details.

Dan'l walked up and down as he listened, hands behind his back, now and then asking a question, now and then plunging his eyes at the floor, as if they'd bore through it like gimlets. When Jabez Stone had finished, Dan'l puffed out his cheeks and blew. Then he turned to Jabez Stone and a smile broke over his face like the sunrise over Monadnock.

"You've certainly given yourself the devil's own row to hoe, Neighbour Stone," he said, "but I'll take your case."

"You'll take it?" said Jabez Stone, hardly daring to believe.

"Yes," said Dan'l Webster. "I've got about seventy-five other things to do and the Missouri Compromise to straighten out, but I'll take your case. For if two New Hampshiremen aren't a match for the devil, we might as well give the country back to the Indians."

Then he shook Jabez Stone by the hand and said, "Did you come down here in a hurry?"

"Well, I admit I made time," said Jabez Stone.

"You'll go back faster," said Dan'l Webster, and he told 'em to hitch up Constitution and Constellation to the carriage. They were matched grays with one white forefoot, and they stepped like greased lightning.

Well, I won't describe how excited and pleased the whole Stone family was to have the great Dan'l Webster for a guest, when they finally got there. Jabez Stone had lost his hat on the way, blown off when they overtook a wind, but he didn't take much account of that. But after supper he sent the family off to bed, for he had most particular business with Mr. Webster. Mrs. Stone wanted them to sit in the front parlor, but Dan'l Webster knew front parlors and said he preferred the kitchen. So it was there they sat, waiting for the stranger, with a jug on the table between them and a bright fire on the hearth—the stranger being scheduled to show up on the stroke of midnight, according to specification.

Well, most men wouldn't have asked for better company than Dan'l Webster and a jug. But with every tick of the clock Jabez Stone got sadder and sadder. His eyes roved round, and though he sampled the jug you could see he couldn't taste it. Finally, on the stroke of 11:30 he reached over and grabbed Dan'l Webster by the arm.

“Mr. Webster, Mr. Webster!” he said, and his voice was shaking with fear and a desperate courage. “For God’s sake, Mr. Webster, harness your horses and get away from this place while you can!”

“You’ve brought me a long way, neighbour, to tell me you don’t like my company,” said Dan’l Webster, quite peaceable, pulling at the jug.

“Miserable wretch that I am!” groaned Jabez Stone. “I’ve brought you a devilish way, and now I see my folly. Let him take me if he wills. I don’t hanker after it, I must say, but I can stand it. But you’re the Union’s stay and New Hampshire’s pride! He mustn’t get you, Mr. Webster! He mustn’t get you!”

Dan’l Webster looked at the distracted man, all gray and shaking in the firelight, and laid a hand on his shoulder.

“I’m obliged to you, Neighbour Stone,” he said gently. “It’s kindly thought of. But there’s a jug on the table and a case in hand. And I never left a jug or a case half finished in my life.”

And just at that moment there was a sharp rap on the door “Ah,” said Dan’l Webster, very coolly, “I thought your clock was a trifle slow, Neighbour Stone.” He stepped to the door and opened it. “Come in,” he said. The stranger came in—very dark and tall he looked in the firelight. He was carrying a box under his arm—a black, japanned box with little air holes in the lid. At the sight of the box, Jabez Stone gave a low cry and shrank into a corner of the room. “Mr. Webster, I presume,” said the stranger, very polite, but with his eyes glowing like a fox’s deep in the woods.

“Attorney of record for Jabez Stone,” said Dan’l Webster, but his eyes were glowing too. “Might I ask your name?”

“I’ve gone by a good many,” said the stranger carelessly. “Perhaps Scratch will do for the evening. I’m often called that in these regions.”

Then he sat down at the table and poured himself a drink from the jug. The liquor was cold in the jug, but it came steaming into the glass.

“And now,” said the stranger, smiling and showing his teeth, “I shall call upon you, as a law-abiding citizen, to assist me in taking possession of my property.”

Well, with that the argument began—and it went hot and heavy. At first, Jabez Stone had a flicker of hope, but when he saw Dan'l Webster being forced back at point after point, he just sat scrunched in his corner, with his eyes on that japanned box. For there wasn't any doubt as to the deed or the signature—that was the worst of it. Dan'l Webster twisted and turned and thumped his fist on the table, but he couldn't get away from that. He offered to compromise the case; the stranger wouldn't hear of it. He pointed out the property had increased in value, and state senators ought to be worth more; the stranger stuck to the letter of the law. He was a great lawyer, Dan'l Webster, but we know who's the King of Lawyers, as the Good Book tells us, and it seemed as if, for the first time, Dan'l Webster had met his match.

Finally, the stranger yawned a little. "Your spirited efforts on behalf of your client do you credit, Mr. Webster," he said, "but if you have no more arguments to adduce, I'm rather pressed for time—" and Jabez Stone shuddered.

Dan'l Webster's brow looked dark as a thundercloud. "Pressed or not, you shall not have this man," he thundered. "Mr. Stone is an American citizen, and no American citizen may be forced into the service of a foreign prince. We fought England for that in '12 and we'll fight all hell for it again!"

"Foreign?" said the stranger. "And who calls me a foreigner?"

"Well, I never yet heard of the dev—of your claiming American citizenship," said Dan'l Webster with surprise.

"And who with better right?" said the stranger, with one of his terrible smiles. "When the first wrong was done to the first Indian, I was there. When the first slaver put out for the Congo, I stood on her deck. Am I not in your books and stories and beliefs, from the first settlements on? Am I not spoken of, still, in every church in New England? 'Tis true the North claims me for a Southerner, and the South for a Northerner, but I am neither. I am merely an honest American like yourself—and of the best descent—for, to tell the truth, Mr. Webster, though I don't like to boast of it, my name is older in this country than yours."

"Aha!" said Dan'l Webster, with the veins standing out in his forehead. "Then I stand on the Constitution! I demand a trial for my client!"

“The case is hardly one for an ordinary court,” said the stranger, his eyes flickering. “And, indeed, the lateness of the hour—”

“Let it be any court you choose, so it is an American judge and an American jury!” said Dan’l Webster in his pride. “Let it be the quick or the dead; I’ll abide the issue!”

“You have said it,” said the stranger, and pointed his finger at the door. And with that, and all of a sudden, there was a rushing of wind outside and a noise of footsteps. They came, clear and distinct, through the night. And yet, they were not like the footsteps of living men.

“In God’s name, who comes by so late?” cried Jabez Stone, in an ague of fear.

“The jury Mr. Webster demands,” said the stranger, sipping at his boiling glass. “You must pardon the rough appearance of one or two; they will have come a long way.”

And with that the fire burned blue and the door blew open and twelve men entered, one by one.

If Jabez Stone had been sick with terror before, he was blind with terror now. For there was Walter Butler, the loyalist, who spread fire and horror through the Mohawk Valley in the times of the Revolution; and there was Simon Girty, the renegade, who saw white men burned at the stake and whooped with the Indians to see them burn. His eyes were green, like a catamount’s, and the stains on his hunting shirt did not come from the blood of the deer. King Philip was there, wild and proud as he had been in life, with the great gash in his head that gave him his death wound, and cruel Governor Dale, who broke men on the wheel. There was Morton of Merry Mount, who so vexed the Plymouth Colony, with his flushed, loose, handsome face and his hate of the godly. There was Teach, the bloody pirate, with his black beard curling on his breast. The Reverend John Smeet, with his strangler’s hands and his Geneva gown, walked as daintily as he had to the gallows. The red print of the rope was still around his neck, but he carried a perfumed handkerchief in one hand. One and all, they came into the room with the fires of hell still upon them, and the stranger named their names and their deeds as they came, till the tale of twelve was told. Yet the stranger had told the truth—they had all played a part in America.

“Are you satisfied with the jury, Mr. Webster?” said the stranger mockingly, when they had taken their places.

The sweat stood upon Dan'l Webster's brow, but his voice was clear.

“Quite satisfied,” he said. “Though I miss General Arnold from the company.”

“Benedict Arnold is engaged upon other business,” said the stranger, with a glower. “Ah, you asked for a justice, I believe.”

He pointed his finger once more, and a tall man, soberly clad in Puritan garb, with the burning gaze of the fanatic, stalked into the room and took his judge's place.

“Justice Hathorne is a jurist of experience,” said the stranger. “He presided at certain witch trials once held in Salem. There were others who repented of the business later, but not he.”

“Repent of such notable wonders and undertakings?” said the stern old justice. “Nay, hang them—hang them all!” And he muttered to himself in a way that struck ice into the soul of Jabez Stone.

Then the trial began, and, as you might expect, it didn't look anyways good for the defense. And Jabez Stone didn't make much of a witness in his own behalf. He took one look at Simon Girty and screeched, and they had to put him back in his corner in a kind of swoon.

It didn't halt the trial, though; the trial went on, as trials do. Dan'l Webster had faced some hard juries and hanging judges in his time, but this was the hardest he'd ever faced, and he knew it. They sat there with a kind of glitter in their eyes, and the stranger's smooth voice went on and on. Every time he'd raise an objection, it'd be “Objection sustained,” but whenever Dan'l objected, it'd be “Objection denied.” Well, you couldn't expect fair play from a fellow like this Mr. Scratch.

It got to Dan'l in the end, and he began to heat, like iron in the forge. When he got up to speak he was going to flay that stranger with every trick known to the law, and the judge and jury too. He didn't care if it was contempt of court or what would happen to him for it. He didn't care any more what happened to Jabez Stone. He just got madder and madder, thinking of what he'd say. And yet, curiously enough, the more he thought

about it, the less he was able to arrange his speech in his mind. Till, finally, it was time for him to get up on his feet, and he did so, all ready to bust out with lightnings and denunciations. But before he started he looked over the judge and jury for a moment, such being his custom. And he noticed the glitter in their eyes was twice as strong as before, and they all leaned forward. Like hounds just before they get the fox, they looked, and the blue mist of evil in the room thickened as he watched them. Then he saw what he'd been about to do, and he wiped his forehead, as a man might who's just escaped falling into a pit in the dark.

For it was him they'd come for, not only Jabez Stone. He read it in the glitter of their eyes and in the way the stranger hid his mouth with one hand. And if he fought them with their own weapons, he'd fall into their power; he knew that, though he couldn't have told you how. It was his own anger and horror that burned in their eyes; and he'd have to wipe that out or the case was lost. He stood there for a moment, his black eyes burning like anthracite. And then he began to speak.

He started off in a low voice, though you could hear every word. They say he could call on the harps of the blessed when he chose. And this was just as simple and easy as a man could talk. But he didn't start out by condemning or reviling. He was talking about the things that make a country a country, and a man a man.

And he began with the simple things that everybody's known and felt—the freshness of a fine morning when you're young, and the taste of food when you're hungry, and the new day that's every day when you're a child. He took them up and he turned them in his hands. They were good things for any man. But without freedom, they sickened. And when he talked of those enslaved, and the sorrows of slavery, his voice got like a big bell. He talked of the early days of America and the men who had made those days. It wasn't a spread-eagle speech, but he made you see it. He admitted all the wrong that had ever been done. But he showed how, out of the wrong and the right, the suffering and the starvations, something new had come. And everybody had played a part in it, even the traitors.

Then he turned to Jabez Stone and showed him as he was an ordinary man who'd had hard luck and wanted to change it. And, because he'd wanted to change it, now he was going to be punished for all eternity. And yet there was good in Jabez Stone, and he showed that good. He was hard and mean, in some ways, but he was a man. There was sadness in being a man, but

it was a proud thing too. And he showed what the pride of it was till you couldn't help feeling it. Yes, even in hell, if a man was a man, you'd know it. And he wasn't pleading for any one person any more, though his voice rang like an organ. He was telling the story and the failures and the endless journey of mankind. They got tricked and trapped and bamboozled, but it was a great journey. And no demon that was ever foaled could know the inwardness of it—it took a man to do that.

The fire began to die on the hearth and the wind before morning to blow. The light was getting gray in the room when Dan'l Webster finished. And his words came back at the end to New Hampshire ground, and the one spot of land that each man loves and clings to. He painted a picture of that, and to each one of that jury he spoke of things long forgotten. For his voice could search the heart, and that was his gift and his strength. And to one, his voice was like the forest and its secrecy, and to another like the sea and the storms of the sea; and one heard the cry of his lost nation in it, and another saw a little harmless scene he hadn't remembered for years. But each saw something. And when Dan'l Webster finished he didn't know whether or not he'd saved Jabez Stone. But he knew he'd done a miracle. For the glitter was gone from the eyes of judge and jury, and, for the moment, they were men again, and knew they were men.

"The defense rests," said Dan'l Webster, and stood there like a mountain. His ears were still ringing with his speech, and he didn't hear any thing else till he heard Judge Hathorne say, "The jury will retire to consider its verdict."

Walter Butler rose in his place and his face had a dark, gay pride on it. "The jury has considered its verdict," he said, and looked the stranger full in the eye. "We find for the defendant, Jabez Stone."

With that, the smile left the stranger's face, but Walter Butler did not flinch.

"Perhaps 'tis not strictly in accordance with the evidence," he said, "but even the damned may salute the eloquence of Mr. Webster."

With that, the long crow of a rooster split the gray morning sky, and judge and jury were gone from the room like a puff of smoke and as if they had never been there. The stranger turned to Dan'l Webster, smiling wryly. "Major Butler was always a bold man," he said. "I had not thought him

quite so bold. Nevertheless, my congratulations, as between two gentlemen.”

“I’ll have that paper first, if you please,” said Dan’l Webster, and he took it and tore it into four pieces. It was queerly warm to the touch. “And now,” he said, “I’ll have you!” and his hand came down like a bear trap on the stranger’s arm. For he knew that once you bested anybody like Mr. Scratch in fair fight, his power on you was gone. And he could see that Mr. Scratch knew it too.

The stranger twisted and wriggled, but he couldn’t get out of that grip. “Come, come, Mr. Webster,” he said, smiling palely. “This sort of thing is ridic—ouch!—is ridiculous. If you’re worried about the costs of the case, naturally, I’d be glad to pay—”

“And so you shall!” said Dan’l Webster, shaking him till his teeth rattled. “For you’ll sit right down at that table and draw up a document, promising never to bother Jabez Stone nor his heirs or assigns nor any other New Hampshire man till doomsday! For any Hades we want to raise in this state, we can raise ourselves, without assistance from strangers.”

“Ouch!” said the stranger. “Ouch! Well, they never did run very big to the barrel, but—ouch!—I agree!”

So he sat down and drew up the document. But Dan’l Webster kept his hand on his coat collar all the time.

“And, now, may I go?” said the stranger, quite humble, when Dan’l’d seen the document was in proper and legal form.

“Go?” said Dan’l, giving him another shake. “I’m still trying to figure out what I’ll do with you. For you’ve settled the costs of the case, but you haven’t settled with me. I think I’ll take you back to Marshfield,” he said, kind of reflective. “I’ve got a ram there named Goliath that can butt through an iron door. I’d kind of like to turn you loose in his field and see what he’d do.”

Well, with that the stranger began to beg and to plead. And he begged and he pled so humble that finally Dan’l, who was naturally kind hearted, agreed to let him go. The stranger seemed terrible grateful for that and said, just to show they were friends, he’d tell Dan’l’s fortune before leaving.

So Dan'l agreed to that, though he didn't take much stock in fortunetellers ordinarily.

But, naturally, the stranger was a little different. Well, he pried and he peered at the line in Dan'l's hands. And he told him one thing and another that was quite remarkable. But they were all in the past.

"Yes, all that's true, and it happened," said Dan'l Webster. "But what's to come in the future?"

The stranger grinned, kind of happily, and shook his head. "The future's not as you think it," he said. "It's dark. You have a great ambition, Mr. Webster."

"I have," said Dan'l firmly, for everybody knew he wanted to be President.

"It seems almost within your grasp," said the stranger, "but you will not attain it. Lesser men will be made President and you will be passed over."

"And, if I am, I'll still be Daniel Webster," said Dan'l. "Say on."

"You have two strong sons," said the stranger, shaking his head. "You look to found a line. But each will die in war and neither reach greatness."

"Live or die, they are still my sons," said Dan'l Webster. "Say on."

"You have made great speeches," said the stranger. "You will make more."

"Ah," said Dan'l Webster.

"But the last great speech you make will turn many of your own against you," said the stranger. "They will call you Ichabod; they will call you by other names. Even in New England some will say you have turned your coat and sold your country, and their voices will be loud against you till you die."

"So it is an honest speech, it does not matter what men say," said Dan'l Webster. Then he looked at the stranger and their glances locked. "One question," he said. "I have fought for the Union all my life. Will I see that fight won against those who would tear it apart?"

"Not while you live," said the stranger, grimly, "but it will be won. And after you are dead, there are thousands who will fight for your cause, because of words that you spoke."

“Why, then, you long-barreled, slab-sided, lantern-jawed, fortune-telling note shaver!” said Dan’l Webster, with a great roar of laughter, “be off with you to your own place before I put my mark on you! For, by the thirteen original colonies, I’d go to the Pit itself to save the Union!”

And with that he drew back his foot for a kick that would have stunned a horse. It was only the tip of his shoe that caught the stranger, but he went flying out of the door with his collecting box under his arm.

“And now,” said Dan’l Webster, seeing Jabez Stone beginning to rouse from his swoon, “let’s see what’s left in the jug, for it’s dry work talking all night. I hope there’s pie for breakfast, Neighbour Stone.”

But they say that whenever the devil comes near Marshfield, even now, he gives it a wide berth. And he hasn’t been seen in the state of New Hampshire from that day to this. I’m not talking about Massachusetts or Vermont.

Chapter 2: Terminating Employment

1. Claims for Wrongful Termination

1.1 Employment-at-Will

Skagerberg v. Blandin Paper Co., 266 N.W. 872 (Minn. 1936)

JULIUS J. OLSON, JUSTICE

Plaintiff is a consulting engineer, a specialist in the field of heating, ventilating, and air conditioning. As such he had developed a clientele bringing him a weekly income of approximately \$200.

Defendant operates a paper manufacturing plant at Grand Rapids, this state. It had employed plaintiff in his professional capacity in 1926 and again in 1930. He was paid at the rate of \$200 per week while so employed. Defendant was planning extensive enlargements of its plant, the estimated expense being about \$1,000,000. Ordinarily a consulting engineer's fees for doing the necessary planning and supervision of the contemplated improvements would involve from \$35,000 to \$50,000. During plaintiff's employment in 1930 there was some discussion between the parties with respect of plaintiff's employment to take this work in hand. At that time, too, he was negotiating with the executive officers of Purdue University relative to taking a position as associate

professor in its department of engineering, particularly that branch thereof relating to heating, ventilating, and air conditioning.

The Purdue position carried a salary of \$3,300 per year and required only nine months' work in the way of instructions. This would leave plaintiff free to continue his practice as a consulting engineer during a period of three months of each calendar year. He was also privileged, if he entered that position, to continue his practice as a consulting engineer at all times insofar as his professional work at the university permitted him so to do. In addition thereto, he was privileged to contribute to engineering magazines and other publications. All income from such outside engagements was to be his in addition to the stated salary. Plaintiff considered this opportunity as one especially attractive to him. Defendant had full knowledge of all the foregoing facts.

On October 13, 1930, plaintiff, having received a telegram from Purdue University offering him the position and requiring immediate acceptance or rejection thereof, at once called an officer of defendant over the long-distance telephone informing him of the offer and the necessity on his part of making immediate response thereto. Defendant's officer agreed that if plaintiff would reject the Purdue offer and also agree to purchase the home of defendant's power superintendent it would give plaintiff permanent employment at a salary of \$600 per month. Relying thereon, plaintiff rejected the Purdue offer and immediately thereafter moved to Grand Rapids and there entered upon the performance of his duties under this arrangement. He later entered into a contract for the purchase of the superintendent's home. Appropriate to note is the fact that these negotiations were entirely oral and over the long-distance telephone, plaintiff being at Minneapolis and defendant's officer at Grand Rapids. The only writing between the parties is a letter written on October 14, 1930, reading thus:

Blandin Paper Co. "Grand Rapids, Minn." Attention: Mr. C.K. Andrews
"Gentlemen:

In accordance with our conversation yesterday when our agreement was settled regarding my position with your company, I have wired Purdue rejecting their offer. Under the circumstances it was impossible for us to get together on a written agreement; I had to wire Purdue at once. However, I am making this move on the assumption that there will be no difficulty in working out our agreement when I get up to Grand Rapids.

Propositions like the one Purdue made are very rare and I am turning it down since I feel that the opportunities with you for applying my past experience are very attractive, the essential consideration being, however, that the job will be a permanent one.

According to the understanding we have, I am to take over Mr. Kull's duties as Power Superintendent and serve also as Mechanical Engineer for your plant, supervising the mechanical construction and maintenance work and other mechanical technical matters. Mr. Kull is to remain for long enough period, about six months, to permit me to get my work organized and get acquainted with the details of his work. If the proposed new construction work is started within that time it may develop that Mr. Kull may remain until that is completed after which he will leave and I take over his duties. As an accommodation to him when he leaves town I am to purchase his house.

My salary is to be six hundred dollars (\$600.00) per month and you are to pay my moving expenses to Grand Rapids.

Very truly yours, "RS/m R. Skagerberg.

Plaintiff rendered the services for which he was thus engaged "dutifully, faithfully and to the complete satisfaction of the defendant and was paid the agreed salary, except as to a voluntary reduction, up to September 1, 1932," when, so the complaint alleges, he was "wrongfully, unlawfully and wilfully" discharged from further employment, although "ready, willing and able to perform." By reason of the alleged breach of contract he claims to have suffered general damages in the amount of \$25,000, and for this he prays judgment.

From what has been stated it is clear that the issue raised by the demurrer is simply this: Do the allegations set forth in the complaint show anything more than employment of plaintiff by defendant subject to termination at the will of either party?

The words "permanent employment" have a well established meaning in the law:

In case the parties to a contract of service expressly agree that the employment shall be 'permanent' the law implies, not that the engagement shall be continuous or for any definite period, but that the term being indefinite the hiring is merely at will.

The difficult question presented is whether the allegations set forth in the complaint bring this case within an exception to the rule stated. We find in 18 R.C.L. p. 510, the following statement:

Under some circumstances, however, 'permanent' employment will be held to contemplate a continuous engagement to endure as long as the employer shall be engaged in business and have work for the employe to do and the latter shall perform the service satisfactorily. This seems to be the established rule in case the employe purchases the employment with a valuable consideration outside the services which he renders from day to day.

And in 35 A.L.R. 1434, it is said:

It has been held that where an employe has given a good consideration in addition to his services, an agreement to hire him permanently should, in the absence of other terms or circumstances to the contrary, continue so long as the employe is able and willing to do his work satisfactorily.

Plaintiff cites and relies upon *Carnig v. Carr*, 167 Mass. 544; *Roxana Petroleum Co. v. Rice*, 109 Okla. 161; *Pierce v. Tennessee C. I. R. Co.* 173 U.S. 1, and other cases of similar import. A brief discussion of the cited cases upon which plaintiff relies may be helpful.

In *Carnig v. Carr*, plaintiff had been engaged in business for himself as an enameler. Defendant was a business competitor. Being such, and for his own advantage, defendant persuaded plaintiff to give up his business and sell his stock in trade to him. As consideration, in part at least, for entering into this arrangement, defendant agreed to employ plaintiff permanently at a stated salary, his work for defendant being the same as that in which plaintiff had been engaged. It is clear that what defendant sought and accomplished was to get rid of his competitor in business upon a promise on his part to give plaintiff permanent employment. The resulting situation amounted to the same thing in substance and effect as if plaintiff had purchased his job. Under such circumstances there can be no doubt that the exception to the general rule was properly invoked and applied and furnishes an illustration thereof.

In *Pierce v. Tennessee C. I. R. Co.*, plaintiff had received an injury while employed by defendant. To settle the difficulty defendant promised employment to plaintiff at certain stated wages and was also to furnish certain supplies as long as his disability to do full work continued by

reason of his injury. In consideration for these promises plaintiff released the company from all liability for damages on account of the injuries which caused his disability. Here, too, it is clear that plaintiff purchased from defendant his employment.

In *Roxana Petroleum Co. v. Rice*, plaintiffs Rice and Lyons were attorneys and rendered professional services for defendant over a period of time. They had other clients who paid them large annual retainers, one of these being the Pierce Oil Company, from which client they received an annual retainer of \$17,500. The attorneys were prevailed upon by defendant to sever their connections with other clients and were promised and paid an annual retainer of \$15,000, later increased to \$20,000. Some time thereafter the petroleum company claimed that the expense bills were unsatisfactory. A controversy arose, and to settle same a compromise agreement was made. "In this compromise agreement a new employment contract was made. The general offices of the company had been moved to St. Louis. Plaintiffs were to continue their services in representing defendant in 40 or 50 lawsuits that were then pending in the courts of Oklahoma and Texas, and they were to continue in the services of the company in these two states as long as the defendant operated therein and as long as the services of the plaintiffs were satisfactory, and pay them reasonable fees for legal as well as other services. Later on new difficulties arose respecting the new contract. The court in distinguishing this form of contract from the ordinary contract of permanent employment came to the conclusion that because plaintiffs had compromised their claims against the company, changed their position in relation to their general practice, incurred expenses in maintaining an office for the special services of defendant, that thereby there was a permanent contract of employment. The court said:

We are of the opinion that from the facts and circumstances attending the making of the contract of employment in the instant case it was the intention of the parties that the employment was to continue as long as the defendant was in business in Oklahoma and Texas, and the plaintiffs were not subject to discharge without cause.

With regard to that part of the new agreement which provided that plaintiffs were to be paid as long as their services were "satisfactory" to defendant, the facts were such as to justify the court in holding that defendant's claimed dissatisfaction was not genuine but rather and only

pretended. The court quoted with approval the following statement from *Electric Lighting Co. v. Elder Bros.*:

But the dissatisfaction must be in good faith and with the performance of the contract. A plea of dissatisfaction with the work agreed to be satisfactorily completed must allege the facts from which the dissatisfaction arises. He must be in good faith dissatisfied. He cannot avoid liability by merely alleging that he is dissatisfied. The dissatisfaction must not be capricious nor mercenary nor result from a design to be dissatisfied. It must exist as a fact. It must be actual, not feigned; real, not merely a pretext to escape liability.

That the court did not intend to go beyond the general rule pertaining to such form of contract is clearly shown by the subsequent opinion rendered in *Dunn v. Birmingham S. R. Co.*, where plaintiff was hired as defendant's exclusive agent for the sale of its products in Tulsa, no time limit as to term of service having been provided for in the agreement. Five months later defendant, without notice to plaintiff, began selling its products to other retailers in Tulsa. Judgment for plaintiff in nominal damages only was sustained on appeal.

This court has had occasion to pass upon similar questions in various cases. Thus in *Horn v. Western Land Assn.*, plaintiff had been appointed as attorney for defendant "at a salary of \$1,000 per year, payable quarterly," and was so informed in writing. Plaintiff wrote a letter "accepting the appointment upon the terms offered." The court determined that this constituted a contract as to which neither party, without the other's consent, could lawfully rescind without cause during the year.

In *Bolles v. Sachs*, two written agreements were involved, neither showing upon its face mutuality of obligation or other consideration. The court held that the two instruments could be considered together so as to show that one was given in consideration for the other. As thus construed the contract amounted to one of employment providing in substance that plaintiff was to render services for defendant as long as he might elect to serve. The employer breached the contract and sued for damages. The court held that the employee, never having fixed by his election the period of service, could not recover substantial damages, the obligation violated being too uncertain to furnish a basis for assessment of substantial damages.

In *Smith v. St. Paul D. R. Co.*, plaintiff had been injured in the line of his employment. In settlement of the injury he was promised employment. In respect of the validity of such contract the court said:

The consideration for defendant's agreement to employ was paid by the release of plaintiff's claim for damages quite as much and as effectually as if plaintiff had actually paid cash. By releasing his claim for damages, the plaintiff paid in advance for the privilege or option of working for the defendant; and, having done this, he had the right to have it remain optional with him how long he would continue to work for the company, while it remained obligatory upon the latter to furnish the opportunity so long as he chose to work, and was able to properly perform the same. The plaintiff had parted with value for the optional contract, and there was owing to him a reciprocal duty and obligation on the part of the company.

In *McMullan v. Dickinson Co.*, the first syllabus paragraph of the second opinion reads:

Plaintiff and defendant, a corporation, entered into an agreement by the terms of which the latter employed the former as assistant manager upon a stated yearly salary, payable in monthly instalments, said employment to continue so long as the business of the corporation should be continued, provided plaintiff properly and efficiently discharged his duties, and only so long as he should own and hold in his own name 50 shares of capital stock, fully paid up, in defendant corporation. *Held*, that the period of employment was for such time as plaintiff continued to own and hold the stock shares, not exceeding the period during which the corporate business was being transacted, and was fixed with sufficient definiteness; and, further, that there was no lack of mutuality of consideration.

In *Newhall v. Journal Printing Co.*, action was brought upon a written contract. Plaintiff's assignor, in consideration of \$135 paid to defendant, was by the latter given the exclusive right to sell its publications within certain specified territory. Provision was made in the contract that either party thereto might terminate the same upon 30 days' written notice to the other. Upon the expiration of the 30-day period from the date of service of such notice "all the rights of said second party *plaintiff* under said contract shall cease, except the right of reimbursement as hereinafter provided; provided, however, that said first party *defendant* shall not terminate this contract, except for the dishonesty, incompetence, negligence, inattention, or irresponsibility of said second party." The court held upon plaintiff's action to recover damages for its breach that the parties intended (and the contract clearly expressed such intention) that

defendant could not terminate the contract “except for the dishonesty, incompetence, negligence, inattention, or irresponsibility” by the other party thereto.

From the cases discussed, and the discussion is limited to but a few of the many available, the rules of law applicable to the facts in the instant case do not seem to be in doubt, nor do we understand that counsel for either side criticize the rules of law laid down in these cases. Division or difference of opinion arises entirely by reason of the difficulty in application of these rules to the facts pleaded.

Plaintiff maintains that four different items of consideration entered into the contract relied upon, in addition to the promised service to be rendered, namely: (1) The rejection of the Purdue offer; (2) the agreement to purchase the superintendent’s house; (3) that plaintiff gave up an established business; and (4) that defendant saved the commission that it otherwise would have to pay engineers on new construction work.

Plaintiff obviously could not accept both the Purdue and the defendant’s offer. It was for him to take one or the other. He could not possibly serve both masters.

A man capable of earning \$600 per month necessarily must be possessed of both learning and experience in his particular line of endeavor. The fact that he was able to command such salary at the time of entering into defendant’s service is convincing proof that there must be more than one person or enterprise seeking his talents and services. If plaintiff had elected to go to Purdue and, after having been there employed the same length of time as he was by defendant, was then discharged, does it follow that he could successfully sue Purdue University upon the same theory that he is here making a basis for liability against defendant? We have found no case fitting into plaintiff’s claim in this regard.

What has been said in respect of the Purdue opportunity applies with equal force to the third point raised by plaintiff. His capacity as a specialist in his line of endeavor had built up for him a lucrative practice. That practice he could not take with him when he entered defendant’s employment. Is not this exactly what every person having any line of employment must do when he seeks and obtains another? If plaintiff had been engaged in the practice of the law and as such had established a clientele bringing the same income and had later taken on a contract to

act for a corporate enterprise at a fixed salary of \$600 per month upon the same basis as here, do his counsel think, in virtue of the well established rules of applicable law, that he would have a lifetime job? Would not counsel have insisted upon a more definite agreement than that relied upon here?

Plaintiff's claims in this regard are ably discussed and disposed of in *Minter v. Tootle, Campbell Dry Goods Co.* In that case plaintiff was employed by defendant for a term which plaintiff supposed to be permanent. About two years thereafter he was discharged and brought this action to recover his expenses and unpaid salary. There the employee in order to enter into defendant's employment gave up his other employment. This was the basis for his theory of the case. The court said:

The reported cases which deal with contracts of employment in commercial business, where no other consideration than a promise to perform the service passes from the employe to the employer, are almost unanimous in applying the general rule that the words permanent, lasting, constant, or steady, applied to the term of employment do not constitute a contract of employment for life, or for any definite period, and such contracts fall under the rule 'that an indefinite hiring at so much per day, or per month, or per year, is a hiring at will and may be terminated by either party at any time, and no action can be sustained in such case for a wrongful discharge.' The general rule that the assurance of permanent employment will be construed as meaning an indefinite, as distinguished from a special, or merely temporary employment, is a common sense inference founded upon common knowledge of the customs and usages of business. The effort of plaintiff to show an additional consideration passing from him to defendant was abortive since it shows that he merely abandoned other activities and interests to enter into the service of defendant — a thing almost every desirable servant does upon entering a new service, but which, of course, cannot be regarded as constituting any additional consideration to the master.

With regard to purchase of the superintendent's house, note should be made that in plaintiff's letter written the day following the alleged making of the contract he said:

According to the understanding we have I am to take over Mr. Kull's duties as Power Superintendent and serve also as Mechanical Engineer for your plant, supervising the mechanical construction and maintenance work and other mechanical technical matters. Mr. Kull is to remain for long enough period, about six months, to permit me to get my work organized

and get acquainted with the details of his work. If the proposed new construction work is started within that time it may develop that Mr. Kull may remain until that is completed after which he will leave and I take over his duties.

As an accommodation to him when he leaves town I am to purchase his house.

It is difficult to find anything in this language indicating a consideration for, going to, or in any way benefiting defendant to induce it to enter into such contract. Plaintiff's own statement is that "as an accommodation to Kull when he leaves town I am to purchase his house." How this could be of any material interest to or concern of defendant in view of plaintiff's own letter and stipulation is not apparent. Nowhere in the complaint is there any allegation that the purchase of the house from the superintendent in any way benefited defendant or damaged plaintiff. A man in plaintiff's position would necessarily be interested in acquiring a place of abode upon leaving Minneapolis for Grand Rapids. In the very nature of his requirements he entered into the purchase for his own use and accommodation rather than for any benefit to or advantage of defendant. Nowhere is there any suggestion that defendant was to furnish him with a place of abode or do anything whatever in respect of finding or providing such.