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With the compliments of
Richd R McMahon
Harper's Ferry

IN THE

Circuit Court of Monongalia County,

WEST VIRGINIA.

OCTOBER RULES, 1901.

JAMES W. HARTIGAN
vs.
BOARD OF REGENTS. } Trespass on the Case.

BRIEF ON DEMURRER.

RICH'D R. McMAHON,
of Counsel for Defendants.

The title of this case, as it appears on the records of the court, is:

J. W. HARTIGAN
vs.
GEORGE C. STURGISS ET AL. } Trespass on the Case.

In May last the Sheriff of Jefferson County served upon me this process:

"STATE OF WEST VIRGINIA, To the Sheriff of Jefferson County, Greeting:

We command you, as at another time we commanded you, to summon J. H. Raymond, Geo. C. Sturgiss, A. H. Kunst, R. R. McMahon, W. E. Powell, James L. Hamill and John A. Campbell, if they be found in your bailiwick, to appear before the Judge of our Circuit Court for Monongalia County, at the Clerk's office of our said Court, at Rules to be holden therefor, on the first Monday in May next, to answer J. W. Hartigan of a plea of trespass on the case, damage, $100,000. And have then there this writ.

Witness, WILLIAM E. GLASSCOCK, Clerk of our said court, at the court-house, this 3rd day of May, 1901, and 38th year of the State.

WM. E. GLASSCOCK, *Clerk.*

(Copy for Rich'd Randolph McMahon, Harper's Ferry.)"

The following is a true copy of the declaration or complaint:

"J. W. HARTIGAN
vs.
GEORGE C. STURGISS ET AL. } In the Circuit Court of Monongalia Co., W. Va. Trespass on the Case. May Rules, A. D. 1901.

State of West Virginia, Monongalia Co.: To-wit; In the Circuit Court.

J. W. Hartigan complains of J. H. Raymond, George C. Sturgiss, A. H. Kunst, R. R. McMahon, W. E. Powell, James L. Hamill and John A. Campbell, individually, and as Regents of the University of West Virginia, who have been duly summoned in an action of trespass on the case. For that, heretofore: To wit; on the — day of ——, A. D. 1900, and before

the grievance hereinafter complained of this plaintiff was a duly and legally constituted Professor of Anatomy in the University of West Virginia. The defendant, J. H. Raymond, President thereof, and the defendants George C. Sturgiss, A. H. Kunst, R. R. McMahon, W. E. Powell, James L. Hamill and John A. Campbell, were Regents of the said University of West Virginia, which institution of learning is located at Morgantown in the County of Monongalia and the State of West Virginia.

Plaintiff further says that he has been Professor in the said University for the preceding —— years of his life—had been elected for life or good behavior the last time, on the — day of June, A. D. 1900, and for his services was at the time of his removal securing a salary of $1,800 per annum, and was and always theretofore had been discharging his duties industriously, faithfully, properly and competently, and to the best interest of the said institution.

Still further plaintiff complaining says that on the day and year aforesaid, to wit: on the 17th day of December, 1900, the defendants contriving and intending maliciously, unlawfully and wickedly to injure Plaintiff, conspired and combined and confederated together for the purpose of unjustly and wrongfully removing this Plaintiff from his chair as Professor of Anatomy in the said University of West Virginia. And the Plaintiff says the defendant, J. H. Raymond as President of said institution without any cause therefor wickedly and maliciously desiring to injure plaintiff as wickedly, unlawfully and maliciously conspired and combined and confederated with the other defendants and asked the defendants Geo. C. Sturgiss, A. Kunst, R. R. McMahon, W. E. Powell, James L. Hamill and John A. Campbell, to remove plaintiff from his chair as Professor of Anatomy, and the said defendants wickedly and maliciously conspired, combined and confederated together and with the said defendant, J. H. Raymond, and did unlawfully, maliciously, unjustly, and without any cause whatever on the day and year aforesaid order the removal of the plaintiff from his position as Professor of Anatomy in the said University of West Virginia.

Further complaining plaintiff says that the said defendants maliciously and wickedly combining and conspiring and confederating together to injure the plaintiff and to make it appear that he was incompetent or unfaithful as a Professor and

teacher in said institution of learning, did on the 17th day of December, A. D. 1900 wickedly, maliciously, unjustly and improperly, and without any reasonable or just cause, without any cause at all, did maliciously, wickedly, unlawfully and unjustly remove the plaintiff from his said professorship of Anatomy in the said University of West Virginia.

Moreover plaintiff states, avers and charges that contrary to the statute in such case made and provided, the defendants gave no notice to plaintiff that his removal would be considered at the meeting of the Board of Regents at which he was removed and without any notification as the law requires that good cause for removal should be specified, but regardless of the interests of the plaintiff and the welfare of the University of West Virginia, plaintiff says, states and avers that the said defendants wickedly desiring and intending to injure the plaintiff, did wickedly, maliciously, anjustly and unlawfully remove him, plaintiff, from his chair as Professor of Anatomy, and that too without allowing the plaintiff to be heard in his own defense. And plaintiff says that by reason of the premises he has been injured in the sum of $1,000 by the loss of salary and $10,000 by damage to his reputation as Professor and teacher and other injury has sustained to the damage of plaintiff of $—— and therefore he brings his suit.

FRAZIER AND FRAZIER,
&
W. W. ARNETT,
Attorneys for Plaintiff."

While it thus ~~appears~~ is alleged "that by reason of the premises he (plaintiff) has been injured in the sum of *$1,000* by the loss of salary and $10,000 by damage to his reputation as Professor and teacher and other injury has been sustained to the damage of plaintiff" in an *unstated sum*, the summons which the Sheriff of Jefferson County served upon me stated that the damage was fixed at *$100,000*.

My distinguished colleague, Mr. Sturgiss, has completely shown the defectiveness of this declaration, both in substance and in form, from its first letter to its last syllable. He has pointed out its manifold imperfections, in that it is a suit by

"J. W. Hartigan," who may or may not be thus identified as the real plaintiff; that it complains of the President of the University and six Members of the Board of Regents who, "individually, *and as Regents* of the University of West Virginia," have contrived and conspired, and combined and confederated together to do him an injury, &c. He has further shown that at the time of the plaintiff's removal he was not the Professor of Anatomy, and that the institution in which he was employed is known in the organic act as the "West Virginia University." These and many other instanecs and evidences of bad pleading have been so clearly shown and ably discussed that it is unnecessary for me to again refer to them.

My other learned associate, Judge Campbell, in his brief on demurrer, has reviewed the law bearing upon the case, and in his instructive oral argument has dealt with the ethical questions involved in this proceeding.

There is, however, another element of this case, which, it seems to me, may as well be considered now. Indeed, it may be regarded as the basic, the fundamental, the controlling question involved, and that is, the power of removal—whether the Board of Regents had that power, and, having it, whether it was properly exercised in the case of this plaintiff. The Board of Regents either had that power or it had not. If it had, the case is concluded.

I.—*The Power of Removal.*

From the very beginning of the Government—certainly from the adoption of the Constitution—the question of the power of removal, or, to be precise, the correct inference as to the power of removal, has been a subject of controversy and debate.

Kent and Story have dwelt upon the *legislative* determination of this power by the action of the First Congress. But the general question has never been settled by any *judi-*

cial decision, the decided cases being confined to the particular statutes upon the construction of which their result depended, unless, indeed, the decision of the Supreme Court in the Parsons case (to which reference will hereafter be made) may be regarded as a final determination of the question. I do not concede that it is.

The Constitution of the United States makes no mention of removal from office where the term is not fixed.

Upon the generally accepted principle that a power to appoint—under statutes silent as to removals—implied a right in the appointing power to remove, Alexander Hamilton held that the consent of the Senate would be necessary to displace as well as to appoint, and such was his construction of the Constitution while it was pending for ratification before the State conventions. The great author of the Federalist discussed the question with marvelous ability.

After the ratification, the First Congress met. A bill was introduced in the House creating the Department of Foreign Affairs, afterwards called the Department of State, and providing for a Secretary thereof, with no prescribed limit as to his term of office, and containing the words "to be removed from office by the President of the United States."

The debate in the House upon this bill was one of the most memorable and comprehensive recorded in the parliamentary annals of the world. It began on June 16, and closed on June 22, 1789. The original bill was amended by striking out the words "to be removed from office by the President of the United States," for the reason that they might be construed into an assumption by Congress of power to grant or withhold this authority, and, instead, to add in the second clause a recognition of the *existence* of such authority by providing that the chief clerk of the Department should exercise the functions of the Secretary "whenever he should be removed from office by the President." The bill passed the House of Representatives by a vote of 31 to 19. It was con-

curred in by the Senate, but neither the debates nor the vote have been preserved in the Annals of Congress. It is a matter of history that it passed the Senate by the casting vote of the Vice-President, John Adams.

The debate and vote upon the bill have been referred to by legal commentators and political writers as a legislative determination that the President has a constitutional power to remove which cannot be affected by legislation.

But, says a learned writer:

"An examination shows that no such question was actually involved. It further shows that the original bill was so changed by a compromise amendment as to combine in favor of its passage those who believed in the President's untrammeled right to remove with those who, not entertaining this belief, were willing to have that right exercised by our first President, through the unbounded confidence reposed in him."

By the Act of August 7, 1789, the second great Department of the Government—the Department of War—was established. It contained the same compromise provision as the Act of July 27, establishing the Department of State.

Next came the Act of September 2, 1789, establishing the Treasury Department. In this there was no compromise. The Secretary was contemplated as being removable from office by the President. The words of the Act are: "That whenever the Secretary *shall be removed from office by* the President of the United States." * * *

This action of the First Congress, Chancellor Kent says, "amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon as decisive of the case." And yet, the great commentator was never satisfied that it was the proper construction, for he said, in 1823:

"The question has never been made the subject of judicial discussion; and the construction given to the Constitution in

1789 has continued to rest on this loose, incidental, declaratory opinion of congress and the sense and practice of government since that time. * * * It is * * * a striking fact that in the constitutional history of our government that a power so transcendent as that is which places at the disposal of the President alone, the tenure of every executive officer appointed by the President and senate should depend upon inference merely, and should have been gratuitously declared by the first congress, in opposition to the high authority of the Federalist."

In fact, the Hamiltonian construction was considered the true one by Kent, Story and Webster; and in the debates of 1867, when the tenure-of-office act was under discussion in Congress, such was said to have been Madison's original construction, but in the debate of 1789 Madison did not agree with the author of the Federalist.

In his earlier speeches Mr. Webster declared that the Presidential power of removal rested upon no ground "except precedent, and precedent alone." "No such power," he said, "is given by the Constitution in terms, nor anywhere intimated throughout the whole of it. No paragraph or clause of that instrument recognizes such a power," which, he added, is "questionable" and "often questioned."

Later, reiterating the same idea, Mr. Webster observes:

"There is certainly no specific grant. It is a power, therefore, the existence of which, if proved at all, is to be proved by inference and argument."

And yet the great statesman, though originally holding that the President's power of removal was not granted by the Constitution, finally exclaimed, in defining his position as a Senator when Andrew Jackson had removed Mr. Duane, the Secretary of the Treasury, and nominated Roger B. Taney in his stead:

"I regard it as a settled point, settled by construction, settled by precedent, settled by the practice of the Government, settled by legislation."

Notwithstanding Mr. Webster's declaration, it is evident from reading his speeches that while he yielded to precedent in his *senatorial* capacity, he avoved that precedent to be wrong in principle, barely established through the confidence felt in President Washington, upon Mr. Madison's theory of necessity in extreme cases of insanity, defalcation, etc.

In concluding this branch of the subject it may be said that it has been the unvarying practice of all Presidents to remove from office civil officers when, in their opinion, it seemed wise to do so, whether such officers held commissions for a term of years or during the pleasure of the President.

It will be borne in mind that so far we have been discussing the exercise of the power of removal under the Federal Constitution in so far as it affected officers not inferior.

II.—*Inferior Officers.*

Now, what has been the rule as to inferior officers?

The power of appointment to office is not, *per se*, and necessarily, an executive function; certainly not where, as under the Federal Constitution, it may be exercised by Congress or the courts. Therefore, those who control the right of appointment to an office may declare its terms and tenure. This has been many times decided in the States whose constitutions, in this respect, were like that of the United States.

Fox v. *McDonald*, 101 Ala. 72, 74.
Peo. v. *Morgan*, 90 Ills. 562.
Mayor v. *State*, 15 Md. 455.
Peo. v. *Freeman*, 80 Cal. 233.
People v. *Hurlbut*, 24 Mich. 63.
St. v. *Constantine*, 42 Ch. 441.

The majority of the States, following the Federal Constitution in respect of appointments, have vested the appointment of all public officers, *i. e.*, not inferior officers, in the Executive of the State, while conferring upon the legislative branches, or upon duly constituted and organized bodies, such

as boards of regents, trustees, etc., the appointment of inferior minor officers, not officers within the meaning of the Constitution, but officers subject to the power that appointed them—officers with duties defined and limited by the appointing power.

We come now to the general question whether the power of appointment vested in a body like the Board of Regents of the University carries with it the power of removal. And, as the same principles apply as in Federal cases in like circumstances, we may turn to some of the decisions of the Supreme Court of the United States.

In the case of Hennen, decided in 1839, the Supreme Court said:

"It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment."

Ex parte Hennen, 13 Pet. 225.

That case was an application for a mandamus against a U. S. District Judge in Louisiana by Hennen, who had been removed from the clerkship of the court by the Judge, Hennen claiming that he had been appointed without limitation as to time, and therefore for life. The motion was denied.

In the case of *Crenshaw* v. *United States*, the claim of the appellant was, that having accepted the appointment of cadet midshipman, he became an officer of the Navy; that such acceptance constituted a statutory contract with the United States, based on a valuable consideration, under which he was entitled to hold the office for life, unless removed by sentence of a court martial.

Said Mr. Justice Lamar, delivering the opinion of the Court:

"The great question of protection to contract rights and vested interests which forms such an interesting feature of our constitutional law is not dominated by the turn of a phrase. Our courts, both state and national, look on these questions through the form to the substance of things; and, in substance, a statute under which one takes office, and which fixes the term of office at one year, or during good behavior, is the same as one which adds to those provisions the declaration that the incumbent shall not be dismissed therefrom. Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege *revocable by the sovereignty at will.*"

Crenshaw v. *United States*, 134 U. S. 99.

In *McAllister* v. *United States*, the Court held that the President was authorized to remove a U. S. Judge for the District of Alaska before the expiration of his term of office to which he had been commissioned for the term of four years from the day of its date and until his successor should be appointed and qualified.

McAllister v. *United States*, 141 U. S. 174.

The next leading case on the question of removal from office is that of Parsons.

In referring to this case I take occasion to say that, as one of his counsel, I took hope from the fact that the decision in the McAllister case was not decisive of the right of an executive officer to hold under a commission fixing a definite term, as the contention in that case was that McAllister was a constitutional judge. The Court held that a Judge of Alaska was not a judge within the meaning of the Constitution, and the case turned on that point only. Parsons had a four years' commission. He was removed without the assignment of any cause; no charges had been preferred against him; he had had no hearing. We contended, upon the authority of many

decided cases, that it was a well-settled law in this country that an officer could be removed only upon notice and after a hearing where the tenure of his office was during good behavior, *or* until removed for cause, *or* for a definite term subject to be removed for cause, and that a removal without notice and hearing in either of these cases was erroneous and void. As the office was one which had been created by Congress, and as Congress had fixed the term thereof, the question was submitted to the Court whether the Constitution conferred upon the President the power to remove such officer—an inferior officer. The counsel for the Government maintained that under the construction of the Constitution given by the First Congress, recognized by text writers and commentators for a century, *all executive power* except for the express qualification requiring the consent of the Senate to the making of treaties and to certain appointments, was vested in the President. As to these issues the Court said:

"It is unnecessary for us in this case to determine the important question of constitutional power above stated."

The decision was that the assignment of a four years' term only fixed the *terminus ad quem*, beyond which the office could not be held. In other words, that the true construction of section 769 of the Revised Statutes of the United States, under which the officer was appointed, was that Congress did not mean that he should hold for four years, but that the term should not last longer than four years, subject to the right of the President to sooner remove.

Parsons v. *United States*, 167 U. S. 324.

In the decisions by the State courts it has been held, as in the Hennen case, by the Supreme Court, that where a definite term is *not* fixed, and the statutes do *not* specify causes for which removals may be made, the power of removal may be exercised at the discretion of the appointing power.

Throop on Public Officers says:

"The general rule is that where a definite term of office is not fixed the officers by whom a person was appointed may remove him at pleasure and without notice, charges or reasons assigned."

Under an act providing that railroad commissioners, after appointment, might continue in office for a term of three years, unless sooner removed, it was held that the appointing power (the executive council), at its discretion might remove such commissioners, and the courts could not prevent or interfere.

State v. *Mitchell*, 50 Kan. 289.

When an office is held at the pleasure of the appointing power, and also where the power of removal may be exercised at its discretion, it is well settled that the officer may be removed at any time without notice or hearing.

Id., 50 Kan. 289.

In the case of *Gillan* v. *Board of Regents of Normal Schools*, Chief Justice Orton, of Wisconsin, delivering the opinion of the court, most admirably and pertinently discussed the ethical question involved in the removal of a teacher. The contention was that the regents of the normal schools should not have removed the plaintiff without assigning cause and without a hearing. Said the Chief Justice:

"The trial of a teacher, in a normal school, on charges of misconduct with its delays and publicity, and the excitement it would produce, and the feelings it would engender, would be very injurious to the school; and it would most likely make heated partisans of the other teachers and the scholars in the contest, and the evil consequences would be great, if not endless. There is no other way in which the character of the teacher could be saved, except by silent removal. *An evil-disposed and perverse teacher might prefer to have charges against him made public, and to rally his forces of teachers and scholars and outside friends, and have a fight and battle with the board, no matter how much the school might be injured by it.* It is at least doubtful whether the

board could set on foot a trial of charges against a teacher of a normal school, with a view of merely removing him. It would seem to defeat the wise purpose the legislature had in view in giving the board this power of removal at pleasure. The question is not whether the board is bound to exercise this power in all cases, but whether, in case they do remove a teacher summarily, the courts could interfere with the exercise of their discretion or reverse their action. This power of summary removal of a teacher, vested in the board by statute, is a discretionary power, and its exercise in a given case cannot be inquired into, or questioned by the courts."

Gillan v. *Board of Regents of Normal Schools*, 24 L. R. A. 336.

To the same effect are the decisions in *Attorney General* v. *Brown*, 1 Wis. 513; *State* v. *Watertown*, 9 Wis. 254; *State* v. *McGarry*, 21 Wis. 496; *State* v. *Kuehn*, 34 Wis. 229; *State* v. *Prince*, 45 Wis. 610; *Reg.* v. *Darlington School*, 6 Q. B. 682; *State* v. *Hawkins*, 440 Ohio St. 98.

There is no provision in the organic act of West Virginia relating to the government of the University, which fixes the term of a professor or specifies causes for removal—not a word. But even if there were, has not the highest tribunal of this State held that the courts have no jurisdiction to review the action of the Board of Regents of the West Virginia University removing a professor; that a professor in the University is not a public officer; that notice and hearing are not required for proceeding by the Board of Regents for the removal of a professor?

The claims set up in the Prohibition Case having been rejected by the Supreme Court of Appeals, were abandoned, but it seems that another had to be found, and now comes this collateral action—a suit for trespass on the case, charging conspiracy and claiming damages. It is, then, an action for tort—for trespass on the case. Malice and conspiracy are charged. The damages are variously fixed at $10,000 and $100,000 as the records show. Without stopping to ask

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how this action can be sustained in the face of the decision of the Supreme Court of Appeals—which was not considered, I assume, by the other side—let us deal with the allegation of conspiracy.

III.—*Conspiracy.*

I submit that the rule of law is that a conspiracy cannot be made the subject of an action like this unless something was done which, without the conspiracy, would give a right of action. As Judge Cooley says: "The damage is the gist of the action, not the conspiracy."

It is a well-settled rule which was not overlooked by the great Pennsylvania Jurist, Judge Jeremiah Black, in the case of *Jenkins* v. *Fowler* (24 Pa. St. R. 308), that bad motive by itself is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.

It is also the rule that when, in legal pleadings, the defendant is charged with having wrongfully and unlawfully done the act complained of, the words are only words of vituperation and amount to nothing unless a cause of action is otherwise alleged.

To constitute a tort two things must concur: actual or legal damage to the plaintiff and a wrongful act committed by the defendant.

An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. Or to put it this way, when an act complained of is not unlawful *per se*, the characterizing of it as malicious, wrongful, illegal and unjust will not be sufficient to sustain an action.

Stevenson v. *Newham*, 13 C. B. 285.

As was said by Mr. Justice Campbell in *Adler* v. *Fenton:*

It is the province of *ethics* to consider of actions in their relations to motives, but jurisprudence deals with actions in

their relation to *law*, and for the most part independently of the motives.

Adler v. *Fenton*, 24 How. 407.

Said the Chief Justice of the United States (Fuller):

A conspiracy is sufficiently described as a combination of two or more persons, by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means.

Pettibone v. *United States*, 148 U. S. 197.

There must be a combination of minds in an unlawful purpose.

United States v. *Hirsch*, 100 U. S. 33.

Conspiracy does not become a legal wrong, unless an unlawful purpose has been accomplished, or until some act distinctly illegal is done towards its accomplishment.

Wellington v. *Small*, 3 Cush. 145.

Was the action of the majority of the Board of Regents, in removing the plaintiff, which is declared on its records to have been for the welfare of the University, the unlawful, or criminal, or malicious, or illegal purpose for which they combined, and conspired and confederated? Was not that act declared by the highest tribunal of this State to be conclusive, and not subject to review or reversal? If, therefore, it be not subject to review much less to reversal, who is to pass upon its alleged criminality? Can it be reviewed, or reversed by any such collateral proceeding as this? It cannot. It was an act within their jurisdiction. That has been well settled.

Even for the sake of argument assume that the action of the majority of the Board *was* an error—was *wrong*—it was not a purely ministerial, but a quasi judicial act. The same rule holds good.

In the case of *Kendall* v. *Stokes*, the great Chief Justice Taney, delivering the opinion of the Court, said:

"But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a

ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; *even although an individual may suffer by his mistake.* A contrary opinion would indeed be pregnant with the greatest mischiefs."

Mr. Justice Blanc said that there was "a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction, and a case where he acts wholly without jurisdiction," and held that where the subject-matter was within the jurisdiction of the judge and the conclusion was erroneous, although the party should by reason of the error be entitled to have the conclusion set aside, and be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion as if the court had proceeded without any jurisdiction.

Calder v. *Halket*, 3 Moore's Priv. C. Rep. 28.

Said Mr. Justice Field:

Officers acting within their jurisdiction are not liable to civil action, and even when acts are done in excess of their jurisdiction they are not liable unless done maliciously or corruptly.

Bradley v. *Fisher*, 15 Wall. 335, citing Randall *v.* Brigham, 7 Wall. 523.

I will go even further and hold that even if the action of the Board had been purely ministerial, the same rule would hold good as the act was absolutely within its discretion.

IV.—*Damages.*

How then can an action for damages lie? As my learned colleague, Judge Campbell, well says, if the defendants had put the plaintiff out without notice or without cause, it would be at best *damnum absque injuria.*

The plaintiff's declaration assumes as a matter of fact that he had a vested title to a professor's chair, alleges as a fact

that his tenure was for life, avers as a fact that he was illegally dismissed, and claims to be entitled to damages upon such statement of facts.

Actual damages should be actually proved and cannot be assumed as a legal inference from facts.

City of New York v. *Ransom*, 23 How. 487.

The party aggrieved must not only establish that the alleged tort or damage has been committed, but must aver and prove his right or interest in the property or thing affected before he can be deemed to have sustained damages for which an action for damages will lie.

Hutchins v. *Hutchins*, 7 Hill (N. Y.) 104.

V.—*The "Conspirators."*

Conspirators! Who are they? Here, let me take occasion to say—as I shall never have another opportunity—that of all gentlemen with whom it has been my privilege and my pleasure to be associated in any official function, I have never known any who gave evidence of a higher sense of duty than the Members of the Board of Regents. And if I say in the presence of the President of the Board, it is because I deem it but scant justice, that his very heart and soul have been in the University. For a quarter of a century, year in and year out, day and night, unselfishly, unsparingly, courageously, and unflinchingly he has, often with marvelous patience and self-control, and in circumstances that were calculated to discourage any ordinary man—in all kinds of vicissitudes, he has stood in the great cause—the cause of education, and the University.

And my honored colleague, Judge Campbell—a co-conspirator! A man whose whole life has been "as chaste as unsunn'd snow." No man in all the world is less capable of exciting malice or of offering, even by implication, an offence to others—a man of rare, great, exquisite soul—a selfless man, and stainless gentleman. And he too is a conspirator!

Dr. William E. Powell. And at the mention of his name, I am reminded that among the nefarious things charged against the Board when some of us were summoned to Charleston in the Prohibition Case, last winter, one was that in order to avoid publicity, and the better to do a wrongful deed in the dark, we met at Parkersburg in December, 1900, and not here, the seat of the University. Our sole object was to enable Dr. Powell, then afflicted with a mortal illness, to be present at our meetings, and be it said, to his everlasting credit, that he hesitated not, although the hand of death had then all but stricken him down.

Dr. A. H. Kunst is another conspirator,—a man who, as charged, co-operated, confederated and combined with others to do a malicious act. A man so kind, so merciful, so humane, so competent as a specialist, that half his life has been spent, with the approbation of all his fellow-citizens, in the work of caring for those whose lives have been made dark and desolate, on their weary road from the hospital to the grave.

James L. Hamill, another conspirator. No man was ever more scrupulously conscientious in the performance of duty. All his life he has been known for strict adherence to principle. Entrusted with large interests, he has gone step by step to higher places of greater responsibility—a university man by training, always eager to raise the standard of education, and absolutely impervious to influences which might control a less resolute man.

Is there, in all the confines of this Commonwealth, any honest, sane man who will asperse the motives of such gentlemen as these?

Will it be seriously charged that such as they were reckless in the exercise of their authority and heedless of their obligations; that they shirked their duty, outraged justice, and violated their oaths of office?

May it not rather be assumed that they did *not* outrage justice? Justice is an aggressive virtue, and it requires courage, oftentimes at dear cost, to do it.

For what purpose and in what cause did they, and I, with them, combine, and confederate, and conspire, as the complaint has it? Were these gentlemen less mindful of their obligations to the young men and the young women of the State than the defendant whom they removed from the University? Did they not realize that they were acting in the best and highest of all causes—the cause of education? They believed—and they were right—that the students of the University were entitled to the best services of the best teachers who should be selected without regard to geographical, political, sectarian or any other lines or influences. So believing, they held that the only title to a chair in the University was fitness. And, under the test of an honest and impartial scrutiny, they made removals in order to give place to true merit and worth. Was *that* a crime, or a tort, or a wrong, or a "trespass on the case"?

VI.—*The "Influence" System.*

Should the cause of education stand still? Should the standard of a university never be raised? Should this or any institution be degraded and debased and debauched by recognizing mere *influence* as a legitimate claim to patronage? Should the welfare of the students be subordinated either to the hunger or the thirst of those who want place? Should posts of honor, of dignity, and of responsibility be dealt out as plunder or as spoils, under the system which makes of teachers mere dependents, weakening their sense of honor, impairing their usefulness and destroying their independence?

Should not this mighty and majestic work—this power, I will call it—of education, be beyond the arrogance and the artifices of the huckster and the politician to control?

"The winning of honor," says Lord Bacon, "is the revealing of merit without disadvantage." Away, then, with the system—with *any* system—that would make men and women dependent except upon their merit and their worth. Every

teacher should go to his work with a mark of the highest honor, and not as the beneficiary of this vile instrumentality—influence. Whenever one in public employment is insolent and insubordinate, heedless of obligations, reckless of rules, and defiant of superior authority, it is because "influence" has vouchsafed tranquillity.

VII.—*Education.*

What is this great work which the defendants were promoting? Education! The most comprehensive of all works. The guidance of the young. Doing away with all mischief and sottishness; paying homage to the beautiful and the good; inculcating love of home; sympathy with the poor; inspiring courage to stand for the right against the wrong; recognizing the everlasting distinctions of moral good and evil. This is to educate. Yet education does more, for, of all the blessings which it has pleased Providence to allow us to cultivate there is not one which breathes a purer fragrance or bears a heavenlier aspect than education. It is a companion which no misfortunes can depress, no clime can destroy, no enemy can alienate, no despotism can enslave: at home a friend, abroad an introduction, in solitude a solace, in society an ornament.

"Without it," exclaims a prince of British orators, "what is man? A splendid slave, a reasoning savage, vacillating between the dignity of an intelligence derived from God, and the degradation of passions participated with brutes, and in the accident of their alternate ascendancy, shuddering at the terrors of a hereafter or embracing the horrid hope of annihilation. What is this wondrous world of his residen ce?

—'*a mighty maze and all without a plan*'

—a dark, and desolate, and dreary cavern, without wealth or ornament or order. But light up within it the torch of knowledge, and how wondrous the transition! The seasons