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Even a Witch Needs a Lawyer

Why Lawyers are Important in the Time of Trump

On January 20, 1692, in the Town of Salem, Massachusetts, two young girls by the name of Abigail Williams and Elizabeth Parris began demonstrating outrageous behavior. They threw things, exhibited "fits" and seizures, uttered peculiar sounds and shouted and engaged in blasphemous screaming. They then accused at least eight other local women of being witches who communed with Satan to produce their troubled state. Other young girls came forward with more accusations. About two hundred people were ultimately arrested and imprisoned on witchcraft charges. Some of the accused were well-off, now thought to be victims of fellow townspeople who gained from their arrests.

All convicted witches were provided with trials brought by a special prosecutor before an allegedly neutral panel of "justices." Remarkably there was a complete absence of legal counsel - each alleged witch was forced to face their accusers without an attorney.

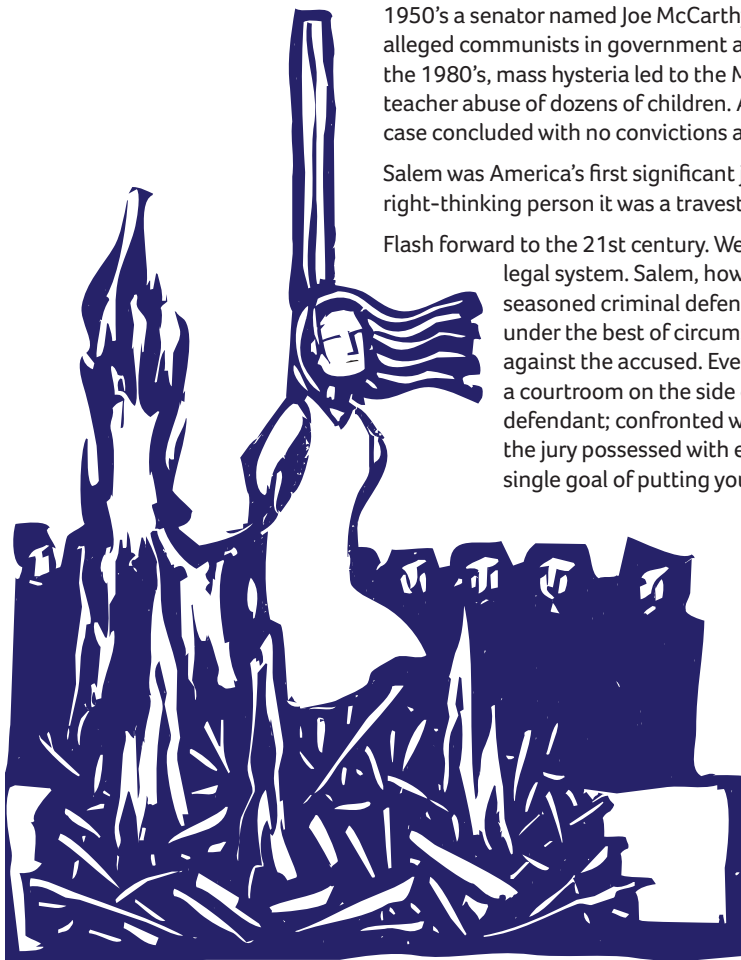
As a result, there was no professional advocate to counter the prosecutor - a gung-ho witch hunter named William Staughton. The case was tried before a jury consumed with unimaginable hysteria which cared nothing for the presumption of innocence and burden of proof. Over the course of ten months in 1692, nineteen men and women were convicted of witchcraft and hanged on Bellows Hill, a barren slope near Salem village. Two dogs were executed as accomplices of witches. An 80 year old man was pressed to death under heavy stones for refusing to submit to trial. All cases were heard by so-called "justices" who were convinced the accusers were honest-to-god-witches.

Witchcraft hysteria has disappeared but witch hunting has continued in America. For example, in the 1950's a senator named Joe McCarthy ran a witch hunt to expose alleged communists in government and the movie industry. Again in the 1980's, mass hysteria led to the MacMartin preschool trial alleging teacher abuse of dozens of children. After six years of litigation the case concluded with no convictions and the dropping of all charges.

Salem was America's first significant judicial experience and for any right-thinking person it was a travesty, violating any notion of justice.

Flash forward to the 21st century. We are rightfully proud of our legal system. Salem, however, is not far removed. Every seasoned criminal defense attorney will tell you that even under the best of circumstance the process is stacked against the accused. Every defense lawyer walks into a courtroom on the side of a frightened, beaten-down defendant; confronted with a prosecutor seated closest to the jury possessed with enormous power who has the single goal of putting your client in prison. On the bench

overlooking the entire scene from an elevated bench is a judge who most likely was a former prosecutor seated before the flags of Government, in most cases convinced that the prosecutor plays a righteous role which he or she is required to facilitate. *continued*



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Even Witches Need Lawyers

Even for a wealthy person, known and respected by the community, the process is stacked against the accused no matter what his status. For every criminal defendant, the presumption of innocence is an illusion: every jury views the accused with suspicion and distrust, convinced of guilt. Even the good people in this process - judges, prosecutor, clerks, and marshalls- do not see people, only case numbers. Similarly, the juries who hear these cases do not see people, only criminals who would not be there if not guilty. Other values, such as reforming defendants and educational rehabilitation have been lost in lieu of efficient processing.

This is what the criminal defense lawyer faces every-day. There are plenty of people with all the power of the State to convict and punish. And Salem is always in the rearview window with its delirious mob staring back. Unlike Salem, what gives any present day defendant a chance is the commitment of the criminal defense lawyer standing up for the client no matter what the cost. There are committed and often courageous defense lawyers who refuse resignation and stand up for the dignity of the citizen accused



and maintain the energy to investigate and re-investigate every case; re-formulate the prosecution's theory of the case; and make every effort to humanize their client to the jury.

As I write this preface to our winter newsletter, I am reminded that as a defense lawyer the specter of Salem haunts every courtroom where I face a skeptical jury or hostile judge. Ironically, our system has the same due process trappings now as then- arrest by warrant; a public prosecutor; a trial by jury. The one enormous difference is the right to counsel - without the assistance of dedicated defense counsel the citizen accused has as much chance of freedom as a defendant staring down a Salem jury. The defense lawyer has an exalted role: the last best chance for every criminal defendant against the witch hunting mob. It is the solemn duty of defense lawyers to resist the de facto presumption of guilt and insist that dignity and respect be accorded the defendant. Without them we are all back to Salem. This I believe beyond a reasonable doubt.

Handwritten signature of Paul J. Smith.

Freedom with a Criminal Record is Not Really Freedom: Pardons and Commutations of Criminal Sentences

The United States leads the world in the number of people in prisons. In 2009, with 4.6 percent of the world's population, the United States had 22.4 percent of the world's prison population. The Department of Justice estimates that approximately 2,200,000 people are behind bars, and nearly all of them are black, hispanic, and/or poor. Over 7,000,000 people are imprisoned or on probation or parole.

According to the Pew Charitable Trust, a highly regarded social research group, the United States has an estimated incarceration rate 6 to 10 times higher than countries with similar standards of living. This situation exists despite the fact that United States crime rates are similar to those found in other countries; for example, the United States and Germany have comparable crime rates, yet there are approximately 750 people per 100,000 in jail in the United States while in Germany there are 93 per 100,000.

The Connecticut Office of Policy Management and Legislative Research estimates that the Connecticut prison population has grown from 3,845 in 1980 to 16,600 in 2014, an increase of 300 percent. Equally significant, there are an additional three people under criminal justice supervision (i.e., probation or parole) for every one person in prison.

In Michele Alexander's recent best-selling book, "The New Jim Crow: Mass Incarceration in the Age of Color Blindness", the blame for this mass imprisonment of our citizenry is placed on drug policy with its imposition of increased mandatory sentences without use of probation or parole. The Justice Policy Institute, a legal policy think tank, has found that across the United States there has been a radical increase in arrests for drug offenses, while arrests for violent and property crimes have fallen dramatically.

In Connecticut it is widely accepted that the increase in Connecticut's prison population is due to the greater prosecution of non-violent crimes such as drug offenses and parole and probation violations, along with more prison time for all offenses, particularly drug offenses. In the

The Life-Changing Burden of a Criminal Record



meantime drug use in the country remains the same as a decade ago and drugs are cheaper and more available than when the so-called war on drugs began.

It is useful to keep in mind that the rest of the world, particularly Europe, views our sentencing system as grossly punitive. Rarely do criminal sentences in Europe exceed 5 years; in our country a 5 year sentence is a minimum baseline for any offense of any seriousness. Even the American Bar Association Standard for Criminal Sentencing, a highly regarded national standard for criminal procedure, takes the position that almost no sentence should exceed 5 years except for crimes that shock the conscience such as murders-for-hire.

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The Life-Changing Burden of a Criminal Record

Whatever the reasons for this state and federal exercise in mass incarceration, there are too many people in jail who endure ruined lives when they are finally released. Indeed, Michele Alexander describes ex-convicts as “permanent second class” citizens, who suffer a kind of “civic death” with a debt to society that is never repaid.

In almost every state parolees will be re-arrested if they are not employed. At the same time approximately 40 states have no laws protecting against consideration of an arrest record when making the hiring decision. “Banning the box” on employment applications has been instituted in the City of New Haven and for Connecticut state jobs; this is an exception, however, as Connecticut, along with most states, has created a network of laws and regulations that prohibit ex-offenders from obtaining jobs in certain fields or obtaining licensure. Moreover, felony drug offenders are barred from obtaining federal public assistance, along with an array of other programs such as food stamps.

The Pew Charitable Trust reports that there is a dramatic fall in family income after an imprisoned family breadwinner is released. The greatest single barrier facing someone released from prison is getting a job, as well as getting a better education or even decent housing. Possessing a job is not only necessary to survival, it is also vital to self-dignity and personal well being. It is also the biggest determinant of recidivism.

The most logical and necessary way of alleviating this otherwise unsurmountable barrier to employment is to provide a method for erasing a criminal record. Incredibly, obtaining expungement of a federal conviction is virtually impossible even if the petitioner has turned his life around and the crime occurred years ago. Only the President can pardon someone convicted of a federal crime, something that is rarely done. Obtaining a pardon is equally difficult in most state court systems.

Pardons in Connecticut

Fortunately for it's citizens, Connecticut has a very special system which has been promoted for use around the country. Connecticut's Constitution does not grant the Governor the power to grant pardons; instead, the power to pardon is accorded the General Assembly, which has delegated that authority to the Pardons Board. In 2003 the General Assembly moved the process to a new Board of Pardons and Parole. This was a serious effort to make the process meaningful since previously, dating back to 1833, the pardon process was essentially handled by a single volunteer in a private office who granted almost no pardons. Presently the Governor appoints the Board (not more than 25 members) and selects the chairperson from among the membership. Unlike most states, such as New York, a Connecticut pardon does not merely reverse the conviction, it provides a clean record without evidence of a criminal conviction.

The time period to apply for a pardon has recently been reduced to three years for a misdemeanor and five years for a felony. Under “extraordinary circumstances”, these time restrictions may be waived.

In addition to a full pardon, a provisional pardon has also been created which allows the applicant to be hired for a job or obtain a license which would otherwise be unavailable to someone with a criminal record. The provisional pardon provides only a partial remedy, however, since it does not completely erase a criminal record- only a full pardon can accomplish this. A provisional pardon can be applied for at anytime.

A pardon application is very lengthy and time consuming to adequately prepare. Once submitted the Pardons Board looks at several factors such as work record; rehabilitation; character references; and the nature of the crime, particularly the impact on victim and family. Rarely is a pardon granted for an exceptionally serious or violent crime. The whole process takes about one year. However, a new expedited hearing process is now in place. Mainly intended for non-violent victimless crimes a specific

contingent of Board staff will afford expedited review in proper cases. In 2016 approximately 40 cases were granted expedited review.

It is a good time to be applying for a pardon. The federal system is presently intent on releasing more prisoners earlier as a result of increased criticism of the country's overflowing Gulag filled with non-violent offenders.

In Connecticut, between 2008 and 2012 state officials granted pardons of various types for 1,564 people convicted of crimes. In 2016 approximately 1500 applications were made and over 700 granted. Hearings are held approximately once a month around the State.

Overall, Governor Malloy has encouraged an enlightened, progressive program designed to minimize the prison population, especially for victimless drug crimes, through bail reform; home release; and other programs. The Board of Pardons has been a big focus of this program with more Board members and increased funding. A newly beefed-up staff consists of 5 probation officers; 3 clerks and legal counsel.

Commutation/ Clemency

In addition to the power to grant pardons, the Board has broad authority to grant conditioned or absolute commutations of criminal sentences. The ability to exercise clemency by commuting punishments applies to any crime for someone in prison or on parole.

There are two classes of eligibility: those with sentences of eight years or more are eligible after four years; for sentences of less than eight years eligibility occurs after 50% of the sentence is served. Where “compelling reasons” can be shown these eligibility requirements may be waived.

Before an otherwise eligible candidate may apply, he must exhaust all judicial remedies. This includes a motion in the trial court for sentence modification and an application for sentence review. As a practical matter these procedures will be futile for most cases; nonetheless they must be pursued and can usually be done without a huge effort.

The panel averages 80 applications per year. Hearings are conducted twice a year. A Board panel will pre-screen the applications administratively and select applications for further proceedings. Re-applications will not be entertained unless new or different extra-ordinary circumstances or exemplary conduct are presented.

Much like a pardon application, a request for commutation is not a retrial- arguments involving claims of innocence or procedural errors in the trial will fall on deaf ears. As frequently said, the applicant must “own his guilt”; there must be a reason presented in addition to a simple plea for clemency. In drafting the content of the application it is useful to think of the argument presented as a re-entry plan, with a description of family and friends who will act as a support group with a job in place and a plan for economic self-sufficiency.

If the applicant has had a troubled family and personal life a good psychological evaluation is a necessity. If drugs have been an issue, a substance abuse treatment plan is also needed. It is also important to keep in mind that the commutation remedy requested must be consistent with the original sentence; for example a commutation request cannot involve special parole if that was not an element of the original sentence; similarly a flat sentence of definite years mandates a commutation consisting of a non-conditional sentence.

Conclusion

Judging from my personal experience representing many clients in this process, Connecticut's pardon program is a welcome success; states like Massachusetts and Illinois are now looking at Connecticut as a possible model. Anyone with a criminal conviction must consider this process.

A. Paul Spinella is the author of Connecticut Criminal procedure.

Judicial Delay is Nothing New

There are many novelists who have written with great insight and wit about lawyers, an endlessly rich subject matter for any writer. Charles Dickens was one of the best. In his great novel of the law- *Bleak House*- he immortalized the notorious Chancery case of Jarndyce and Jarndyce. Dickens was convinced that the courts, by their refusal to decide cases promptly, created more injustice than the very wrongs alleged. The following famous passage is from the opening of *Bleak House*:



London. Michaelmas term lately over, and the Lord Chancellor sitting in Lincoln's Inn Hall. Implacable November weather. As much mud in the streets, as if the waters had but newly retired from the face of the earth, and it would not be wonderful to meet a Megalosaurus, forty feet long or so, waddling like an elephantine lizard up Holborn Hill. Smoke lowering down from chimney-pots, making a soft black drizzle with flakes of soot in it as big as full-grown snowflakes- gone into mourning, one might imagine, for the death of the sun. Dogs, undistinguishable in mire. Horses, scarcely better; splashed to their very blinkers. Foot passengers, jostling one another's under umbrellas, in a general infection of ill temper, and losing their foot-hold at street corners, where tens of thousands of other foot passengers have been slipping and sliding since the day broke (if this day ever broke), adding new deposits to the crust upon crust of mud, sticking at those points tenaciously to the pavement, and accumulating at compound interest.

Fog everywhere, fog up the river, where it flows among green aits and meadows; fog down the river, where it rolls defiled among the tiers of shipping, and the waterside pollutions of a great (and dirty) city. Fog on the Essex Marshes, fog on the Kentish heights. Fog creeping into the cabooses of collier-brigs; fog lying out on the yards, and hovering in the rigging of great ships; fog drooping on the gunwales of barges and small boats. Fog in eyes and throats of ancient Greenwich pensioners, wheezing by the firesides of their wards; fog in the stem and bowl of the afternoon pipe of the wrathful skipper, down in his close cabin; fog cruelly pinching the toes and fingers of his shivering little prentice boy on deck. Chance people on the bridges peeping over the parapets into a nether sky of fog, with fog all round them, as if they were up in a balloon, and hanging in the misty clouds...

The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest, near that leaden-headed old obstruction,

appropriate ornament for the threshold of a leaden headed old corporation: Temple Bar. And hard by the Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition, which this High Court of Chancery, most pestilent of hoary sinners, holds, this day, in the sight of heaven and earth.

On such an afternoon, if ever, the Lord high Chancellor ought to be sitting here- as here he is- with a foggy glory round his head, softly fenced in with crimson cloth and curtains, addressed by a large advocate with great whiskers, a little voice, and an interminable brief, and outwardly directing his contemplation to the lantern in the roof, where he can see nothing but fog. On such an afternoon, some score of members of the High Court of Chancery bar ought to be- as here they are- mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee deep in technicalities, running their goat-hair and horsehair warded heads against walls of words and making a pretence of equity with serious faces, as players might. On such an afternoon, the various solicitors in the cause, some two or three of whom have inherited it from their fathers, who made a fortune by it, ought to be- as are they not?- ranged in a line, in a long matted well (but you might look in vain for Truth at the bottom of it), between the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense, piled before them. Well may the court be dim, with wasting candles here and there; well may the fog hang heavy in it, as if it would never get out; well may the stained-glass windows lose their colour, and admit no light of day into the place; well may the uninitiated from the streets, who peep in through the glass panes in the door, be deterred from entrance by its owl aspect, and by the drawl languidly echoing to the roof from the padded dais where the Lord High Chancellor looks into the lantern that has no light in it, and where the attendant wigs are all stuck in a fog-bank! This is the Court of Chancery; which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give- who does not often give- the warning, "Suffer any wrong that can be done you, rather than come here!"

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Judicial Delay is Nothing New

...Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no one alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how, or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not there Jarndyce left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.

Jarndyce and Jarndyce has passed into a joke. That is the only good that has ever come of it. It has been death to many, but it is a joke in the profession. Every master in Chancery has had a reference out of it. Every Chancellor was "in it," for somebody or other, when he was counsel at the bar. Good things have been said about it by blue-nosed, bulbous-shoed old benchers, in select port-wine committee after dinner in hall. Articled clerks have been in the habit of fleshing their legal wit upon it. The last Lord Chancellor handled it neatly, when, correcting Mr. Blowers the eminent silk gown who said that such a thing might happen when the sky rained potatoes, he observed, "or when we get through Jarndyce and Jarndyce, Mr. Blowers" - a pleasantry that particularly tickled the maces, bags, and purses.

...Thus, in the midst of the mud and at the heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

"Mr. Tangle," says the Lord High Chancellor, latterly something restless under the eloquence of that learned gentleman.

"Mlud," says Mr. Tangle. Mr. Tangle knows more of Jarndyce and Jarndyce than anybody. He is famous for it- supposed never to have read anything else since he left school.

"Have you nearly concluded your argument?"

"Mlud, no- variety of points- feel it my duty to submit- ludship," is the reply that slides out of Mr. Tangle.

"Several members of the bar are still to be heard, I believe?" says the Chancellor, with a slight smile.

Eighteen of Mr. Tangle's learned friends, each armed with a little summary of eighteen hundred sheets, bob up like eighteen hammers in a pianoforte, make eighteen bows, and drop into their eighteen places of obscurity.

"We will proceed with the hearing on Wednesday fortnight," says the Chancellor. For the questions at issue is only a question of costs, a mere bud on the forest tree of the parent suit, and really will come to a settlement one of these days.

The Chancellor rises; the bard rises; the prisoner is brought forward in a hurry; the man from Shropshire cries, "My lord!" Maces, bags, and purses, indignantly proclaim silence, and frown at the man from Shrophshire.

"In reference," to the young girl- "

"In reference," proceeds the Chancellor, with extra distinctness, "to the young girl and boy, the two young people," (Mr. Tangle crushed.)

"Whom I directed to be in attendance today, and who are now in my private room, I will see them and satisfy myself as to the expediency of making the order for their residing with their uncle."

Mr. Tangle on his legs again.

"Begluship's pardon- dead."

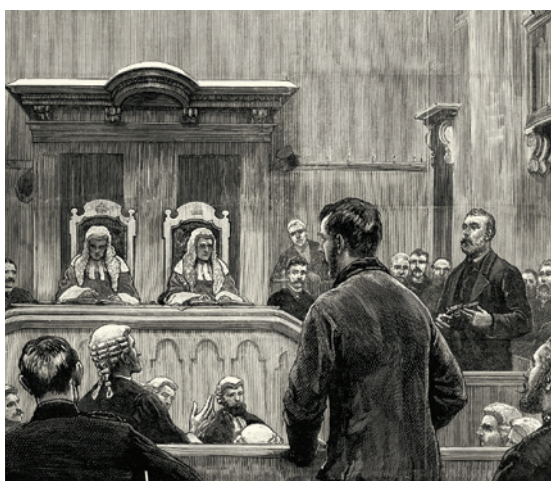
"With their," Chancellor looking through his double eyeglass at the papers on his desk, "grandfather." "Begludhsip's pardon- victim of rash action- brains."

Suddenly a very little counsel with a terrific bass voice, arises, fully inflated, in the back settlements of the fog, and says, "Will your lordship allow me? I appear for him. He is a cousin, several times removed. I am not at the moment prepared to inform the Court in what exact remove he is a cousin; but he is a cousin."

Leaving this address (delivered like a sepulchral message) ringing in the rafters of the roof, the very little counsel drops, and the fog knows him no more. Everybody looks for him. Nobody can see him.

"I will speak with both the young people," says the Chancellor a new, "and satisfy myself on the subject of their residing with their cousin. I will mention the matter tomorrow morning when I take my seat."

The Chancellor is about to bow to the bar, when the prisoner is presented. Nothing can possibly come of the prisoner's conglomeration, but his being sent back to prison; which is soon done. The man from Shropshire ventures another remonstrative "My lord!" but the Chancellor, being aware of him, has dexterously vanished. Everybody else quickly vanishes too. A battery of blue bags is loaded with heavy charges of papers and carried off by clerks; the little mad old woman marches off with her documents; the empty court is locked up. If all the injustice it has committed, and all the misery it has caused, could only be locked up with it, and the whole burnt away in a great funeral pyre- why, so much the better for other parties than the parties in Jarndyce and Jarndyce!





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