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Article Title: Silas A Holcomb (Part Two)

Full Citation: N C Abbott, "Silas A Holcomb (Part Two)," *Nebraska History* 27 (1946): 3-17

URL of article: <http://www.nebraskahistory.org/publish/publicat/history/full-text/NH1946SAHolcombPt2.pdf>

Date: 6/02/2017

Article Summary: Holcomb had a long career as district judge, governor, judge of the state Supreme Court, and member of the Board of Control. Abbott asserts that Holcomb's finest work was on the board of control.

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Cataloging Information:

Names: Silas A Holcomb, J L Norval, Charles Saunders, Henry Gerdes, Howard Kennedy, J J Sullivan, Edward Rosewater, Daniel Freeman, David C Troyer, A Jorgensen, John H Morehead

Place Names: Broken Bow, Nebraska; Seattle and Bellingham, Washington

Keywords: *State vs. Savage*, Freeman Public School Bible Reading case, Board of Control, Populist (party), Silas A Holcomb, Edward Rosewater, Daniel Freeman

Silas A. Holcomb

(Part Two)

N. C. ABBOTT

III

At the time when Silas A. Holcomb ascended to the Supreme Court Bench in January, 1900, there were only three justices to carry on the work and the Court was far behind in its schedule. He was out-ranked for the first two years by J. L. Norval, C. J. and J. J. Sullivan. Holcomb began vigorously and did his part in the deliberations of the august body and in the writing of decisions.

However, the English of Judge Holcomb was not especially good—in fact, it was often notoriously bad. And it was particularly glaring in contrast with the exact and clear writing of Judge Sullivan on the same bench. Holcomb's decisions did not compare favorably in style and diction even with those of the Chief Justice, and no one would maintain that Judge Norval was much of a legal stylist.

Holcomb never learned the value of paragraphing. For instance, the decision in *Peterson vs. Kingman* (*Nebraska Reports* 59, p. 667) is written without a single break, as far as I could see, in a behemoth paragraph of almost four pages, approximately 1,300 words, though the syllabus has six paragraphs. Judge Holcomb failed to get his clear thinking into his writing.

One of the most engaging verdicts, reaching back into the murder of Barrett Scott, defaulting treasurer of Holt County, relates to the recovery of the reward offered by a secret society for the finding of the murdered man. The court upheld the payment of the reward.

Holcomb was inclined to include in his decisions more of the testimony offered in the lower court than were his fellow-judges. His decisions were longer and more circuitous; though, since the other judges concurred, they must have come close to the established belief. Not always were the opinions unanimous. Hol-

comb and Sullivan represented the Populist angle. Sometimes the Chief Justice withheld his approval.

In Volume 65 of *Nebraska Reports*, reviewed by me, the pages used in the decisions written by Holcomb run up to a total of 116. As there were three judges and nine commissioners in the court as constituted, his quota would have been about eighty-five pages. So in dry measure, Justice Holcomb carried more than his fair load.

But his expression was not at all improved over what it was at his first essay into the writing of decisions. He still constructed bungling sentences in outlandishly colossal paragraphs. He was prolix, verbose, circuitous, and not always clear.

Two decisions by Justice Holcomb, reported in Volume 65, are worthy of special attention.

The first, giving its full title, is *State of Nebraska ex rel. Bee Building Company et al., Relators vs. Ezra P. Savage, Governor, et al., Respondents*. It is commonly referred to as *State vs. Savage*. The case relates to the proper and adequate taxation of railroads and other corporations and was an effort originally to compel through mandamus the State Board of Equalization to reassemble and gather additional information as to proper assessment. The decision was read in the September session and gives evidence of careful study by the writer. The mandamus was denied. The Court's reasoning was upheld in the following words: "The rule is universal that such a proceeding can be resorted to only for the purpose of compelling action, and cannot be made a means of correcting errors or reviewing the proceedings of the assessing body."

The second decision in which Holcomb took part was an affirmation of the whole court but stated additional reasons of his own. This was the celebrated Freeman Public School Bible Reading case. It is found on page 853 and its full title is *State of Nebraska ex rel. Daniel Freeman v. John Scheve et al.*, and on page 876 there is a second motion for rehearing.

The case grew out of a stubborn determination on the part of Daniel Freeman that the Bible should not be read, prayers offered, religious instruction given, and sacred hymns sung in public

school district No. 21 in Gage County, Nebraska. Before this action Freeman had gained a certain fame for taking out the first homestead in the United States under the well known Homestead Act. In this school district was included the famous homestead, part of which has recently¹ become a national park.

For several years Freeman had prevented the teachers from carrying out the somewhat common practice of opening exercises that included these religious elements. In the year 1899, Miss Edith Beecher was employed as teacher in the district and asked the school board for permission to hold such exercises. This permission was granted. Freeman objected to the practice. The State Superintendent, William R. Jackson, upheld the board. A mandamus to the board ordering the discontinuance was denied by the district court and the question was carried up to the supreme court.

In the higher court a brilliant and incisive decision was prepared by Commissioner Ames concurred in by C. C. Duffie and Albert and upheld by the whole court in these words: "It is ordered that the judgment of the district court be reversed, and that a peremptory writ as prayed issue from this court to the respondents and their successors in office."

This controversy rocked the state. There is nothing that so works upon the passions and prejudices of people as religious views and practices. Most distinguished disputants entered into the polemics and at times one would think the fiery assaults of the Middle Ages were bursting forth anew.

Several members of the court gave their opinions, stating that in agreeing with the reversal they disagreed with some of the reasons advanced for the reversal. In comment of this sort we may get some idea of the inner struggle that went on in Holcomb's soul before he set down his conclusions. He was the grandson of a Baptist preacher and was, as was also his wife, a member of the so-called Christian Church, or Disciples of Christ. As a follower of the Man of Galilee he revolted at the thought of preventing the spread of what he regarded as the living gospel; yet as a judge sworn to protect the American

¹ 1941.

ideals of fair play and democracy and believing in absolute separation between church and state, he joined in maintaining the constitutional rights of a parent to veto the teaching of sectarianism in a public school at the cost of the public taxpayer. The judge, it might be added, was not inclined to offer prayers himself in public, though he favored such practice.

His own concurrence, in part, is expressed in these words: "The provision of the constitution. . . should be construed so as to give it the scope and effect intended by its framers and the people who adopted it. This is accomplished by firmly excluding therefrom all forms of instruction calculated to establish and confirm in the mind of the students those theological doctrines and beliefs which are peculiar. . ."

A study of the Holcomb decisions reported in Volume 70, September term, 1903, and January term, 1904, shows little of interest for a layman comparable to the ones to which I have already made reference. He appears as author of nine decisions and these show a marked improvement in literary style over his earlier efforts. They are paragraphed and not so prolix and circuitous as the ones on which I have commented.

This improvement, one may surmise, was due first and foremost to the fact that Holcomb had himself improved and grown more proficient in his job. Second, that the court was not limited to three overworked members, but had nine commissioners in addition, some of them highly gifted, to lift part of the burden in an overloaded docket. We might put down a number in brief form: his actual growth in knowledge and ability to write; less pressure in amount of work to be done; observance of the skill of other writers; contact and discussion with his fellow judges and with the commissioners; and probably more efficient secretarial assistance.

At any rate, Holcomb was a more efficient judge in 1903 and 1904 than in 1900 and 1901. As one bit of evidence I quote a few words from *Chicago Burlington & Quincy Railroad Company v. David C. Troyer* which related to a suit for damages by an injured man who had been hurt in the shipping of cattle; "A person with right of passage on a freight train, for the purpose of attending to his stock being shipped by the railroad company

on such train, sustains to the company the relation of passenger to carrier, but in a restricted and modified sense. He is required to perform the duties for which his passage is provided and, for such purposes, assumes the risks incident to their performance."

In Volume 75, which covers the period from November 12, 1905 to February 22, 1906, there are two decisions written by Holcomb, then Chief Justice. They are: *Lowe v. Prospect Hill Cemetery Association*, page 85, and *Application of Jorgensen*, page 401. The former is dated December 6, 1905, and the latter, January 3, 1906. They were handed down as Holcomb was packing up his personal belongings and getting ready to move out.

The first dissolves a perpetual injunction relative to the use of land and on a rehearing of September 21, 1906 this dissolution was upheld, opinion by Judge Letton. The second confirms an order of the board of fire and police commissioners refusing the application of A. Jorgensen to sell liquors. This had been appealed from the district court of Douglas County.

Until the matter of the fewness of opinions written by Holcomb as compared with the many written by him several years before is explained, one might get an entirely erroneous opinion. This would be almost certainly the first impression: Holcomb had not been re-elected; the court with the help of commissioners, though now reduced from nine to six, was catching up with the docket; the Chief Justice assigned the writing to his colleagues, both judges and commissioners, and was perfectly willing to coast until the end of his term.

But this first impression, gathered wholly from the printed volume, would be essentially wrong. Silas A. Holcomb, although he appeared the picture of health, had begun to fail physically some years before and was now suffering greatly from a disease which seriously impeded his activity. Even back in his days as governor he was taking means to check, if possible, the rheumatism, arthritis, or other muscular disease that seemed to be hereditary in his family.² His activity was now seriously checked and he had already made plans to move to the Pacific coast where climatic

² L. J. Abbott was his personal physician and I often went with Dad on his calls. My mother frequently took flowers from the hospital greenhouse to Mrs. Holcomb.

conditions would be more favorable to his health. A few days ago³ former Governor Morehead suggested to me that Holcomb's enormous body had probably placed a very heavy load on his heart.

IV

Without severing all of the connections with Nebraska, the Holcomb family soon took up residence in Seattle, Washington. The climate did benefit Judge Holcomb's health and he gained some lucrative practice on the Coast. Mid-west interests were glad to entrust business to the former governor and chief justice. After a period of two years or slightly more, the family returned to the old home at Broken Bow.

Judge Holcomb was again a citizen of our state when the voters at the November election, 1912, approved a constitutional amendment, establishing a so-called Board of Commissioners of State Institutions, name later changed to Board of Control. This board was instituted to improve the conditions in the fifteen state institutions by taking them out of partisan politics, placing them under a non-partisan board, establishing a practical civil service tenure, eliminating collection of funds from institutions to be used at elections, and taking direct responsibility of institutional management from the shoulders of the governor and two boards already created. The appointment of the members of the Board of Control, who were entrusted with the onerous duties, was assigned to the governor of the state who, beginning in January, 1913, was John H. Morehead, of Falls City. The constitutional amendment made it incumbent on the governor to arrange for not more than two of the three members of the same political party. Terms were to be for a six year period and confirmation must be made by the state senate with at least a two-thirds ap-

³ October, 1941. At the request of Morehead I had gone to see him particularly that he might accompany me to call on Arthur J. Weaver, former governor, and Henry Gerdes, former Board of Control member, two distinguished fellow citizens of Morehead's, both of them very low. In the course of my visit John H. Morehead gave me some intimate details of his official contacts with Holcomb, which may never be revealed, though they govern my opinion in part. . . N.C.A.

proval. To put the board into operation three persons were to be chosen for terms respectively of two, four and six years. The person appointed for the shortest term was to become chairman; for four year term, vice-chairman; and the one with the longest term would be lowest in rank. This matter of precedence was to be followed so that every two years there would be a change in chairmanship.⁴

Morehead carefully looked the field over and not long after the legislative session opened sent his names to the senate-the three G's as they were dubbed by the newspaper folk. The nominees were C. H. Gregg, of Kearney, Republican, for the short term; Charles Graff, of Bancroft, Democrat, for the four year term; and Henry Gerdes, Democrat, the Governor's close friend, of Falls City, for the long term. These men may have been excellent for these positions but the manner of their appointment proved to be a political mistake. The senate had not been consulted in the matter: the two democrats drew a total of ten years, under the scheme, while the Republicans were allowed only two. This aroused the Republicans, who, under the leadership of Senator Charles Saunders, of Omaha, immediately repudiated the selectees in executive session. The avowed reason was that the Governor had acted most unfairly and in a highly partisan manner though the constitutional amendment intended to eliminate partisanship.

There the matter rested for a matter of two weeks; Republicans and Democrats indulged in sniping at each other with shots of Punic faith. It is interesting to one on the inside, this story of how the two factions came together after Governor Morehead made friendly overtures to his opponents, led by Senator Saunders.⁵

Governor Morehead was particularly interested in the acceptance of Henry Gerdes to this post, and this fact explains the following paragraphs in the *Nebraska State Journal* of March 19, 1913:

⁴ This system of progressive chairmanship has recently been modified to an elective choice. . N.C.A.

⁵ Some day, this story, with minute and intimate details, will, I hope, be unearthed from among my private papers. But not yet. . N.C.A.

The Senate yesterday afternoon in executive session asked Governor Morehead to renominate Henry Gerdes of Falls City a member of the state board of control, and the governor did so and also sent in the names of ex-Governor Holcomb of Broken Bow and Judge Howard Kennedy of Omaha, the latter a republican, as the other members of the board, and the senate confirmed the nomination of all three nominees by unanimous vote.

Judge Holcomb of Broken Bow has served the state as governor and judge of the supreme court. He is well known on account of his administration as governor and on the supreme bench. During his long service he established a reputation for fair dealing and honesty. He recently served as referee for the supreme court in the suit of the state, which was instituted by Governor Aldrich for the purpose of ousting two fire and police commissioners of South Omaha under the Sackett law for failure to enforce laws regulating the sale of intoxicating liquors. His health has become impaired by rheumatism and his physical condition was taken into consideration by the senate and the governor when his appointment was made. It was believed that even if he is prevented on account of physical disability from making frequent visits to state institutions he will be an invaluable man in the office of the board.

In all of the years since John H. Morehead left the governorship he has felt that his greatest forte lay in the choice of excellent men for appointment to posts under him, referring repeatedly to those who organized the board of control on July 1, 1913, but speaking of others as well. Holcomb himself thought that his greatest service was as district judge. I feel his finest work was on the board of control.

The men selected were admirably fitted for organizing the board of control. They studied the set-ups in other states and arranged for reports following in general those in use in our neighboring state of Iowa. Officers in charge of the various institutions were given to understand that, if found efficient, they would be expected to carry on for a biennium. At the end of that time it would be a matter for reconsideration. A vast majority of the executive heads were found deserving and given commissions by the board of control in about two years.

The board ordinarily acted as a unit with little friction. Holcomb supervised the legal and business details. Gerdes had lands,

buildings, care of stock, improvements, and so forth. Kennedy looked after education, care of personnel, and efficiency of service rendered. Each endeavored to supplement the other.

Of the first recorded disagreement I have a very vivid recollection. It occurred on New Year's Eve, 1913, just six months after the Board took over. As superintendent of the Nebraska School for the Blind, I had a number of details to call to their attention and by appointment I was to report at the office by four in the afternoon.

The office was crowded and I was kept waiting until after five. My estimates were allowed rapidly and without much comment, a question or two now and then with my explanation. We were all waiting for the clash. I had asked for a victrola and fifty records for the music department. Our teachers thought this instrument would help the blind boys and girls in their own development. Judge Kennedy, whose wife was a skilled musician, was urging the purchase. The item was reached and Judge Holcomb let loose. "Wastefulness, fad, pleasant plaything-" he spoke with vigor and vehemence.

By this time I was roused. I charged Judge Holcomb with unfairness to me personally. "The trouble with you, Governor, is that you are unfair to me because you fear the public will say you are favoring me on account of our old friendship; because my father was an appointee of yours and superintendent of the Lincoln State Hospital, you fear you may favor me. You are so intent on not favoring me you bend backward and are unfair."

The room had become tense by these two bursts of temper. Governor Holcomb broke the tension by a witty sally. "If you can tell me, Abbott, just how I can bend backward with this twisted body, I'll be grateful."

Not many folk can joke on such personal infirmities. The three of us looked at this bent and broken giant, now a twisted body, unable, without help to get out of his chair. I apologized for my outburst.

Then the chairman in a very low tone turned to Member Gerdes, "Will you stick with me, Henry?"

"No, I've changed my mind, Governor. Abbott has convinced me."

The chairman signed the estimate on the dotted line and wrote something else: "Yes, Kennedy, Gerdes. No, Holcomb." . . . "You may get your victrola, Abbott. The board has had its first recorded disagreement."

The legislature met again in January, 1915. Morehead had been chosen as governor for a second term. Holcomb's term would expire on July 1. Would he be reappointed?

Morehead was himself for a time in doubt as to his duty under the circumstances. He was beset by proponents and opponents of the reappointment. There was reason to suspect that the senate would reject and this would be a blow to the chief executive's prestige. No action was taken for several weeks. Under date of December 28, 1914, the *State Journal* had published an advance feeler in the matter as follows:

Governor Morehead's praise of ex-Governor Holcomb as a member of the state board of control and non-committal statement as to whether or not he intends to renominate the ex-governor for a term of six years, has created suspicion that the governor as the nominating source, has a trump which he might play by merely failing to nominate any one during the next session of the legislature, and claiming the right to appoint between sessions of the state senate.

Some contend that failure to nominate does not necessarily mean the incumbent holds over until the next legislature. Judge Holcomb's term on the board expires July, 1915, as provided by the amended constitution of the state. The legislature is said to have intended to prevent appointments between sessions of the senate, and to require approval of two thirds of the senate, but it provided by statute that the governor can make appointments between sessions to fill vacancies, such appointments to hold good until the thirtieth day of the next succeeding legislature. Judge Holcomb's term of office expires the first of July next year.

Others contend that the legislature made its intent plain when it said regarding vacancies:

"Provided, however, that a vacancy shall not be deemed to have occurred under this section providing for appointment between legislative sessions, if there shall be a failure to nominate and confirm during the session." If this proviso had closed with the positive statement that a

vacancy does not occur "if there shall be a failure to nominate and confirm during the session of the legislature preceding the expiration of the term of a member of the board," it would have left no doubt in the minds of lawyers.

This suspension of any action caused Governor Holcomb great perturbation. He appealed first to Andrew M. Morrissey, private secretary, and then hobbled over to the executive office for an impassioned appeal to the governor himself.⁶ Judge Howard Kennedy joined in the request that his fellow-member be continued on the board. The original intent of the proponents of the constitutional amendment was that a non-partisan, continuing body might be erected. In brief, Kennedy said, "I will render Holcomb all the aid possible so that he may make the visits called for by the law."⁷

Morehead acquiesced and the Senate confirmed the appointment.

For another biennium there was a constant evolution to higher standards and greater efficiency in the fifteen institutions. The system of management was improving.

In 1916, Keith Neville of North Platte was elected governor. He appointed, early in 1917, another in place of Judge Howard Kennedy. The successor, E. O. Mayfield, was a newspaper man of high type but without business experience and no executive or administrative capacity. The board suffered immeasurably by the loss of Kennedy.

When the 1918 election occurred, Nebraska went republican and there was a legislative onslaught against the board of control. Governor McKelvie planned a complete investigation. Even before that time Judge Holcomb had told the Governor frankly of the increasing severity of his disease and had suggested a resignation which McKelvie accepted.

This resignation took from high official position in the government of Nebraska for the fourth time—district court, governor, supreme court, board of control—a man of high mental and moral character.

⁶ Quite unintentionally I was a witness in part to some of these confidential negotiations. Governor Morehead, many years later, gave me first-hand knowledge of the others.

⁷ This promise Kennedy carried out meticulously.

In his make-up were some decided characteristics. He was modest, for instance. It was found, when Silas was nominated for governor rather unexpectedly, that he had no photograph of himself.

He was sympathetic. The convict and the inmate at the asylum could get a hearing. Not only to the unfortunate people in confinement did he show understanding, but to executives who were struggling to do right. Once he said to me when something went awry: "I think you were wrong, though you were trying to do the wise thing."

But the most considerate words were spoken under the following circumstances. The board had found two superintendents flagrantly violating the law. The officials had removed summarily the violators. This had happened at about the time when the board was compelled, by mandatory provisions of the state constitution, to make a full-member visit to each institution. People were suspicious of all officials in state institutions. News-hawks watched every movement of the board.

At this particular juncture I saw a taxi drive up to our front door with Holcomb, Kennedy, and Gerdes. And even before the car stopped the governor sang out, "This is just a formal visit. We just have to come every six months!"

V

It was in March, 1919, that Holcomb resigned his position, leaving soon after to spend his remaining days in the Pacific Northwest at Bellingham, not far from where he had lived two years at the close of his chief-justiceship. Holcomb's daughter had married and had her home in the Washington city.

A few days after the judge had resigned, I paid a visit of courtesy and farewell to him. I found him doubled up in a large chair on the second floor of a house just north of the state house. His large moon-like, almost bucolic face had shrunk and more resembled a tomahawk. But his eyes were large and bright and occasionally twinkled as he told a funny incident in his long career as district judge, governor, judge of the supreme court and member of the board of control.

Among other things he said, "You bridge, Abbott, in a way, my official life as governor and as board member. Your father served under me four years and I knew you as a young man. Now you have been under the board of control, of which I have been a member, almost six years. I have known your three brothers (and he called them by name—what a memory!) and this parting is not easy."

I turned the door knob to go, feeling I had already stayed too long. But a rather impetuous word from my friend arrested me.

"Wait a minute, please, Abbott," the Governor said. "I want to ask you to do something for me. You have gained some prestige as a writer on the history of Nebraska."

Here he coughed and motioned to me to give him a glass of water, and when he had drunk it asked for a teaspoon of some dark brown medicine on the table. After he had swallowed the stuff, he smiled and resumed:

As I was saying, you take considerable interest in our state history. I wish you would some day, when the occasion appears fitting, scotch a myth—an untruth. That false report to the effect that Edward Rosewater and I once had a quarrel or break of some kind; and particularly that it was precipitated by Mr. Rosewater's effort to dictate my appointments. There is nothing further from the truth. We never had a quarrel nor a disagreement of any sort wherein anger was aroused. Edward Rosewater never attempted to dictate any of my appointments. From the beginning, starting as soon as the result of the state election had been definitely determined, he told me repeatedly that I must get men and women who would conscientiously carry out the policies which we had jointly advocated in the campaign.

He had recommended me, wanted me to succeed, felt his integrity was involved. He pointed out to me, from time to time, it is true, persons who would, in his opinion, cooperate with me in this endeavor. But he always made it clear that he was merely a friendly adviser. Edward Rosewater was not, in any sense, a boss or a bully. He never became angered when I followed a different course from that advised by him. And his advice, I feel now, as I did then, was wholly for what he deemed would result in benefit to my

administration and to the state, in whose welfare he was vitally interested.

It is true that things shaped themselves politically so that we were not often in consultation. He thought it was better for both him and for me. Bryan was back in Nebraska on the *World-Herald*. It became more and more apparent that things would shape themselves politically so that the *Bee* would support the regular republican candidate for the presidency in the '96 campaign. After all, he was a republican editor and I was the state leader of the Populist party. He had supported me rather than a faction of the republican party which consisted, as he fully believed, of false and dangerous men. He had chastised what he believed to be recreancy in his party; but he was a republican. We did not see much of each other as time went on, and so the rumor went forth that we had quarreled.

Neither of us was in a position to speak out, and enter denial, and we should not have been believed anyway. But now Edward Rosewater is dead and I am through with political life. Will you not tell the people the truth? Your story will be believed.

Let me suggest something else to you as bearing on what I have told you. During the whole of my administration—I mean the two terms—Rosewater never made any attack upon me showing any malice or personal anger toward me. He commented through his columns on the action of my administration, sometimes praising and at other times condemning. That is what a newspaper is for in a republic. That is its mission.

But this may also surprise you, since you were an observer on the ground and noted what was passing politically in Nebraska during the last few years of the nineteenth century. During the very time that newspapers were reporting a deep breach in the personal relations of Holcomb and Rosewater, Mr. Rosewater was accustomed to drop me little notes, suggesting that I do this or that; praising my action in a certain instance, or suggesting that I might perhaps have done better by a different course. I appreciated them.

When a vacancy occurred on the Board of Regents of the University of Nebraska, I appointed, without suggestion on the part of anyone, the younger Rosewater to this position. Folk then said that I was trying to placate

Mr. Edward Rosewater. The truth is, as I again tell you, there had been no quarrel of any kind, nothing to placate. I was always grateful that he had made me governor and I have always regarded him as one of the most unselfish and patriotic men of my acquaintance.

Governor Holcomb was always voluble and prolix. His personal letters, his official letters and papers while governor, and his decisions while a member of the supreme court—all were wordy. He was inclined to state, iterate and reiterate what he was trying to convey. What I have set down above as a direct quotation was not given in exactly the form I report. I am no stenographer. I made notes after I left him. He said everything I have reported; he said much more and elaborated on his thought by many illustrations. My quotations carry out, however, his entire thought.

The visit was long and not one of steady conversation. There was a hiatus now and then. I thumbed through a book. He looked out of the window. I straightened a pillow. I walked around the room, my back toward him, and hurled ejaculations over my shoulder. Friends do not need to talk steadily in order to visit.

Forty minutes after my first attempt to leave, I opened the door toward a side entrance. I took a last look at the shrunken, wasted figure, once the powerful giant of a man who had served as the young governor. I closed the door quietly.

Then something prompted me to open it again softly. He was looking intently at the place which I had just left and I heard his thin lips repeat, "Remember!"