

Summer 1999 2d Series + Volume 2 + Number 4

For every wrong there is a remedy.

Things happen according to the ordinary course of nature and the ordinary habits of life.

The law never requires impossibilities.

Private transactions are fair and regular.

A thing continues to exist as long as is usual with things of that nature.

The law disregards trifles.

Calif. Civ. Code §§ 3523, 3546, 3531, 3545, 3547, 3533.





Ross E. Davies Editor-in-Chief

DAVID M. GOSSETT & MONTGOMERY N. KOSMA Executive Editors

Senior Editors
SUZANNE GARMENT
THOMAS B. NACHBAR

Contributing Editors

Daniel G. Currell

Susan M. Davies

Thomas H. Dupree, Jr.

James C. Ho

Edward N. Siskel

Student Editor Susan Kearns

Board of Advisors

Robert C. Berring A. Morgan Cloud David P. Currie Richard A. Epstein Leonard Garment

Mary Ann Glendon R.H. Helmholz Philip B. Heymann Dennis J. Hutchinson Henry P. Monaghan A.W.B. Simpson Kate Stith-Cabranes William W. Van Alstyne

The Green Bag, Second Series, is published quarterly by The Green Bag, Inc., an Ohio nonprofit corporation. It is printed by Joe Christensen, Inc., in Lincoln, Nebraska. ISSN No. 1095-5216. Copyright © 1999 The Green Bag, Inc. Thanks to Gibson, Dunn & Crutcher LLP for their support.

SUBSCRIPTIONS: One year (four issues) costs \$35. Single and back issues are \$12. Subscriptions start with the next issue, and are automatically renewed absent timely cancellation. Email subscriptions@greenbag.org or see inside back cover.

EDITORIAL POLICY: We are committed to publishing authors' ideas in their own words, which means we don't fool around much with either. We assume our authors do careful research and provide accurate references upon which others can rely. We will fix typos and other small problems that we notice, and make minor non-substantive changes to put a piece in the *Green Bag* format. We may make a few additional suggestions, but they will be only suggestions.

Submissions: We welcome unsolicited manuscripts, preferring submissions via email to editors@greenbag.org. We also accept diskettes, and will consider hardcopy submissions in cases of hardship. We accept material that is short, clear, interesting, and law-related – up to 5,000 words, and 0 to 50 footnotes. We especially encourage the submission of poetry, anecdotes, cartoons, and other miscellany.

LETTERS: We welcome letters, which we subject to the same standards as submissions (who would wish to read a letter with more than 50 footnotes?).

DEADLINES: August 1 for the Autumn issue; November 1

for Winter; February 1 for Spring; May 1 for Summer.

Dealing with Authority: Citations should be accurate, complete, and unobtrusive. Familiar cases may need no citation. Most important, our readers should be able to find the authorities on which our authors rely. Authors may use whatever citation form they prefer; we will make changes only where necessary for our readers' ease or to keep footnotes from looking like goulash. The preferred citation form for any article published in the Green Bag, Second Series, is __ Green Bag 2D __ (__) (now Y2K compliant).

COPYRIGHT, ETC: If no copyright notice appears in the author note on a piece, the *Green Bag* holds the copyright. We hereby grant permission to duplicate such items for classroom use, provided (1) copies are distributed at or below cost of reproduction; (2) the author and the *Green Bag* are identified; (3) proper copyright notice is affixed to each copy; and (4) the *Green Bag* is notified of the use. Duplication, including electronic transmission and republication, is otherwise prohibited without advance written permission.

If a copyright notice appears in the author note, all requests for permission to duplicate or republish must be sent directly to that author.

Note: The *Green Bag* corollary to the Heisenberg Uncertainty Principle: It is impossible to know at the same time where the law is and in what direction it is moving.

CORRESPONDENCE: The Green Bag, P.O. Box 14222, Cleveland, Ohio 44114. Telephone: (202) 955-8252. Email: editors@greenbag.org. Web: www.greenbag.org



Contents

Ex Ante

345 Death Duty

A Somewhat Modest Proposal To Bring Executions To The People Joshua Dressler

Articles

351 Yugoslavia

Morgan Cloud

361 The Sunday Mails

David P. Currie

367 Marshall's Questions

Walter Dellinger ⊕ H. Jefferson Powell

379 Some Reflections on Oliver Wendell Holmes, Jr.

Grant Gilmore

395 Dean Breck

as recorded by Erik M. Jensen

403 The More Law, the Less Rule of Law

Stephen Williams

From the Bag'

411 David Daube

Peter Stein

413 The Self-Understood In Legal History

David Daube

Terms of Art

421 Pardon My Law French

David Franklin

Reviews

425 Taking Justice Thomas Seriously

Scott Douglas Gerber
First Principles: The Jurisprudence of Clarence Thomas
John C. Eastman

Painting a Ship with the Sentencing Commission

Kate Stith & José Cabranes
Fear of Judging: Sentencing Guidelines in the Federal Courts
Suzanne Garment

The Spirit of the Ghost of Islamic Law?

Bernard Weiss The Spirit of Islamic Law Abdullahi A. An-Na`im

EXPOST

449 If Great Literary Works Had Been Written By Lawyers Kevin Underhill