Mr. O'Halloran's vaunted length of experience, gives him, not only a disposition to indulge in sneers which do not fit, but also a capacity to import into a question what is irrelevant and inaccurate, and calmly to shirk the essential point, namely that in his evidence he was essentially in agreement with me. That being so, there is not, and cannot possibly be, any real ground for his objection to my observations; and to continue to make such objection is clearly "frivolous and vexatious." —I am, &c.,

COLEMAN PHILLIPSON.

University, May 10, 1923.

12.5.23.

PROFESSOR PHILLIPSON AND MR. O'HALLORAN.

To the Editor.

Sir—I would not further trespass on your space but for the fact that Professor Phillipson has dared to say that the remark in my last letter that he had made "strictures on the bench and bar of South Australia" was untrue. So far as it refers to the bar, this is one of the matters upon which I have not completed my evidence, and until then, as already intimated, I do not propose to discuss it in the press. As regards the bench, the position is as follows:—Before the Royal Commission, Professor Phillipson, referring to a clear case of counsel throwing mud at a witness said, "I should prefer that the judge should use the powers he now has and report counsel to the Law Society." Referring to conduct of counsel, which he characterised as "monstrous," Professor Phillipson was asked how he would prevent it, and replied, "Another way would be to appeal to the judges to use the powers that they now have. They have absolute powers in the court. Some questions amount to a criminal offence." Rightly, or, may be, wrongly, I regard these as statements that the bench has two distinct powers to check the alleged improper practices of counsel, but does not exercise either of such powers. Incidentally I may say that the bench does not, in my opinion, possess any power to report counsel to the Law Society, unless Professor Phillipson when he asserts that they have such power is referring to mere physical ability to write a letter of complaint. Professor Phillipson also stated in his evidence (I am again quoting from the official transcript)—"I consider that counsel abuse their positions because of the extraordinary latitude allowed them by judges and by the law itself." Professor Phillipson, in his letter under reply, says that he "never made the slightest disparaging references" to the bench. Are the above quotations from his evidence meaningless, or did he use them and regard them as merely complimentary and eulogistic references? I ventured to describe them as "strictures on the bench," and because I so ventured I am at once charged by Professor Phillipson, or rather, I should say, found guilty, of making a remark which is quite untrue. I note that Professor Phillipson claims that my evidence in some respects supports his views. It may be that it does, but even that fact will not necessarily compel me to retract what I have said. I promise, however, to reconsider this aspect of my evidence, and see whether I cannot remove this possible reproach.—I am, &c.,

T. S. O'HALLORAN.

Steamship Buildings, Currie-street.

14.5.23

PROFESSOR PHILLIPSON AND MR. O'HALLORAN.

To the Editor.

Sir—I expected that my brief letter in "The Advertiser" of May 11 would definitively convince Mr. O'Halloran that his objections are unfounded. But he publishes another letter, May 12, which is feebler even than its predecessors. As the whole matter is of public interest and importance, I feel it my duty to reply, and this time I hope to administer the coup de grace, though as gently as possible. This little controversy is due solely to Mr. O'Halloran's uncalled-for and unjustifiable attack on my evidence before the Law Reform Commission. The courteous chairman (indeed I found all the members most fair and courteous) suggested that the witness should not adopt such a course, but he disregarded the chairman's direction, and threatens to disregard it again. Considering Mr. O'Halloran's unwarrantable pertinacity, and especially his misdirected sneers, for which he has not yet apologised, I must show now a little more fully, and, once for all (I trust), the nature of his objections and their ground, his error in misinterpreting simple language, in drawing conclusions from manifestly clear data, and, what is even more serious and significant, in presuming to pronounce publicly on certain points with inadequate knowledge.

Now, in his last letter ("Advertiser," May 12) Mr. O'Halloran observes, with a sort of cock-of-the-walk flourish, that I have "dared" to say that his statement is untrue. Does he think he is addressing a trembling, helpless witness in the box? Does he expect to derive a controversial advantage by using such a word as may prejudice in his favor the minds of readers? Not only did I "dare" to say it, but I reiterate it now. Perhaps Mr. O'Halloran uses the expression "dare" because he takes the word "untrue" necessarily to mean "lie," whereas it was clearly used in the sense of inaccurate, or contrary to fact. Surely he knows the meaning of "false representation." However, Mr. O'Halloran quotes passages from my evidence to justify, if not his sneers, at all events his conclusion that I disparaged the bench and the bar. Let us then look at the passages quoted, together with Mr. O'Halloran's context.—

1. Mr. O'Halloran says: "Before the Royal Commission, Professor Phillipson, referring to a clear case of counsel throwing mud at a witness, said, 'I should prefer that the judge should use the powers he now has and report counsel to the Law Society.'" The fact is I was asked by a Commissioner whether I would recommend that the judge should be empowered directly to inflict a penalty on such an offending counsel; I pointed out the great difficulties involved in such a course, and gave the above answer. So far, this does not look like my disparaging the bar, but rather protecting it, if I may be permitted to say so.

2. Mr. O'Halloran continues: "Referring to conduct of counsel, which he characterised as 'monstrous,' . . ." Now, this passage, couched as it is, without reference to the kind of conduct I denounced as monstrous, may create a false impression through its apparent begging of the whole question. I ask the reader to note the insinuation conveyed in the words as they stand. They make it seem that I employed such an epithet to characterise the conduct generally of counsel in general. Whether Mr. O'Halloran wrote in this form deliberately or not, I don't know; if deliberately, it is a base trick in argument; if not deliberately, it is a careless mode of expression, from which an untrained reader may get a wrong idea. Certainly I used the word "monstrous," but of what and of whom? A Commissioner asked my opinion of certain questions, among them the following put by a solicitor to a witness:—"Did you seduce your governess?" when, in fact, there never had been a governess in the witness's household, and such an imputation was in any case untrue. I promptly answered that counsel knew that the implication was false, it was a "monstrous" question (I am prepared to use the word "diabolical" in such circumstances), and then I went on to say that most probably he was instructed to ask such a question, so that the real responsibility lay on the instructor. Does this look like disparagement of the bar, or again protection of the bar?

3. Mr. O'Halloran next says:—"Professor Phillipson was asked how he would prevent it (asking improper questions), and replied, 'Another way would be to appeal to the judges to use the powers that they now have. They have absolute powers in the court. Some questions amount to a criminal offence.' Now the last sentence refers to such a question as I before described as monstrous; so that Mr. O'Halloran will not quarrel about that. As to the other part of my statement, I spoke of the power of the court to report offending counsel to the Law Society. Every court in every civilised country has a natural and inherent right, irrespectively of statutes, ordinances, or other express authorisation, to report misconduct of a legal practitioner to the governing body of the profession. What in the world is the organisation of a profession for? What in the name of commonsense does any Law Society exist for, if among other functions, it is not to look into complaints against members made by a judge, or, indeed, by any responsible citizen. Surely one of the principal objects of establishing a governing body in a recognised profession is that it may resort to disciplinary measures against a peccant member. But note the delicious comment of Mr. O'Halloran, who also gives us his "opinion" (free of charge, I trust):—"Incidentally, I may say that the bench does not, in my opinion, possess any power to report counsel to the Law Society, unless Professor Phillipson, when he asserts that they have such power, is referring to mere physical ability to write a letter of complaint." Leaving the bad grammar aside, was there ever a more fatuous and pettifogging remark? And, what is more, his opinion is wrong in fact. In England the judges may not only punish a barrister for contempt of court arising, for example, out of language used by him in the discharge of his functions, but may also report serious misconduct of a barrister to the benchers of his Inn. As a barrister of one of the most distinguished of the Inns of Court, the Inner Temple, I am proud to say that cause for this hardly ever arises; though in the case of solicitors, I am afraid their slate is not quite so clean, judging from reports now and again sent to their Law Society). This power is possessed equally by judges in South Australia, until it is taken away by statute.

4. Mr. O'Halloran goes on:—"Professor Phillipson also stated in his evidence—'I consider that counsel abuse their position because of the extraordinary latitude allowed them by judges and by the law itself.'" Certainly I made some such statement as that, when I was discussing the question of privilege of barristers, and recommended a certain modification of it by statute. Now my actual words used obviously could not always be reported in full, even for the official report, the reporter being frequently obliged to summarise. Still, even as that short statement stands, how many readers would interpret it in the sense that the judges are unduly remiss in the execution of their duties? Surely, a fair-minded person will get the true meaning by reading the words "allowed them by judges" in association with the remaining part of the sentence; so that the sense is that as the law allows an extraordinary latitude to barristers, the judges can scarcely do otherwise, as they are bound by the law. Good Heavens! it was exactly because of this that I recommended an alteration of the law concerning counsel's privilege. On such brave arguments and brilliant interpretation does Mr. O'Halloran constitute himself a defender of the judges, forsooth!

5. Now as to the bar. Mr. O'Halloran, with self-assumed importance and fussy gusto, as well as with a lamentable lack of sense of humor and proportion, constantly speaks of the bar as though it were some sacred entity wrapped in celestial effulgence. He sets himself up as its jealous guardian, ready to warn off, with quixotic gesture, anyone who should so much as dare to breathe upon it. The humor of the situation (unperceived, alas! by Mr. O'Halloran) is twofold. In the first place there is no bar at all in the proper sense of the term in South Australia (convulsive gasp on the part of Mr. O'Halloran). A few—and a very few—members practise chiefly, if not exclusively, as barristers, whilst the majority of practitioners do almost entirely the work of solicitors. And there is a profound distinction between the two branches: for example, barristers proper may not be in partnership, may not hold conferences with lay clients, and, with certain exceptions that come under the general law, cannot sue for fees, and so on. Secondly, Mr. O'Halloran has himself said far severer things and more of them than I have regarding the methods of cross-examination by his colleagues. In the report of his evidence in "The Advertiser," May 8 (official report not yet to hand), he has a long calendar of charges—irrelevant questions, cross-examination "pushed to an extreme," its purpose "to create an atmosphere," the considerable lengthening of cases due to "cross-examination with a view to getting contradictions," the putting of "improper questions," and even "browbeating witnesses." And in the face of his own comprehensive condemnation of his colleagues he actually puts on a pretentious air of alarmed, immaculate innocence with a kind of "noli me tangere" attitudinising; he tries to overawe me (and perhaps the Commission, too) with the fact of his 36 years' experience—as though experience when it is narrowly circumscribed and monotonous is of any value, or when it is without adequate intellect, penetration, and vision to illuminate it and vitalise it into wisdom; he quotes with self-complacency Tennyson's line, "Better fifty years of Europe than a cycle of Cathay," and cannot see that its point is entirely against him and in my favor. May I in return give him a quotation—it is an Eastern proverb:—"Frogs in the pond know nothing of the great ocean." After all, why should Mr. O'Halloran blame me for discovering, say, in 36 hours what it has taken him 36 years to discover? He is not very encouraging.

6. Finally, in order to complete the promise I made at the beginning, I must refer to that part of Mr. O'Halloran's evidence where he says:—"A man of the lower class might think he was not being tried by his peers, but by another class" (that is, if an educational test were required for jurors). This is extravagant nonsense. The expression "trial by peers" gained currency through the famous phrase "judicium parium" of Magna Carta (1215), though the phrase is much older than that and was used in England long before trial by jury in its modern conception was instituted. In the first place, it did not refer to criminal law at all; and, secondly, it related only to peers in the proper sense of the term, as is clearly seen from chapter 21 of the Charter, which expressly states that neither earls nor barons should be amerced except by their peers. Obviously, then, the question of trial by one's peers may concern England, but it does not at all concern us here in South Australia; and even in England peers are triable for misdemeanors by an ordinary jury, say, of artisans. Mr. O'Halloran's interpretation of "trial by peers" is not only entirely erroneous, unintelligible, and impracticable, but is also pernicious, as tending to bring about a factitious cleavage between different sections of the community, especially at a time when our world and civilisation are begging and praying for harmony, solidarity, and co-operation in national affairs as well as in international relations.

The moral that can be drawn from the above exposition might have a pungent savor; and, mindful of Mr. O'Halloran's seniority in age, I abstain from drawing it. I don't want to offend his feelings more than I can possibly help in an unpleasant task, which I was, in duty to myself and to the public, bound to perform, and which was imposed upon me by an assailant who is a man of standing in the community.—I am, &c.,

COLEMAN PHILLIPSON.

North Adelaide, May 12, 1923.

15.5.23

PROFESSOR PHILLIPSON AND MR. O'HALLORAN.

To the Editor.

Sir—Professor Phillipson has administered his coup de grace, and, mirabile dictu, I still live. I am described as "a frog in a pond;" as either "using a base trick or a careless mode of expression;" as "making famous and pettifogging remarks, possessing only a narrowly circumscribed and monotonous experience, and without adequate intellect, penetration, and vision to illuminate it and vitalise it into wisdom;" as writing "extraordinary nonsense," &c. I wonder that such a distinguished barrister of one of the most distinguished Inns of Court, the possessor of an intellect so great that he is able to discover in, say 36 hours, something—I am not quite sure what it is—that I have taken 36 years in discovering, occupies his valuable time in even noticing, let alone in administering his coup de grace to so unimportant an individual. Professor Phillipson must have forgotten the following passage from his evidence:—"It is quite possible to get all you want from a witness in a quiet, simple, and gentlemanly manner, without jumping down his throat or imputing slanderous things concerning him." I have twice told Professor Phillipson that I do not, at present, intend discussing in the press the statements which I ventured to characterise as strictures on the bar. Moreover, Professor Phillipson has now discovered that there is no bar in South Australia. As regards the bench, I repeat the following quotation from Professor Phillipson's evidence:—"Another way would be to appeal to the judges to use the power that they now have. They have absolute powers in the court. Some questions amount to a criminal offence." I wrote that I regarded this as a statement that the bench had power to check improper practices of counsel, but did not exercise such power. Professor Phillipson's sole answer to my criticism of this evidence is limited to the last sentence. He says:—"Now the last sentence refers to such a question as I before described as monstrous, so Mr. O'Halloran will not quarrel about that." My quarrel is not with the last sentence, but with the suggested remedy by way of "appeal to the judges to use the powers they now have," coupled with the only inference that can be drawn from those words. Professor Phillipson suggests that I should apologise to him. I do so now. I apologise to him, as a barrister of 16 years' standing in one of the most distinguished Inns of Court, for my temerity in holding and expressing an opinion which is contrary to the views he holds.—I am, &c.,

T. S. O'HALLORAN.

Steamship Buildings, May 14, 1923.