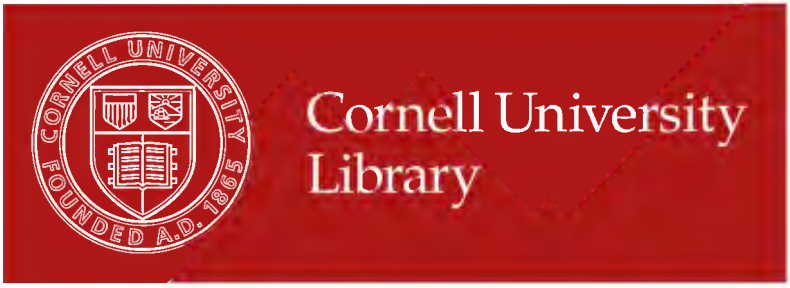

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A MEMOIR

OF

BENJAMIN ROBBINS CURTIS, LL.D.

A

MEMOIR

OF

BENJAMIN ROBBINS CURTIS, LL.D.

by George Ticknor Curtis,

WITH SOME OF

HIS PROFESSIONAL AND MISCELLANEOUS WRITINGS.

EDITED BY HIS SON,

BENJAMIN R. Robbins CURTIS.

VOL. I.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1879.

A. 7146.

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PREFACE.

MANY friends and acquaintances of my late father, in various parts of the country, have expressed a strong desire for the publication of an authentic account of his life, and of a collection of such of his principal productions as are not contained in the Reports of the courts in which he practised as a lawyer or sat as a judge. In consequence of these suggestions this work has been prepared. My endeavor has been to provide a full account of his life in the first volume, and to collect in the second such of his literary efforts as may illustrate his character, and are worthy of preservation in a permanent form. An index is added to each volume.

It seemed to be proper to commit to my uncle, Mr. George Ticknor Curtis, the preparation of the biographical part of this work. He was my father's only brother, and as there was a difference of but three years in their ages, and as their relations were always so intimate, he was best able to give a full account of the life of the elder. It was said soon after my father's death, by a distinguished member of the Boston Bar, who had known him for forty years, that all that part of his life which preceded his removal to Boston, in 1834, was known only by tradition. This portion of his history is now for the first time fully related in the following Memoir.

My thanks are due to many friends of Judge Curtis, for their aid in furnishing materials of great value to his biographer. Among them, I am under special obligations to my father's college classmates, George William Phillips, Esq., Dr. Oliver Wendell Holmes, the Rev. Samuel May, and the Rev. Dr. Chandler Robbins. To President Eliot, and other gentlemen connected with Harvard University, I am also indebted for the obliging manner in which inquiries concerning my father's college life have been met. From the stores of the late Mr. George Ticknor, who collected and preserved many things relating to his nephew, through a period of more than forty years, I have been supplied by Mrs. Ticknor with very valuable materials, of which the author of the Memoir has made full use. My father's letters to his uncle, from the time when he first began the study of the law, show the free, confidential, and affectionate intercourse that always existed between them.

From the Department of State and the Department of Justice, through the kindness of Secretary Evarts and Attorney-General Devens, I have received important information. To the Hon. Henry Stanbery, of Ohio, formerly Attorney-General of the United States, the author of the biography is also peculiarly indebted, as he likewise is to his and my father's friend, D. W. Middleton, Esq., the venerable and urbane Clerk of the Supreme Court of the United States.

The purpose which has guided me in the selection of such of my father's productions as are included in the second volume, has been to give only those which exhibit the growth of his mind and character; which illustrate the influence which he exerted, or endeavored to exert, upon the times in which he lived; or which show the

manner in which he discharged his public duties on very important occasions. While some of these, and others of his writings that are included in the Memoir, touch upon public questions or events or persons that have been or still are subjects of controversy, it should be remembered that the sole object of this work, in reference to all such matters, is to show how my father felt or acted respecting them.

BENJAMIN R. CURTIS.

Boston, September, 1879.

New York, June 1, 1879.

Benjamin R. Curtis, Esq., Boston.

My dear Nephew, — I now send you the Memoir of your father, which I promised to write as a companion volume to precede your proposed collection of his most important literary remains. If it affords to you or others, in the reading, one half of the pleasure that it has afforded to me in the writing of it, my labor of love will be amply rewarded.

I am sensible, however, of the dangers of biographical writing; among which is the tendency to praise and exalt beyond what the general opinion will confirm. But the judgment of friends and acquaintances concerning your father has been made up. All that we need be anxious for is, that strangers and other generations shall understand him as well as he was understood by those who knew him, or who knew much of him. I desire only to have it remembered, that the whole of his life, from his boyhood, was known to me as it could be known to no

one else now living. Tracing, as I have done, the entire course of his life, from the days when we were both cared for by a parent whose energies made her one of the most efficient, and whose tenderness and self-devotion made her one of the loveliest of her sex, I am reminded of the beautiful allegory of two of Milton's lines : —

> "For we were nurst upon the selfsame hill,
> Fed the same flock, by fountain, shade, and rill."

Whatever deductions, therefore, should be made from what I have here recorded or said of your father, on account of fraternal partiality, I ought to be ready to accept, as I am ready to bear my just responsibility for any thing that this Memoir contains. From the time when I began it to this moment when I commit it to your care, I have heard a voice which seemed to say to me, "Make no imperfect exhibition of what I was ; and as I courted no man's favor, and feared no man's frown, so do you take care that nothing I ever did shall be allowed to be misunderstood."

I cannot transmit this biography to you without saying that your filial desire to have full justice done to your father's memory, and your diligence in collecting the materials needful to illustrate his character, are most gratifying to all who feel an interest in you. That you will use every effort to be worthy of the honored name you bear is both the hope and the belief of

Yours most affectionately,

GEORGE TICKNOR CURTIS.

CONTENTS OF VOLUME I.

CHAPTER X.

1857–1874.

CHAPTER XI.

1860.

CHAPTER XII.

1860–1866.

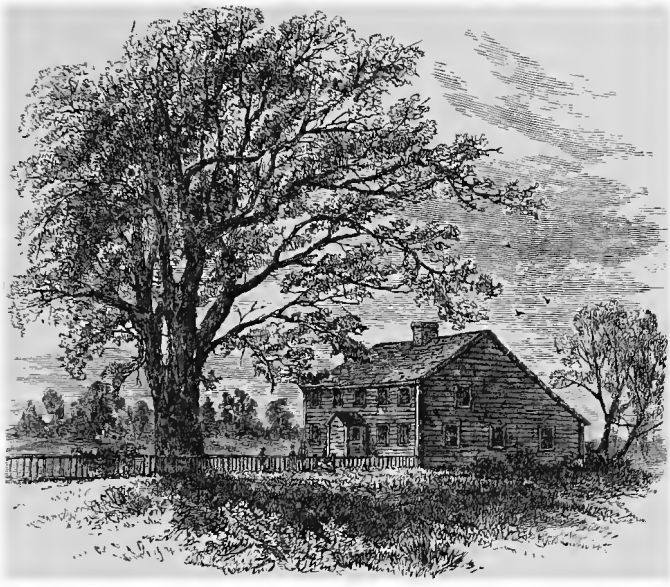
CHAPTER XIII.

1865–1868.

CHAPTER XIV.

1869–1874.

APPENDIX.



MEMOIR OF BENJAMIN ROBBINS CURTIS.

CHAPTER I.

Birth and Parentage. — Early Opportunities for Reading. — Schools attended. — A Mother's Self-Devotion. — Boyhood. — Religious Impressions. — First Written Production that is Extant. — Enters Harvard College.

Most persons in Massachusetts who bear the name of Curtis are descended from William and Sarah Curtis, who emigrated from England in the ship "Lyon," and landed at Boston, Sept. 16, 1632.

William Curtis was born in the village of Nazeing, or Naseing, in the county of Essex, in 1592. On the 6th of August, 1618, he married Sarah Eliot, of the same village, a sister of John Eliot, the "Apostle to the Indians." Whether William emigrated from Essex or from Warwickshire is not certain; but, in regard to his family name, we have the authority of Shakspeare for the mode of spelling

it in use at the present day among most of his descendants.[1] He settled in Roxbury, and in 1639 he built a house on Stony Brook, under the shadow of a large elm. The house and the tree are still standing; and the house was until quite recently occupied by one of his lineal descendants of the sixth generation, the late Mr. Isaac Curtis. The place is near the Boylston Station, on the west side of the Boston and Providence Railroad; and on it there is a spring of water which has been used by the family for more than two hundred years. The family tradition is that this house was built from timber cut on the ground.

The name of Curtis has been variously spelled, both in England and America, — as it is here printed, and as Cur-

[1] In the "Taming of the Shrew," one of the inferior characters is named Curtis. In this play, the scene of which is laid in Padua, Shakspeare, with his usual disregard of congruities, mixes up English names and localities with Italian names and scenes. Thus he makes Sly declare that he is "Christopher Sly, old Sly's son of Burton-heath," or Burton-on-the-heath, a village in his own Warwickshire; and he introduces the name of "Marian Hacket, the fat alewife of Wincot," who is supposed to have been a real personage at Wincot, four miles from Stratford-on-Avon, at the time the play was written. In the same way, he picked up the name of Curtis, either at his own town of Stratford-on-Avon, or elsewhere in Warwickshire, and bestowed it upon a servant of Petruchio, calling the other servant Grumio. In the Connecticut Stratford there is a family of Curtises, who are supposed to be descended from a brother of our William, of Roxbury; but this is not certain. The tradition, however, is, that the two brothers came over together, but that the progenitor of the Connecticut family came from the Warwickshire Stratford. But whether William, of Roxbury, came from that county, or, as is more probable, from Essex, where he and his wife were born, the name appears to have been a common one in the northern and middle counties of England two centuries and a half ago. In the parish register of Brington in Northamptonshire, there is a record that, in 1620, Philip Curtis married Amy Washington. She was a sister of John Washington, the grandfather of our first President. The "Apostle" Eliot, who was brother of my ancestress Sarah Curtis, the wife of William, of Roxbury, was born in 1603, was educated at Jesus College, Cambridge, and came out to Boston in 1631. In 1632, he married in Boston Ann Mountford, who came out with Mr. and Mrs. Curtis in Winthrop's fleet. He was minister of Roxbury for fifty years. He was the third son and fourth child of Bennet Eliot, of Nazeing, "yeoman and freeholder."

There lies before me a copy of a record, made in 1632, in the Herald's College, by Richard St. George, Knt., Clarencieux King of Arms in the reign of Charles I., from which it appears that there had long been a family

teis, Curties, Courtis, and Cortis. But of the identity of the name and family there can be no doubt. The Nazeing branch of the family were substantial yeomen, possessing property; and in the records of their parish, in 1637–38, their name is found as customary tenants attending the old court leet. Of the families in England now, above the rank of yeomen, those in Sussex write the name Curteis, while those in Devon and other counties write it Curtis, as it is usually, but not universally, written in America.

Thus it appears that William Curtis, the progenitor of the family in Massachusetts, belonged to that middle class of Englishmen who constituted the great bulk of the first emigrations. It is not known that he was connected by blood with the Warwickshire family of the same name, who claimed the rank of gentry. Nor is it known that any of

of Curtises in Warwickshire, of the rank of "gentlemen." It recites that "John Curtis of London, Gent.," had applied for a search and certificate of his coat-of-arms; that he was the "sonne of William Curtis in the County of Warwick, Gent., the sonne of Eustace Curtis of Malstock in the said County of Warwick, Gent., the son of William Curtis, son and heir of John Curtis of Malstock aforesaid, Gent., who bears for his armes, &c., . . . which William Curtis (sonne and heir of John) married Ann, the sole daughter and heir of John Cawley of Rygate in the County of Sussex, Gent., who bears his armes, &c., . . . as did appear to mee by sundry ould seales and other good testimonies and proofs now in my owne custody and keeping." The herald then proceeds to certify and grant, by elaborate description, according to the terms of heraldry, to John Curtis and his issue and posterity for ever, and to the issue and posterity of John Curtis of Malstock, the coat-of-arms which he finds them entitled to bear. From this it appears that, reckoning back from the reign of Charles I., the ancestors of John Curtis of London were in Warwickshire for four generations, of the rank styled in heraldry as "gentlemen;" that they wrote their name Curtis, as their neighbor, Shakspeare, wrote it when he borrowed it for some of his rollicking purposes in one of his plays, and as the yeomanry family of Nazeing, in Essex, also wrote it.

There are two families in England of this name, of the rank of baronets, whose connection with the Nazeing or the Warwickshire family has not been traced. Sir Arthur Curtis, of Gatcombe, county Hants, is descended from Robert Curtis, of Downton, Wilts, whose son, Sir Roger, was a distinguished naval officer, and was created a baronet in 1794. His son, Sir Lucius, Admiral of the Fleet, was the father of the present baronet. Sir William Michael Curtis, Bart., of Cullard's Grove, Middlesex, is descended from William Curtis, Esq., Lord Mayor of London in 1795.

his ancestors were of either of the learned professions, or that any of them received a university education. They were probably farmers. That his wife was the sister of such a man as John Eliot, who became their pastor in Roxbury, indicates that William Curtis was a man of good social position in his rank of life. Of his descendants, from the Rev. Philip Curtis down to the present generations, more than twenty-five are borne on the catalogue of Harvard College, between the years 1738 and 1872.[1]

Fourth in direct descent from William of Roxbury was Benjamin Curtis, the second of that baptismal name after the emigration. He was a great-great-grandson of William, and was born in Roxbury in 1750. He graduated from Harvard College in 1771, in the same class with the first Dr. John Warren, of Boston. He studied medicine, and served for some time as a surgeon in the Revolutionary army. He afterwards settled in Boston, became a Fellow of the Massachusetts Medical Society, and acquired a good practice. He had married Elizabeth Billings, of Sharon, before he entered the army. He died in Boston, greatly lamented, at the early age of thirty-four, Nov. 26, 1784, leaving four children. In 1791, his widow married Mr. Elisha Ticknor, of Boston; and of this marriage the late Mr. George Ticknor was the only child.[2]

[1] Judge Curtis, probably from some data that I have not seen, considered that there was a family connection between the Curtises of Connecticut and the family in Massachusetts. See his letter of March 23, 1870, to the Hon. Wm. E. Curtis, now one of the Judges of the Superior Court of the City of New York, who is one of the Connecticut family, *post*, chap. xiv. This letter gives a somewhat humorous, but in the main correct, description of some of the characteristics of the descendants of William Curtis of Roxbury.

[2] A more particular account of my grandmother, Mrs. Elizabeth Ticknor, may be found in the recently published memoirs of her son, Mr. George Ticknor, vol. i. pp. 3, 4. Her children by her first marriage with Dr. Curtis were Eliza, Harriet, Benjamin, and Gustavus Curtis. In the "Boston Magazine" for December, 1784, there is an obituary notice of Dr. Benjamin Curtis written in verse, and another in prose. Both of them speak with great feeling of his virtues and usefulness, and mourn him as a man of uncommon character. His father was Benjamin, the first of that name. One of his

Benjamin Curtis (3d), the eldest son of Dr. Curtis, was bred in the merchant marine. He made several voyages as supercargo, and afterwards as master. On the 18th of January, 1807, he married Lois Robbins, of Watertown; a town of large territorial extent and early settlement, adjoining Cambridge, the principal village of which, commonly called "Watertown Square," on the northerly side of the Charles River, was about seven miles distant from Boston. Of this marriage there were two children; Benjamin Robbins, born Nov. 4, 1809, and the writer of this Memoir, born Nov. 28, 1812.

My mother was a daughter of Mr. James Robbins, a prominent and much respected citizen of Watertown, who carried on various branches of manufacturing, and was also interested in a country store. He was not a very prosperous man in the later years of his life; and when he died, in 1810, he left a widow and a numerous family of children, with but a small estate. He had owned and lived in a large old-fashioned house, which stood on the bank of the river, near the "Square," and just at the entrance of "Watertown Bridge," — an ancient bridge that

uncles was the Rev. Philip Curtis, who was minister of Sharon for fifty-five years, and died in 1797, at the age of eighty-one. He married my grandfather and grandmother, when they were both quite young. (Memoirs of George Ticknor, vol. i. p. 3.) For the greater part of the earlier facts here stated in reference to my family I am indebted to a compilation of the descendants of William Curtis, originally gathered by Miss Catharine P. Curtis, of Roxbury, and edited and published, in 1869, from her MSS. and other sources, by Samuel C. Clarke, Esq., of Jamaica Plain, whose grandmother was a daughter of Obadiah Curtis, a great-grandson of William of Roxbury. In Potter's "American Magazine," for March, 1876 (Philadelphia), there is an accurate cut of the house of William Curtis in Roxbury (now Jamaica Plain), from a sketch made by Miss Sarah Clarke, a sister of the gentleman just named, and a description of the house by Benson J. Lossing, LL.D., who includes it among "The Historic Buildings of America." Mr. Lossing observes that our history furnishes "no parallel case of continuous habitation of a dwelling by the same family for almost two hundred and forty years," and that this "is probably the oldest inhabited dwelling within the domain of our republic." The cut at the head of this chapter is copied from Potter's Magazine.

led toward Newton. My mother, after her marriage, remained in this house with her parents, on account of my father's seafaring occupation; and there both of her children were born, and lived until they were respectively of the ages of fourteen and eleven. My father died abroad, at so early a period in his life that I have no recollection of him. He was said to have strongly resembled my brother, as the latter became when he was grown up, in mind, person, and demeanor. My mother, a young and beautiful woman, of delicate constitution and great tenderness of feeling, left a widow with very little property and with two children to provide for, might naturally have become dependent upon friends, or have sunk under sorrows that had darkened her early days. But she was a person of great energy. I often look back with wonder at what she could do, not only for herself and her children, but for others. She was never what could be called a strong woman physically; and, morally, she was always as far removed as possible from the class of the "strong-minded." A part of her acknowledged power was due to her sweetness of disposition, her quick sympathy with every form of suffering, her practical intelligence and capacity, and her complete unselfishness. These qualities, added to her personal attractions, gave her an extraordinary power of being useful to others; and this is a character which generally wins for its possessor a large return. In all trouble of every kind, through a wide circle of relatives, friends, and neighbors, — not omitting the poorest of the latter, — she became the one person whose help and sympathy and efficiency were always sought for, expected as a right, and never withheld when they could be given. She, who might well have been absorbed by her own cares and troubles, had energy enough for her personal duties, and for many things which to her were no duties at all. The consequence was that everybody regarded her with great respect; everybody appreciated the resolution with which she met the demands of her widowed condition; and all in

her circle who could aid her were ready to afford her all the aid that a woman of so much character, and so much independence of spirit, could receive.

She and a younger sister had been educated, as day pupils, at a boarding-school for young ladies, kept by a Mrs. Rowson in Newton, about half a mile from their father's house. The education was such as young women at that time, in New England, obtained at such schools. It did not comprehend the ancient languages, or any modern language excepting English; but in plain and ornamental needlework, in arithmetic and geography, in a little astronomy and some history, and especially in English literature, it was a good education. My mother, after her marriage, in consequence of her maternal and other cares, did not continue to seek literary cultivation so much as her younger sister did, who was never married, and whom some persons still living remember as a very brilliant woman, of uncommon conversational powers.[1] This lady lived with my mother a good deal, and helped her to inspire her children with a love of books and knowledge. She had, at different times in her life, seen something of the world out of New England, in visits to New York and Philadelphia, and was a rather sharp critic in manners and grammar. Any solecism in either was sure to encounter her reproof.

Among the occupations to which my mother resorted, in order to support herself and her children, she established a circulating library, at a time when my brother was about nine years old. This collection of books comprehended the current literature of the day, and some of the standard English authors. It was kept in a room on the ground floor, appropriated to my mother as a "shop," in my grandmother's part of the old house. The circulation of the

[1] Martha Robbins. She died in Boston, in the year 1846. In the later years of her life she became very intimate in the family of Judge Story, at Cambridge. She had a peculiar enjoyment in the Judge's conversation, and he liked hers. When they met, there were no "flashes of silence."

books, on the loan of which there was a small charge, brought in a little revenue; and as many of the books were the gifts of friends, who had purchased them for their own use, and after they had read them gave them to my mother, the expense for her of keeping up the collection with the new works of the time was inconsiderable.[1] It was chiefly a collection of novels and poetry; and when I name the period during which my mother kept this library, as from about 1818 to about 1825, the reader will see that Scott's novels from "Waverley" to "Redgauntlet," and all his principal poems; Byron's works; Southey's "Thalaba" and "Roderick;" Irving's "Sketch Book," "Bracebridge Hall," and "Tales of a Traveller;" Cooper's "Spy," "Pioneers," and "Pilot;" and many other books, new at that period, might have been, as in fact they were, included in this collection. The books were much sought for by the surrounding families.

My aunt's books were not embraced in the circulating library; but she possessed, among others, an excellent edition of Shakspeare, — of whose works she was a constant reader, — Milton's "Paradise Lost," Young's "Night Thoughts,"

[1] Among the friends who thus contributed to my mother's collection of books, I should mention Mr. Ticknor and Mr. Marshall Binney Spring, the father of Mrs. Edward Perkins and Mrs. W. C. Wharton, of Boston. Mr. Spring was the only son and only child of Dr. Spring, a very eminent physician in Watertown, whose grounds, it used to be said, were often seen of an afternoon filled with the carriages of patients who had driven out from Boston to consult him. After his death, it was rumored that a considerable sum in bank-notes was found in his study, stuffed in the cushions of his chairs and sofas, and other odd places; being, it was supposed, some of the fees paid by his town patients. He died Jan. 11, 1818, at the age of seventy-six. He left a good fortune to his son, who had married Miss Eliza Willing, of Philadelphia, a ward of the late Hon. Horace Binney. She died young, in 1825. Her husband, who was inconsolable for her loss, did not long survive her. Mrs. Spring was a very elegant woman, and her husband was a young man of most amiable and accomplished manners. Both were kind friends of my mother. I saw Mr. Binney at the funeral of Mrs. Spring, when I was twelve years old, and I distinctly remember his personal appearance. When I next saw him, he was between eighty and ninety. He and Mr. Marshall B. Spring were half-brothers. The latter graduated at Harvard in 1812.

Thomson's "Seasons," Cowper's Poems, Johnson's "Rasselas," Jeremy Taylor's "Holy Living and Dying," and the "Spectator." I am quite sure that my brother's first knowledge of these authors was derived from her books. In a home so furnished with the lighter and some of the more solid materials of intellectual development, my brother became a great reader, at an age when most boys care for nothing but their sports. At first, he read novels incessantly; and I can well remember the sorrowful resignation with which he would surrender a volume of Scott, or Cooper, or Irving, when a call for it came into my mother's little parlor from the "shop." Of course a book's chance of earning a "fourpence-ha'penny" was not to be pretermitted; and as the chances came frequently, in the case of the popular authors, he had to read by snatches. He devoured a book, but he mastered every thing in it; and he would expound the story, or the allusions, or the historical connection, to my younger and feebler apprehensions, with much boyish gravity and wisdom. He had a faculty, remarkable in one so young, for distinguishing fact from fiction, superstition from well-grounded belief, theory from experience, and the natural from the unnatural.[1] From novel-reading he passed to

[1] One of the books in my mother's circulating library which I heard talked about a great deal, and which I read as much of as I dared, was a strange, weird, metaphysical novel, called "Melmoth, the Wanderer," by Charles Robert Maturin. The principal character was a man of genius, who had made some kind of compact with the powers of darkness, by which he was permitted to live for centuries, and to have supernatural powers of locomotion and other pernicious advantages; but at the end of the stipulated period, when the awful hand on the great dial of the ages pointed to the fatal hour, he had to sink into everlasting perdition. As a matter of course, he committed, while he was on earth, all kinds of wickedness. Such at least is my recollection of the story, but I have not seen the book since I was a child, and may not be entirely accurate about it. But I remember very distinctly how my brother used gravely to argue that there could not possibly be any truth in such adventures. No doubt such a book should not have been within the reach of very young persons; but as we revelled in "Robinson Crusoe" and "Gulliver's Travels" when mere children, and later on in the Waverley Novels, it will be allowed that we had more wholesome reading. How wisely and with what a master's hand did Sir Walter, in all his dealings

some of the historical plays of Shakspeare, and afterwards to the "Paradise Lost."

The "shop" to which I have alluded was a retail dry-goods business, which my mother carried on for several years, chiefly in articles of millinery and such small gear as ladies most affect or need. She had all the credit she wanted with the leading importers and "jobbers" in Boston, who had entire confidence in her business capacity; but I do not suppose that this little trade was ever very profitable to her. It gave her, however, a pleasant occupation, because it brought around her the principal ladies of the neighborhood, who were glad to do their shopping without the trouble of going to Boston for it, and who, besides doing her a good turn, were quite willing to have a chat with an interesting woman about the last new book, or to look over her catalogue and find something to read when there was no new book that was "the rage." The country ladies of the less wealthy or cultivated sort came to drive good bargains, get what they wanted, and talk about their troubles. A single maid-servant — some country girl of the native New England race — was all the help in domestic affairs that my mother could afford.[1]

Thus the earlier years of her widowhood passed on, with many struggles and trials; but she gained a comfortable subsistence, although nothing more, and she had no trials in her children.[2] When my brother was about ten years old, she began to think that a boy of such talent and such

with the marvellous or the supernatural, enable even his youngest readers to see that the phenomena were capable of a natural explanation, that the superstition was not a reality, and that the imagination can fill the universe with agencies of which human experience knows nothing, and which it can contemplate only as a part of the materials of poetry and romance! Yet how skilfully did he weave these materials into the web of human life!

[1] In my native town, during my boyhood, I can remember only a single foreigner of either sex.

[2] The shocking death of her mother, who was accidentally drowned in the year 1819, was a terrible affliction to her. She was absent from home on the day of this occurrence, and had to be sent for.

a studious temperament ought to have a college education. But how this was to be obtained was a serious difficulty, in her circumstances.

In the first place, there was the question of a school. The nearest classical school supported at public expense was the Boston Latin School, at which many of my brother's contemporaries and college classmates were fitted for Harvard. But only boys who were residents of Boston could attend that institution.[1] The town of Watertown was very ill furnished with schools. Its public schools were then but poorly provided, and there were no private schools at which boys could be trained for a college education within the limits of the town. My brother's first school was a dame's school, kept by a little old lady named Gerrish.[2] Next, he attended for a short time a school kept by Mr. Samuel Worcester, in Newton, along with my mother's youngest brother.[3] At this school, nothing was taught but reading, writing, arithmetic, and geography. From Mr. Worcester's, my brother went for a little while, as a day pupil, to the Rev. Samuel Ripley, the clergyman of Waltham. This gentleman, who had a learned and accomplished wife, took a few pupils into his family as boarders,

[1] The late Hon. George Tyler Bigelow, one of my brother's classmates, who became Chief Justice of Massachusetts, was born in Watertown, where his parents always resided. He was fitted for college at the Boston Latin School; a privilege that was allowed because of his residence in Boston with one of his kindred.

[2] This ancient spinster, always called "Ma'am Gerrish," had kept a private infant school in Watertown, time out of mind. She had taught my mother to read, and afterwards taught both of her children. She was a rather strict old body, but she took excellent care of the children intrusted to her. Her literary instruction did not go beyond the "New England Primer;" but she taught both boys and girls to knit, and the girls to sew. I have known the author of the celebrated dissenting opinion in the Dred Scott case to knit a pair of woollen mittens, and to cover with leather any number of "bat-balls."

[3] Mr. Isaac Robbins, still living in a hale and happy old age. He was but a little more than six years older than my brother, and they were companions in many a hunting and fishing expedition. He was born April 21, 1803.

and also had some day scholars.[1] With Mr. and Mrs. Ripley my brother began the Latin, and I think the Greek grammar. But the distance of their house from ours was more than two miles; and my mother did not feel that she could afford to make her son a boarder in their family. At last there seemed to be an opening for classical tuition nearer home.

In the early part of the year 1822, a number of the families in Watertown who wanted a higher education for their children than the public schools afforded, established a private school for pupils of both sexes, which they called an "Academy." I forget whether they procured for it an incorporation, but they built a school-house and engaged a master. The property was held in shares; the right to send pupils to the school being limited to the share-holders. My mother subscribed for one share, which secured a seat in the school for my brother; for me, she used a share belonging to one of her relatives. It was intended that this school should be able to fit boys for college; and, so far as the association could do what was needful, it was an excellent plan. But the course of studies was left altogether to the master; and none of the masters remained long.

The first one who opened the "Academy" was a divinity student from the Cambridge Theological School, Warren Burton, afterwards a Unitarian clergyman and an author of some little repute.[2] Whatever his attainments may have been, he was a very unsuccessful school-master. He was perpetually varying his methods of teaching and discipline, never adhering to any one for more than two weeks, and constantly plaguing our parents with changes of the school-books, and with demands for new blank-books in which to keep the record of our "marks." The parents could not

[1] It used to be said of this lady that she could, and often did, rock her baby's cradle, darn a stocking, and hear a boy's Greek lesson, at one and the same time.

[2] "The Village Choir" and "The District School as it was" were among his productions.

respect him as a teacher, and even the youngest pupils in the school understood and laughed at his eccentric fickleness. He went away at the end of a year, with great dissatisfaction on all sides. Yet I believe he was a thoroughly good man, and meant to do his duty. His misfortune was that he did not know how to manage children. I never had any acquaintance with him in after life.

Mr. Burton was succeeded by a Mr. Kendall, a graduate of Bowdoin College, of whom I remember only that he seemed to be a fair Latin scholar, that his favorite classic was Ovid's "Metamorphoses," and that he chewed tobacco inordinately. He was our teacher for a very short time. After him came a third master, Joseph H. Abbot, also a graduate of Bowdoin, of whom I remember nothing excepting that he was a mild and gentleman-like person, and had no offensive ways.[1] The last master, John Appleton, I remember with great distinctness and pleasure, and have since known him, although we have met but rarely in this long interval of more than fifty years. He became an eminent lawyer in Maine, and is now the Chief Justice of that State. I think my brother gained more from Mr. Appleton than he did from all the previous masters whom he had attended. He was a good teacher, and a person of superior mind.[2]

[1] Mr. Abbot was a teacher all his life. For many years he kept a school for young ladies in Boston. He was a member of the American Academy of Arts and Sciences, and wrote various papers published in its "Memoirs." He died about a year since.

[2] Judge Appleton has recently written to me as follows: —

"I recollect your brother perfectly as a student and as a young man. He was a fine scholar, very punctual and attentive to his duties, and never failing in his recitations. I remember him for his manly bearing above his years. He then gave abundant promise of that high distinction to which he subsequently attained. He was the best scholar I had during my school-keeping days.

"I am very glad you propose publishing his miscellaneous writings, together with a Memoir. His judgments while on the bench are monuments of unanswerable logic and thorough learning, which will endure as long as the Constitution which he so ably expounded. It is due to him that his

But, after Mr. Appleton's departure, my mother became very anxious about my brother's progress in his studies. The late Rev. Convers Francis, D.D., had then lately been settled as the clergyman of our parish; the congregation having become Unitarian, in the course of the change which took place in so many of the old congregational parishes of Eastern Massachusetts.[1] Mr. Francis was a scholar, as scholarship was attainable in his time. He was, moreover, a kind and faithful parish clergyman, and he had become a warm friend of my mother. He offered to have my brother come to him of evenings for instruction, without being willing to receive any remuneration.[2] This arrangement continued until my brother was sent, in the year 1824, to a boarding-school kept by the late Mr. John Angier, in Medford, where his preparation for college was finished.

For a good while, however, after my mother first resolved that my brother should be sent to Harvard, it was exceed-

memory should be preserved in a permanent form. I have no recollection of any particular fact relating to your brother, but only the recollection of his remarkable promise. . . .

"Of your mother I have the most agreeable recollections, as one of the pleasantest and best women I ever had the pleasure of knowing."

[1] Mr. Francis was settled as minister of the territorial parish of Watertown in June, 1819. He succeeded the Rev. Richard R. Elliott, whose funeral I remember. The pulpit of the "meeting-house" was draped in black cloth, which was taken down afterwards and given as a melancholy kind of perquisite to his widow.

[2] Lydia Maria Francis, sister of our clergyman, more widely known after her marriage as Mrs. Lydia Maria Child, resided with her brother at this time, and was very intimate in my mother's family when, at the age of two-and-twenty, she published anonymously her first book, "Hobomok, a Tale." The mention of this little novel recalls to me the just and at the same time amusing criticism with which its story was received, while its general merits were freely acknowledged. The heroine was a Puritan girl, in one of the early settlements of Massachusetts. The lover to whom she was betrothed was reported and believed to have been lost at sea. After a long mourning, she consents to marry Hobomok, a young Indian chieftain, who had followed her with romantic devotion for several years. There is a son born. The English lover returns. Hobomok, coming home one evening from a hunting expedition, laden with game, sees his rival, and is frightened by the idea that he has risen from the dead. The Great Spirit has decreed that

ingly doubtful how the expense of such an education was to be defrayed. It never could have been, or at least my mother never could have had the courage to undertake it herself, if it had not been for a kind and considerate act of Mr. Elisha Ticknor. I have mentioned that this gentleman married my grandmother, the widow of Dr. Benjamin Curtis, in 1791. He always felt towards his wife's children by her former marriage, and her grandchildren, as if they had been his own. At his death, in 1821, he of course gave the bulk of his fortune to his only son and only child, the late Mr. George Ticknor. But he did not forget the two widows, one of whom was the daughter and the other the daughter-in-law of his deceased wife.[1] The provisions of his will, in regard to my mother, require a little detailed explanation.

She was entitled to a small share of her father's estate in Watertown, for which a part of his house was set off to her when her mother's dower was assigned in another part of it. The year following her father's death, she joined with her husband in a deed of this property to Mr. Elisha Ticknor.

Hobomok must give up his wife. He contrives, unseen, to embrace his boy, then lays the game at the door of his wife's cottage, and sorrowfully departs into the wilderness for ever. The two original lovers meet, and after a time are united in wedlock. The story was told with much beauty and pathos; but all the talent in the world could not reconcile readers to the glaring unnaturalness of the character of Hobomok, whose tomahawk, some said, would have been the most likely mode of settling the difficulty; and all New England was moved to something like anger at the thought of such a *mésalliance* as the Indian marriage being tolerated by our "Pilgrim Fathers." I do not remember how the dissolution of the first marriage was managed. In her next work, "The Rebels, a Tale of the Revolution," the fair authoress did much better.

I have not seen Mrs. Child for fifty years. Had we met at some periods in this interval, differences of opinion on public topics on which she was an enthusiast might have alloyed the pleasure of our intercourse. But gratitude for her brother's kindness to my family, and a lively recollection of the brilliancy of her youth, lead me to express the sincere hope that the evening of her days is happy, and that it may so continue to the end.

[1] My grandmother died in 1819. Her eldest daughter, Eliza Curtis, had married Mr. William H. Woodward, of Hanover, N. H., and was now a widow.

It was not a conveyance in trust for her, but it was an absolute deed to Mr. Ticknor, given for money advanced by him to my father; and no doubt the sum named in the deed was the full value of the interest, if not more than the value. Mr. Ticknor was under no obligation to restore this little property to my mother. But she continued to occupy it down to the time of Mr. Ticknor's death, in 1821. It was then found that he had devised it to a trustee, in trust, to apply it to my mother's use, but with power to sell it, on her request, and to apply the proceeds to the maintenance and education of her children, in such manner as she might desire. He also directed his trustee to pay to her, for the period of ten years, the sum of one hundred dollars per annum for the same purpose. In addition to this, by a codicil to his will, he devised to the same trustee a small farm in the town of Dunstable, on the border of New Hampshire, on the same trusts and with the same power of sale in case of my mother's request. The little capital of these two estates could not have exceeded the sum of three thousand dollars. My mother needed her share in the Watertown house as a home. The rent of the Dunstable farm must have been very small. It was all the income she had, besides the one hundred dollars, and what she could derive from the small business which she had carried on for some years.

But her decision was soon made. Money was taken up on this property from time to time, until its value was exhausted; and it then passed into the hands of a relative who had made the advances on it. My mother thought that to devote it as far it would go to the education of her sons was the best use that could be made of it, and that this would fulfil the implied — though they were only the implied — intentions of the kind testator, who had ever treated her as a daughter.

It may be suggested that many a boy has worked his own way through college and into a life of usefulness and

distinction. Such efforts are not to be undervalued. But, in giving an account of my brother's early life, I owe a duty to the memory of a parent whose exertions and sacrifices gave both of us our educations, and who did not deem it well that the years which ought to be devoted to study should be harassed with earning bread and clothes, and the means of paying tuition fees. She preferred to spend the little all that she had, taking upon herself the risk of destitution when her plan had been accomplished. She had once sacrificed all that she could give up to her husband. She now sacrificed it again for her children. But she lived for many, many years, saw the honors and distinctions that were bestowed unsought upon her eldest son, and felt that her mission had been fulfilled.[1]

I have paid this tribute to the revered memory of the excellent man who put it in my mother's power to obtain what had become the great object of her life, not forgetting what is also due to the memory of his accomplished son. When Mr. George Ticknor learned my mother's purpose to send her eldest son to Harvard, he feared at first that it was too great an undertaking for her, and that it would involve sacrifices which she ought not to make. But when he appreciated the strength of her resolution, he gave her his unfailing sympathy and encouragement, and his ever wise and affectionate counsels.[2]

[1] In 1866, when she was nearly eighty, she one day sent to my brother's wife a lock of hair, with the following words, written in the trembling hand of age, on the paper which enclosed it: "This silky lock of hair was cut from the head of my son, B. R. Curtis, in the second year of his age, 1811. Is it not in as good preservation as the lovely little child's frock? Do take pains to preserve it, for I always have kept it with my jewels, — and I can say he has never given me a pain in my heart. MOTHER. 1866."

[2] In their connection with him, there were blessings which his young kinsfolk had reason to remember throughout their lives. Of a numerous circle of his half nephews and nieces, I am the only survivor but one. In this commemoration of his domestic virtues, his kindness, his strong and active interest in the welfare of all who were near to him, I may speak not only for myself, but for those who are no longer here to bear testimony to his worth, or to record what they owed to his love.

The first religious impressions of any man of distinction are an important item in an account of his life and character. In the present case they are peculiarly so. My brother was through life a man of very strong religious feelings and principles. They were derived partly from his mother, and partly from the Unitarian influences which surrounded his youth.

The early "Unitarianism" of Boston and its vicinity was no exotic transplanted from abroad. It sprung, so to speak, from the soil. It was a revolt and protest against the old Calvinism of New England, spontaneously arising in the midst of a system of faith to which a more cultivated and reasoning generation could not continue to submit without peril to their religious convictions. The men of powerful and liberal minds — able preachers and learned controversialists — who led this movement, might have found in the beautiful liturgy and more comprehensive spirit of the Episcopal Church what would have satisfied their aspirations for a faith different from that of their fathers, and so they might have taken refuge in that Church from the gloomy and oppressive creed that had come down from the Puritans, had it not been for certain obstacles and preventions which were both negative and positive in their operation. In the first place, the Episcopal Church had never been a strong and active force in the religious world of New England. A few sleepy old churches of that denomination, a few "bishops and other clergy," who were not men of any energy, constituted, in the latter part of the last and the early part of the present century, all of a "church militant" that the Episcopal body presented to the people of that region. The Episcopal Church, therefore, was not in a condition to win large accessions from the traditionary faith and form of Congregationalism; although, Puritan antagonism being left out of the case, that Church had a great deal that might have suited the tastes of men and women of cultivation. But the eminent preachers and

theologians who became the great leaders of Unitarianism were all born and educated as Congregationalists. They could not adopt episcopal ordination, nor could they lead their congregations to adopt it. They did not try to believe that "apostolic succession" was any the less likely to exist when a man is inducted into the sacred office of a clergyman by his brethren in the ministry, and with the assent and approbation of a Christian laity, than when he is consecrated to that office by the "laying on of hands" of a bishop. They could not have so believed, if they had tried; for their early convictions, associations, and habits were all opposed to such a belief. Situated as they were, they could not seek to change the frame-work of the Congregational order. While they were iconoclasts in their attitude towards many of the doctrines of the popular faith, they were, both by temperament and by the force of circumstances, strictly conservative in every thing else. They sought to reform the creeds, but not to change the structure of their church organization.

In this reformation of the popular religious belief, they assailed the doctrine of the Trinity, because they found it associated with other doctrines which were exerting, as they believed, a pernicious influence upon the religious feelings and the lives of men, and because their studies had convinced them that the Trinity is not taught in the Scriptures as an article of belief; while it is, as they viewed it, a conception utterly repugnant to reason, and therefore one that places the human mind in an attitude unfavorable to the reception of Christianity. They might perhaps have considered that there are as many texts of Scripture which appear to assert, as there are of those which appear to militate against, this doctrine; and that, if a belief in revelation and in what is embraced in the Christian scheme of redemption is to be received at all, the conception of a triune God is no more a mystery, and no more above the reach of the human faculties, than is the conception of an infinite

Deity, who is self-existent, eternal, who never had a beginning, and can have no end. Whenever the human mind penetrates beyond the bounds of the material universe, and, exploring the realms of spiritual existence, tries to reach the idea of God, as that idea is presented by Christianity, it must find mysteries which it cannot understand, and which it may be perfectly consistent with the Divine purposes to suppose are to be received by faith, and not by that kind of demonstrative proof which human faculties can grasp.

But whether these men erred or did not err in their conception of the Godhead and the nature of Christ, it is certain that they did not weaken, in their own minds or the minds of others, the attributes of the eternal and infinite Creator, as those attributes are regarded in all Christendom, by asserting that his existence is one, unshared, undivided, and supreme. Nor, if I am capable of comparing the effects of their theological teachings with what I have seen of other systems of Christian belief, did they aim to displace the Saviour of mankind from the office of a Mediator and a Redeemer; for they believed and taught that he was the Son of God, specially designated, in infinite mercy and wisdom, to the reconcilement of man with his Creator. Nor yet did they less accept or teach the influence of the Holy Spirit, although they denied to it a personality at once separate from and a part of the "very God."

In all things else that should mark a Christian ministry, — in piety, in learning, in devout and useful lives, in the rebuke of sin, in the inculcation of all Christian duties, in exposition of all the Christian morality, adapting it to the conditions of modern society without impairing its authority, and in bringing the consolations of religion to the afflicted and the dying, — these early Unitarian preachers of New England were, as a body, the equals of any clergy of whom I have ever had knowledge.

Such was the spirit of "Unitarianism" from which my

brother received the religious impressions of his youth, so far as they were to be derived from public teaching, from the public services of religion, and from the Sunday school. His mother's religious character was very simple, but her religious influence was not therefore the less strong. She read her Bible, and she did her duty. She was a constant attendant on the public religious services, and a communicant in the church. She taught her children to repeat the Lord's Prayer, and those simple hymns which, clothed in homeliest words of our English tongue, best accustom the mind of childhood to the primary religious truths. She did not much concern herself with the religious controversies that were then so rife in the world around her. According to her feelings, the great idea that is to predominate over all others is the idea of God and our responsibility to him. I think that she made a sense of this responsibility the one chief trait in my brother's religious character; and it will be seen hereafter that the fear of God was the only fear under which he ever acted.

As I have now reached the period of his first absence from home, when the boy begins to develop rapidly into the man, I must say something of the kind of boy he was before this time, in other respects than in learning or religious training. He was, in fact, a rather universal boy; that is to say, whatever a boy of sound moral organization may do, he could and did do with energy and success. He was always a leader in all boyish games, — strong, plucky, active, and skilful. He was never quarrelsome. I never knew him to be in a fight; but he had that about him, in whatever collisions he had with his fellows, that would make "the opposer beware of" him, and that rendered blows unnecessary. He had a great deal of mechanical skill, and generally made his own playthings and implements of sport, as well as mine. He was an unrivalled builder and flyer of kites, often sending one far towards the clouds and keeping it there for hours. We had three maternal uncles,

who were all more or less sportsmen.[1] They furnished him with a gun, and with such fishing-tackle as he did not make for himself. He shot the feathered game of the neighborhood, before he was thirteen, with great success; and as to the fish with which our beloved old river abounded, he knew all their haunts and habits, times and seasons, and pursued them with remarkable skill. He took to trout-fishing, however, much later.

Years afterwards, when he came to the bar, it was observed that he had a remarkable aptitude for all that class of litigations which relate to water-powers, flowage of lands, and the like; and some of his contemporaries speculated a good deal about the origin of his familiarity with the practical details of these subjects. One account of the matter is, as I have recently learned, that, when a boy, he resided for a time with a distant relative, who had a woollen mill on the Concord River. We had such a relative in the town of Billerica, but my brother never resided there. The truth is that, having been born on the banks of the Charles River, in the near neighborhood of the "Watertown dam," the oldest water-power in America, and one of considerable importance in its time, he did not need to go away from home to learn whatever an intelligent boy could observe of such things. Our boyhood was spent, when not at our books, in roaming up and down the dear old Charles, either on its banks, or on its bosom in canoes. Every foot of its course for several miles, every stone of its bed, every pool and every shallow, its freshets and its droughts, the lawful height of the "flash-boards" on its dam, and the distribu-

[1] James, George, and Isaac Robbins. They were all engaged in a manufacturing business. But the eldest, Mr. James Robbins, was very fond of farming, and was a good amateur farmer. Through him, my brother saw a great deal of agricultural operations in his early days; and his agricultural tastes — in which, as will be seen hereafter, he indulged largely in middle life — were imbibed I think in his boyhood, in the rural scenes of his native place and on his uncle's lands. This uncle died in 1830, at the early age of thirty-eight.

tion of its "power" to the different uses to which it was appropriated, were as familiar to us as our alphabet. Its glancing waters, glistening in the sunrise, presented the first object in nature that saluted our waking eyes, and the gentle and unbroken music of their fall was our evening lullaby. In process of time, we learned how the proprietors of water-rights higher up the stream could complain of "back-water;" and I remember one litigation of this sort that was carried on before referees sitting at our village tavern, in which eminent counsel from Boston took part, and at which we boys were among the audience.

But when my brother went to the school in Medford, it seemed as if he had suddenly turned his back upon boyhood and most of its interests. After he had been there about a fortnight, he came home on a Saturday morning, to remain until the following Monday. I had looked forward to his visit with a childish anticipation of some of the old fun. But he was very grave and dignified. A slight change of dress to a more manly style, a sense that he was now near the gates of Harvard, and contact with older boys from different places, had outwardly transformed him. He was very kind and gentle; but as to flying a kite, or wading with me in the river to catch minnows as bait for pickerel, — such things were out of the question. His talk was now of the Æneid, and algebraic equations; whether So-and-so, who was studying for a Sophomore examination, was likely to "get in;" and what was going on at Cambridge, whence some of the former pupils of the school, now become great men in the undergraduate world, came over sometimes to Medford, to display their "crow's-feet"[1] and enlarge the minds of their probable successors. I listened to all this with wonder akin to awe.

[1] The undergraduates of Harvard, at that time, were required to wear a uniform, consisting entirely of black cloth, and a black or white cravat. The coat had an ornament worked on the cuff of the sleeve in black silk braid, which was called, I know not by what token or derivation, a "crow's-

Before he went to the school in Medford, he had not been exercised in written composition at any of the schools he had attended; and, as he had never been absent from home before for any length of time, he had not had much occasion for writing letters. There is extant, however, among his mother's papers, in his boyish hand, a "theme," or composition, which he wrote at the school in Medford, after he had been there for some months. He sent it to her, with these words written on the back of the paper: "You must not show this to any one; if you do, I shall not let you see any more." No doubt she faithfully observed the injunction, but death has dissolved its obligation. I give the essay here, as the earliest known writing of Benjamin R. Curtis: —

On the Origin of Evil.

Perhaps there is no moral subject that could be proposed, about which there always has been, and is at present, so great a diversity of opinion as on this. Many have thought that there are two powers acting in creation, — the one evil, the other good. This idea is common to many savage nations. The nations of North America, for instance, worship both a good and evil spirit; and

foot." A Sophomore wore one of these badges, a Junior two, and a Senior three. A Freshman was not allowed to wear any. Perhaps the customary law of our present Harvard, enforced by the Sophomore classes as part of the unwritten code, which prohibits a Freshman from wearing that species of high-crowned hat known as a "beaver," is derived from that earlier law which did not allow the Freshman a "crow's-foot." I suggest this as a curious subject in the origin and history of such codes. In my brother's time and mine, the college laws enforced this uniformity of dress with some rigor. It was therefore, with the "swells," the daring thing to appear at chapel with a party-colored cravat; and I have known the audacity of a claret coat with a velvet collar to be sported in the "college yard" by some Senior near the beginning of the long vacation, to the great wonder of admiring fellow-students. At one period, a monstrosity was introduced, in the shape of a high imitation of the Oxford cap; but the imitation was a bad one, and it did not last a great while. The University has long since given up such puerilities, and allows its students the freedom of any dress for every day that they choose to wear. An academical costume, for days of public ceremony, no one would wish to see laid aside.

when any evil befalls them, they attribute it to the evil spirit, and when they receive any good, they thank the good spirit. But this opinion is not confined to savages, but exists, though perhaps in a different form, in our own times, and in our own country. Many believe that there is an evil spirit, who, though less powerful than the good one, has power enough to counteract and oppose many of the designs of God; and when He would make happiness and goodness, he by his power often converts them into sin and misery. They do not think that this spirit is independent, but that he holds his power from God, who permits him to exercise it upon man. But I think it is an insult upon the wisdom of God to suppose that He would give power to an evil spirit to oppose and counteract His designs and purposes, when He could have withheld it; and that He could withhold it there is no doubt. Besides, I conceive man to be an accountable creature; but this would take away all his responsibility, to attribute all his sins to the instigation of an evil spirit, and it would make him like a block of marble in the hands of two statuaries, one of whom was continually endeavoring to make it a handsome and well-proportioned statue, and the other a deformed and ugly one. But there is another class of people who attribute the origin of moral evil to a different source, which is the depravity of human nature: they say that man is naturally corrupt and inclined to sin; that he inherits this corrupt inclination from the father of his race, who fell by eating the forbidden fruit, and if he had not eaten it there would have been no death or sin in the world; and to this cause they attribute the origin of evil. But I do not believe in the depravity of man; I do not believe that God would implant in the breast of man a passion the first impulse of which would be to teach him to break His laws. Neither do I believe that the first man differed in any respect from others of his race, but that he had the same passions and inclinations, and was placed here in a state of probation for a better world, and that the sin of Adam, who was the father of all mankind, was any more the origin of evil than the sin of a father of the present day is the origin of the wickedness of his children. But I think that the true cause of moral evil in the world is that men conceive that there is some pleasure in sin independent of the crime itself; for I think no one would do wrong merely for the sake of doing wrong, but for the sake of some pleasure or advantage that he imagined to be contained in it, and he would a thousand times rather have obtained

the advantage without the sin if he could; but as he could not, the imagined pleasure or advantage outweighed his abhorrence of sin, or in other words the temptation was greater than he could bear. From what has been said I think that we may conclude that the origin of evil is to be attributed neither to the agency of an evil spirit nor the natural depravity of man, but to some pleasure or advantage which outweighs a man's abhorrence of sin; and then and then only he will commit it.

BENJAMIN R. CURTIS.

April 17, 1825.

This little essay, written by a lad who was under the age of sixteen, affords a striking proof of the theological emancipation effected in New England by the kind of preaching introduced by the Unitarian clergy in the early part of this century. The boy who wrote thus on the origin of evil could not have thought and written as he did at that age, if he had been born ten years earlier, and had been trained only in the prevalent popular creeds. The paper shows that, while he had been taught to disbelieve in a "personal devil" as a being commissioned by the Almighty to introduce sin into the world, and not to believe that sin is a necessary result of man's natural depravity, it is apparent that he had a conception of God and his attributes, and a sense of the accountability of man, with which he might safely walk through life, from youth to age. We get here, too, the first traces of that logical power which was one of the strongest of his intellectual gifts, applied to one of the most important subjects of human contemplation.

Mr. Angier was a good enough teacher to get his bright and studious boys into Harvard, as he did my brother, without "conditions;" but he certainly never imparted to any of his pupils a great amount of scholarship, as he did not have it himself, and he employed no teachers. The requirements at Harvard in those days were pretty low, compared with what they have since been made. My brother entered as a Freshman in the autumn of 1825, as well qualified, by

his talent and his studious habits, to take a high rank as any of his classmates.[1]

[1] John James Gilchrist, who became Chief Justice of the Superior Court of New Hampshire, and who was Chief Justice of the United States Court of Claims at the time of his death, in 1858, was a contemporary of my brother at the school of Mr. Angier in Medford. He entered Harvard College in the same year with my brother, but in the Sophomore class. He was graduated in 1828, in the same class with the Hon. Robert C. Winthrop and the late Hon. George S. Hillard.

CHAPTER II.

Harvard College. — Trials of the Freshman Year. — A Mother's Anxiety quickly relieved. — College Friendships. — A Bowdoin Prize. — Rank as a Scholar. — Evident Capacity for the Legal Profession. — An Oration at Commencement not delivered.

THE "Class of 1829" — to follow the Harvard custom of designating men collectively by the year of their graduation — numbered, when they entered, seventy-one. It pleased these young gentlemen, before they had got far into their Freshman year, to manifest their decided opposition to a new rule made by "the Faculty," they being the first class to which it was applied. This rule undertook to divide the members of the class into sections, not according to the alphabetical order of their names, as had been the custom from time immemorial, but according to their proficiency; and to allow those who could and did make more rapid progress than their less gifted or industrious companions to go on in a section by themselves in certain studies. This rule the Freshmen of that year (1825) considered as establishing invidious distinctions, which are always odious in a college democracy when they are new; and even the best scholars, like my brother, who could have availed themselves of it, did not like it, — it was unpopular. The opposition to the rule was a very serious affair, especially as a minority of the professors were supposed to disapprove of it. It was understood, in the neighborhood of the College, that the Freshmen were on the eve of breaking out into a "rebellion." That any of the overt acts usually held to constitute that insurrectionary resistance to lawful author-

ity were actually committed, so as to amount technically to a rebellion, I do not affirm. But, however this may have been, the Freshmen found means to manifest their displeasure at the new rule so decidedly that the peace and good order of the College were in some peril.

My mother, who, with all her energy of character, was of an anxious temperament, became disturbed. She was afraid that my brother, from sympathy with those of his classmates who were the most excited, might be drawn into some act that he would regret, or at least that between the Faculty and the class he would be placed in a trying situation.[1] As rumors of serious disturbances came thick and fast to our village — only three and a half miles from the College — she could not restrain her solicitude. She procured a "horse and chaise,"[2] and, taking me with her, drove to Cambridge. My brother's room was on the ground-floor of Hollis Hall. We reached it just as the college bell began to ring for a "recitation," and some of the class, one or two of whom my mother knew and greeted, were passing by his door in a rather tumultuary frame of mind. As soon as she saw him, she begged him to apply to the President and obtain leave to go home, with his books, and remain for a while until the trouble had subsided. It was a woman's weakness, to wish to withdraw her son from temptation or trial. He had but a moment to make his answer. He turned round at the door of his room, and said to her with great firmness, but with perfect tenderness, "Mother, you had best go home and make yourself easy about me. I shall take no side in this affair. The Faculty,

[1] It must be remembered that he was but sixteen years old. His situation was perhaps a little trying, as he was an applicant for what was called "exhibition money," to help pay a part of his tuition fees. There were, I think, but very few scholarships in those days.

[2] A New England "chaise" was a very comfortable covered vehicle, on two wheels, drawn by a single horse. They are nearly gone out of use, but one can be occasionally seen. A chaise driven "tandem" realized the poetry of motion.

who have got us into this scrape, must get us out of it as they can: I shall not help them. As for the class, they want nothing of me; and if they do, they will get nothing of me that is wrong." He then returned to where she sat and kissed her. With this, he went off to his recitation at a very measured pace. This judicial attitude might or might not have foretold the future magistrate, but it was quite characteristic of the lad as he then was. My mother was satisfied. I think that she never, after that morning, felt any concern about him in any emergency of life.

The college lives of even our most distinguished men can present very little of importance as an indication of their future eminence. The honors that are to be gained in the English universities, if they do not insure success in the professions or in public life, seem to help a man of talent and industry to make for himself a career, because they are regarded as high certificates that he has talent and industry, and because they are generally known to the great body of those who, for the time being, command the avenues to all employments. What our young men gain, or ought to gain, at our colleges and universities, is intellectual discipline, or the power to use their own faculties; a knowledge of how to employ books as their intellectual tools; the habit of written or oral expression; and the learning that is comprehended in the education given at the particular institution. These my brother acquired at Harvard, as abundantly as they could be acquired at that time. His college exercises, in every department of the *curriculum*, were all performed with that sustained, even, and easy excellence for which he was distinguished through life. I have not sought to ascertain from the record in what particular study he was foremost, because I am quite sure that in all branches there was a uniform proficiency, far above mediocrity, but not rising to brilliancy of scholarship, or the exhibition of other powers than the power of steady

industry applied by a mind singularly endowed with the faculty of doing well whatever was to be done.

Judging by what I afterwards knew of his attainments, I should say that in college he acquired but a moderate knowledge of Greek, which he did not continue to read, excepting in the New Testament; and that he was pretty strong in Latin, which he did continue to read through life in some of the great classic authors. But his scholarship in the ancient languages was not, at any period, of that kind which is displayed in frequent quotation, apt or inapt; nor was it the habit of his mind to parade whatever learning he had. His mind was enriched by learning, but not overlaid by it; and to aim to appear learned was as foreign to his nature as any other form of pretence. In the modern languages, which were voluntary studies at the time he was at Harvard, he learned to read French, German, and Spanish quite well, though he never spoke either.[1] In Italian, he went through a course which terminated in Dante, whose "Divina Commedia" was taught by a very accomplished native of Italy.[2]

The department of the modern languages and their literatures was then under the general charge of Mr. Ticknor. It was the department in which there was the greatest amount of activity and of positive instruction. My brother

[1] While my brother was in college, Francis Lieber and Edward Wigglesworth were editing the "Encyclopædia Americana," in which a part of the articles were translated from the German "Conversations-Lexicon." My brother made some of these translations, for the sake of the money that was paid for them. So far as I know, this, with the exception of what he received as a Bowdoin prize, was the only money that he earned by his pen during his college life.

[2] Pietro Bachi, Ph. D., instructor in Italian in Harvard University for twenty years. He was born in Sicily, in 1787. He was implicated, in 1815, in Murat's attempt to reascend the throne of Naples, and was banished. After remaining in England for ten years, he came to this country, and obtained an appointment at Harvard. He was a most accomplished person in many ways. He died in Boston, Aug. 22, 1853, at the age of sixty-six. (See Blake's Biographical Dictionary.)

had the advantage of hearing Mr. Ticknor's courses of lectures on the French and Spanish literatures; and I think that a very ample and instructive course of lectures on Shakspeare was also delivered by that gentleman to the same class.[1]

In the mathematics and such of the exact sciences as were then taught at Harvard, I do not suppose that he made any considerable acquisitions. Indeed, for the higher mathematics he had very little taste. In the moral sciences, it might be expected that he would obtain all that the state of instruction at that time could give him. In logic, moral philosophy, and political economy, the text-books and the teachings were perhaps up to, but certainly

[1] I can myself remember nothing, in the whole of the instruction at Harvard, from which I derived more than from Mr. Ticknor's lectures on French literature. It was a most thorough, comprehensive, and methodical history and criticism of the entire body of French literature, from the origin of the language down to the year 1830, arranged with all the accuracy of detail for which he was noted, and interspersed with interesting biographical accounts of the authors. No one who heard that course of lectures, and really attended to them, could ever afterwards be at a loss where to place any of the great writers, or forget their productions and the merits of each of them, or be ignorant of the history of the language, or of the distinction between the classic and the romantic drama, or the characteristics of French prose and poetry. I do not, of course, presume to intimate that Mr. Ticknor did not, in his great work on Spanish Literature, surpass all that he ever did in the *belles-lettres*. I have the same vivid impressions of his lectures on the Spanish as of those on the French literature; but having taken full notes of both courses as they were delivered at Cambridge, I venture to express the belief that the publication of the French lectures, from his manuscripts, would in no degree diminish his fame. It may perhaps be thought that, as a great deal has since been done in the same field, the literary world would not gain as much from his French lectures as it has gained from his work on Spanish Literature, and that as the author himself did not prepare them specially for the press, it is not worth while for any one else to undertake it. But there must be, and I am confident that there is, a great deal in these French lectures that would be highly interesting as exhibitions, not only of his peculiar scholarship, but of his characteristic methods of criticism, his views of the growth of a literature and of its influence upon and its subjection to the national character. Others may have written as well on these subjects, or better; but would the world therefore be careless of any thing that came from the pen of George Ticknor?

not in advance of, the times. In history, whatever of importance an undergraduate could gain was gained by his own voluntary studies. The sum of my estimate, in regard to his positive acquirements in college, is, that while, as his "college rank" shows, he neglected no part of the *curriculum*, and was punctilious and exact in all his prescribed duties, he did about as much for himself as was done for him by the institution. But of course he could not have well dispensed with a college education; and, indeed, I ought to mention, as of special importance, one of the advantages that were afforded at Harvard in his time. Whatever power of correct writing he or any man obtained who was educated there while Edward T. Channing was Professor of Rhetoric, he must have largely owed to that accomplished critic and teacher.[1]

[1] Mr. Channing was a brother of the celebrated divine, Dr. William Ellery Channing. His nicety of taste, his knowledge of the capacities of our English tongue, and his large acquaintance with English literature, made him a most useful Professor. I am ignorant of the mode in which rhetoric is now taught at Harvard or our other colleges; but I can conceive of nothing better than Mr. Channing's method, and of nothing more valuable than his criticism. It was his habit to give out a subject every fortnight, on which each member of a class was required to write an essay, called in the college parlance a "theme." These he read carefully in his study, correcting them with his pencil by a peculiar system of marks, which were well understood by the students. The papers were then returned to the writers. After a short interval, the class attended him in his lecture-room, and each student in his turn was called up to the table and seated by the Professor's side. Speaking in a clear tone, so that the others might profit by his observations, he placed the point of his pencil under the word or passage that he meant to object to, and then, with a slight suspicion of a sneer, kindly but pointed, he in a few words gave you a criticism that went through you like a rapier. Whatever other faults you might thereafter commit, you were not likely to repeat that one during the remainder of your life. Mr. Channing was not fond of work, but he performed his stated duties with great fidelity, and he sometimes went beyond them. He received during one winter, at his study, on one evening in each week, eight or ten of the members of my class, — of whom I was lucky enough to be one, — and read with us choice passages of the English poets, from Chaucer to Wordsworth, and of the principal prose-writers from Bishop Latimer to Burke. I have known no man who had a more extensive knowledge of the whole body of English literature, and no one whose methods of teaching

I have now to quote from a recent letter, written to me by the distinguished poet Dr. Oliver Wendell Holmes, one of my brother's classmates, in answer to some inquiries which I had addressed to him: —

"The only college society in which I remember meeting your brother was a small and temporary association, called the *Διαφημίζοντι*.[1] I do not remember any of the members except your brother and William Henry Channing. I should perhaps not remember the society at all, but for the fact of 'Ben Curtis's' having taken part in a discussion, and shown in that first effort such extraordinary clearness of statement that we all saw at once that he *must* be distinguished in the legal profession if he adopted it. His was the first horoscope that we cast, and from that hour his record was but the fulfilment of our unquestioning prophecy.

"I was not intimate with him in college, nor do I think that he was intimate with many, if with any, members of the class. Keeping himself rather apart from the multitude, he never gained that cheap popularity which is often awarded to men for their social habits, rather than their deserts. Consequently, although he was one of the candidates for the place of Class Orator, it was awarded to

good English writing were more successful. As a reader, he was positively charming.

Since the foregoing part of this note was written, I have received from Mr. George William Phillips the following account of the strong testimony once borne by Judge Curtis to the merits of Mr. Channing. "At one of the annual meetings of 'the Class of 1829,' Curtis remarked that for the freedom from the florid style so common among boys, and which he did not suppose had ever prevailed at Cambridge as much as at other colleges, we were mainly indebted to Channing's influence. 'I can cite a strong case,' he said, 'here in our own circle. Bigelow is not here to-night, and so I may speak of him as I should not if he were here. You know much of my life has been so spent as to give me a large acquaintance with the judicial style; and I here express the opinion, which is not a new one, that for simplicity, clearness, and purity of style, so well suited to his purpose, I know of no living judge who is the superior of our classmate Bigelow.'" The gentleman here referred to was Chief Justice of Massachusetts from 1860 to 1867. He died in April, 1878.

[1] The term may be rendered "notabilities," or notables, "famous persons." College students are never too modest in adopting the names of such associations. My brother was a member of the Hasty Pudding Club; an honorary member of the Porcellian Club; a member of the Harvard Institute, and of some other college societies. At the end of his Junior year, he was entitled by his rank to be, and was, elected a member of the Phi Beta Kappa Society.

another.[1] We do not often think of your brother as a student of *belles-lettres*, or as particularly given to the reading of poetry; yet I remember very vividly that, on going into his room one day, he burst into what was almost a rhapsody of delight over some of the poems of Coleridge, a volume of which he had before him. Two passages I remember he recited, or read from the book, with glowing enthusiasm. One was, —

'All thoughts, all passions, all delights,' &c.[2]

The other I cannot give textually, but it is the one in which the question is asked, —

'What if all nature is an Æolian harp?' —

the same thought, by the way, which you may find in one of Burns's poems or letters, and perhaps in older writers."[3]

[1] The appointment of "Class Orator" was determined by a vote of the class. It fell upon George H. Devereux, of Salem.

[2] It is the first line of the first stanza in Coleridge's poem entitled "Love."

[3] "Are we a piece of machinery, which, like the Æolian harp, passive, takes the impression of the passing accident?" (Burns's Letter to Mrs. Dunlop, New-Year's-Day, 1789.)

Dr. Holmes, in a postscript to his letter to me, adds: "I cannot forget that you were the first reviewer who ever spoke a good word for me. You may have forgotten that you wrote a notice of a Phi Beta Kappa poem which I delivered in 1836. I wish I could repay you better than by these scanty pages." I had certainly forgotten that I was entitled to the distinguished honor which Dr. Holmes assigns to me; nor can I now recall what led me to try my "prentice hand" in a notice of his poem. But the poem itself I remember with as much distinctness as if I had heard it within a week. The beautiful lines relating to the two churches in Cambridge have run in my head ever since, and I never revisit that classic ground without recalling them. I quote entirely from memory: —

"Like Sentinel and Nun they keep
Their vigil on the green;
One seems to guard, and one to weep,
The dead that lie between."

Dr. Holmes had then just returned from Europe. Extremely youthful in his appearance, bubbling over with the mingled humor and pathos that have always marked his poetry, and sparkling with coruscations of his peculiar genius, his Phi Beta Kappa poem of 1836, delivered with a clear, ringing enunciation, which imparted to the hearers his own enjoyment of his thoughts and expressions, delighted a cultivated audience to a very uncommon degree. I suppose my little "notice" could have been only an attempt to express the general admiration. But in these memories of two and forty years, what one has done one's self may fade, while what was done by others is more enduring.

There is one slight qualification to be made of Dr. Holmes's remark concerning my brother's intimacies. In college, as in later life, he chose his friends very much according to the principle of the advice given by old Polonius to his son; and perhaps this is what Dr. Holmes meant to imply. It is certain that in college he had intimates. One of his closest friends was Mr. George William Phillips, who has been for six and forty years a much respected member of the Boston bar. They made together a journey to Niagara, on horseback, in the long summer vacation of their Senior year. Another of his college friends was Mr. Edward D. Sohier, also still an active and prominent member of the same bar. They were drawn together by their common tastes for field-sports; and through many a "bushy dell and bosky bourne" they followed, with dog and gun, where the wary woodcock, swiftest of birds, rushed away on the wing, and was often dropped by their quicker shot. Still it is true, in a general way, that my brother's friendships were not many. "He had," says Dr. Robbins, "even at that early age, the air of stateliness and reserve which has often given the impression of a cold and haughty nature. But those who knew him best ever found, beneath, a warm and generous heart, habitually kind in its judgments and considerate of the feelings of others."[1] In regard to the "stateliness and reserve," the same mistake was made concerning Mr. Webster, as it has been in the cases of many other men of superior intellect, whose manners have not been what is often called "popular." I am not aware that, either in his youth or at any other period of his life, my brother was ever regarded as a haughty man,

[1] Memoir by Dr. Robbins, read before the Massachusetts Historical Society, and lately published. As an instance of his consideration for the feelings of others, I recollect one proud and sensitive youth making a complaint, in a formal note, that he did not have so much of my brother's society as he thought himself entitled to. He was answered gently and kindly, and always remained strongly attached to my brother. The gentleman has been deceased for many years.

even by those who did not know him well. He certainly did have at an early age an air of sedateness, which was the natural expression of his maturity of character, and his balanced and thoughtful nature. Dr. Robbins observes that he had "nothing of what is termed self-consciousness;" and his testimony, which is of itself valuable as that of one who had the earliest means of observation, and who knew the man of whom he speaks, through all the remainder of his life, would doubtless be confirmed by the general verdict.

But I must return to the journey to Niagara, in order to quote from a recent letter addressed to me by Mr. Phillips, concerning that and an earlier trip of the same sort.

Boston, Sept. 27, 1878.

My dear Curtis, — . . . There were two of these horseback journeys. I shall never forget them. I have known nothing in that line like them. The first was in our Junior year, the summer of 1828, half a century ago. Ben,[1] Weston (we always called him Harry Weston[2]), and I made the party. We went to Portland, up the Saco Valley, to the White Hills; then over to the head-waters of the Connecticut, down the river road to Springfield, and thence home. We were gone three weeks. Each had $50, and each brought home some balance. The next year, just preceding Commencement, Ben and I rode to Niagara through Northampton, Albany, and Central New York, and back by much the same route. . . . It was on these journeys especially that Ben impressed me with his singular maturity of character. He managed and decided like a father of forty.

[1] At home, and among his friends and intimates, until he became a judge, my brother was always called by this diminutive. In the Life of Mr. Ticknor, it is related how he gravely counselled, after his nephew had been elevated to the bench, that in the family circle this habit should be dropped, and that he should be called "the Judge." Every one conformed to this excepting my mother. With her, all the honors and dignities in the world could not displace the endeared name by which she had always called and spoken of her eldest child. And as these surviving companions of his youth, now verging on the threescore and ten, go back in their memories to his and their early days, how else should they speak of him but by the fond, affectionate appellation by which they first knew and loved him?

[2] His name was Ezra. He was of a family in the Old Colony of Plymouth.

These journeys were glorious. We sometimes spoke of them in after years, and it was always agreed that there had been nothing like them. We had our horses in training a fortnight before we started; carried nothing but the round military valise at the back of the saddle; and all dressed alike, in short jackets and pantaloons of brown linen.

I have been living for more than twenty-five years on a small farm to the north of Boston, which happens to bound, on one entire side, on the old Newburyport turnpike, — the very road by which we three boys started on our first day's ride to the White Mountains. I ride now a good deal, and twice out of three times I turn my horse's head in that direction. It is still, as then, a wild, wooded road, — scarcely any houses; and it is easy to imagine my companions by my side. Ben always rode on the left, I in the middle, and Weston on the right. The companionship is at times very real. There are no tolls or ferries there; but if there were, it would be straining nothing to say, —

> "Take, O boatman, thrice thy fee,
> Take! I give it willingly;
> For, invisible to thee,
> Spirits twain have crossed with me."

You must never refer to these rides, or say "horse," if you can't bear a good deal of this. . . .

Very truly yours,

GEO. W. PHILLIPS.

GEO. T. CURTIS, Esq., New York.

In his Junior year, he wrote a dissertation for one of the Bowdoin prizes, and received for it a first prize of fifty dollars. The subject, prescribed by the college, was the question, "How far may political ignorance in the people be relied on for the security of absolute government in Europe?" The editor of this work has selected this essay for the first place among his father's productions that are to be included in this collection. It will give the reader the means of judging how far he had attained, at the age of nineteen, the style of his maturer years. It was written in 1828, four years after Mr. Webster's celebrated speech in Congress on the Greek Revolution, which was delivered

Jan. 19, 1824. I suggest these dates because it is quite probable that the Professor of Rhetoric, in assigning this question to the competitors for the prize, was led to choose the topic itself by some of the passages in that speech. But a comparison between a college essay written by a youth of nineteen, and a careful and finished speech by a distinguished statesman of forty-two, is of course not to be made for any other purpose than to ascertain if the young collegian borrowed any of his ideas or his expressions. So little does this seem to have been the case, that the treatment of the subject would hardly lead one to suppose that the writer of the essay had read the speech, although he doubtless had.[1] Mr. Webster's striking and eloquent description of the power of public opinion will recur to the reader. But the remark of the young essayist, that that power can be exercised only by an enlightened and judicious people, — that public opinion cannot be formidable without freedom of thought and cultivation of mind, — was a just discrimination, which certainly was not borrowed, however obviously true it may be.

The precise rank in which my brother graduated, as measured by the rules then prevalent and by the public performances assigned at the graduating "Commencement," was that of second scholar of his class.[2] His "part" at the Commencement (August, 1829) was what was academically denominated an "Oration." The subject was, "The Character of Lord Bacon."

I am not sure whether the subject was assigned to him by the Faculty, or was chosen by himself; but my impression is that the two graduates who received the highest of the Commencement honors were at liberty to choose their subjects. If this one was assigned by the college authority,

[1] The famous passage in Mr. Webster's speech, "Sir, this reasoning mistakes the age," was then declaimed in half the colleges and high-schools throughout the country.

[2] The first rank was taken by Mr. Charles S. Storrow, who became an eminent civil engineer.

the professor who had the direction of the matter made a happy adaptation of the topic to the reading and tastes of the young man who was to treat it.

I can bear testimony that Bacon's "Advancement of Learning," his "Essays," and some of his other works, were constantly on my brother's table during his Senior year. But how he handled this subject cannot be known. In consequence of an illness which followed the journey to Niagara already spoken of, the oration was not delivered at the Commencement. It was, therefore, not placed in the college archives, and no copy of it has been found.[1]

After he had graduated, he received an appointment to the office of Proctor in the University.[2] This gave him a right to reside in one of the college halls, rent free. But the duties of the office were not very onerous, at least in quiet times, and it involved no duty of giving instruction. In the month of September in that year (1829), he entered the Law School of the University.

[1] I am under the impression that my mother once had it, and that I at one time read it. But I cannot trust my memory sufficiently to describe it.

[2] Soon after he became a Proctor, I (being a Sophomore) met Mr. Quincy, the President, one day, in the college grounds. He had not been President long, and was probably not familiar with my brother's person. He began abruptly to speak to me about some matter which apparently involved "government secrets." As soon as I perceived his mistake, I undeceived him. He looked at me shrewdly for an instant, and then said, — "Ah! I see, sir; there is some difference, after all, between Alexander the Great and Alexander the Coppersmith." The President of course had the laugh on his side: an undergraduate could not return his joke; but I, in my sophomorical dignity, thought it an odd way of offering an apology, when I had been so prompt in making him aware of his mistake.

CHAPTER III.

Enters the Law School at Cambridge. — Steady Progress. — Quits the School for a Country Residence. — Finishes his Studies at Northfield. — Admitted to the Bar. — Marriage. — Country Practice. — Invitation to remove to Boston. — Acquisitions and Reputation. — Character and Professional Standing of Mr. Charles Pelham Curtis. — Letters to G. W. Phillips and Mr. Ticknor.

It would be quite an unnecessary refinement to speculate about the causes or reasons that made my brother choose the law as his profession. He was not led to it by any accident, whether of association or employment. He was not apprenticed in his youth as a lawyer's clerk or office-boy, and he had no relative or acquaintance whose example or influence might have affected him.[1] Nor was he advised by any one to choose this profession. Nature made him for a lawyer, — and a great one; and when, as we have seen, some of his college classmates cast his "horoscope," the elements of their calculation were all patent to their perceptions of his natural gifts. In resorting to the study of the law, he simply followed what was as much a dictate of his moral and intellectual, as the appetite for food was a dictate of his physical constitution. I do not think that there was ever any question in his mind about a profession from the time when he was eighteen years old. Some of his voluntary studies, during his last two years in college, show what he expected to become. He devoted much time during

[1] In Lord Campbell's "Lives of the Chancellors," we read that the great Lord Somers was clerk to his father, who was a country solicitor, and that Lord Hardwicke was an articled clerk to Mr. Salkeld, a London attorney.

those years to English history, reading systematically Hume, Lingard, and Hallam; thus making the best preparation for Blackstone, Coke's "Institutes," and the Reports.

It has been finely said that "Justice is the great interest of man on earth;"[1] and if there ever was one who, by an instinctive propensity to that noble science which regulates the social rights of men, was qualified to use to the utmost advantage every available means for its study, it was he who is the subject of this Memoir.

In the same autumn in which he graduated from the academic department of Harvard, the Law School of that University became what it had never been before, — a living and working institution. Judge Story had come there with his affluence of learning, his power of satisfying young men who had a real thirst for knowledge, and his magnetic activity. His inaugural discourse as Dane Professor of Law — delivered Aug. 25, 1829 — gave a new and stimulating exposition of the objects and methods for and by which the study of the law should be pursued.

There, too, had come, as Royall Professor of Law, John Hooker Ashmun, of Northampton, — then, perhaps, the first lawyer of his age in Massachusetts; at all events, one who was a thorough master of the common law and its system of pleading, and who was as winning in his intercourse with young men as he was capable of instructing them in his particular department. Judge Story brought with him his ample library, and gave the use of it to the students. There had not been such an opportunity for legal education in America. The first class that availed themselves of it was composed of graduates of other colleges, as well as of Harvard, and from various States of the Union; some from States as far as Virginia and South Carolina.

I am not disposed to say that my brother was then recognized as the foremost man of this eager band. But among

[1] Daniel Webster, Remarks at a Meeting of the Suffolk Bar, on Occasion of the Decease of Mr. Justice Story. Works, vol. ii. p. 300.

the studious young men of talent who first gathered about Judge Story and his associate Professor in the Cambridge Law School, Curtis was regarded as one of whose future the most confident hopes might be entertained, because he had given, and was constantly giving, proofs of his peculiar adaptation to the profession of the law. He entered upon its study with zeal, rapidly acquiring what is so essential to a beginner, — a knowledge of the books of the law, and of how to use them. His Common-place Book, kept at this time and long afterwards continued, shows with what diligence he read, and with what system he digested his reading.[1] Its titles and references exhibit a remarkable sagacity in selecting and preserving the learning that would be useful in practice. Some men have read law by going over a great field of books, and acquiring a habit of heaping up citations, without seeming to have cultivated the faculty of judging nicely of their bearing upon the point or question with which they may have to deal. The power of being learned with discrimination — of making a pertinent use of what one knows — is very necessary to a lawyer who expects to instruct and influence a court. This power my brother possessed in an eminent degree from his earliest professional years. He was always, and justly, considered as a learned lawyer: no one ever regarded him as a pedant.

Judge Story introduced into the Cambridge Law School the custom — since followed in most of the law schools in the country — of holding "moot courts." A case was given out; the parts of junior and senior counsel were regularly assigned to two students on each side from among those who chose to enjoy the privilege; and the case was publicly argued before one of the professors sitting as a judge, by whom the decision was pronounced in an oral opinion at the close of the discussion. My brother always availed

[1] The Common-place Book lies before me, and I can distinguish the reading of his law-school days.

himself of every opportunity for this kind of exercise; and his immediate success as an advocate, from the first moment when he began to appear in the real tribunals of his native State, proves how well he had profited by those fictitious trials.[1]

I am not aware that any production of his while he was in the Law School has been preserved, excepting another Bowdoin prize dissertation which he wrote in 1830, when he had been graduated just one year. A copy of it has been obtained, as the previous one has, from the college archives, for publication in this work. The subject was, "The present character of the inhabitants of New England, as resulting from the civil, literary, and religious institutions of the first settlers." It is not surprising that this dissertation should have taken a first prize. In historical research, accuracy, and grasp of the subject, it would have done honor to any writer of twice his years. It shows that his style was even then fully formed, although there is here and there an expression that might be improved. It is printed in the present work just as it has been received from the college files.

The following letter to his friend Phillips, which shows how he passed the summer vacation of the year 1830, is the only part of his correspondence during his connection with the Law School that has come within my reach. What were the "attractions" of Hanover will be presently explained.

[1] The "moot courts" were almost always held as sittings *in banc*. But I remember that, on one occasion, Judge Story organized and presided at a *nisi prius* trial. The case was an action upon a policy of marine insurance, and it turned upon the question of a total loss. The jury was composed of twelve students, drawn from the Divinity School. I forget how the evidence showing the loss was introduced, but I presume it must have been presented in depositions, borrowed probably from some actual case. My distinguished and beloved friend, the late Hon. George S. Hillard, is the only one of the "counsel" whom I remember as taking part in the trial. He "led" on one side or the other. He closed an impassioned peroration by exclaiming, "Gentlemen of the jury, the verdict is mine! I *will have it!*" Yet I am quite unable to say how it went. But I know that a great deal was taught in those "moots," in which all the forms were punctiliously observed.

To Mr. G. W. Phillips, Boston.

Hanover, Aug. 11, 1830.

My dear Friend, — Your pleasant letter, which I received two days since, found me in Hanover, where I have been quietly located for the last four weeks, and where I expect to remain one week longer, until after the Commencement here, when I shall leave for Burlington, Vt., where I shall stay a week or so, and return to Cambridge on Saturday after our Commencement. Now don't ask me what I am staying in this dull place for so long, and how I contrive to pass away the time, and don't look wise when I see you and say that, ahem! doubtless there are attractions which may make the most stupid places very pleasant; for indeed this is an excellent place to study, and a vast deal of law have I read since I have been here; and positively that is the only reason why I have stayed so long. Then, as you say, what fine rides there are on the river, and in the back country, and what a fine moon we have had! and indeed, altogether, it has been a very pleasant four weeks. I shall not be present at Commencement or the class supper. I believe you are on the committee. The best wish I can entertain for you in that respect is, that you may not be compelled to pay for more of your supper than you can eat.

I am sorry to learn that it is probable that Davis, of Worcester, will be placed on the bench: I hoped it might be one of the Boston Bar. The appointment of Mr. Hubbard or Mr. Shaw would leave a fine practice to be distributed among the remaining lawyers; and would be a good example to teach young men that, though the number of lawyers does increase, still from time to time an old gray-head makes way, and leaves room for others.

I am greatly interested in the Salem trials.[1] We get little news of them, or of any thing else going on in your quarter. Sohier is kind enough to forward me a paper, so that I am not more than a week behind the rest of the world in news.

We have had terrible freshets here and in Vermont, — whole villages swept away, and numbers of lives lost, crops destroyed, and a vast deal of damage done. All the north-west part of the State of Vermont has been under water. I am not able to go from here to Burlington directly, but am obliged to cross the State to the foot of Lake Champlain, and go up the lake in the steamboat.

[1] The trials of Knapp and others for the murder of Capt. Joseph White.

Your generous apology for conduct which, though I had not forgotten, I had certainly and truly forgiven, was unnecessary; but it has confirmed my high opinion of your good sense and candor. We both of us behaved less like men than we might have done, and if my part in the affair renders it allowable for me to make any request concerning it, it is that you will not trouble yourself any more about it, but will forgive and forget it all, as I have done.

Since I last saw you, I went to Nahant, and spent a day in company with ——. He has all his old peculiarities, though they are somewhat diminished in degree; and, on the whole, I think he has greatly improved, as much so as any of our class whom I have seen. By the way, — speaking of classmates, — I saw Conant in Greenfield, Mass. He had been to the White Mountains, had come down to Bath, purchased a boat, and floated down the river as far as Greenfield, where I saw him. He had a companion and intended to go as far down as Springfield, and then walk to Worcester, where he is studying law.

Yours truly, B. R. Curtis.

Mr. Curtis left the Law School in the early part of the year 1831, some eighteen months before the completion of the regular course. How he came to do so requires explanation.

Between forty and fifty years ago, there resided and practised in the town of Northfield, in Franklin County, Massachusetts, an old-fashioned lawyer, — John Nevers, Esquire. He was universally called General Nevers, because he held, or had held, a commission as Major or Brigadier-General in the militia. When I first knew him, which was in 1833, he was a quaint, tall, and spare man, with silvery hair, a parchment complexion, manners that were both rustic and formal, a dry humor, and an expression about his eyes and mouth that indicated shrewdness and a habit of suspicion. He was, however, a man of strict integrity, and of great firmness and resolution; qualities that made him respected by his neighbors, and up and down the valley of the Connecticut River as far as he was known. As a lawyer, he was not distinguished. He knew some-

thing of the statute law of Massachusetts and a little of what was contained in the earlier volumes of the Massachusetts Reports. But, altogether, he was not a member of the profession with whom such a young man as Curtis would have been likely to place himself as a pupil under ordinary circumstances, in preference to remaining in the society of Judge Story and Mr. Ashmun, and the students who surrounded them. He did a considerable business as a collecting lawyer, and made a good many "entries" at every term of the Common Pleas. But he always employed other lawyers to conduct his cases in court, when there was to be a contest. At the time of which I am writing, he had amassed a fair property, and was disposed to accept the office of Sheriff of his county. The sheriffs in Massachusetts were always appointed by the Governor and Council; they were almost always lawyers; and, from the dignity and importance of their office and their official relations with the judges, it was fit that they should be gentlemen. General Nevers was in all respects a suitable person to bear the sword of justice, and to represent the executive authority of the Commonwealth.

Having made up his mind to retire into the office of sheriff, this cautious gentleman looked about for a young man on whom to devolve his law business, and on whose assistance he could rely in matters arising in his new position. He had the sagacity to see that what he wanted was a young man who knew more than he did in the law; although few men, old or young, could know more than he did in the common affairs of life that had fallen within his limited range. It happened that James C. Alvord, of Greenfield, a young lawyer of the most eminent abilities, but who had not been long at the bar, came to attend the law lectures at Cambridge, attracted thither by the accession of Judge Story to the principal chair. A strong and intimate friendship grew up between Alvord and Curtis. General Nevers could not offer to Alvord a position in his office;

for Alvord's future was already secured in his native town of Greenfield, the shire town of the county. But Alvord put General Nevers and my brother in communication with each other; and the result was that, early in the year 1831, the latter left the Law School, and took up his abode in Northfield, with a prospect of succeeding to the business of General Nevers. He still wanted eighteen months of the time when he would be entitled to be admitted as an Attorney of the Common Pleas.

It was, in one aspect, a great and perhaps an unwise sacrifice for him to leave the Law School. Possibly it might have been better for him to have completed the course of preparatory studies at the school, as it had been arranged by the Professors, and then to have sought a knowledge of practice in some office in Boston. But the real motive must be told. A mutual attachment had for some time existed between him and his cousin, Miss Eliza Maria Woodward.[1] The prospect of an assured income, however small, coming sooner than could be expected if he submitted to the usual waiting that is the lot of most young lawyers, decided him to bury himself in a country village, where he could have very little congenial society, scarcely any books but such as he could take with him, and where he must encounter the risks of an association with a gentle-

[1] She was the youngest daughter of my father's eldest sister, by her marriage with Mr. William H. Woodward, a highly respectable lawyer of Hanover, New Hampshire, long the Treasurer of Dartmouth College. Mr. Woodward was the defendant-in-error in the celebrated case of *Dartmouth College* v. *Woodward*, decided by the Supreme Court of the United States in 1819. He died before the final decision of the case, but his family continued to reside at Hanover for many years. He was descended from the celebrated Captain Miles Standish, the Puritan leader and warrior. Josiah Standish, third son of the great captain, settled in Preston, Connecticut, in 1687. His daughter, Mary Standish, was the mother of the Rev. Eleazar Wheelock, the founder of Dartmouth College. Mary Wheelock, daughter of the founder, married Bezaleel Woodward, a Professor in the College. Their son, W. H. Woodward, was Chief Justice of the Court of Common Pleas of New Hampshire; and his son was W. H. Woodward, the Treasurer of the College, who became the defendant-in-error in the celebrated litigation.

man who, with all his good qualities, was something of an oddity. Cambridge was at that time filled with a new intellectual activity. My brother's position in the Law School was every thing that he could desire. His mother was residing there;[1] and in Boston the house and library of Mr. Ticknor were always open to him, and always afforded many attractions. But the hope of an early fruition of his matrimonial plans carried him through all these sacrifices and all the hard work that he had to encounter, and tinged the enterprise, to his feelings, with a romance which was understood by few persons but himself and the young lady of his choice.

He had not been long settled at Northfield when his uncle had occasion to write to him in regard to a feeling of hostility towards Harvard which had at that time grown up in the western part of the State. The answer was given in the following letter: —

To Mr. Ticknor.

Northfield, March 29, 1831.

My dear Uncle, — I received your letter on Friday last, and, not having seen any of the publications of which you speak, I went over to Greenfield to see if I could find them there. I was not able to do so, nor did I see any one who had seen such communications in any of the Western papers. But though I was so far unsuccessful, I found in all the most intelligent and influential men here enough of the spirit and feelings likely to produce such effusions. I have talked with some of all parties; and, as near as I can ascertain, there is among all who think or care at all about the college either decided hostility or dissatisfaction with what they call "the illiberal policy towards this part of the State." The *hostility* is confined to the

[1] She removed to Cambridge in 1826. For many years she received at her table eight or ten of the resident graduates or undergraduates who desired a more liberal diet than the college "commons" afforded. At her house, therefore, there was always a choice collection of young men of good manners and agreeable conversation, some of whom, while my brother remained in Cambridge, were his personal friends, and all of whom were persons whose society he was sorry to lose.

"Orthodox party," and I have reason to think that an effort has been made here to elect such Senators as would do their utmost to effect a change in the present state of things at Cambridge. The effort must fail, owing to political, which is here too strong for religious excitement.

But, passing over this party and all those who are *enemies* to the college, all the most respectable men in this part of the State are dissatisfied.

The causes of this dissatisfaction are, that the expenses of an education at Cambridge are greater than are necessary; that the College is sectarian; and last, but far from least, that it is the College of Boston and Salem, and not of the Commonwealth. These three things they believe most firmly, and they act accordingly, and send their sons to Yale or Dartmouth, or even to Amherst, rather than to Cambridge.

These are not the views of narrow-minded men, or of those who feel little interest in the subject. I have obtained them from such men as Daniel Wells and Samuel C. Allen, and they are certainly easily accounted for even if they are not well founded.

"There has not been a single person in the old county of Hampshire," said the Hon. S. C. Allen, the other day, "since my recollection, in any way connected with the College, or likely to exert his influence in its favor, and how should it be otherwise than that the people should either care nothing about it, or be led by its enemies to suspect or dislike it."

On the other hand, the other colleges have persons here, and those the most influential men, among their trustees; and these men are of course interested to do all they can in support of the institutions with which they are connected.

I am told that this dissatisfaction is increasing; that the circle in which Cambridge is respected, and in which its influence is felt, is constantly contracting; and that the number of students from this part of the State will continue to diminish. How far this is true you yourself can judge far better than myself; but if the influence of the College would be materially increased, as I have no doubt it would be, by the appointment of some few members of the Board of Overseers from this part of the country, it may certainly be worth considering whether it should not be done, rather than lose the students from so large and respectable a portion of the State.

I write in great hurry, for next week is court week, and business is just now pressing. Remember me to aunt, and say that I shall soon answer her kind letter.

Your affectionate nephew,

B. R. CURTIS.

GEORGE TICKNOR, Esq.

The following letters to his friend Phillips disclose his feelings in regard to the sacrifices he had made, and the motives which led to them. I am inclined to believe that his sober renunciation of Boston and Cambridge had, after all, a little of the delusion under which the fox in the fable, whose situation he disclaims, labored, when he recommended a new fashion to his brethren. But the letters are full of his thoughtful and reflecting character, and of the spirit with which he disciplined himself to a situation which was solitary enough, until his marriage gave him another home than his office.

TO MR. GEORGE W. PHILLIPS, BOSTON.

NORTHFIELD, April 16, 1831.

MY DEAR GEORGE, — I have never answered your letter, which I received a long time ago, because I had nothing to say to you which I supposed you would care to hear or know; and, indeed, the same reason would prevent me from writing now, did I not wish to hear from you, and I suppose I shall not have that pleasure without answering your last.

The reasons which you gave for not coming here are unanswerable; and I am sometimes glad that you did not come, so total is the want of any thing to please or interest me out of the walls of the office, — in which I spend all my time, — if I except the scenery, which is now putting on a spring-like look, and is, even thus early, very pleasant. But still I do think that this is in many respects a more eligible residence than Boston.

There may be those who can hold an onward course in the midst of all the interruptions and obstacles with which a city must surround them, — who can preserve a clear and quiet and happy spirit, an active and obedient mind, amidst temptations to habits which are inconsistent with each and all of these; but I am not one of these,

and I am better, morally, intellectually, and physically, where I am.

Do not smile at me and say my taste for the country is like that of the *fox who approved of short tails;* for it is not so. I do truly feel and believe that the effect of the quiet and almost solitary life which I lead will be far more beneficial to me than all the advantages presented by Cambridge or Boston. It is true there are some weary hours in a week, when law books are hardly sufficient to banish all thoughts of other days; but they are few, and time and habit will continue to diminish them. I spent the last week at Greenfield, where the Supreme Court has been sitting, and where I saw much of Mr. Bates.[1] He was in fine spirits, and very successful as an advocate. He is certainly a graceful speaker; and, though uncertain and very unequal in his arguments, I should think he would be considered an able advocate in any court in the Commonwealth. He inquired particularly after you, and said his family were all well, &c.

If you see Sohier, please to ask him why he does not answer my letter which I wrote him long since, and do not make it necessary for me to send the same inquiry after you.

Yours truly, B. R. Curtis.

To Mr. George W. Phillips, Boston.

Northfield, Nov. 2, 1831.

Dear George, — It gave me great pleasure to receive your last letter; for I had feared, either that my request that you would not write to me more on a subject on which I will hardly yield to yourself in high estimation of its interest and importance, but which I nevertheless thought, and still think, we had better not write about, — I say, I had feared that this request, or that forgetfulness which the noise and bustle and the many changes of a city are so apt to produce towards one's *country* friends, had put a final stop to our correspondence. But I should have been truly sorry to have had it so. Now that I have left Boston and its vicinity, and all the things and people with whom I have been connected since infancy, and have come among strangers, to fight my way by my own unaided strength, I do assure you that I look back with strong

[1] Hon. Isaac C. Bates, of Northampton.

feelings to those who have been my companions and friends at what will probably prove to have been the happiest part of my life. I have here a good field for professional exertion, as well as an opportunity to do much good in other ways; but there is little, very little, in the manners, the habits, or the character of the people to which I can look for sympathy. I am thrown entirely upon my own resources for happiness, and you may be sure that many of these are drawn from the past. It would be a sad thing for me, therefore, if I should find my old friends forgetting me, now that I have come away from them, and now that I so much need their friendship.

I presume I should tell you no news if I were to say to you that I am engaged to my cousin, Miss E. M. Woodward; for I suppose you have known it before. There is no keeping such a thing secret, even if one were disposed. You have seen her, I think, but do not know her much. I am not about to say any pretty things about her. I have trusted her with my happiness for this world, and I know of no greater compliment I could pay her; but I hope you will one day know her well.

I was at Burlington with my sick friend, Deming, when Taylor was there. But I did not know he was in town until just before he left. He looked well. He said I did not; and you caution me to take care of my health. I received your caution at a time when I was nearer giving up and allowing myself to be sick than I have been since the summer I graduated, when I had a fever, as you may remember. The truth is, I have not been as careful of my health as I ought; but I hope better things hereafter. Poor Deming I shall never see again, I fear. It is too probable that the grasp of a disease which no care, no change of climate, can relax, is firmly fixed upon him. There are some hopes entertained of the effects of the voyage and a mild climate: I have very few.

I am glad you continue to be more and more interested in our profession. It is indeed a noble science, and there are parts of its practice, also, which yield to no human occupation for dignity and interest. As for myself, I love it unaffectedly and I study it closely. My progress, like that of every student who has been but a short time engaged in it, is slow. Sometimes I do not appear to go along at all, and all my efforts do but render the task of advancement apparently more hopeless; but still I persevere, and do not doubt that light will shine in upon me at last, and clear away many

of the shadows which are now broad and deep over nearly all the field.

——'s father has died poor, you say. It will doubtless be a benefit to his son. There is a strange fatality attending large fortunes in New England. Where will old ——'s fortune be when this generation are dead? Nature, education, chance, every thing, seems to unite with the institutions of our country in making those first who were last, those last who were first.

Do, my dear George, write me again when you have leisure, and be sure it will ever give me great pleasure to hear from you.

Ever yours, B. R. CURTIS.

To Mr. George W. Phillips, Boston.

NORTHFIELD, Feb. 11, 1832.

I was very glad to receive your last letter, my dear George, and I assure you that I laughed heartily over some parts of it which related to myself as well as others. When am I going to be married, say you. Why, truly, you might have learned, even from your own letter, that it takes two to make a bargain of that kind, and that therefore I could not answer the question. So much as this I will say, that the *promise, quoad* your being groomsman, was made in 1827, if I recollect right; and as I certainly shall not be married till 1833, why, I can plead *non assump. infra sex annos* to it; i. e. I could if I were disposed, but I assure you I am not, and I here take upon myself to renew the promise, if you will accept of it.

I had heard that —— was engaged to Miss ——, with whom I am not acquainted; but be she who and what she may, I sincerely pity her. It is not merely that he is dissipated, though this is bad enough; but he is thoroughly and entirely heartless and corrupt. . . .

You ask me about my business. It is as good as I expected. It will probably be worth to Wells and Alvord, in whose names and for whose benefit it is transacted, about $800 during the year that it is in my hands, though I do not think it will be as good as that to me during the first two years. It may be so, however; and if I am pretty successful at the outset, it probably will. I believe you never rightly understood my motives for coming here. The first, certainly, was to get a living by my profession immediately. But

I had others which weighed not a little with me. I did not like the influence of Boston and its society upon young men. I believed then, and I believe now, that at the end of six or eight years I should be a better man and a better lawyer, and should have been of far more use to the community, if I came here, than I could if I went into your city. I have as yet seen no reason to doubt the justice of my conclusion. At the same time, I do not mean to make a general rule of it. My situation and character were both considered in arriving at it; and they whose situations and characters are different must come to a different result.

You speak of coming up here when pleasant weather arrives. I hope to have the pleasure of seeing you before that time; for it is my intention to come to Cambridge in April, and spend four months there.

There are some branches of the law which I can study to peculiar advantage there, at the close of my last year; and I still think that there is no place in this country for getting the theory of the law like the Cambridge Law School. If you see Sohier or Taylor, please remember me to them.

Your friend, B. R. Curtis.

Fortunately, young Curtis and the old Northfield lawyer, who had become sheriff, suited each other well. General Nevers at once appreciated the acquisition he had made, and ever afterwards had an unbounded respect and admiration for his young friend. Whatever he could do to promote my brother's interests was done. My brother, on his part, adapted himself to the sheriff's peculiarities, and aided him in his affairs with untiring industry. The law business which General Nevers had surrendered was devolved upon the student immediately; although it continued to be done in the name of Messrs. Wells and Alvord, of Greenfield, until my brother was qualified legally to take charge of it in his own right.

During his residence at Northfield, he was invited by the citizens of the ancient town of Deerfield to deliver an address on the centennial anniversary of Washington's birth, — Feb. 22, 1832. At this time he was in his twenty-third

year. As it is the purpose of this collection of his writings to put within the reach of readers whatever illustrates both his early maturity and the subsequent growth of his mind, this address will find its appropriate place next after the second Bowdoin prize dissertation. Like that production, it is remarkable chiefly for the knowledge which it exhibits of the period when the foundations of the political institutions of New England were laid.

In the spring of this year (1832), he determined to connect himself again with the Law School in Cambridge, in pursuit of the objects described in the following letter: —

To Mr. Ticknor.

Northfield, Jan. 22, 1832.

My dear Uncle, — I write to ask your advice relative to a plan I have been for some time deliberating on, — of coming to Cambridge in the spring, and spending the summer term there in the Law School. There is one branch of the law, viz. the doctrines and practice of courts of equity, which I have no means of studying here. Both books and instruction are wanting; the former being of course indispensable, and the latter even more necessary in this department than any other of my profession, on account of the want of elementary treatises, and, indeed, of any means of gaining an entrance to its most simple and often-recurring principles.[1] The jurisdiction of our Supreme Judicial Court is now such that this knowledge is important, and there is every reason to believe that that jurisdiction will be extended to meet the increasing wants of the community. In the mean time, there is almost an entire ignorance on the subject in the bar of Massachusetts out of Boston; and the younger part of the profession do not seem to be making more progress in it than their fathers have done. I have also thought that it was well to get an early start in this branch of learning; for it must be difficult for one bred up in the rigid rules of the Common Law to imbibe the more liberal principles of Equity. If I can get this start, and make some little progress under an instructor, I can then go on by myself.

In addition to this, I have heard that it was proposed by the

[1] Judge Story's "Commentaries on Equity Jurisprudence" had not then been published.

students to get a course of lectures on the Civil Law from Dr. Follen in the summer term, either at the expense of the institution or at their own expense; and this would of course be an additional inducement, for though I may find little opportunity to commence chancery suits, or apply the doctrines of the Civil Law in the remote town of Northfield, I know you would not have me form my plan of studies in reference to the narrow arena in which I now stand, or limit my acquirements to the humble demands which are made upon me here. It is now somewhat more than a year since I came here, and I have had a good opportunity to test the wisdom of my decision to come. The result is, I have not been disappointed, — the place and the business are much as I had supposed. I can obtain a comfortable living here till I can find a better place; or, if that time shall ever come, till my acquirements shall enable me to seek a wider field where more is to be gained, though the competitors are more numerous.

If I do go to Cambridge, Mr. Alvord will spend nearly all his time here; but the nature of his business is such that he cannot [spend] quite all. I do not think the business will suffer seriously, and perhaps not at all. The only remaining consideration is the expense; but that will be small, and is not in itself important to me in comparison with the advantages which I expect it will purchase for me. I will thank you if you will have the kindness to communicate your opinion to me on this subject.

I returned last week from a short visit to Hanover. I left Mrs. Woodward and Eliza both well, Mrs. W. looking, I think, better and younger than I have seen her for many years.

Will you give my love to Aunt Anna, and say to her that I should have written to her ere this time to ask for another letter from her, had I not been incessantly occupied, what with study and business, — which last has taken me about from one place to another a good deal, and broken up my time; but I shall do so soon. Please to remember me to Nanny, and give my love to her; I hear that she has entirely recovered her flesh and strength.[1]

I remain yours affectionately,

B. R. Curtis.

George Ticknor, Esq.

Having spent the spring and summer term of 1832 at the Law School, in pursuance of the plan described in his

[1] Miss Anna E. Ticknor, the eldest daughter of Mr. Ticknor.

letter, he returned to Northfield, and was admitted as an Attorney of the Court of Common Pleas, at Greenfield, in August of that year. The succeeding winter was passed in the somewhat dreary round of a country practice, unrelieved by any social enjoyments; but his marriage took place in the following May.[1] Miss Woodward had a little fortune of her own, — just sufficient to furnish tastefully a small house in Northfield, in which the young couple immediately commenced housekeeping.

Besides General Nevers, there had for many years been no other lawyer in the town of Northfield excepting a pettifogger of the worst character. This person was a regular member of the bar, — at least he had been admitted as an attorney of the Common Pleas; but he was as ignorant of law as he was knavish. He preyed upon the farmers and poor people of the "hill towns" in his neighborhood, with a rapacity almost unheard of. He possessed a large fund of audacity and cunning, and no man who fell into his clutches was safe. Antedating writs, making false affidavits, procuring snap judgments, obtaining people's signatures to papers falsely read to them, and such like performances, were his common avocations. Altogether, he was a very great scoundrel, of considerable natural ability, — such as might be portrayed in fiction, as an extravaganza, but not often to be found in our profession in real life, as it may be hoped. Against this man, my brother was pitted in trials before justices of the peace, soon after he went to Northfield; and many a pitched battle they had, in which my brother was victorious, from his superior knowledge, whenever the justice was intelligent enough to appreciate what the younger lawyer told him was the law, and honest and fearless enough to encounter the hatred of the older one.

[1] On account of the relationship of both parties to Mr. Ticknor, he thought proper to have the marriage solemnized at his house in Boston. It occurred on the 8th of May, 1833.

At length this man's rascalities became intolerable. The whole community rose up, and demanded of the bar of the county that this nuisance be abated. The culprit was presented to the Court of Common Pleas, held at Greenfield, on charges which were most vigorously and unsparingly prosecuted by Mr. James C. Alvord, who had been deputed to that duty by the bar. He was defended by the late Hon. Pliny Merrick, of Worcester, then in the prime of life and at the height of his brilliant reputation as an advocate. Mr. Merrick made a powerful and ingenious argument on all the charges; but at the close, conscious of the weakness of his case, in a most touching and pathetic appeal he threw his client upon the mercy of the court. But it was a case in which the mercy had to be extended to the community. At the next term, the Chief Justice of the court, the late Hon. John M. Williams, reviewed the evidence with stern severity, and ordered the respondent to be stricken from the rolls.[1]

I have related this occurrence, because my brother was a good deal embarrassed as to the part he ought to take in it. The man had been for years a bitter enemy of General Nevers; he had become a bitter enemy of my brother; and many of his victims were their clients, or were persons who had resorted to them for advice. He was their regular antagonist in half the small suits and controversies springing up in their section of the county. At length, after a good deal of hesitation, my brother decided not to take any active part in the prosecution, but to furnish the committee of the bar with such facts as had come within his knowledge, and with the names of the witnesses.

The poor culprit, smarting under his disgrace, brought an action for libel against Mr. Daniel Wells, who had signed

[1] I was present at the hearing, and also at the decision, in 1834. The whole proceeding was one of painful interest, but of very salutary example.

the charges on which he was presented to the court. There is extant, in manuscript, an elaborate and learned brief, which my brother prepared for the defence of this action when it was expected to be argued before the Supreme Court, at its law term held at Northampton, in September, 1834. The case is not reported, and it was probably never argued. The defence was, that the paper which Mr. Wells had signed was a privileged communication; and as the intended argument embraced much curious learning and skilful reasoning, to establish the right of the bar to inquire into the official misconduct of its members, the brief is placed in the second volume of this work.[1]

In regard to my brother's forensic powers at this period of his life, I am able to speak from some personal observation, as I was a student at law in the office of Messrs. Wells and Alvord, in Greenfield, during a part of the time of his practice in that county. A description of his manner and his accomplishments can be best given by selecting a particular case, — one which he had nursed with great care through all the intricacies of special pleading, until certain complicated issues had been developed. As the "conclusions" of the pleadings were "to the country," the issues were to be put to the jury under the directions of the court upon the law. The jury was composed of respectable farmers, men of plain, ordinary intelligence. The controversy related to a quantity of shingles; and the plaintiff (my brother's client), who was immensely interested to beat his adversary in a matter worth possibly fifty dollars, probably expected to pay his lawyer a fee of ten or fifteen. But the interest with which the spectators watched the proceedings in this little case did not depend upon the amount in controversy, or the fee. The issues had been evolved with such beautiful nicety — the defendant's counsel being also a good pleader — that the attention of the bar was

[1] It will be found by consulting the Index, *verb.* "Wells."

uncommonly attracted by the contest. It fell, of course, to my brother, representing the plaintiff, to open the issues and explain them to the jury. He did it with all that admirable clearness of statement, precision, and lucid arrangement, which characterized him afterward; leading the jury through a maze of technical distinctions, until he made them comprehend precisely what they were to find, and the logical order in which they were to deal with the questions. The presiding judge was at the same time instructed how he ought to present the issues to the jury in his charge, and he followed in the line which the young advocate had given him. My brother gained his case. It was long remembered in the locality as a striking exhibition of his peculiar powers.[1]

An anecdote which belongs to a little later period may be related here, because it refers to his residence at Northfield. After he had been for a short time practising in Boston, he had occasion to use his knowledge of special pleading against a very astute opponent, and used it in such a manner that some one asked him how he came to know so much about that science. He replied that he had studied it a great deal while he was at Northfield, and knew by heart the whole series of declarations, pleas, replications, rebutters, sur-rebutters, &c., as given by Chitty; that he had sometimes walked the floor of his nursery for hours in the night, with a sick child in his arms, repeating to it these forms; and that he found them as good a lullaby as any thing in Mother Goose, and much more of a relief to his own mind.

[1] It generally happens in *nisi prius* courts held in rural regions, that the intelligent men of the county are largely represented at the shire town during "court week;" and the whole of the county bar is also commonly present. A man's abilities are thus gauged on the spot by a body of persons who, in a very few days, diffuse their estimate of him through the entire county. In the large cities, a reputation is of comparatively slower growth, because the proportion of persons who attend the courts is, relatively to the whole community, much smaller than in the country.

His residence in Northfield, reckoning from the time when he went there in 1831, covered a period of three years. During all this time he may be said to have been in practice, although his practice after he had been admitted in the Common Pleas extended only from August, 1832, to September, 1834. He came forward at once, on his first entrance into the active duties of his profession, as a well-equipped lawyer, able to cope with any antagonist whom he was likely to meet in that part of the State. Besides yielding him an income sufficient for his immediate wants, his country practice was of great value to him as a field in which to try his powers and to make a reputation. I should say, however, that the chief benefit which he derived from his residence at Northfield was in the opportunity it afforded him for study in connection with business, and for acquiring the habit of thorough preparation of his cases. His time could not be fully occupied by his practice; and, in the long winter nights and summer days, there was much room for serious reading. It was then that he acquired his extensive knowledge of the Common Law, which he explored in the pages of Coke, in the Year Books, and in the later Reports. He had carried with him to Northfield all the books that he could afford to buy, and some that were loaned to him. It was not a large collection, but it was chosen with sound judgment from the books out of which the earlier law could be most profitably learned. The statutory and customary law of Massachusetts, the law of real property and real actions, the law of contracts, and the system of common-law pleading, were the branches most involved in his practice during this period. His knowledge of equity did not come into use until later, when he began to practise in the courts of the United States. Indeed, the equity jurisdiction of the courts of Massachusetts was at that time somewhat narrow and fragmentary.

His studies in Constitutional Law at this period were con-

siderable. He had the benefit of Judge Story's lectures on Constitutional Law, at Cambridge, by his short attendance there in the spring of 1832; and he now followed out the principal topics in the decisions of the Supreme Court of the United States.[1]

But the Northfield sphere could not last long, for a man who was made for a much greater one. We begin to get traces of a yearning for a wider and more varied field in the autumn of 1833.

To Mr. Ticknor.

Northfield, Sept. 22, 1833.

My dear Uncle, — I wish to communicate to you a plan which I have under consideration relative to my removal from Northfield to Boston, with a view to attempting to establish myself in business in the latter place as a lawyer. I wish to speak of it, not as a thing settled or resolved upon, but merely as a project which is in my mind; and to lay before you, as one of my best and earliest and wisest friends, my own views in regard to this important step, and to ask of you yours in return.

And, first, you will naturally ask, Why leave Northfield at all? You are doing well there at present, and may hope to do better in future: why, then, you may say, do you not content yourself there? This is undoubtedly the first point to be settled, and I have settled it with myself after no little reflection. I know you will not accuse me of vanity or self-conceit, if I tell you that one great reason which has determined me not to consider Northfield my permanent home is, because I deem myself worthy of a wider field than can ever be open to me here. I do not mean that it is not sufficient for me now, or that it would not continue to be for some years to come, but that I do look forward to the time when it would no longer be so. If I am in an error in regard to this, it is an error into which I have been led, not by any over-estimate of myself, but by the repeated and urgent advice of such men as Judge Story and Mr. Ashmun and Mr. Wells, who from my first coming here have uniformly told me that it was a good *present* arrangement, but that

[1] Judge Story's "Commentaries on the Constitution" were not published until January, 1833.

I must not think of settling permanently here, and must be careful not to remain too long. I repeat, therefore, what I have said above, — that I am satisfied that both on account of the character of the people, and the comparative narrowness of the field for exertion here, I should not be contented permanently to make Northfield my home. The next thing to be determined is, when and how to leave here and establish myself elsewhere; and, also, where shall I go when I do leave here? As to this latter point, I have always proposed to myself to go to Boston as my ultimate destination. There is the home of all my dearest and most prized associations, and of most of my friends; and success and respectability and usefulness there have always formed the grand objects of professional exertion in my mind. So far, therefore, all is clear enough. But when to go there, and how to go through the slow and discouraging process of getting professional business and obtaining a support in the mean time, — these have been the difficulties with me; and it is only because a plan is now offered which seems calculated to relieve me from some of these difficulties, that I have been led to think of leaving here at this time. The plan is as follows: Mr. J. C. Alvord offers to form a partnership with me, — he remaining at Greenfield with Mr. Wells, and I going to Boston and opening an office there; the profits of his business at Greenfield to be united to the profits of my business at Boston, and the whole sum to be equally divided between us. This arrangement to continue for three years; at the end of that time, he to have the option either to remain at Greenfield for a definite time longer on the same terms, or to come to Boston and go into business with me there on the same terms. I suppose we could calculate with great certainty upon $1,000 per annum from the office at Greenfield, and with much probability upon $1,200 per annum. The time when I am to leave here is some time between this and the 1st of May next. The question is, Shall I close with this offer? Most of the reasons in favor of and against it will naturally suggest themselves to you. Of some I would say a few words. It may seem at first view, perhaps, surprising that I should consider my chance of success, both immediate and remote, better, if I should come to Boston now, than it would be if I should wait a few years. Yet I do so consider it. In the first place, unless a lawyer brings with him to a city a great reputation as an advocate or as a scientific lawyer, he must be content to begin with small business, — he must acquire the con-

fidence of people one by one. Now, a young man, who has no other reputation than that of being glad to get work, and careful in performing it, is much more likely to get this kind of business than one who has already acquired some reputation as an advocate or lawyer. People do not like to go to a counsellor of the Supreme Court who has come into Boston because he has gained an extended reputation in the country, and ask him to collect a five-dollar note. They think, that is not what he has come here for, and we will give it to some young man who will feel obliged to us for it. It seems to me, therefore, that I should go through these steps more readily and easily now, than I should after waiting a few years. But this is not the only reason. The desire of improvement — of strengthening and advancing myself in the science of the law, as well as in all intellectual improvement within my means — is a powerful reason to prevail upon me to leave Northfield at this time. I have been here now nearly three years. Two years of that time have been passed in a pretty extensive and very diversified practice. From a bill in chancery down to a suit on a five-dollar note, nearly all varieties of practice have passed through my hands; and that, too, when I was far from aid or counsel, and obliged to rely upon my own investigations — often upon my own *inventions* — to help me through difficulties and novelties. The result is such as would naturally follow. While I have acquired considerable knowledge of practice, and some facility and dexterity in *the art*, I have not been gaining ground as I wished in the science of the law. The course of study which Mr. Ashmun was so kind as to lay out for me when I left his care has been broken in upon and irregularly pursued; and I feel every day as if I were losing my hold upon the roots and groundwork of the science which I had so painfully and laboriously laid. I feel the force of a remark which I once heard Mr. Ashmun make; when asked if some person "was a good lawyer," he answered, "No, he has always had too much business to be a good lawyer." At the same time I feel that I was never so well prepared for the study of the law as I am now; and that, if I could have leisure and books and advice, I could go on with an ease and freedom to which I was a stranger before my mind had become habituated to think upon and decide questions of law, and when I was almost at every step checked and embarrassed by forms and modes of proceeding of which I was ignorant. Now, all these three things — leisure, books, advice — I should have if I came

to Boston, and I look upon the kind offers which Judge Story has made me in regard to the latter as no small inducement to come there. After all, however, I do feel that I must run some risks by taking this step, and it is therefore that I wish for the advice of my friends upon it. Will it be too much to ask of you to show this letter to Mr. Charles Curtis, whose great and uniform kindness to me emboldens me to trouble him also with my plan, and whose knowledge of the subject of it would render his opinion of great value to me. We are well and happy here; and Eliza joins me in love to aunt and the children.

Truly your affectionate nephew,

B. R. Curtis

To Mr. Ticknor.

Northfield, Oct. 10, 1833.

My dear Uncle, — Although I am unable at this time fully to answer your kind letters, yet I can thank you for the interest you have shown in regard to my plan, and I do so most truly. I shall be in Boston about the middle of November, and *then* I shall decide whether or not to come there to live. Until that time, I shall remain, as at present, entirely undecided. I am not able to be there before the 15th of November, as the court sits at Greenfield on the second Monday, and will detain me a week. Before that time — and I believe about the last of October — the premium on my policy of insurance becomes due. Will you have the goodness to pay it to the company, and I will repay you when I come.

Mrs. Woodward arrived here on Wednesday evening, well, and after a comfortable journey. Eliza and I are well, and send love to aunt and yourself.

Yours affectionately,

B. R. Curtis.

The result of his visit to Boston was, that, in the winter of 1833–34, he received an invitation from Mr. Charles Pelham Curtis, of that city, to become his associate in business; a plan which of course superseded the proposed arrangement with Mr. Alvord. Mr. C. P. Curtis, who was only a quite distant relative, had at this time been a member of the Bos-

ton bar for a period of twenty years. He had an excellent commercial business, and was greatly distinguished for his accuracy, method, and systematic habits as a lawyer. His clients were numerous, and among them were many of the most substantial merchants of his native city, who had known and trusted him in their affairs from his entrance into his profession. He had by the most industrious devotion to it, aided by singularly practical abilities, worked his way up, from his youth, to an eminent position at a bar that was always furnished with learned and accomplished rivals, against whom any successful competitor must needs have had more than common powers. As an advocate, he was able to hold a good rank, from his clearness and precision, and from competent although not extensive learning. As a man of affairs, he was wise, sagacious, of perfect integrity, fair and upright in his practice, firm and resolute in pursuit of legitimate and just ends, always courteous, and of a singularly cool and rarely disturbed temper. No man was more respected, or enjoyed more of the confidence of the community of his native city, than did this distant kinsman, who, in the winter of 1833–34, attracted by my brother's reputation, offered to share with him his business.[1] It was a tempting offer; for not only

[1] The descent of these two gentlemen from their common ancestor was as follows: —

William Curtis, of Roxbury, *b.* 1592, emigrated 1632, *d.* 1672.
Isaac, *b.* 1642.
Samuel, *b.* 1688, *d.* 1722.

Benjamin, *b.* 1722, *d.* 1773.	Obadiah, *b.* 1724, *d.* 1811.
Benjamin (2d), Physician, *b.* 1752, *d.* 1784.	Thomas, *b.* 1759, *d.* 1812.
Benjamin (3d), Shipmaster.*	Charles Pelham, *b.* 1792, *d.* 1864.
Benjamin Robbins, *b.* 1809, *d.* 1874.	

* Benjamin (3d), my father, in a deed executed in 1811, described himself as "mariner."

did it at once insure a professional opening in a new sphere attended by great advantages, but the social position and personal qualities of Mr. C. P. Curtis rendered such a connection with him all that could be desired. For a period of thirty years, their friendship was never disturbed by a single difference, a single jealousy, or overclouded by a single shadow. Although the younger of these two associates far outstripped the elder in distinctions and honors, and indeed rose rapidly to a much higher position at the bar than the senior ever attained, the liberality of the elder partner in their pecuniary relations always kept pace with the younger's increasing power to augment their joint earnings while they remained together; and his pride in that younger's success and fame was like that of a father. The terms of their first connection can be learned from the following letter: —

To Mr. Ticknor.

Northfield, April 24, 1834.

My dear Uncle, —. . . I have settled definitely my arrangements with Mr. C. P. Curtis, and am to become his partner in September next. I am to have one-half the profits of all business in the Court of Common Pleas, collection of debts, making common conveyances, opinions on titles, and some few other small items; he pays all expenses of the office; these terms to last one year. At the end of that time I am to have better terms, provided — I deserve them. He thinks the profits of the first year will be $1,000. I shall be well content with this for one year, with better things in prospect.

We shall break up here in August, and Eliza and the boy (whom we call Charles Deming, from my friend who is dead) will go to Cambridge then. I shall remain till after the autumn courts and come some time in September. William has concluded to succeed me at Northfield.[1] I do not think he can do so well anywhere else at present. He can step into the most of my business here without difficulty; enough, I think, to give him $800 a year. He would not make so much money at Greenfield in his present partnership,

[1] His brother-in-law, Mr. William G. Woodward.

We are all very well. Charlie flourishes finely, *and they tell me* is a fine child; never having looked at a baby before, I do not profess to be able to form an opinion for myself.

Give my love to aunt, and believe me,

Your affectionate nephew, B. R. CURTIS.

My brother was admitted as an attorney of the Supreme Judicial Court of Massachusetts, at Northampton, in September, 1834.[1] This made him known personally to Chief Justice Shaw and his associates on that very eminent bench; and it was partly through them that his reputation reached a few of the members of the profession in Boston, before he had actually removed to that city.[2]

[1] The Supreme Court sat *in banc* at Northampton, for the three counties of Hampshire, Hampden, and Franklin.

[2] It has been my fortune, in the course of a professional life of more than forty years, to practise before some very distinguished judges. But I cannot mention the name of Chief Justice Shaw without saying that, in all the qualities which make a great judicial magistrate, — in strength of intellect, in depth of mental vision, in comprehensive grasp of every question, however difficult, that came before him, in application to it of the appropriate learning, and in the unquestioned and unquestionable poise in which he held the scales of Justice, until one or the other ought to predominate, I have known no man who was his superior. Chief Justice Marshall I never saw; Chancellor Kent I never saw upon the bench, although I once met him in private life. But when I name Taney, Story, Nelson, and Curtis, as among the judges before whom it has been more or less my lot to appear, and recall many others of deserved distinction in different States, of whom I have had personal observation, it will perhaps be allowed that my estimate of Shaw as a judge, unimportant as it is to his fame, has not been formed without sufficient opportunities of comparison with men of note and mark. There have doubtless been judges who would be called more learned, or who possessed more learning in special departments of the law; but no one ever knew Chief Justice Shaw to fail in the knowledge and application of whatever law was necessary to the decision of the cause on which he had to act. It is true that he was aided by a learned bar, whose presentation of their cases was habitually thorough. But, after all has been done that learned advocates can do, it is the office of the judge to select, to weigh, to compare, and not unfrequently, before the law can be declared, to make researches which counsel have not made, or to draw distinctions which they have not drawn. The opinions of this eminent person have always been received in the courts of other States of this Union, and in the Federal Courts, with a respect that has not been less than has been accorded to those of any other judge who has held a place in the judicial history of any part of the country.

When he had at length effected the change, he and his wife and child resided for some time with my mother in Cambridge. For a while, he rode daily on horseback into and out of Boston to his business, for the sake of the exercise; his health at that time not being very good.[1]

[1] This seems to be the appropriate place to correct an error which appears in the recently published Memoirs of the late Hon. Charles Sumner. In a letter written by Mr. Sumner, Oct. 24, 1832, from Cambridge, to his classmate Charlemagne Tower, he says of the Harvard class of 1829: "There was a general rising against the Master's degree. Curtis, by far the first man of his class, with the *highest* [*sic*] legal prospects before him, refused it, and stirred many of his class to the same conclusion." (Memoirs, &c. of Charles Sumner, vol. i. p. 116.) This was entirely a mistake on the part of Mr. Sumner. At that time, the members of any class who had been regularly graduated for three years were entitled, as of course, to receive the degree of Master of Arts, on payment of a certain fee. The class of 1829 were so entitled at Commencement in the year 1832. The members resident in Boston and the neighborhood held a meeting, on the 27th of August, to make a respectful protest against the exaction of a fee. The gentlemen who were active in that proceeding were the late Hon. George T. Davis, the Rev. Samuel May, George W. Phillips, Esq., Charles L. Hancock, Esq., and some others. None of the survivors remember or believe that my brother was present. Mr. Hancock, who now resides in Chicago, is positive that he was not. The record of the meeting, kept by the class secretary, Mr. May, makes no mention of his name. To this I can add my strong conviction that my brother was at his home, in Northfield, in August, 1832, and was much occupied with his business and his admission to the bar, which took place during that month. He would not have been likely to make a journey to Boston, for the sake of stirring up his classmates about any thing. This matter is of no great importance, to be sure, but accuracy is always desirable even in trifles.

CHAPTER IV.

1834–1844.

Removal to Boston. — Letters to Mr. Ticknor in Europe. — Rapid Rise at the Boston Bar. — Character as an Advocate. — The Case of the Slave-child Med. — Death of James C. Alvord, and Tribute to his Memory. — Extensive Practice. — Statesmanlike Qualities, but not a Politician. — Rule in regard to Participation in Public Affairs. — Article on Repudiation in the "North American Review." — Letter from Judge Story. — Death of his Wife. — Letters to Mr. Ticknor on that Event.

My brother's removal to Boston, in the autumn of 1834, was soon followed by the absence in Europe of friends whose interest in him began in his boyhood. Mr. Ticknor went abroad with his family in June, 1835, and remained absent for three years.[1] Before I enter upon the professional life which is to be described in this and the next following chapter, it may be well to give the letters which my brother wrote to his uncle during this separation, — the longest that ever happened while they both lived, after the younger of them had grown to manhood.

To Mr. Ticknor.

Cambridge, Aug. 23, 1835.

My dear Uncle and Aunt, — We were truly glad to learn from Mrs. Guild, who kindly called at our house to give us the news, that you had been safely landed in Liverpool; and before this letter reaches you, I suppose even the recollection of the discomforts of your voyage will have faded away before the brightness of your present agreeable life.

Many things have occurred here to interest you, and some to afflict you, since you left us; but of all these you have heard from

[1] Life and Letters of George Ticknor, vol. i. p. 402, vol. ii. p. 183.

others more fully than I can tell you. I can, however, and I do, offer you my sincere sympathy for the loss of the two young friends of yours who have died, in whom you felt so strong an interest.

In my own small circle at home, we are all pretty well. . . .

The topic which engrosses the public attention, to the exclusion of almost every other, is the "Antislavery Society." You will see by the newspapers, which I suppose you receive, that a great meeting has been held at Faneuil Hall on this subject. It was caused by the excitement which exists through all the slave-holding States, in consequence of the efforts of that Society to excite the slaves to insurrection. Dreadful scenes have already occurred in Mississippi. The mob have hung numerous persons, *suspected* of being emissaries of the Society, without legal trial; and so great have been the commotions excited in many parts of the South, and so excited is the public mind there, that there are strong fears felt here by the friends of the Union that, unless something is done here to check the Abolitionists, and convince the South that the opinions of the great body of the people of the Northern States are unfavorable to the Society, the Union will not continue for a single year. All those persons in the Southern States who are enemies to the Union have seized the present occasion, and are endeavoring to do their utmost to increase the excitement. Some idea may be formed of the interest felt in the subject, from the fact that numerous Southern gentlemen came from all parts of the country to be present at the meeting. You will see the result of the meeting in the newspapers; and we are all glad it is so *well* over. Would that the whole subject could be as easily and as safely disposed of! Mr. Sales desired me to tell Mr. Ticknor that he had several sections reading Don Quixote, for he said he knew Mr. Ticknor would be glad to hear it. . . . I am affectionately yours,

B. R. Curtis.

To Mr. Ticknor.

Boston, June 19, 1836.

My dear Sir, — I do not make any apology for not writing to you more frequently, because I believe you know, and will make just allowances for the fact, that my occupations are so constant and pressing as to leave me exceeding little opportunity to write letters. Of late this has been more than commonly the case; for Mr. C. P. Curtis, with his wife, sister, brother Tom, daughters, and Miss

Mary Ann Mason, went to Niagara Falls the first of June, and will not return till some time in July. The "shop," therefore, is on my shoulders for the present, and I have not a great deal of time to spare. I cannot, however, suffer your last kind and pleasant letter to go longer unanswered, both because it was kind and pleasant, and because I have some agreeable news to give you in return, which I imagine will be unexpected. It is that we have another daughter, now three days old, — and a good stout little lady she is, both in body and lungs, — and Eliza is marvellously well. She sends her love to you, but is not quite able to write. The other children are extremely well, grow finely, and are intelligent and bright. For some days past we have had a house full. . . .

Your friends, I believe, are all well. I dined with Mr. Guild a few days since at Brookline; and their place looked delightfully green and cool and quiet, though the wind was east and the sky lowering. I do not think there is any news in the political world to interest you, unless it be that the Senate by a very large vote, and the House of Representatives by one equally decided, have passed the bill to distribute the surplus revenue among the States, and the country is all expectation as to the action of the President. This is Mr. Webster's bill, and the passage of the law is considered a great triumph by all the friends of stability and good order. We have wars in abundance; — an Indian war in Florida, in which the Indians have been uniformly victorious throughout the campaign, which closed absolutely without effecting any thing; another Indian war in Georgia, excited by the frauds and rapacity of the whites, — and in this, too, terrible vengeance has already been taken by the Indians for the cruel and faithless treatment which they have experienced at the hands of the people of Georgia. Many towns have been burnt: men, women, and children murdered, negroes and plantations destroyed and robbed, and large districts wholly deserted by their inhabitants, are matters which now daily fill the newspapers.

Pray give my love to Aunt, and tell her how much pleasure it gives me to learn that her health and strength are increasing. My love to Cousin Anna, and desire her not to forget me or any of the little cousins whom we shall have to show her when she returns.

Yours truly,

B. R. Curtis.

To Mr. Ticknor.

Boston, February, 21, 1836.

My dear Uncle and Aunt, — Your pleasant letter of the 22d of December reached us two days since, and gave us great pleasure. We were glad to know that you had lost none of your kind interest in us; we were glad to know that you were so pleasantly fixed for the winter, and that you were all well, and likely to find much enjoyment in the pleasant things with which you are surrounded. We are all extremely well, and like our new home very much; and while I am obliged to walk four times each day from my house to my office, you need entertain no fears for my wanting exercise, since it amounts to about three miles; for we live in West Cedar Street, a great way off from almost any other part of the town. We removed from Cambridge in October, — partly because I found that it would be a great loss of time and strength to have my house three miles from my office this winter, and partly because I thought we were a great deal of trouble to mother, and her family would go on more comfortably to herself without us.

We see her frequently, though we do not tempt her here so often as I could wish. Charlie, whom I believe she loves better than anybody else in the world, is delighted to go out and see her, which he does quite often. I shall leave his praises entirely to his mother, only premising that his cheeks look like a red apple, and that he is nearly as round, and rolls about very much like one.

I saw Mr. Stackpole the other day, and he told me that he met you in Dublin.[1] He has come to Boston with the avowed intention of becoming a lawyer, although he says everybody is determined that he shall not be content to apply himself to the practice of that profession, because he has been so long abroad. Judging from the specimen we have in our office (Lothrop Motley[2]), I should not think that a foreign University was a good place to acquire a love of the Common Law. Perhaps, however, there will be no Common Law when you come back; for among other wild theories with which the Legislature now in session are bitten is an idea of codifying the Common Law. You remember that the Statute Law of the Commonwealth was undergoing revision when you left Massa-

[1] The late Lewis Stackpole.

[2] The late John Lothrop Motley, the historian, was at this time a student at law in the office of Messrs. C. P. and B. R. Curtis.

chusetts. Having got well through with that, the Legislature are so much encouraged that many of them imagine that the whole body of the law may now be reduced to a pocket volume, so that any man may carry about with him his own lawyer. It does not occur to them that a good system of law must be at the same time so extensive as to apply to and govern all the existing relations between men in society; so stable and fixed, in all important principles, as to furnish *a certain* guide; and so flexible as to be capable of adaptation to the ever-changing forms into which property is thrown by the unwearied enterprise and all-absorbing love of gain which distinguish our people. With the exception of this scheme, I think matters are going on well in Massachusetts. Her people hold fast to their integrity. They will vote for Mr. Webster for President: not because there is the least hope of his being elected, but because it is respectable and right. The great body of the people in the central and western parts of the State are entirely sound on this subject. To use the language of one who was urged to give his vote and influence to Mr. Van Buren because he was a better man than Judge White, and one of them would be elected, "Between two evils, I will choose n'ary one: I shall vote for Mr. Webster."

Mr. Everett has lost, and I think is daily losing ground. People say that radicalism has got into the Governor's chair, and the popular branch of the Legislature have become conservatives. . . .

Yours truly,

B. R. CURTIS.

P. S. Mr. T. B. Curtis desires me to say that, if Mr. Ticknor can without inconvenience procure and send him a copy of Correggio's Magdalene from the Dresden Gallery, he should be much obliged.

To MR. TICKNOR.

BOSTON, May 14, 1837.

MY DEAR UNCLE, — I wrote to you about six weeks since, giving you an account of the *res angustæ* which pertain to me. Since that time, we have changed our location, and are now boarding in the country for the health of the children, who had become quite too delicate from confinement to the house, and want of fresh air and plenty of dirt, both which they are now enjoying and

thriving by. My own health, too, had become somewhat reduced from the confinement and fatigue which I have been constantly subjected to during the past winter; and as the state of affairs here and throughout the country rendered it quite important to me, if not to others, that I should be pretty constantly on my post, and I could not therefore journey, we thought it best to leave town for the summer. We board at a large house which, I believe, has been erected since you left Boston, at South Boston Point. It is a very quiet, well-ordered house, on a delightful site, with a few pleasant people; and I can ride by the public coaches, or walk, to my office with entire convenience.

I have referred to the state of affairs here and in other parts of the United States: it is, indeed, most gloomy. That has taken place which never before happened in Boston. On Friday last, every bank in the city stopped specie payments. This was preceded by the failure of all the banks of the city of New York, and has been followed by Philadelphia and Baltimore, and all other places, so far as heard from, not even excepting Mr. Biddle's bank, which held out only twenty-four hours after the other banks of Philadelphia had stopped. We are thus reduced in a day to a state of universal bankruptcy, at a time when the commercial engagements of the country are vast beyond all former precedent.

Before this event, the merchants and manufacturers were reduced almost to despair. No amount of wealth, no stability of credit, seemed sufficient to prevent the bankruptcy of any man whose engagements were at all extended, and indeed there were few whose engagements were not extended; for the large profits which have been constantly realized from almost all kinds of business during the last two years had drawn the most prudent into large speculations, and had multiplied to a great extent the wants of all borrowers: so that, for the last six weeks, New York especially, and Boston and the other cities to a great amount, have seen their oldest and wealthiest merchants sink into insolvency; and I have no doubt, from the information which I possess, — and lawyers, you know, are behind the scenes of this matter, — that one month more would have left every considerable merchant in Boston *connected with manufactures* a bankrupt, including even the Lawrences. The resolution of the banks not to redeem their bills or pay their depositors in specie has, of course, afforded a temporary relief to them. The banks can, and do, now discount. Their pressing wants are supplied; and, so far

from feeling the sad calamity which has come upon us, *the borrowers* seem to be almost in an exulting, and certainly are in a very happy, state of mind. For the present, they are much the largest class. They give the tone to popular feeling in all the cities, and public meetings have been held, in which resolves are passed approving the course taken by the banks, agreeing to sustain them, &c.; and bills now pass from hand to hand as readily as when they represented (or were supposed to represent) specie. This, however, cannot last long. Neither comity, nor forbearance, nor popular feeling, will create a currency any more than cause the lifeless clay to perform the functions and render the services of a living agent. And reflecting men, who are so far disinterested and calm as to be able to think, are waiting for — they know not what. There is one good, however, which we all hope to bring out of this body of evil; and that is, to sweep from the offices of the country the ambitious, selfish, and ignorant men who now carry on the government. We believe this will be done. All the elections which have taken place confirm our hopes that the mass of the people will be taught by severe suffering the extent of the mistakes they have made, and will be wise enough to confide their trusts to safer hands. No doubt there are many views of the state of things now existing here; and perhaps I am wrong, and all will be well, but I cannot think so. Give my love to Aunt and to Nannie. Eliza sends her love to you all.

Yours truly, B. R. Curtis.

To Mr. Ticknor.

Boston, Oct. 22, 1837.

My dear Uncle, — Since I wrote to you (or to Aunt, I do not remember which, and in point of law at least it is immaterial), we have come into town, and are now in a very good house on the Mill-Dam, which you may have known as occupied by Mr. Pickering, and which the fall of rents and my own increased income brought within my reach, — I trust without exceeding the limits which a just regard to the future prescribes. The third year of my connection with Mr. C. P. Curtis expired with the month of September; and we then made such new arrangements as will give me an income from my profession sufficient to supply all the wants of myself and my family, numerous as its members are becoming, and to enable me to support mother in a comfortable

independence. . . . She boards at Cambridge with Mrs. Holmes, staying with us a considerable part of the time and returning there whenever she chooses; and although she is yet hardly accustomed to her new mode of life, and has had one or two pretty severe attacks of illness, yet I think she is in a fair way to spend the remainder of a life, which has been more than commonly filled with exertions and sacrifices for others, in peace and enjoyment. Certainly I have many things to thank Heaven for, but for none more than that I am able to repay, in some small degree, the debt which I owe to her. The babies are all well and thriving. They are healthy and bright children; and though they doubtless give their mother some cause to complain of the labor and care which three such active and noisy youngsters impose upon her, to me, who see them only for a short time every day, their gayety is an ever-renewed source of happiness, and I find in my home the only, and I sometimes think insufficient, protection from that hardness and dryness of mind which a perpetual contact with the actual affairs of life, and a constant struggle with the interests and passions of men, almost inevitably produce. I would most gladly shake off the cares and thoughts of business often, if it were in my power, and find relaxation in literature; but I cannot. In the first place, I am of an earnest temperament, and can do nothing well without a strong devotion of my mind to it. In the next place, I have no dislike to the practice or study of the law, nay, I believe I may say without affectation that I have a strong love for its rough chances; and last, but most important, I am in the very midst of the tide, where its current is strongest and most rapid, and nothing would be easier than to be thrown out into comparatively still water, but in this eager community of the bar I am sure I should never get back again. It has been truly said, that a lawyer can no more regulate the amount of business he will do, than an engineer can blow a barrel of gunpowder half-way down; so I think of those who are dependent on me, and, blessing my stars for my good fortune, rejoice in the clients who make me work so hard, but withal pay me so well. Here I have written you the best part of the sheet, and all about myself. But you will pardon my egotism, on the plea that, though I have plenty to do, I have little to say about any thing else which would be in the least interesting to you. I learned to-day that letters from you in Paris, as late as 15th October, were in town, and that Aunt's good health, which gives us

all so much pleasure, continued unabated. Pray give my love to her, and with mine Eliza's. I hope the winter in Paris will but confirm what the last year has effected, and that we shall see her (next autumn may I say) so well as to prove you a true reporter. May I ask of you the favor to purchase for me while you are in Paris a copy of the entire works of Pothier. I have not at hand the catalogue, which would give me the title of the best edition; but it is probably *the latest*, and is the only one which has a full verbal index. I presume you can easily ascertain at a law book-store. If you can do this without too much trouble, and let it come with any books of your own which you send in the course of six or eight months, you will oblige me much, and I will pay the cost to your agent here. You will of course purchase a copy unbound. The elections have gone off well. Maine, Rhode Island, Tennessee, New Jersey, thoroughly revolutionized, and great changes elsewhere. The country has suffered dreadfully, and Congress has adjourned without attempting any thing to relieve the people, except by granting credits on duty bonds, which is only a submission not to ask for payment of those who could not pay.

Yours truly, B. R. CURTIS.

To MR. TICKNOR.

BOSTON, Jan. 14, 1838.

MY DEAR UNCLE, — From what I learned from Mr. Savage some time ago, I suppose you have but little personal interest in the fate of any banks in Boston; and it argues well for your foresight, and is extremely well for your fortune, I think, that it is so. On Friday last, the Commonwealth Bank, which you may remember had a capital of $500,000, failed and blew up entirely. You may at first be at a loss to know how a bank can fail in a city where every bank pays only in promises; but then, while the law holds those promises to be binding, and is ready to enforce them, you will readily perceive that there may be a difference in the value of promises; and I take it that the failure of this bank is nothing more than a confession by itself, and a conviction in the public mind, that its promises are worth nothing. The precise state of its affairs is not yet known; but the Legislature have appointed a committee to investigate them, of which Mr. Samuel Hubbard is the chairman, and Mr. C. P. Curtis is one of the mem-

bers, and they begin their examination to-morrow. This is the third bank which has broken to pieces in this city, and they have all been "pet banks," — the Commonwealth Bank the chief of the "pets." The United States are their creditors to a large amount; and the debtors, in very large sums, are the prominent members of the Administration party in Boston, and Isaac Hill, the Governor of New Hampshire. The Commonwealth Insurance Company, also belonging chiefly to the same party, has gone down with the bank. It happens unfortunately, I think, that these events have happened while the Legislature is in session. Every bank in the Commonwealth, by reason of the suspension of specie payments, is at the mercy of the Legislature; and the danger is, that, under the excitement of the occasion, they may deal with a subject which is of great difficulty and of the first importance to the prosperity of the Commonwealth, and which can only be properly handled by wise and cautious men. These events have caused a very strong excitement here, and the unsoundness of three or four other banks in Boston is more than suspected. Of political events there is nothing at present before Congress of much importance, waiving that question which threatens so much the peace of the country, viz. slavery. I believe, however, that it is now clear that the subject must and will be discussed in Congress, not this winter, perhaps, but soon, and that when discussed it will be done freely, perhaps too freely by the Northern members. If you see the debates, you will notice the admirable dexterity with which Mr. Clay is keeping himself in the position to act as a mediator upon this great subject, as he has twice before done on other questions which threatened a dissolution of the Union. The disturbances in Canada have led to an unpleasant occurrence on the Niagara frontier, the royal troops having crossed over to the American territory and burned a steamboat which belonged to our citizens, and killed several people who were on board, — an attack which was undoubtedly provoked by the use which had been made of the boat to convey men and military stores to Navy Island in the Niagara River, where a body of insurgents were, and still are, in arms against the government of the Queen, though this cannot justify a hostile invasion of our territory. No one doubts that the English government will do all that is proper on such an occasion, and that it will pass away without leading to further collisions. The President has ordered out a body of militia, drawn from places remote from

the scene of war, under command of General Scott, with the ostensible object of protecting the frontier, but probably for the purpose of restraining the New-Yorkers from taking part in the war in Canada. Mr. George Bancroft, being eminently a practical man and extremely well versed in mercantile affairs, has been appointed, by the President, Collector of the Port of Boston, *vice* Mr. Henshaw resigned. You may be sure that this is agreeable to the merchants.

We heard from Mr. Guild the other day, that we might expect to see you at home in the course of the coming summer, and so far as we are concerned this was the last news we had heard of you since you went away. Please to give my love and Eliza's to Aunt and Anna, and tell Aunt we laughed heartily over her last letter, which described the great advances in age made by all of you since you left the country. Eliza and the children are well, and have been so through the winter. Mother has been with us for a few weeks, but has now returned to Cambridge.

Yours truly, B. R. CURTIS.

TO MR. TICKNOR.

BOSTON, Feb. 11, 1838.

MY DEAR UNCLE, — I return my sincere thanks for your welcome present of the works of Pothier. They have not yet arrived, but I have learned that they were on the way from your kind letter of the 28th of December. It is not, however, for the purpose of thanking you for the books that I so soon write to you again, — having sent a letter to Mr. Savage not more than two weeks ago, — but to tell you and Aunt that another son was born to us on Saturday last, and that Eliza is doing well. We have now two boys and two girls, all healthy and good children, the youngest not excepted, for it sleeps all the time and troubles nobody; and when you come home next autumn, if God spares all their lives, you will say they are a funny sight.

Matters are going on here much as when I last wrote to you. A few more banks have failed, and the common impression is that some three or four more must be disposed of in some way before the community will be safe. Within the last fortnight there has been some improvement in the currency, inasmuch as before that time it was difficult to get a bank-note which could be safely kept for

twenty-four hours; but now the notes of the sounder banks are in circulation. Still, all things in the money world are but little removed from a state of chaos. . . .

While I write, it is snowing in that deliberate and cautious way in which all good snow-storms begin, and it is the first good snow-storm we have had this winter. With the exception of a slight fall of snow in November, the ground has been wholly uncovered, and hardly a sleigh has been visible. Indeed, we have had no winter. Mother is with us for a visit. She is well, except some touches of rheumatism. Give my love and Eliza's to Aunt and Cousin Anna, and believe me to be

Yours truly, B. R. CURTIS

A period of seventeen years' residence and practice in Boston, from the age of twenty-five to forty-two, now claims the reader's attention. The impression which my brother made upon the bar of that city, and upon its leading and thoughtful citizens, was immediate and strong.

The Boston bar was then led by men of great learning and ability, among the foremost of whom he soon vindicated for himself a place. His rise to that place was rapid, but every step was made good by the sure and steady development of his powers. As successive opportunities for the employment of his professional talents arose, he gave proof that he was fitted for the occasion and equal to its utmost demands. Yet there was no straining for meretricious effect; no ambitious struggling for distinction. It was very early seen that his character was one of great weight, from his simple earnestness, his aim to do faithfully the duty of the day without looking for applause, and his peculiarly elevated moral tone. Scarcely any man has become a distinguished advocate, who was less prone to exaggeration, less relied upon the force of mere rhetoric, or thought less of any thing but the solid merits of his cause.

His means of producing conviction, whether with a court or a jury, were plainness, conciseness, and accuracy. He was persuasive, because of his rejection of all superfluous

and irrelevant matter, and because it was known that he disdained all the mere devices of speech. Mr. Webster said of him, that "his great mental characteristic is clearness; and the power of clear statement is the great power at the bar."[1] This power of lucid and exact statement, observed by all his contemporaries, was united with the power of close, logical, and sustained reasoning. There have been very prominent advocates, who, when they have stated their case, have done all they can for it; and when this gift has risen to a high accomplishment, it has been of great value. But in Mr. Curtis it was accompanied by another power of equal importance, — the power of argument, which should come into play after the groundwork for reasoning has been laid. When he had stated his case, he had *not* done with it, unless the statement was all that was needful to lead the tribunal to the desired decision. When more was requisite, his propositions followed each other in their appropriate order, and were enforced by a method of reasoning which was pure deduction from well-chosen premises to just conclusions, without a needless accumulation of ideas.

With the gifts of what is sometimes called eloquence, he was not endowed by nature or cultivation. Those who took pleasure in listening to him at the bar derived their enjoyment from the lucid and unimpassioned character of his discourse. This is an enjoyment which all minds can feel, when there is the requisite intelligence to appreciate such a treatment of a subject by one who deals with it without prolixity, and with a sufficient exhibition of its essential truths. This enjoyment was felt in listening to Mr. Curtis, by the unlettered as well as the lettered of his hearers, by jurors as well as by judges. Yet, although he always had his feelings under control, he had very deep feelings; and he sometimes, with great simplicity and with an imagery that was all the more effective because it was never forced,

[1] This was written in 1849.

and was but a momentary deviation from the steady march of his mind, touched the feelings of others while he was addressing their reason. But on such occasions he used no art, for he said nothing that he would not have said to himself in his private meditations. To the passions or prejudices of men he never appealed. His mind was too honest, his strength was too real, to allow him to employ a weakness in others which he knew should not be allowed to govern them. He spoke directly to the judgments of those whose convictions he was to gain, putting his mind into contact with theirs, on an equality of condition, without assuming the superiority that is implied in efforts to mislead through the ignorance, the failings, or the peculiarities of men.

Such were the intellectual and moral traits of the young man who began in 1834 a professional career that was to be marked by extraordinary success, and that was recognized as an uncommon one, among a people proverbially intelligent, observing, and critical. The practice on which he entered in Boston led him at once into fields of the law that were then new to him. It obliged him to master the maritime law in all its branches, and the peculiarities of the admiralty jurisdiction and procedure. It made him familiar with the patent law, for which his mental characteristics gave him a singular adaptation. Equity jurisprudence and its distinctive system of pleading were opened to him by his engagements in the Circuit Court of the United States. Whatever of the commercial law is in active operation in a commercial community was necessarily a part of his studies and of his daily employment. The law of real property and of wills and testaments was no less a part of his needful acquisitions; and in constitutional law and the law of nations, he not only prosecuted new studies, but he sometimes had practical use for them. Nor was he without occasion to know and apply the system of revenue law which is in operation in all the ports of the United States. In short, whatever learning an American lawyer,

who is both a chamber counsel and an advocate, needs to have, in a wealthy, prosperous, and active community, of diversified occupations, he acquired, and was constantly employed in using, during this period of his life. He did not attain the kind of eminence that comes from a speciality of practice. The character of his mind and the requirements of his daily avocations made him equally eminent in all the civil departments of the law, while his studies in all of them kept pace with the demands that were made upon him.[1]

The professional reader may perhaps look for an account of some particular case which first brought this distinguished lawyer into notice in his newly chosen sphere, and secured his success. We read, in the lives of several great lawyers, of some occasion happily availed of for the display of powers until then unknown, and which has been the stepping-stone to the subsequent career; which is looked back upon in after years with honest pride and related circumstantially by biographers and friends.[2] In the professional life of Mr. Curtis, there is no such case to be referred to; no fortunate supply by a junior of the shortcomings or absence of a senior; no lucky hit, attracting the sudden attention of those who are on the watch for talent and power. It is not remembered that, in the earlier years of his career at the Boston bar, there was a single occasion out of which he can be said to have "made his fortune." This was partly because he came there to take part in an established business; but it was mainly because of the uniform merit of his efforts and the early maturity of his mind.

Yet I may here refer to a case in which he made a

[1] He did not practise in criminal cases; but when he came to the bench it was found that his knowledge of criminal law was not inferior to his other acquirements.

[2] "Young man, your bread and butter is cut for life," a solicitor said to John Scott (Lord Eldon), as the latter was leaving Westminster Hall after his argument in *Ackroyd* v. *Smith*.

remarkable argument, in the year 1836, when he had been at the Boston bar not more than two years; and I refer to it on account of the character of the question, and because the argument affords a good illustration of his power at an early age to deal with a difficult subject in the conflict of laws, growing out of the differing public policy of different States of this Union. A lady whose domicile was in New Orleans came to Boston on a visit to her father, bringing with her her own female child of tender years, and, as a companion to that child, a colored child of the same age, who was the daughter of one of her husband's female slaves, and who was, by the law of Louisiana, also the slave of the husband. A writ of *habeas corpus* was sued out, by persons who felt interested to put an end to all restraint of this slave-child within the limits of Massachusetts, and in order to have her declared free. The father of the lady, in whose house the colored child was temporarily resident and suitably cared for, made return on the writ, setting forth the facts, and claiming that, as agent of her husband, his daughter had a right, and intended, to return the child to Louisiana, by the laws of which State she was a slave; and that no other restraint was exercised over her in Massachusetts than such as was necessary for her health and safety, and for her return to the domicile of her owner. The writ was made returnable before one of the judges of the Supreme Court of Massachusetts, in vacation, and was then adjourned into court and argued before Chief Justice Shaw and a full bench. Had this case occurred at a later period in the sectional conflict on the subject of slavery, it would doubtless have been made the occasion of much excitement and comment. As it was, it could be discussed and decided calmly and rationally, and the determination of the question could pass into the juridical history of the country, to stand as an important precedent in reference to the inter-state relations of the different members of this Union, upon the points involved in the decision. There was no political motive

whatever, on the part of the respondent or his daughter, in asserting her right, as her husband's agent, to restrain the child. They desired only to discharge their duty to the child, and to her mother, who had remained behind in New Orleans. At the argument, Mr. Curtis maintained for the respondent the following proposition : —

That a citizen of a slave-holding State, who comes to Massachusetts for a temporary purpose of business or pleasure, and brings his slave as a personal attendant on his journey, may restrain the slave for the purpose of carrying him out of Massachusetts and returning him to the domicile of his owner.

The question was confessedly new. For, whatever might be the law of England, as declared by Lord Mansfield in Somersett's case, it was obvious that the relations of the different States of this Union involved other considerations; that comity between two American States, in giving effect to each other's laws of personal relations, might require a court in Massachusetts to allow the qualified exercise of the master's right that was here claimed; while in Somersett's case the master was a British subject, resident in Virginia when it was a British colony. Mr. Curtis, therefore, directed his argument mainly to the distinction between the comity which an English court could show towards the local law of one of her colonies when conflicting with the common law of England, and the comity which a Massachusetts court may and ought to show towards the local law of Louisiana, which fixes the personal rights of its citizens, although that law is itself in conflict with the public policy of Massachusetts in respect to her own citizens. Such a discussion necessarily involved the sense in which slavery was to be regarded as immoral in a court of law; whether it is prohibited by the law of nations; whether, although contrary to natural right, it is not, when recognized by the local law of an American State, a relation between persons to which some effect must be given in the

courts of other States; and whether it could in truth work any injury to the public policy of Massachusetts to allow of so much recognition of that relation as to admit of the exercise of the qualified restraint claimed in this case. Whatever learning could throw light upon these topics found its appropriate place in a massive and impressive argument, which, although made by a young man of seven and twenty, was regarded by the eminent Chief Justice as one calling for a careful judicial answer, step by step.[1]

The decision pronounced by the Chief Justice, and concurred in by all the judges, negatived the proposition maintained by Mr. Curtis. It held that the maxim that the right of personal property follows the person of the owner is to be limited to those commodities that are everywhere and by all nations treated as and deemed subjects of property, which is not true of property in slaves; that the local laws which recognize property in slaves, while they operate within their own jurisdiction to give to the subject the incidents of property, and apply to it the same rules that govern other species of personalty, cannot operate *proprio vigore* out of that jurisdiction; that the rule of comity does not require a State to give to the laws of another State an operation within its territory which is inconsistent with its own public policy and legislation; that to allow of the temporary and qualified restraint asked for in this case would lead logically to the exercise in Massachusetts of other rights of the master given by the local law of his domicile; and that, as slavery was a condition unknown in Massachu-

[1] The argument in support of the writ was made with great ability and learning by the late Mr. Ellis Gray Loring. Mr. Choate was on the same side, but he did not add much to Mr. Loring's argument. The case is reported in the eighteenth volume of Pickering's Reports, at page 193, under the name of *Commonwealth* v. *Ares*. The report does but scant justice to the arguments of Mr. Curtis and Mr. Loring. I heard them both. There was a full and accurate report published at the time in a pamphlet. From this the editor has taken his father's argument for insertion in the second volume.

setts, and repugnant to its Constitution and laws, the right of property founded upon the local law of States where slavery exists could not be exercised in that Commonwealth. The opinion made a broad distinction between the right secured by the Constitution of the United States to recapture a slave who had escaped from a slave into a free State, and the right of the master who voluntarily brings his slave within the territory of a State where slavery is prohibited.

The practical and direct importance of these questions, in reference to the condition of servitude, has passed away. But in the personal history of one who twenty years afterward had to act upon them judicially, it is interesting to note how he had sounded some of their depths at this early period in his life; and how this subject connects itself with that great topic which became the occasion of his crowning judicial distinction. At the time of this quiet but searching forensic discussion in Boston, that portentous claim to the extra-territorial operation of the law of property in slaves, which was afterwards advanced, had not reached the proportions which it subsequently assumed in its political and judicial aspects; and it had attracted but little attention compared with the intense interest that it was destined thereafter to excite all over the country. But the reader who is curious to trace the progress of an individual mind may find, in the celebrated dissenting opinion in the case of Dred Scott, how well its writer was prepared for the demands of that occasion, and how much further and with what more forcible and ample illustration he then carried the doctrine incidentally touched by the clear and vigorous mind of Shaw.

An anecdote, which has been told by Dr. Robbins, may be transferred to these pages, because it illustrates a well-known trait in my brother's character, and relates to the period covered by the present chapter: —

I remember that, a great many years ago, the late Governor Kent of Maine told me that, having heard that Mr. Webster was

about to argue a case at Portland, he went from Bangor to hear him. One of the opposing counsel was Mr. Curtis, then a young man, whose fame had hardly reached beyond his native State. After Mr. Webster had finished his plea, of course powerful and eloquent, Mr. Curtis, in rising to reply, made no allusion to his mighty antagonist any more than if he had been of no reputation; but with perfect composure entered upon the merits of the case, and argued it in a masterly manner. "I was greatly impressed," said Mr. Kent, "by this remarkable instance of manly self-respect, and honest reliance on the justice of his cause, in so young a man, and at that moment recognized in him the genuine marks of greatness."[1]

When he had been a resident in Boston for about five years, he lost the most intimate friend of his early manhood, to whom I have already alluded, — James C. Alvord of Greenfield. I can hardly dare to trust my pen in an attempt to describe this distinguished young man, for the number of my readers who can test by their memories the truth of my description is necessarily small. When the broken column that typifies an unfinished career stands to remind us of one with whom we began the journey of life, — one to whom we look back through the long vista of years that are crowded with events and scenes and persons in which he is not associated, but among which we have ever missed him, ever thought of what he would have done, of what would have been his impress upon the age, of what a part he must have played upon the theatre from which he was snatched by an early death, — we are too apt perhaps to feel that nothing has filled the void, that all comparison is vain. We carry our early estimate of a long-lost friend, uncorrected by our riper experience and wider observation, to the end of our own pilgrimage; and at every stage of it we are too prone to exclaim, —

> "For Lycidas is dead, dead ere his prime,
> . . . . and hath not left his peer."

[1] Dr. Robbins's Memoir of the Hon. B. R. Curtis, pp. 16, 17.

Yet I must here express my conviction that the State of Massachusetts never lost, at so early an age, a citizen of greater hope and promise of useful distinction, than she lost in Alvord. As a lawyer, he was the equal of his friend Curtis in learning and in logical power. But they differed remarkably and obviously in another respect. There was an energy of enthusiasm in Alvord which bore down all opposition, while it won the sympathy and admiration even of those who felt his blows. If he had had less intellectual strength, his zeal would have carried him where mere ardor and earnestness become of little value or effect. But in him the fire of enthusiasm burned in an intellect of the highest order, kindling without consuming his reasoning faculty. In this he was a strong contrast to his friend, whose mind and character derived none of their power from an ardent temperament, or any impetuosity of the moral feelings. In Curtis, the moral sentiments and convictions were very strong; but they lay deep beneath the surface, forming, like conscience, the unseen and silent guide of life. In Alvord, they were equally strong and sincere; but they were worn like the armor of a champion, which does hardy service in the fight.

Two men so differently constituted, yet of such equal intellectual gifts, bound together by an affection surpassing that of brothers, necessarily modified each other in some degree. Alvord had a strong propensity to public life, and a large capacity for it. He was an impressive and captivating speaker in public assemblies, and he possessed a fine tact in dealing with masses of men, especially in matters of legislation and public policy. Curtis was acted upon by the warmth of his friend's nature, as the bodily frame which needs more heat than it can supply to itself is acted upon by an external source.[1] The one of these men was formed

[1] One who has survived Mr. Alvord for forty years, and who was united to him in her early days by the closest of all ties, has recently said, in a letter to my nephew, the editor of this work: "Mr. Alvord's magnetic enthusiasm acted upon the natural reserve of your father like sunlight."

to be a great judge: the other was destined to become a statesman. One lived to become what he was fitted by taste and temperament to be: the other was cut off on the threshold of a public career that promised to be singularly brilliant, before his strong and noble character had become known beyond his native State. The survivor paid the following tribute to the memory of his friend, and went on his way, feeling that he should never look upon the like of him whom he had lost.

James C. Alvord.

Died, at Greenfield, on the morning of the 27th of September [1839], James C. Alvord, aged thirty-one years.

Many can bear witness that in his death the Commonwealth has sustained a serious loss, — such a loss as should not be passed by without some notice of its magnitude, and some passing tribute to his talents and character.

Mr. Alvord graduated at Dartmouth College in August, 1827, having held, throughout his collegiate course, a high rank in his class, and having acquired a frank, generous, and manly character. He may be said to have had an hereditary attachment to the science and practice of the law; for his father and another near relative had studied the law with a strong love for the science, and had practised it with much success, and from early life he had been in the midst of scenes which gave his mind a decided bent towards that profession. On leaving college, he entered the Law School at New Haven, and there, under the wise guidance of the two eminent lawyers who presided over that school, he continued for two years, when he was called to the bar in his native county. For a few months he devoted his time to the practice of the law, under circumstances which enabled him, in that short period, to master all its practical details; and then, with an ardent love for the noble science he professed, he withdrew himself from practice, and entered the Law School at Cambridge, then conducted by Mr. Justice Story and the late Mr. Ashmun. There he pursued his studies with a breadth of views, a lively interest and strength of purpose, which are rare indeed in one of his years. His progress was truly great; and when, in the autumn of 1830, he returned again to the bar, he carried with him a depth of learning and habits

of thought and investigation which were a broad and deep foundation for future eminence.

The numerous and great obstacles which beset the path of a young lawyer everywhere, especially at the crowded bar of our Commonwealth, he cleared at a bound, and almost at once stood in the front rank of the distinguished lawyers whom the valley of the Connecticut River for several generations has continued to produce. Within the short period of a little more than ten years, that valley has seen three of its great lights of the law sink in early night. Howe, that bright example of a Christian judge; Ashmun, of whom it was beautifully said that he was fit to teach when most men are beginning to learn; and now Alvord, of whom it is not too much to say that he was worthy to stand side by side with them.

At the decease of Mr. Ashmun, Mr. Alvord, though scarcely older than the majority of the pupils at the Law School, was called to supply his place until a permanent professor could be appointed. The young men who were under his care, as well as the eminent judge, who then, as now, was at the head of the school, will bear witness how faithfully and well he discharged his duties. In the Legislature of 1837, he represented his native town of Greenfield in the lower house. In the next Legislature, he represented his native county in the Senate; and at the ensuing election, in the fall of 1838, he was chosen, by a very large majority, to represent the district in the Congress of the United States which will assemble in December next. To the All-wise Disposer of events, it seemed fit that his duties there should never begin.

His was truly a remarkable mind. With a quickness of intellect which travelled to conclusions with the rapidity of light, he united habits of the most patient investigation. Searching always for principles, he had yet as much deference for authority as a vigorous mind can feel. Though capable of long-continued labor, his power of concentration was so great as almost to dispense with it.

Though exceedingly zealous in action and of an ardent temperament, his opinions, even on the most exciting subjects of the day, were uniformly the result of a nicely balanced judgment. United with these intellectual qualities was a character from which they borrowed new vigor. Courage which always rose with the occasion, until it became perfectly indomitable; firmness of purpose which no opposition could shake; a generous self-devotion, easily excited; an entire frankness and openness, which sometimes would have

seemed almost childlike if it had not been united with a keen insight into the characters and purposes and weaknesses of others, — all these qualities combined gave him a control over men such as few can acquire. Yet how well do all that knew him know that his courage was united with gentleness; that, though firm, he never showed any other obstinacy than an obstinate adherence to his friends; that he had no hardness of character, but almost a woman's tenderness and quickness of feeling; and that his perception of others' weaknesses was no quicker than his impulse to help them.

The writer of this imperfect sketch has known him in the halls of legislation, at the bar, in professional studies, in domestic life, in the offices of friendship, and, though he was ambitious, has never seen the least attempt to advance himself professionally or politically by the smallest deviation from principle. From year to year, the writer has found his convictions strengthening, that, if the ordinary length of years should be granted to Mr. Alvord, the country would owe to him at his death a debt of gratitude such as is rarely due. He had hoped to see the noonday brightness of that sun, — but let no man say it is not best as it is.

"Surrounded by his family, watched by affection's gentle eye, he sank to rest;" and, though he died young, we can truly say of him what was said of one who had lived twice his years, "Multa ejus et in senatu et in foro, vel provisa prudenter, vel acta constanter, vel responsa acute;" and what is more, and most of all, we can say that this brief life is competent to teach us how few years are necessary to form a manly and virtuous character. Though to our short sight his death may seem premature, yet even we can see that he is indeed happy who has found such an end of such a life.

In after years, when great trouble came upon our country, and the dark clouds of sectional passion lowered over the whole land, it was often doubted, in my brother's hearing, whether Alvord's course and influence, if he had lived, would not, from the ardor of his nature and in the temptations of ambition, have proved unfortunate for himself and for the public weal. But my brother never would admit the peril which others suggested. He said that Alvord, although ambitious and fond of popular approbation, was

too broad, wise, and great a man to have become in any way a dangerous one; that he was made for a national statesman, and not for "a sectional man, a local man, a separatist." [1]

Of my brother's professional avocations and rank during this period of his life, it is to be observed that, in the variety and importance of his engagements and of the branches of jurisprudence involved in them, he was second to no man of that time in New England; and that, before he had reached the age of forty-two, he was known as a lawyer of great eminence in the courts of his native State, and in the Federal courts of that portion of the country. He first became entitled to act as a Counsellor of the Supreme Judicial Court of Massachusetts in 1836, — the year when he argued the case of the slave "Med," described in the present chapter. The sittings of that court *in banc* were denominated its "Law Terms." It appears from the reports of Pickering, Metcalf, and Cushing, that, during the fifteen years from 1836 to 1851, he took part in the argument of one hundred and thirty-eight cases at the law terms of the Supreme Court. In the Circuit Court of the United States for the First Circuit, he made arguments during the same period in many cases, which are reported in Sumner, Story, and Woodbury and Minot. An equally large proportion of *nisi prius* trials, and of hearings in admiralty in the District Court of the United States, constituted a part of his professional labors, while a constant chamber practice also occupied his attention. To sustain such an amount of professional labor in all departments of the law, and to answer the demands of clients who could expect the services of an attorney, an adviser, and an advocate from the same person, required an almost incessant labor and a great variety of professional

[1] "What States are to secede? What is to remain American? What am I to be? An American no longer? Am I to become a sectional man, a local man, a separatist, with no country in common with the gentlemen who sit around me here, or who fill the other house of Congress? Heaven forbid!" (Webster, Speech on the 7th of March, 1850.)

accomplishments. In the earlier years of his practice in Boston, from the number and magnitude of the litigations in which he was concerned, and the responsibility imposed upon him by the weight of the interests on which he was privately consulted, he was in some danger of overtasking both his mental and physical powers. But, as he went on, he acquired a facility which is rarely found until a later period of life. It was observed of him that, in the ease with which he could go *de die in diem* from court to court in successive engagements of the most different kinds, and in the sustained and uniform excellence of his efforts in them, he resembled that distinguished person who was at the same period exhibiting at the English bar what was considered the most remarkable professional versatility of our times, — Sir William Follet. But the aids which a leading English barrister derives from attorneys and solicitors, his general exemption from the duty of seeing clients and witnesses, and the completeness of the briefs which are placed in his hands, give him one advantage, at least, over his American brother, who is often obliged to be at once special pleader, consulting counsel, and advocate in court.

The two systems of professional labor — growing partly out of a difference of manners in the two countries, and partly out of a difference in their laws — do not admit of a comparison that will determine which of them produces the most accomplished lawyers or the most accomplished men. All that we can say of our own system, in regard to its tendency to produce accomplished judges, is, that when the varied experience of an American lawyer, as in the case of Mr. Curtis, has carried him through the widest range of the duties of an attorney, a chamber counsel, and an advocate, he is as well fitted for the bench as any man can become under our institutions, and as the interests of our society require him to be, provided he possesses the judicial habit of mind and the moral qualities which the judicial function demands in its highest exhibition.

I am now to turn from the strictly professional side of his character, and to answer the natural inquiry of what he was or did in other spheres of intellectual activity. It has been frequently asked, how it happened that he did not become a statesman. Why was it that one who was so furnished with the knowledge that, under free institutions, is a high qualification for public life, so endowed with the power of impressing his convictions upon others, so capable of instructing the public mind upon subjects material to the public welfare, — why was it that he did not enter the political field and make himself felt in the political world? The question is one peculiarly liable to be asked in this country, where the general expectation is that great abilities at the bar will be accompanied by corresponding eminence and activity in the political sphere. The popular idea is, that, if a man is only a distinguished lawyer, there is an implied defect in his character or his mind, and his having attained or not attained political office is made the test of his greatness. Not unfrequently, too, it is assumed that distinction in politics is a proof of distinguished professional abilities. I am not content to rest the answer to these inquiries, in the case of Mr. Curtis, upon his lack of political ambition, which was certainly a trait of his character; for no right-minded person will suggest that political ambition is necessarily a duty of a good citizen. Nor do I think it sufficient to say that he had a chosen field for the exercise of his powers, and that he found in that field abundance of occupation in what seemed to him the best opportunity for being useful to society. It is rather my duty to give frankly my own conception of the feelings and principles which governed his course of life, believing that I know them, not only from observation, but from frequent conversation with him in regard to his public relations and duties. It is equally incumbent on me not to leave the reader to suppose that there was any neglect of those duties and relations, measuring his fulfilment of them by what it

was practicable for him to do, and by what he did. In this measurement, it must be considered that for the lower politics he had neither taste nor capacity. He could not "give up to party what was meant for mankind." While he had nothing about him that would have been specially useful to party, he had a great deal about him that could be eminently useful to society. For the higher politics he had great capacities. No man's views upon any important public question were sounder; no man thought more justly, comprehensively, and wisely upon any subject that concerned the public welfare; no man possessed more courage in encountering public opinion when it was wrong, or was better able to instruct and guide it in the right. All this was well known. But that which sometimes appeared in him, to superficial observers, to be a fastidious withholding of himself from the political conflicts of his time, or to be induced by a selfish absorption of his energies in the pursuits of his profession, was in truth a systematic principle of action deliberately and wisely chosen. He regarded whatever power he had to act upon public sentiment, whatever weight of character he possessed, whatever facility he had for instructing his fellow-citizens, whatever influence their respect for him had given him, as so many trusts to be exercised only when he saw or believed that an opportunity was before him for doing good, and not to be lightly or frequently employed. In this conscientious economy of the moral capital which he held, he would not squander or risk a particle of it upon mere partisan demands, or venture it in any way, unless he felt that the occasion or the subject called for just such discussion or inculcation as he felt qualified to give. When he was satisfied that this was the case, how much he risked, or what he was personally to gain or lose, rarely entered into his thoughts. He aimed to convince all whom he could convince, and thus to discharge his duty to society.

It is obvious that a man who thus acted in reference to

public affairs would speak or write but rarely on any public topic, and that the occasion or the subject which would call forth his exertions would be one of more than ordinary importance. Some principle must be at stake; some example must be wanted; some course of action must be material to the public welfare in a large sense and to a high degree; some wrong of a more than ordinary character must require to be rebuked; some state of public opinion or feeling needing the best enlightenment must exist, — before such a man would be likely to come forward and use the influence that he had. It will be found, therefore, in the instances which I shall now adduce, and in others to which I shall refer at a later period, that such was the character of every occasion or topic on which Mr. Curtis undertook to address the public mind; that these were frequent in the proportion in which any just demands of public duty could be said to rest upon him; and that, in doing what he endeavored to do, public duty alone was his motive, and the public good his single aim.

Between the years 1836 and 1842, the States of Pennsylvania, Maryland, Mississippi, Michigan, Louisiana, Indiana, and Illinois had contracted public debts, or become obligated for the debts of private corporations, which in one form or another, on various pretexts, they refused or threatened to refuse to pay. It was then that the word REPUDIATION, first coined in Mississippi into the sense and application in which it has since had a bad eminence in our country, began to be used. Many countries in Europe contained numerous injured creditors of these States, who had taken their obligations in reliance upon their public faith; and these creditors comprehended all ranks and descriptions of people who had any money to invest, — bankers, clergymen, shopkeepers, mechanics, farmers, and women. In short, the public stocks of these States were held by the multifarious classes of individuals to whom punctual payment of their incomes is a matter of supreme personal im-

portance. At home, the holders of these obligations were not so numerous, and perhaps not so diversified. But wherever they existed, there was great individual suffering; and, in addition to this, to borrow the language of Mr. Curtis, "disgrace had fallen upon the people of this country in the eyes of the civilized world." Abroad, there was no true understanding of the facts, or any proper comprehension of the degree of responsibility for this state of things justly resting upon the national government or the governments of the States. Public opinion in this country, save in those States whose public credit and financial conduct had always been without suspicion or reproach, was inclining to excuse or justify some of the delinquent States. There was danger that "repudiation" might become an accepted mode of meeting public obligations which it might be inconvenient to discharge, or unpopular to provide for.

Mr. Curtis had no pecuniary interest whatever in any of these securities, nor had any of his relatives. He felt deeply the stain on the American name which already rested upon it, and which threatened to become indelible. He saw how imperfectly the subject was understood, — how necessary it was that the case of each of the delinquent States should be analyzed, and have applied to it the true principles of public law and that high moral code which should govern the conduct of a sovereign people. He saw that angry denunciation could effect nothing, and that only a calm, judicial, and unimpassioned discussion could reach the public mind. He was well aware that it would be utterly vain to deal with this subject as a politician might handle it; and that it was only as a jurist, a moralist, and an impartial citizen, fearing nothing but wrong, and concerned for nothing but right and justice, that he could hope to accomplish any good.

He prepared himself with great care and research to sum up the whole case of the repudiating States, and to examine

in detail the several arguments, excuses, or subterfuges that had been relied upon, in or out of each particular State, to justify its delinquency. He chose the form of an article in the "North American Review," because he could there best deposit the facts, principles, and reasoning to which others might resort as to a storehouse, and which would furnish what he deemed the sound and just conclusions to which public opinion should be led. His paper, entitled "Debts of the States," was first published in the North American Review for January, 1844, and was immediately republished and widely circulated in pamphlet. It is included in the present collection of his writings; and whoever now reads it will judge whether it justifies my remark, that for the higher politics he had great capacities, which he was willing to use for the public good. If, in the whole range within which a public topic may be treated, there be a higher and a lower plane, — if there be a supreme fountain of truth and reason, from which the means of persuasion and conviction are to be drawn for the welfare of mankind, and made practically more powerful than the baser passions and narrow objects of immediate self-interest, — then there is a broad distinction between the higher and the lower politics. That the loftier plane was reached in this appeal to the better sense of a people, — that the highest strains of what is rightly called eloquence flowed from his pen, through many passages in prose of the purest diction, impressive thought, and chaste construction, — will I think be allowed. The paper is valuable now, not only as an illustration of the writer's character, but on account of the principles of public and constitutional law to which he has there given the sanction of his authority. He spoke of it in the subjoined letter as having been written hastily; but in fact, before it was published, he went over the whole of it again very carefully, and, with the aid of a friend in Baltimore, he made it much more full, in regard to the real finan-

cial situation of the State of Maryland, than it was in its first form.[1]

To Mr. Ticknor.

Circuit Court Room, Nov. 3, 1843.

Dear Uncle, — I hoped to be able to see you a few minutes before leaving for New York, but I cannot: I shall be in court till the last moment. I wished to say that, if you will have the kindness to use your pencil freely in reading my paper on the state debts, I shall be much obliged to you: please to make any corrections of words or phrases or ideas which occur to you. I have no doubt it will be found to need a good deal of correction. I have been for ten years so little in the habit of writing any thing but bills in equity, and such like, and so much in the habit of debating, that I have found it very difficult to write in a style adapted to the character of the paper. It has been written also in much haste, and in the short intervals I could snatch from severe professional labors. I know it is incomplete also in some particulars, and I intend to add something to show that Maryland is not in so bad a condition after all. I beg you, in reading the article, to bear in mind the circumstances under which it was written, and that I have not had time to give it a revision. I hope to return from New York on Sunday morning. Yours most truly,

B. R. Curtis.

From Mr. Justice Story.

Cambridge, Jan. 2, 1844.

My dear Sir, — I return you my sincere thanks for the present of your article on the State Debts in the North American Review, which I am glad to possess in an independent form. I have read it with the greatest satisfaction. It is equally remarkable for its conciliatory tone, its clear statement of facts, the calmness and conclusiveness of its reasoning, and its sound constitutional views. I think that in this country, as well as in England, its influence will be at once extensive and salutary.

For your personal remarks to myself, I am indeed truly your

[1] The gentleman here referred to was John H. B. Latrobe, Esq., of Baltimore, to whom my brother was indebted for a comprehensive and accurate account of the public debt and resources of Maryland.

debtor. Such kindness and such praise from one whose course is so high and honorable is to me a source of the most unfeigned gratification. I will not disguise that I have the greatest pride in you as one of my law pupils; and I trust that, even if a solitary lesson at the School has left any deep impression on your memory, it is no less a source of consolation to the Professor who still survives, that his own recollections of your devotion to the law while here gave him the strongest assurances of your future eminence.

Believe me most truly and affectionately yours,

JOSEPH STORY.

BENJAMIN R. CURTIS, Esq.

But I must now turn aside from public questions and professional avocations, to a domestic event which put the character I am endeavoring to place before the reader to one of those trials that reveal the materials of which a character is composed. In the month of July, 1844, my brother lost the wife of his youth. Without comment, and without disclosing more than should be seen, I may permit the perusal of the following letters: —

TO MR. TICKNOR.[1]

BOSTON, July 10, 1844.

MY DEAR UNCLE, — I got your letter, and Aunt's most kind and welcome note to Eliza, this morning. I feel sustained and strengthened by your sympathy in this trial. I have a strong conviction that the event of the disease must be unfavorable, and I am as well prepared to sustain it as I ought to hope to be. We have spent ten days at Hopkinton. The change of air and the quiet of the place were comforting to her, but I do not think she returned really better. She does not suffer a great deal, except from excessive weakness at times; and she bears it all patiently and cheerfully. I feel grateful to you for your wishes to be with us; but there is nothing to be done save what we can easily do, and I am quite equal to all which is necessary.

It gives me great pleasure that Aunt is doing so well. Give my love to her, and to all, and believe me

Affectionately yours, B. R. CURTIS.

[1] Absent and travelling.

P. S. It has occurred to me that I ought, perhaps, to give you some more particular account of the symptoms and progress of the disease; but such details are always painful. . . . This morning when I left her she was quiet, and even cheerful, and made some playful remark to me as I came away. While we were at Hopkinton she herself was convinced that she should not recover; but she was not agitated, nor did she at any time lose her self-command. I have entire confidence that she is quite prepared for either event, and that, with God's help, she will bear it all well.

To Mr. Ticknor.

Boston, July 22, 1844.

My dear Uncle, — I have just received your letter dated at Geneseo. Eliza is still living, and it is possible may continue for a day or two longer, though I think not.[1] Her sufferings have at no time been great, and of late I think she has not suffered. Certainly she is not conscious of any suffering. I am quite well. The advice you give me in your letter I know to be most judicious; for I have followed the course you point out, and have up to this moment preserved my composure of mind. I came early to the conclusion that the termination must be fatal, and I thank God that I was able to look steadily and calmly upon what was coming. From that time, I have kept out of my mind all thoughts which would disturb my firm trust in God, and acquiescence in his will, and have endeavored to think and act, in regard to this event, just as I should wish to have done in looking back upon it some months hence. I have been every day to my office, and several times into court, and have been able to apply my mind to some matters which required a good deal of study and reflection. I mention these things, my dear uncle, not because I like to talk about myself, but that you and Aunt and Cousin Anna may not feel anxious about me, — in short that you may not fail to do what I have done, viz. to suffer no unreal evil to disquiet you. Certainly it would be a great consolation to me to have you here, but it will be equally so by and by; and therefore I sincerely hope you will not by hastening home deprive Aunt of any benefit which she can have by a longer stay. The children are very well, and the infant is a fine child, and grows fast. Give my love to all, and believe me now and always

Yours affectionately,

B. R. Curtis.

[1] The disorder was consumption.

To Mr. Ticknor.

Boston, July 25, 1844.

Dear Uncle, — George wrote to you two days since, but I am not willing to let another day pass without a few lines from me, to say that I am able to write to you, that I am well, that the children are cheerful and in good health, and mother, who of course is with me, is composed and quiet, though somewhat exhausted by her labors and watching. I have been so long prepared for the event, the tone of my mind for some weeks has been so far fixed and adapted to what has come, that I have been able to bear the blow with composure. The fortnight which I passed at Hopkinton, in entire solitude when not in attendance on her, was of great use to me, and on my return to Boston I at once forced myself into constant occupation during a part of every day; so that I have at no time since I returned wholly lost that calmness of mind which it is, in such scenes, so important to others, as well as to one's self, to preserve. The children bore their grief with some fortitude, though of course it was a grievous thing to them. They are now cheerful and well. I feel quite anxious lest you should hasten home. I earnestly hope you will not come one day sooner than is for Aunt's advantage. I shall stay here a week or two and go on with my business, and then go away for a short time to Newport, or some other pleasant, healthful place.

Give my love to Aunt and the cousins, and believe me

Your affectionate nephew,

B. R. Curtis.

CHAPTER V.

1845–1851.

Death of Judge Story. — Mr. Curtis appointed to succeed him in the Corporation of Harvard College. — Letters to Mr. Ticknor. — The Fugitive-Slave Excitement in Boston. — Address of Welcome to Mr. Webster. — Speech in Faneuil Hall on the Duty of obeying the Constitution. — Address to the People of Massachusetts, occasioned by the "Coalition."

In September, 1845, the death of Judge Story profoundly moved the community in which the whole of his laborious, useful, and distinguished life had been passed, when he was not away from it on his judicial duties. His energetic nature acted upon society in many ways that were not inconsistent with his judicial character. Among the local positions which he had held for many years, the Dane Professorship of Law in the University at Cambridge, and a membership of its "Corporation," were the most conspicuous and important. Mr. Curtis was selected to succeed him in the Corporation. This had always been deemed a great distinction. The trusts and authorities exercised by this board required that it should be composed of men of known wisdom and weight of character, whose residence in the immediate neighborhood of the University would permit their constant attendance to its concerns. A vacancy in the Corporation had rarely been filled by the appointment of so young a man as Mr. Curtis.[1] It was mainly through

[1] "The Corporation," as it is habitually called in the neighborhood of the University, is the governing body, which is charged with the care and administration of all its fiscal concerns, the appointment of its professors and all officers of instruction and government, and the regulation of all its

his exertions and influence that Judge William Kent, of New York, was appointed to and induced to accept the vacant Professorship of Law.[1]

The summer of 1845 was passed by my brother and his children at Nahant, near the residence of his friend and partner, Mr. Charles P. Curtis. The following letters, written during that and the succeeding year, relate to domestic affairs, to some of the concerns of the College, and to the death of Judge Story: —

To Mr. Ticknor.

Nahant, Aug. 3, 1845.

Dear Uncle, — I have no expectation now that I shall be able to come to Geneseo this summer. I had hoped that Mrs. Curtis's[2] condition would be somewhat improved by the air of Nahant, and though I expected no permanent effects from it, I thought she would probably go through the summer pretty well. It has not proved so. She has been saved from much discomfort by being here, away from the noise and heat of the town; but her condition has been such as to excite constant apprehension in the minds of those near her, and to leave no doubt that the disease has made

internal affairs, subject, in some respects, to the confirmation of another body, known as "The Board of Overseers." In law, the Corporation, officially styled "The President and Fellows of Harvard College," represents the University. The President of the University is *ex officio* a member of it, and there are five "Fellows" and a Treasurer. This Corporation fills its own vacancies.

[1] The Hon. William Kent, only son of the great Chancellor, admirably qualified by his learning, his genial manners, and his numerous accomplishments for such a place, became Dane Professor of Law in Harvard University in the autumn of 1846. He held the position, however, for a single year only. He resigned the professorship in 1847, to the great regret of the authorities and friends of the University. It was stated by his intimate friend, Benjamin D. Silliman, Esq., at a meeting of the New York bar, held after his death, that he resigned "that he might be with his venerable father, whose twilight was then fast fading into night." Judge Kent was born in Albany, on the 2d of October, 1802, and died at Fishkill, on the 4th of January, 1861. He was a very distinguished and much beloved member of the bar of the city of New York, for nearly thirty-seven years.

[2] Mrs. Anna Wroe Curtis, wife of Mr. Charles Pelham Curtis.

progress since she came here. Of course Mr. Curtis has been unable to take his usual part in the business of our office, and I am obliged to do more than usual. Add to this that my presence here is some support and consolation to those who very much need them, and you will see why I cannot leave my post.

Meantime, I am very well, and quite able to do what is required of me, and, though it would be a very great pleasure to come to Geneseo and see you all, I cannot say it is necessary. Mother and my children are very well. The children have grown strong and hardy here, and the youngest especially has improved very much. Anna is well also; but she is new to the care of her father's house, and her mother's condition weighs heavily on her heart. She goes along with her duties with that steadiness and never failing sweetness of temper and clear judgment which, when you know her, you will find her remarkable for.[1]

A word about a matter of charity. A client of mine, who has a very large estate, wishes to make such a disposition of it that, in some contingencies, a part, and perhaps the whole of it, will go to the establishing of a farm school in Massachusetts. His general object is to afford to boys a good education to fit them to be scientific farmers. He has no such knowledge himself of what is necessary or expedient to be said by him as founder, as would enable him to prepare the proper directions; and I have not the requisite knowledge, nor can I give time to acquire it. If it would not be too much trouble, it would be useful, I have no doubt, if you would give me some of your ideas respecting such an institution. Perhaps you would prefer to do it orally, and, if so, I can wait till I see you; for the will is executed, and the trusts are so shaped that directions can be prepared at leisure. Give my love to Aunt and the cousins. I hear *of* you through those who go where you are, and this, though not hearing *from* you, is something.

Always your affectionate nephew,

B. R. Curtis

[1] On the 5th of January, 1846, my brother was married to Miss Anna Wroe Curtis, eldest daughter of Mr. Charles P. and Mrs. Anna Wroe (Scollay) Curtis.

To Mr. Ticknor.

Boston, Sept. 11, 1845.

Dear Uncle, — It must surprise and grieve you, as it has our whole community, to learn that Judge Story died last night, at a quarter before nine o'clock. He was doing well until Tuesday night, and his physicians considered the danger past, or nearly so. About seven o' clock on Tuesday he began to grow weaker, and continued to sink through the night, and yesterday morning his case was hopeless. He lived, however, till about nine in the evening. He was without pain, and the cause of his death is as yet undiscovered. Mother says that Mary bears this affliction well, and I hear the same from Mrs. Story.

Please give my love to Aunt. I hope she is quite recovered from the illness which I was sorry to hear of a week ago.

We have returned from Nahant, and are once more settled at home. Mr. Curtis and his family have also come back. Mrs. Curtis bore the ride better than was feared; but she is now very ill. She does not suffer much at present, and from the first has borne all with great patience. How much longer she may be required to wait is wholly uncertain, though it seems to me it cannot be long.

I find I have omitted to mention, what perhaps you would be glad to know, that the bar have already made arrangements for proper tributes of respect to Judge Story's memory, and, among other things, Mr. Webster will deliver a discourse on his judicial character and the value of his labors, &c.

Your affectionate nephew, B. R. Curtis.

To Mr. Ticknor.

Jan. 9, 1846.

Dear Uncle, — I have been invited to be a member of the Corporation of the College in place of Judge Story. I am not willing to act on a matter of so much importance without talking with you. I hope you will not get tired with my applications to you in reference to my affairs, and I do not believe you will. If you come down in town this morning, will you stop at my office for a few minutes. If it is not quite convenient to do so, I will see you in the evening.

Yours always, B. R. Curtis.

To Mr. Ticknor.

Boston, May 5, 1846.

My dear Uncle, — I was very glad to get your letter this morning, and I assure you I have had better reasons for my seeming neglect to write to you than mere inattention. The truth is, I should have written more than once if I had been able to get news of you in no other way; but having learned from time to time that all was going on well with you, I forgot that you might wish to hear something of us, and not having a large amount of leisure it had not occurred to me to write. Anna has been ill with something like scarlet-fever, taken from one of the servants who had it in the house; but she was not very ill, and is now fast recovering. No one else has taken it, and I think we are now safe. Mother is with us for a few days, and is pretty well. George and Mary went to the Connecticut River for a few days last week, and have returned with improved health, though I think they both need to go away from Boston for a few weeks. We shall get into our new house in June. I was at Lynn yesterday, and it is going on well. It is the *third* time I have seen it; so it has not lost the charm of novelty yet. I am glad you got the right accounts of the inauguration.[1] It was a very successful day. Every thing went right. I was greatly pleased with Mr. Everett's discourse, chiefly because it was practical, and showed interest and feeling to a degree which I had not expected. I think he has pledged both himself and the Faculty to good things; but I may say to you that I am surprised and pained to learn, even imperfectly as yet, how lax Mr. Quincy's administration has been of late years, and how lazy many of the faculty have become. What do you think of a New England college where most of the teachers do not go to church at all, and next to none go in the afternoon? I am satisfied nothing will answer but a system of direct and regular accountability, upon a comprehensive and systematic plan, to the Corporation. How far I may be able to do any thing to procure this to be done I know not, but I shall try. At present it is substantially unknown. I am grieved at what you say about Kent. I had hopes of getting him, and, being disappointed there, I know not where we can look. Doubts sometimes cross my mind whether

[1] Inauguration of Mr. Everett as President of Harvard.

I ought not to say to the Corporation that I will take the place if they cannot do better; but it would be a great sacrifice of money and inclinations, and I have not yet got very far into doubts about it.

Please give my love to Aunt and the cousins. Anna, that is my Anna, joins me in it. I have thought we might come to New York soon, but it has blown over for the present. It is very gratifying to us to know that all the eyes are looking and feeling better, that is, when the doctor's medicine does not make them smart.[1] The town has been all alive about the steamer's being ashore on Cape Cod. She is now safe at the wharf here, thanks to the prompt and spirited exertions of the Boston folks. The people from Cape Cod who know the place where she was stranded, all thought she would be buried there, and it was a most rare and fortunate escape.

Yours faithfully, B. R. Curtis.

To Mr. Ticknor.

Boston, June 6, 1846.

Dear Uncle, — George goes to New York next week, and being sure only of this-present-Saturday-night-leisure (to use a compound *word*), I beg leave to say that we are all quite well, and very glad to hear favorable accounts of your patients. We have had two days of quite warm weather, but nothing to complain of, and this day has been very fine indeed.

I am sure you will be glad to learn that we have strong assurances both from Judge William Kent and his father that the former will accept the vacant Law Professorship. He has not actually accepted it, because he waits his father's consent, to be sought after his return and conference with the Chancellor; but the latter has, in a letter to the Chief Justice [Shaw], substantially given his approval.[2] I should prefer, however, for obvious reasons, that this should not be known in New York till the party chooses to make it known. It is in contemplation to establish a third professorship of law, but as yet it is an undigested scheme. I was greatly grieved to hear some account, though very imperfect, of

[1] Mr. Ticknor had taken his daughter and some other ladies to New York, to be under the care of Dr. Elliot, an eminent oculist.

[2] Judge William Kent was at this time in Europe.

Wadsworth.[1] Please to tell George what you know about his case, as I wish much to learn how it is with him.

We shall probably go to Lynn about the first of July. The damp weather has retarded the workmen, but the house will be ready, I think, on that day; and for a working lawyer, who wants to be within half an hour's ride of his office, I think it will be an agreeable and quiet place.

There is no news in Boston but what you have had or will have before this reaches you; and indeed if there were, I doubt if I should know it, for I am a very poor collector of "intelligence." But however old the story is, I hope you will allow me to assure yourself, Aunt, and the cousins of the affectionate regards of

Your nephew,

B. R. Curtis.

The four succeeding years, from 1846 to 1850, were passed by my brother in unremitted devotion to professional pursuits, scarcely broken by any vacation, but somewhat relieved by his residence during the summers at Lynn, from which, however, he came almost daily to his business in Boston. Nothing occurred during this period to draw him into any participation in public affairs; but troubled and trying times were approaching, in which he again had occasion to act upon the rule which I have elsewhere described. How largely the tranquillity of American life was disturbed by the cause to which I am now to refer, can scarcely be understood by those who have no personal recollections of the conflicts and events of the decade preceding our civil war.

The years 1850 and 1851 were years of great political excitement throughout the country, occasioned by the adoption of a series of measures by the Congress of the United States known as the "Compromise Measures of 1850," which were designed as a final settlement of all questions relating to slavery on which Congress could in any way act. In Massachusetts this excitement was vastly intensified by the course of Mr. Webster in the Senate in regard to these

[1] William W. Wadsworth, of Geneseo, brother of the late General Wadsworth.

measures, and by the differences and controversies between those who approved and those who disapproved of his support of them.

He had made a speech in the Senate, on the 7th of March, 1850, in reference to which there was a more angry conflict among his constituents than had been known in respect to the conduct of any other statesman in their annals. Men were divided from one another by a line, according to their approbation or disapprobation of that single speech; one side consisting of the great body of Mr. Webster's personal friends, and the conservative members of the two old political parties, the Whigs and the Democrats, and the other side being composed of a new and third party, made up of individuals who had seceded from the political organization of the Whigs, upon the professed ground that the latter were not sound on questions relating to slavery. This new political body called themselves the "Free-Soil Party;" partly by way of describing their superior opposition to the further territorial extension of slavery, in respect of which they accused all other parties of lukewarmness or want of principle, and partly to characterize their determination not to allow a certain provision of the Constitution of the United States for the extradition of fugitives from service to be executed on the soil of a non-slaveholding State. The leading men of this organization were particularly hostile to Mr. Webster. His avowed support and approval of a proposed new law of Congress, one of the Compromise Measures of 1850, designed for the more effectual execution of that provision of the Constitution, gave them the means of doing him much political injury. Mr. Webster's friends claimed that he was acting for the welfare of the whole country, taking upon himself the risk of losing support at home in order to preserve the peace and harmony of the Union; and that, in the matter of the extradition of fugitive slaves, he was acting from the highest sense of constitutional obligation. His enemies, on the contrary,

contended that he was seeking the political support of the South, in the hope of being made President, at the expense of the interests of the North, of his own principles and his own consistency.

Mr. Webster was expected to return to his home in Marshfield for a short visit, in the latter part of April, 1850. He was still in the Senate of the United States. The Compromise Measures had not then been enacted. Men's minds were filled with the excitement caused by the speech which he had made on the 7th of March. To encourage him in the efforts which he was making for the pacification of the country, and to mark their sense of his patriotic exertions, a great body of his fellow-citizens determined to receive him with a public demonstration, by assembling in the square in front of the hotel at which he was to arrive. Mr. Curtis was urged to make the address of welcome to Mr. Webster, in the name of the assembled multitude. Participation in such ceremonies was not much to his taste. He never had been a partisan; and although he had generally voted with the organization known as the Whig party, because their political principles had usually been the same as his own, he was never willing to be put forward on public occasions as the spokesman or representative of any party. But he did not regard this as such an occasion. It was evident that the multitude which would be assembled for the purpose of welcoming Mr. Webster and expressing their gratitude for his past and recent public services, would be composed of citizens of all parties excepting that one which denounced and reproached him. Mr. Curtis felt, therefore, that he could and ought to accede to the request that had been made of him, — that it was his duty to express publicly to Mr. Webster, for his fellow-citizens and himself, the deep sense which he believed that they, and which he knew that he himself, entertained of Mr. Webster's unequalled exertions and sacrifices for the good of the whole Union. He believed that the best inter-

ests of Massachusetts required her people to understand Mr. Webster's motives and to approve his acts. For no purpose and no reason less than this would he have consented to be the organ of any body of men whatever in an address to any public man in the country.[1]

Mr. Webster arrived in Boston on the afternoon of April 29th, and was driven in an open carriage to his hotel.[2] The square in front was densely packed with people. From a temporary rostrum, erected for the occasion, Mr. Curtis welcomed him in the following sincere and heart-felt address: —

MR. WEBSTER, — These your fellow-citizens have come here to bid you welcome home.

They desire to express to you, by their presence, their appreciation of your great past services in the public councils of the nation. They are not politicians, sir, any more than myself, — nor deeply skilled in political history; but they know your political history, and they have come here to greet you, on your return to Massachusetts, after the arduous labors of the winter, *because* they know it.

They are aware that, for the third of a century, during more than the lifetime of a generation of men, you have been serving their country with unsurpassed ability and patriotism. These, sir, are Northern laborers; for where is there a Northern man, of an age to labor, who is respectable and respected, who is not a laborer in some good work? And they are not ignorant how long and zealously you have upheld the rights and interests of the labor of the country. They are deeply concerned in the maintenance of a safe currency, and they recognize the just and sound principles which you have always held and enforced on this subject. Living almost at one of the extremities of the country, and dependent for our prosperity on the free development of all its commercial resources, we are not unmindful that the internal improvements of the whole United States have found in you a steady and powerful friend. We know also, that when a protracted and difficult controversy with a great foreign nation involved the honor and threatened the peace of our

[1] He told me so at the time, almost in the words that I have here used.

[2] The Revere House, situated on Bowdoin Square.

country, by your efforts, mainly, its peace was preserved, and its honor maintained with increased brightness.

Allow me to say also, sir, that we never for one moment forget that we are citizens of the American Union, — that its peace and prosperity and glory are our peace and prosperity and glory, — and that only under the Constitution, and in the Union, can these exist for us or our children; and therefore, with our whole hearts, we say here and everywhere, that the friends of the Constitution are our friends, — and its enemies, whether open or secret, wilful or blind, are our enemies also, — that there is one party in which all minor differences of opinion and feeling are merged and obliterated, and that is the party of the Union. As members of that great party, sir, we desire to express to you our *abiding* gratitude for the ability and fidelity which you have brought to the defence of the Constitution and Union of these United States.

Recent events have awakened our most painful attention to this great subject. You are well aware, sir, that it involves some important conflicting *interests*, and still more conflicting *opinions and feelings*. Any attempt to reconcile them must, for a time at least, be a cause of offence to many honest men. But even they, sir, can scarcely withhold their respect from manliness which dares to speak disagreeable things, and from the patriotism which seeks, in the spirit of conciliation, a remedy for an inflamed and disordered state of the public mind. And when they shall have waited long enough to allow their judgments somewhat to cool, and their views to embrace the end as well as the beginning, they may be expected to feel as we now do, that we are not about to begin to distrust one who, before many of us were born, was eminently vigilant, wise, and faithful to our country, and who, without a shadow of turning, has ever continued so.

You have for many years stood before this community as the expounder and defender of the Constitution, and we have no doubt that you will continue so to stand. In this cold Northern soil, confidence is indeed a plant of slow growth; but believe me, sir, when it is grown, it is not to be uprooted by any gusts of passion or prejudice, nor blasted by the breath of suspicion.

Permit me once more to say, that we welcome you to your home.

Upon the close of this address, Mr. Webster, standing in the carriage, his imposing form in the full light of the de-

scending sun, and in the sight and hearing of a vast assembly of his constituents, made the following reply: [1] —

Mr. Webster's Reply.

It gives me great pleasure to meet so large an assemblage of my friends when my private affairs have called me from the seat of government to my own home. As you have said, sir, the duties of the winter in the public councils of the country have been arduous. I am sorry to say that those arduous duties are not done with. I am sorry to say that the public affairs of the country have not yet made so much progress towards satisfactory adjustment as to remove all the anxiety which has been felt about the adjustment of the subjects under discussion. But I feel authorized to say that there is now reason to hope, reason to expect, that further reflection — that a generous comparison of various wishes where we disagree — will bring about that improved state of public feeling on the reproduction of which all our expectations of useful discharge of public duty, all our expectations of useful legislation, must depend.

I cannot but feel, sir, that I stand in the presence of my friends. I must regard this gathering as the personal tribute of your welcome to me. You do not welcome the politician, and this is not an opportunity for discussing those questions which now agitate the community and the government, — questions which can leave little repose in the mind of any intelligent man till he can see some probability that from their discussion an adjustment may come in favor of the prosperity, peace, happiness, and continued union of the country.

Gentlemen, I have felt it my duty, on a late occasion, to make an effort to bring about some amelioration of that excited feeling on this subject which pervades the people of the country everywhere, North and South; to make an effort also to restore the government to its proper capacity for discharging the proper business of the country. For now, let me say, it is unable to perform that business. That it may regain that capacity, there is a neces-

[1] As this speech has not been hitherto printed *in extenso* in a permanent form, and can be found only in the newspapers of the time, I have here inserted it at length. I was in the carriage next to Mr. Webster's, heard every word that he uttered, and can vouch for the substantial accuracy of the report which I have transcribed.

sity for effort both in Congress and out of Congress. Neither you nor I shall see the legislation of the country proceed in the old harmonious way until the discussions in Congress and out of Congress, upon the subjects to which you have alluded, shall be in some way suppressed. Take that truth home with you, — and take it as truth! Until something can be done to allay the feeling now separating men and different sections, there can be no useful and satisfactory legislation in the two houses of Congress.

Mr. Curtis, and gentlemen, the Commonwealth of Massachusetts has done me the honor to place me as her representative — as one of her representatives — in Congress. I have believed that she would approve in me any honest, conscientious, and sincere effort to allay the dissension which we see among the people of the country, and to restore Congress to its constitutional capacity for action. I have believed that the Commonwealth of Massachusetts would support her representatives in that course. I have believed that the general sentiment of the whole country would favor and encourage their efforts to this end; and I have the satisfaction now to believe that in that hope I shall not be disappointed. However that may be, that effort I shall repeat. In that course of pacification I shall persevere, regardless of all personal consequences. I shall minister to no local prejudices. I shall support no agitations having their foundations in unreal, ghostly abstractions. I shall say nothing which may foster the unkind passions separating the North from the South. May my tongue cleave to the roof of my mouth before it may utter any sentiment which shall increase the agitation in the public mind on such a subject.

Sir, I have said that this is not an occasion for political discussion. I confess that, if the time and circumstances gave an opportunity, I should not be indisposed to address the people of Massachusetts directly upon the duty which the present exigencies of affairs have devolved upon her, — upon this great and glorious Commonwealth, — upon the duty, at least, which it devolves upon us who represent her in the national legislature. I shall have occasion, in my seat in the Senate, to which I shall immediately return, to give my opinions upon some topics of an interesting character, — topics in regard to some of which there exist both misstatements and misapprehension, — the greatest misstatement, the greatest misapprehension, especially so far as I am concerned. I

may simply mention one of these. It is the question respecting the delivery of fugitives from service. With regard to that question there exist the greatest prejudices, — the greatest misapprehensions. I do not wonder at these misapprehensions. I am well aware that this is a topic which must excite prejudices. I can very well feel what the prejudices are which must naturally start up in the minds of the good people of this Commonwealth. But, Mr. Curtis, and gentlemen, there are in regard to that topic duties absolutely incumbent on the Commonwealth, — duties imposed by the Constitution, — absolutely incumbent on every person who holds office in Massachusetts under her own constitution and laws, or under those of the nation. She is bound, and those persons are bound, to the discharge of a duty, — of a disagreeable duty. We call upon her to discharge that duty as an affair of high morals and high political principles. We ask her to resolve upon the performance of duty, though it be a disagreeable duty. Any man can perform an agreeable duty, — it is not every man who can perform a disagreeable duty. Any man can do what is altogether pleasant. The question is whether Massachusetts, — whether the old State of Massachusetts, improved by two centuries of civilization, renowned for her intellectual character, mighty in her moral power, conspicuous before the world, a leading State in this country ever since it was a country, a leading State in the Union ever since it was a Union, — the question is, whether Massachusetts will shrink from, or will come up to, a fair and reasonable and moderate performance (and no more than a fair and reasonable and moderate performance) of her sworn obligations.

I think she will.

Sir, the question is, whether Massachusetts will stand to the truth, against temptation, — whether she will be just, against temptation, — whether she will defend herself against her own prejudices. She has conquered every thing else in her time; she has conquered this ocean which washes her shore; she has conquered her own sterile soil; she has conquered her stern and inflexible climate; she has fought her way to the universal respect of the world; she has conquered everybody's prejudices but her own. The question now is, whether she will conquer her own prejudices. I shall return to the Senate to put that question to her, in the presence of our common mother, who will address it to her heart.

In the mean time, let me repeat that I tread no step backwards. I am devoted to the restoration of peace, harmony, and concord out of Congress, and such a degree of mutual co-operation in Congress as may enable it to carry on once more the legitimate business of the government.

The Union for the preservation of which I strive, the union of States for which I strive, is not merely a union of law, of constitution, of compact; but while it is that, it is a union of brotherly regard, of fraternal feeling throughout the whole country. I do not wish that any portion of the people of this country shall feel held together only by the bonds of a legal corporation, — bonds which some of them may think restrain their limbs, — cramp their affections, — gall and wound them. I wish, on the contrary, that they shall be bound together by those unseen, soft, easy-sitting chains that result from generous affections, and from a sense of common interest and common pride. In short, fellow-citizens, my desire is, and my labor is, to see that state of things produced in which — filling all bosoms with gratitude, all hearts with joy, illuminating all faces, spreading through all ranks of people, whether rich or poor, whether North, South, East, or West — there shall exist the balm of all our sufferings, the great solace of all our political calamities, the great security of every thing prosperous, and great, and glorious in the future; — and that is, THE UNITED LOVE OF A UNITED GOVERNMENT.

The Compromise Measures finally became laws in the month of September, 1850. Throughout that summer, the agitation of the subject of the surrender of fugitive slaves had continued to increase in Massachusetts, the head-quarters of most of the excitement being in Boston. The question whether Mr. Webster was to be sustained by the public sentiment of the State, became of comparatively less importance than the question whether the State was to array itself in open opposition to a provision of the Constitution. What might be the political fate or fortunes of an individual statesman, however interesting or important, was of less consequence than the issue whether the people of Massachusetts were to refuse to be bound by a part of the Constitution of the United States, which was at once a

compact between the States and a command of the supreme law of the land. The details of the law of Congress, which had been recently enacted for the more effectual execution of the Constitution, became comparatively insignificant in the presence of the transcendent question whether the Constitution was to be obeyed. The Constitution itself was assailed: its moral foundations were assaulted. The doctrine was broached that the compact, made in 1788, by which it was solemnly stipulated between the States that fugitives from service should be surrendered, was immoral and unfit to be observed. Sermons were preached, inculcating principles of action utterly inconsistent with the duty of civil obedience. The rash and inconsiderate were excited to a state bordering upon frenzy; and many good men were perplexed by doubts about the obligations imposed by a fundamental law, which recognized the idea of property in human beings.

In this state of things, in a community possessing many classes peculiarly prone to mistake the moral foundations of a civil obligation distasteful to their feelings, it was clearly necessary that some one should treat the subject from a point of view different from that ordinarily taken by political men. The politician could argue, and could argue truly and sincerely, that the Constitution required the performance of a certain duty; and that to remain under it and to claim the benefit of its powers, and to refuse to perform a part of its obligations, was both inconsistent with the honor of a rational people, and in the highest degree impolitic. He was answered with the passionate outcry that the Constitution was in this respect a "bond of iniquity," unfit to bind a moral and religious people, — a "covenant with hell" which ought to be broken.

How Mr. Curtis viewed this matter, and how carefully he had considered it, will appear from a letter which he had occasion to write to a friend who had endeavored to

reach the minds of a certain class of persons who occupied a sort of middle ground on this subject.

SUNDAY MORNING.[1]

DEAR . . . ,— I was sorry that a peremptory engagement prevented me from reading your article in manuscript; but when I saw it in the "Advertiser," I found there was not the smallest reason that I should do so. It is as accurate in its legal as its moral principles. It cannot but do much good. I wish its ideas could be repeated and enforced everywhere in New England. There are many political principles with which our people are well acquainted, and there is an intuitive disposition to obey the laws very prevalent among them; but that the Constitution of the United States is a *law*, — binding by each clause the conduct of every man in the country in the particular to which such clause relates, equally obligatory whether obeyed or disobeyed, — that organized disobedience is rebellion, and, if force is used, insurrection or revolution according to the event, — are things which a great many of the teachers of political morals, of the present day, do not seem to have taken into their minds at all.

I blame no one for arriving at the opinion, either by reasoning or impulse, that fugitive slaves ought not to be restored to their masters. But having arrived at this opinion, there remains another step; and I wish these Unitarian clergymen would sit down calmly and measure, or attempt to measure, its length, and look as steadily as they can, for one moment at least, into the place where that step must carry us.

I want to see somebody come manfully up to the point, and attempt to show that the moral duty which we owe to the fugitive slave, when in conflict with the moral duty we owe to our country and its laws, is so plainly superior thereto, that we may and ought to engage in a revolution on account of it. I should be glad to see this attempted, because it presents the true issue, and I am sure the attempt must fail. Wendell Phillips and his followers have taken the only sound ground; and their success in maintaining it does not seem to be very encouraging to others to join them there; nor do these gentlemen intend to do so. They are entirely unaware of their own true position, — or rather they *were* so; if they have read your article, they can hardly be so any longer.

[1] The letter is without other date, but the context places it in the period soon after the enactment of the Fugitive Slave Law in 1850.

I return the books you lent me the other day, and also two volumes of pamphlets about the College, which I have kept a good while, as I have wanted to refer to them, and supposed you did not.

Yours faithfully, B. R. CURTIS.

Not long after this letter was written, a public meeting was held in Faneuil Hall, according to the custom of that people when grave questions were to be acted upon, to consider and discountenance the spirit of disobedience to the laws of the land, which seemed to be so rife and so fraught with dangerous consequences. It was an imposing assemblage, in point of the character of those who took part in its proceedings, and in the respectability and intelligence of the thousands who thronged the venerable building. There was at all times something peculiar in the characteristics of a Faneuil Hall audience, when it had been assembled on the call of citizens commanding the public confidence, to act upon matters that rose in dignity above party discussions. Nowhere could a great popular assembly be found that more quickly appreciated, or more instantly understood, or more closely followed, an argument addressed to the reason and conscience of intelligent men.

Perhaps there has been nothing in modern times more like the discussions in Athens before the whole body of the citizens, than has sometimes been witnessed in Faneuil Hall, when there was no object to be promoted less than the good and the duty of the whole.[1] It was on such an occasion, and to such an audience, that Mr. Curtis made the following address : [2] —

It is a source of great satisfaction to me that I can stand *here* and say, not fellow Whigs or Democrats, but *fellow-citizens ;* —

[1] The same remark has been made by Mr. Ticknor in reference to the town meetings in Boston, which he witnessed during the war of 1812. I can bear witness to meetings of the same character at a much later period.

[2] Proceedings of the Constitutional Meeting at Faneuil Hall, Nov. 26, 1850.

that here I can meet on common ground, in an important emergency, those who have a common interest with me in the country. For I understand we have come here, not to consider particular measures of government, but to assert that we *have* a government; not to determine whether this or that law be wise or just, but to declare that there *is* law, and its duties and power; not to consult whether this or that course of policy is beneficial to our country, but to say that we yet *have* a country, and intend to keep it safe. These are the objects for which I understand we have, as American citizens, here met; and, for my own part, I cannot think we have come together too soon.

There is a very excited state of the public mind all over the country. It grows out of a subject of the last importance, — so connected with the interests and sentiments and passions of our countrymen as to make it difficult for the wisest and coolest on either side to restrain themselves within the limits of prudence and moderation. Many good men among us, with very tender consciences but not very sound practical judgments, — apparently not at all aware of the direction in which they are moving, or of the results to which they are tending, believing themselves to be as harmless as doves, and feeling, no doubt, quite sure they are as wise as serpents, — have plunged into this contest. Others, who love excitement or notoriety, or influence and power, or who are smarting under disappointment, have found here a new field of promise. Others still, whose daily food is contention, and whose daily drink is the waters of strife, have rushed hither as into a quarrel, and brought with them temper and feelings which have been justly characterized as "malignant philanthropy." While influencing more or less all these, and thousands of others who have suffered themselves to be led into this excitement, and lending a certain dignity and power even to the bad passions which are enlisted, is that deep and ineradicable love of human liberty which beats in every throb of every heart of the true sons of New England.

And when we add to all this, that the people of other parts of our country, having opposite interests and passions, — who, I believe, have never been remarkable for letting that excellent virtue called moderation be known unto all men, — have, upon this subject, used language and manifested feelings and done acts which I am sure wise and good men everywhere must deeply regret, and that

these things have produced their natural consequences here, — we may not be greatly surprised, however deeply we may be concerned, at the existing state of things.

In my humble judgment, it is a state of things calling for the sober and careful consideration of good citizens of all parties in the State, and for the public expression of a well-considered, temperate, but fixed opinion thereon.

In times of public danger it was the usage of our fathers to come together in this hall to embody and express the public sentiment of this people concerning their important affairs. Is not this an occasion on which we may well imitate their example?

There has been heard within these walls, addressed to a public meeting, and received with approbation by that meeting, the declaration that an article of the Constitution of the United States shall not be executed, *law or no law*. A gentleman offered a resolve, which passed at a public meeting *here*, that, "Constitution or no Constitution, law or no law, we will not allow a fugitive slave to be taken from Massachusetts." Here and elsewhere have been publicly uttered exhortations to violent resistance to law, and assurances of aid and succor in maintaining such resistance. The chairman of a public meeting declared *here* that "the law will be resisted, and if the fugitive resists, and if he slay the slave-hunter, or even the Marshal, and if he therefore be brought before a jury of Massachusetts men, that jury will not convict him." Here and elsewhere has been promulgated the idea, that it is fit and proper for strangers coming from abroad on to our soil to put themselves upon their natural rights, viewed according to their own human light, and by that light arm and resist unto blood the execution of the law of the Commonwealth. I speak not of any law of Congress, but of the Constitution, the supreme law of the land. The chairman of a public meeting here has ventured to assure such persons that judges and jurors will violate their oaths to protect them from punishment; and as if there should be nothing wanting to exhibit the madness which has possessed men's minds, murder and perjury have been erected into virtues, and in this city preached from the sacred desk. I must not be suspected of exaggerating in the least degree. I read, therefore, the following passage from a sermon preached and published in this city: —

> Let me suppose a case which may happen here, and before long. A woman flies from South Carolina to Massachusetts to escape from bondage. Mr.

Greatheart aids her in her escape, harbors and conceals her, and is brought to trial for it. The punishment is a fine of one thousand dollars and imprisonment for six months. I am drawn to serve as a juror and pass upon this offence. I may refuse to serve and be punished for that, leaving men with no scruples to take my place, or I may take the juror's oath to give a verdict according to the law and the testimony. The law is plain, let us suppose, and the testimony conclusive. Greatheart himself confesses that he did the deed alleged, saving one ready to perish. The judge charges that, if the jurors are satisfied of that fact, then they must return that he is guilty. This is a nice matter. Here are two questions. The one put to me in my official capacity as juror is this, — "Did Greatheart aid the woman?" The other, put to me in my natural character as man, is this, — "Will you help to punish Greatheart with fine and imprisonment for helping a woman to obtain her unalienable rights?" If I have extinguished my manhood by my juror's oath, then I shall do my official business and find Greatheart guilty, and I shall seem to be a true man; but if I value my manhood, I shall answer after my natural duty to love a man and not hate him, to do him justice, not injustice, to allow him the natural rights he has not alienated, and shall say, "Not guilty." Then men will call me forsworn and a liar, but I think human nature will justify the verdict. . . .

The man who attacks me to reduce me to slavery, in that moment of attack alienates his right to life, and if I were the fugitive, and could escape in no other way, I would kill him with as little compunction as I would drive a mosquito from my face.[1]

I should like to ask the reverend preacher, when he goes into court, and holds up his hand, and calls on his Maker to attest the sincerity of his vow to render a true verdict according to the law and the evidence, whether he does *that* as a man, or in some other capacity? And I should also like to ask him, in what capacity he would expect to receive the punishment which would await him here and hereafter, if he were to do what he recommends to others?

Is it not time that they who love their country, and respect the laws, should come together and soberly ponder these things?

If a case exists which demands a breach of a fundamental law of the government, and justifies armed resistance by individuals, it is a case for revolution, and it is time we knew and acted on it.

If there is not such a case, then this language, and the feelings that prompt it, and the conduct which accompanies it, disgrace our community, and endanger its safety and peace, and should receive the rebuke of every good citizen. There is no middle ground between these two alternatives. If there is a case for forcible resistance of law, for refusal to execute one article in the compact which constitutes the government, for vilifying this compact by

[1] A Sermon of Conscience, by Rev. Theodore Parker.

names which I should be unwilling to repeat, for stirring up the angry passions of men, and arraying one part of the country against another part, it can be nothing less than a case for revolution, and in a revolution it must end, if its progress be not checked.

Now I understand that those who act in concert on this subject are divisible into two classes. One class openly avow that this is a case for revolution. They say the Constitution of the United States contains an article which is immoral, and must not, under any circumstances, be obeyed; — that as honest men they cannot undertake to abide by this compact, with a mental reservation that they will break an important part of it. And therefore they reject the whole, and hold it to be the duty of this Commonwealth to withdraw itself instantly from this whole compact, and thus revolutionize the government. This is the ground of action and the end of one class, — the ground of action being, that there is a fundamental error in the Constitution of the government, and the end, that the government must be destroyed.

Whatever else may be said of this, it cannot be denied that it is open, definite, tangible, capable of being seen and understood in its true proportions. These persons do not profess one thing and mean another. They do not move blindly towards the gulf of civil discord and national destruction. They do not lead their followers towards it with boastful assurances that the ground is safe and clear. They see treason, and they honestly say so, and give their reason for it.

In my humble judgment, it is time that reason were examined. You may say it needs no examination; the bare statement of the proposition carries its own refutation with it. So I had supposed, until recent events changed my opinion. I do not think it important to examine their reason, because I entertain any hope of influencing any of this class of men whom I have mentioned. I believe their passions are too much excited. But there is another larger class who are now acting with them, many of whom, I verily believe, do not see whither they are going. These have not thrown off their allegiance to the Constitution. On the contrary, many of them hold, or have held, public office, and have sworn to support the Constitution. Many more, if we may judge from the recent elections, desire earnestly to take that oath. I am bound to think, and do think, they have taken this oath without any mental reservation. They include in it that article

which promises that fugitives from service escaping into this State shall be given up. But ask your Free-Soil neighbors, "Will you give your support to a law which shall fairly and fully execute this article, — you are dissatisfied with the present law, but, laying aside all questions about means and details, do you mean that Massachusetts shall keep this promise, or break it?" — and depend upon it, if you get any answer at all, it will be that it is a promise not fit to be kept.

I do not mean to say that all would so answer. Some have not sufficiently probed their own consciences to know what lies at the bottom, and some who have may be willing to have this article executed. I hope there are many such. But I do believe that, when it comes to the practical question, whether the promise shall be kept, many will be found in the condition in which Sir William Blackstone says he was in respect to a belief in witchcraft. For, says he, in substance, inasmuch as both the Scriptures and the laws of England recognize the crime of witchcraft, I cannot take it upon myself to deny that there has been such a thing, though I cannot give credit to any particular modern instance of it.

So it is with some of these gentlemen. Inasmuch as the Constitution, which many of them have sworn to support, contains an express promise that fugitives from service shall be given up, they cannot take it upon themselves to deny, in the general, that the promise is to be kept; but as to its being done in any particular way, or by any particular means, or in any modern instance, they cannot consent, and to prevent it they are ready to join their best and utmost exertions to those of the first class whom I have named, though these latter all the time declare that this distinction between the abstract and the concrete is too thin for their eyes to see.

Now the real difficulty with both these classes of persons is the same. The difference between them is, that one sees it and avows it; the other does not see it, or is too prudent to avow it.

Is it not fit, then, that this supposed difficulty should be brought out into the light of day and steadily looked at? There ought to be no reluctance to do this. If the difficulty be real, it should be acknowledged, and due effect given to it. If it be unreal, it should be dissipated. If the Constitution under which we live is, — as is expressed in the calm language so well befitting the discussion of a

subject deeply involving the welfare of so many millions of people, — if it be a "*bond of hell*," which it is the duty of every just man to break, we ought to know it and act on it.

I hope you will bear with me, therefore, fellow-citizens, while I attempt to discuss this question.

I am a Massachusetts man, — born on her soil, bred in her schools, partaking, from my infancy to this hour, of the blessings which, under Providence, flow from and are secured by her laws, — and I hope I am not unmindful of the honor and the duty of the State. And I feel with you a common interest to inquire, whether, when this Commonwealth entered into this compact, and agreed that it should be the supreme law, it made a covenant of iniquity.

Let me say, at the outset, that this is not a question to be settled by calling hard names. It is a moral question, to be approached with calmness and solved by the reason and judgment of sober men. And I shall endeavor to state, as well as I can, that course of reasoning which has satisfied my own mind.

Let me begin by asking you to keep in view that we are considering the rights and duties of a civilized state. The question is, whether this Commonwealth acted within the bounds of right, in 1788, when it entered into the compact in question.

At that time Massachusetts was an independent, sovereign state, possessing, of course, all the powers over its own citizens in reference to foreign states which constitute and arise from sovereignty.

Among these powers, two only are important here: the power to make binding compacts with other states, and the power to determine what persons from abroad shall be admitted to, or excluded from, the territorial limits of the state, and on what terms and conditions any such persons shall be allowed to come, or be required to depart. Both these powers are unquestionable. For centuries a succession of great minds have been employed upon this subject of public law. Beginning with Grotius, above two hundred years ago, and ending with our countryman Wheaton, who died in this city two years ago, or with Lieber, if you please, who still lives, I believe there cannot be found anywhere a set of more profound, wise, humane Christian moralists than these; — men of great boldness of mind, restrained by no positive rules, seeking the moral truth of the great subjects they have discussed by the best lights of divine and human wisdom.

Yet not one of them, so far as I know, has ever doubted that the

powers which I have mentioned rightfully exist and are necessary for the preservation of every civilized state.

There is another principle equally clear, and that is, that every state may and should exercise its powers for its own preservation, and the advancement of the welfare of its own citizens.

Indeed, outside of this exciting subject, all these principles are not only unquestioned, but they have been acted on by this Commonwealth, over and over again, to the acceptance of every body.

As early as 1793, this Commonwealth passed a law prohibiting, under a severe penalty, any shipmaster from landing in this State any foreign convict; and this has ever since been, and is now, the law. What right had the State to pass this law? The right to protect its public peace, and the persons and property and morals of its citizens; and to exercise its own discretion as to what persons from abroad might prove injurious to either.

In 1830, it was found Ireland was pouring upon our shores a tide of pauperism and disease. The victims of centuries of oppression and wrong came hither to seek relief and succor. Poor-houses and hospitals were emptied of their contents, which, at the public expense, were transported hither. Did any man doubt the rightful authority of the Legislature to put a stop to this; to say that these persons, however ground down by oppression and distress at home, must not be thrown upon our hands? No one, that I ever heard of, doubted it. On the contrary, very stringent laws were passed, which we have been struggling ever since to maintain against the exclusive power of Congress over commerce. What right has the State to pass these laws? I answer again, the right of self-protection; the right to determine what persons from abroad shall be admitted to its territory; the right to use its own discretion and consult the safety and welfare of its citizens in admitting or excluding them.

Let me borrow an illustration out of this very subject of slavery. We all know that in every slave-holding State there are thousands of slaves who, from age, disease, or infirmity, are mere burthens. Now, we have heard some angry talk about retaliatory legislation. Suppose Carolina and Georgia should pass laws that, if any such aged, diseased, or infirm slaves desired, with the consent of their masters, to come to Massachusetts, they should be transported hither at the public expense. I wonder if a Free-Soil Legislature

would consider itself powerless to prevent this State from being overwhelmed by such an irruption?

I have been attempting to illustrate what really requires no illustration. The principles are clear. Every sovereign state has, and must have, the right to judge what persons from abroad shall be admitted, and this and all other powers the state is bound to use for the safety and welfare of its own citizens. Taking along with us these principles, I ask you to go back with me to that Convention which assembled in this city on the 9th day of January, 1788, to consider whether this State should adopt the proposed Constitution. We are in the presence of no ordinary assembly. In the chair is John Hancock, the man who, in 1775, threw his name and his fortune into the scale of the Colony, at the beginning of its contest with the Crown, and who, whatever else may be said of him, was always true to the Revolution. There is Theophilus Parsons, who has sounded all the depths of public and private law. There is Samuel Adams, not improperly called the Cato of America, his whole soul filled with the idea of human liberty and popular rights, upon whose ears the sounds of the guns at Lexington fell with sweeter tones than the songs of birds in that morning of spring. There too were Gerry and Varnum, and Gore, Ames, and Bowdoin, and Sedgwick of Stockbridge, the soldier, the jurist, the ardent patriot, the true philanthropist, who by his professional exertions had just before struck the last blow at negro slavery in Massachusetts, and a crowd of able, just, and wise associates, fresh from the deep and intensely interesting discussions concerning political and civil liberty, which originated and accompanied and followed the war of the Revolution. The question is, whether these men were so ignorant, or so blind to their duty as legislators, as citizens, and as men, as to make, in behalf of this Commonwealth, a compact so grossly immoral, that their children may not fairly execute it, but must now overthrow and destroy the work of their hands. Let us see.

In the first place, it was known to them, and is certain, that the Union could not be formed, and the Constitution adopted, without this article.

In the next place, they believed, and we know, that it was impossible to over-estimate the importance of this Union and this Constitution to the people whom they represented. The Confederation had proved powerless for good. The public debt of

the country, due chiefly to the officers and soldiers of the Revolution, of whom this State furnished so large a part, could not be paid.

The commerce of the country was in the utmost disorder. Each State had its own navigation laws and imposts, and was already using these powerful and exciting instruments in a manner hostile to every other State. An insurrection against the laws *in this State*, known as Shays's rebellion, which seriously threatened, not only the existence of our government, but the general peace of the country, and was connected with risings both in New Hampshire and Connecticut, had just been quelled with great difficulty. Great Britain, from whose grasp we had escaped in open contest, was now waiting to see us prostrated by internal struggles, and from the great heart of Washington was extorted the exclamation, "What, gracious God, is man, that there should be such inconsistency and perfidiousness in his conduct! It is but the other day we were shedding our blood to obtain the constitutions under which we live, — constitutions of our own choice and making, — and now we are unsheathing the sword to overturn them. The thing is so unaccountable that I hardly know how to realize it, or to persuade myself that I am not under the illusion of a dream."

This was the state of public affairs under which, in January, 1788, this Convention assembled. They foresaw that this great instrument presented for their adoption would accomplish what it has accomplished, — that it would form a more perfect union, — that it would establish justice, — that it would insure domestic tranquillity, — that it would provide for the common defence, — that it would promote the general welfare, and secure the blessings of liberty to the people of this Commonwealth, and their posterity.

On the one hand were the evils, on the other the benefits, — and they were called on to choose between them for the people of this Commonwealth during countless generations.

Now, let us suppose that some one had been mad enough to rise in that Convention, and say, "I see these evils, — they are great now, and threaten to become intolerable. I see these benefits; I believe this Constitution will perform for Massachusetts all that it promises. But I deny that Massachusetts, as a sovereign and civilized state, has the rightful power to make this compact. For here is a stipulation in it that persons held to service in states

now foreign to us, escaping hither, shall be given up to be carried back again."

I cannot pretend, fellow-citizens, to give any idea of the treatment which such an objection would have received from the great and powerful minds of that Convention. I believe they would not have left a vestige of it on earth, — no, nor the material to make a ghost of, to rise from regions below, and frighten some of their descendants. But it needs no uncommon ability and discernment to see sufficient answers to this objection.

In the first place, are not these persons foreigners as to us, — and what right have they to come here at all, against the will of the legislative power of the State? And if their coming here, or remaining here, is not consistent with the safety of the State and the welfare of the citizens, in the name of all that is rational, may we not prohibit their coming, or send them back if they come?

If we have a right to say to those who have been ground down by the oppression of England, you must not land on our shores, because your presence here is injurious to us, have we not a right to avoid enormous evils, and secure incalculable benefits, not otherwise attainable, by a compact, one article of which agrees that our State shall not be an asylum for fugitives from service?

To deny this, is to deny the right of self-preservation to a state. It strikes at the heart of every civilized community. It makes its preservation impossible, and throws us back at once into a condition below the most degraded savages who have a semblance of government.

No sane man can reflect, and then make such a denial; so that there can be but one possible question, and that is simply a question whether the emergency was such as called for the exercise of the power. Upon this question also, unless we overturn principles necessary to the existence of civil society, it is impossible to doubt that we are precluded and justly bound by the action of the State in 1788. Has not a state the right to make compacts and treaties, — and when they are made, are they not to be kept?

May the State make a promise to-day, and to-morrow say, "On the whole, our interest did not require that promise, and it is not to be kept"? If it be the test of a just man that, though he promise to his harm, he keeps his promise good, is it not also applicable to a state? But, in truth, there is no occasion to rely on any such obligation, for if it be once admitted that this Commonwealth in

1788 had the rightful power to assent to the Constitution, there cannot be two opinions among those who know the facts, that the requisite emergency existed.

I am not about to repeat what I have already said respecting that emergency. You know what it was. You know that the great duty of justice could not otherwise be performed; that our peace at home, and our safety from foreign aggression, could not otherwise be insured; and that only by this means could we obtain the blessings of liberty to the people of Massachusetts, and their posterity. I may add what now is a great and glorious motive, which our fathers anticipated, and our eyes have seen, in no other way could we become an example of, and a security for, the capacity of man, safely and peacefully and wisely, to govern himself, under free and popular constitutions. But I wish to ask your attention particularly to one thing, which is more intimately connected with this subject.

I undertake to say, that men of forecast must then have foreseen, and subsequent events have demonstrated, and it is now known, that without an obligation to restore fugitives from service, Constitution or no Constitution, Union or no Union, we could not expect to live in peace with the slave-holding States.

You may break up the Constitution and the Union to-morrow; you may do it by a civil war, or by what I could never understand the method or the principles of, — what is called a peaceable secession; you may do it in any conceivable or inconceivable way; you may draw the geographical line between slave-holding and non-slave-holding *anywhere;* but when we shall have settled down, they will have their institutions, and we shall have ours. One is as much a fact as the other. One engages the interests and feelings and passions of men as much as the other. And how long can we live in peace, side by side, without some provision by compact, to meet this case? Not one year. Any reflecting man can satisfy himself of this, by turning his mind upon the facts; and history proves it. As early as 1643, when the country was a wilderness, and the movement of persons from one part to another unfrequent and exceedingly difficult, the Colonies of Massachusetts and Plymouth, Connecticut and New Haven, found it necessary, even in that primitive and imperfect union, which they founded to stay themselves against destruction, to insert an article substantially like this one: "That if any servant run away from his master, into any of

the confederate jurisdictions, that in such case, (upon certificate from one magistrate in the jurisdiction out of which the servant fled, or upon other due proof,) the said servant shall be either delivered to his master, or any other that pursues, and brings such certificate and proof."

But we need not pause upon this very early experience of our New England ancestors. The government of the United States had not been in operation two years, when the necessity of some such provision, in some form, to preserve the peace of bordering independent states, was clearly proved. You know that in 1789 Florida belonged to Spain, and stretched along the southern border of Georgia. Well, General Washington had not been two years in office when the people of Southern Georgia became so uneasy on account of the escape of their slaves across the border into Florida, as to make very urgent representations to the national government demanding redress. And thereupon orders were obtained from the Spanish court to arrest the further reception of the fugitives, and to make restitution; and President Washington sent a special messenger into Florida to see to the execution of these orders.

It is unnecessary to enlarge upon this. If any one in this age expects to live in peace, side by side with the slaveholding States, without some effectual stipulation as to the restoration of fugitives, he must either be so wise as to foresee events in no way connected with human experience, or so foolish as to reject experience and probabilities as guides of action.

I know it may be said, "Let the contest come. We are ready for it. Let the blood of the slaughtered be upon the heads of those who are in the wrong" When I look abroad over a hundred thousand happy homes in Massachusetts, and see a people such as the blessed sun has rarely shone upon, — so intelligent, educated, moral, religious, progressive, and free to do every thing but wrong; when I call to mind its admirable constitution of government, and that it comes as near to perfection as the lot of humanity permits; when I remember that these things are the free gifts of that awful Being, who holds peoples and nations in the hollow of his hand, — I fear to say that I should not be in the wrong to put all this at risk, because our passionate will impels us to break a promise which our wise and good fathers made, not to allow a class of foreigners to come here, or to send them back if they come.

With the rights of those persons I firmly believe Massachusetts has nothing to do. It is enough for us that they have no right to be *here*. Our peace and safety they have no right to invade; whether they come as fugitives, and, being here, act as rebels against our law, or whether they come as armed invaders. Whatever natural rights they have, and I admit those natural rights to their fullest extent, *this* is not the *soil* on which to vindicate them. This is *our* soil, sacred to *our* peace, on which we intend to perform *our* promises, and work out, for the benefit of ourselves and our posterity and the world, the destiny which our Creator has assigned to *us*. So far as He has supplied us with the means to succor the distressed, we, as Christian men, will do so, and bid them welcome, and thank God that we have the means to do it. But we will not act beyond those means; we will not violate a solemn compact to do it; we will not do it by holding up our hands and swearing to render a verdict according to the law and the evidence, and then knowingly violate that oath; we will not plunge into civil discord to do it; we will not shed blood to do it; we will not so throw away the rich gifts which He has conferred upon us, not for our benefit alone, but in trust for the countless generations of His children.

In my judgment, these are not means which He has confided to us to enable us to succor the needy and the oppressed of other states; and, so far as depends upon me, these means shall never be used.

I have now to describe an occasion on which Mr. Curtis felt called upon to appeal to the people of Massachusetts, in regard to an act which he deemed one of great political profligacy perpetrated by two different bodies of their representatives, in the pursuit of party objects and power, by a flagrant violation of a public trust. It may be that such acts have become common; that the public conscience is somewhat blunted now by similar doings; and that it is too late for a true appreciation of their enormity. But even if this be true, it must be remembered that this is a sketch of the life and character of an individual, and that its principal concern, in regard to any public affair, is with the manner in which he felt about it and acted upon it.

In January, 1851, Mr. Curtis became a member of the lower house of the Massachusetts Legislature. He had consented to be chosen to this position by his fellow-citizens of Boston, in order to effect some reforms in the practice of the courts. It happened that the State election of the preceding autumn had resulted in a condition of parties in the Legislature which was quite unusual, if not unprecedented. It was a period in the political history of that State, when the third political party, already referred to, unable to control the political power of the State by their own numerical strength, sought to obtain as much of that power as they could by a bargain with one of the other parties for an equal distribution of the public offices between them. There had been no election of a Governor and Lieutenant-Governor by the popular votes, and those offices, and all the minor ones involved in the organization of the State government, were to be filled by the Legislature. Two United States Senators were also to be chosen, — one for a term of six years, to succeed Mr. Webster, who had become Secretary of State when Mr. Fillmore became President, after the death of President Taylor, — and one for a shorter period.

The members returned to the two houses of the Legislature represented the Whig, the Democratic, and the Free-Soil parties, — neither party having by itself a controlling majority. In professed public principles on all the questions relating to national affairs, and especially to the Compromise Measures of 1850, the representatives of the Democratic and Free-Soil parties were as wide asunder as men could be. They assembled, separately, on the eve of the meeting of the Legislature, and, after various messages and negotiations through their respective committees, a bargain was at length concluded, by parcelling out office for office between the two parties, according to an arranged programme, which was afterwards followed out in exact performance of the contract, step by step, in regard to all the appointments that were to be made, — Democrats vot-

ing for men whose political principles they disapproved, and Free-Soilers doing the same thing. The ultimate object of this trade in the positions of public trust that were to be filled — so far as the Free-Soil party was concerned — was to reach and secure the election of Mr. Charles Sumner to the Senate of the United States for the long term. This was finally accomplished, because the Democrats, after they had gone, step by step, through all the preceding part of the bargain, found that they had received both promise and delivery of the consideration for which they had pledged themselves in advance to elect whomsoever the Free-Soil party might name as Senator in Congress for the period of six years. It seemed to Mr. Curtis, and other members of the Legislature who thought of this transaction as he did, that the facts should be laid before the people of the State, accompanied by appropriate comments. He was requested to prepare for this purpose an Address to the People of Massachusetts, to be signed by the Whig members of the Legislature. This paper, signed by one hundred and sixty-seven members of the two houses, and published and circulated throughout the State, read as follows: —

To the People of Massachusetts.

The undersigned, members of the Senate and House of Representatives of the Commonwealth of Massachusetts, desire to address you on a subject of great public concern. They wish to ask your attention to certain transactions, which have passed under their notice, and which demand your serious consideration.

It is known to you, that, at the election of State officers in November last, the Free-Soil and Democratic parties were separate political organizations, having different candidates for Governor, and publicly professing very different political principles. You sent to the Legislature members of each of these political parties, who had theretofore held the distinctive political principles of each, and who were elected because they were known to hold those principles. On the first day of January, the Legislature assembled, and its members, including the persons above referred to, were

sworn. On the evening of that day, the Democratic members of the Legislature came together in caucus, at a room in the State-House in Boston, and at the same time, and in another room in the same building, the Free-Soil members of the Legislature also met in a distinct caucus. Each of these bodies on that evening appointed a committee, to meet and confer in regard to all the offices to be filled by the Legislature.

These committees met for this conference on the evening of the 2d of January, and the Free-Soil committee "proposed to *concede* the Governor to the Democrats, *on condition* that the United States Senator for six years should be *conceded* to the Free-Soilers." What was intended by "*conceding*" the Governor to the Democrats, was explained by the Free-Soil committee to be this: "The Free-Soilers were ready to elect Mr. Boutwell without any pledges whatever; they were willing to place the government of the State in the hands of the Democracy, asking no pledges for *principles*, measures, or offices." But, at the same time, they had so little confidence in the men to whom the administration of all State affairs would thus be confided, that they thought it necessary to make an explicit declaration, that "they would give no pledges to support his (Governor Boutwell's) administration, *and would take no responsibility for it;*" so that they were willing, and then offered, by their votes as members of the Legislature, to confide the whole executive power of the State, with no restriction as to principles, or measures, to a man whom they so distrusted that they expressly stipulated not to be in any way responsible for any thing he might do.

In consideration of this, they required that the United States Senator should be *conceded* to them; and they went on to explain the meaning of this It was, that "the Senator, *whoever he might be*, must go to Washington uncommitted to any party, or any set of men; *he must stand upon the principles publicly recognized by the party with which he acted.*" That is, the Free-Soilers were to select a person not yet fixed upon, the Democrats were to elect him, by their votes as members of the Legislature, and he was to act in the Senate of the United States upon the principles of the Free-Soil party, the Democratic party having no right whatever to expect him to act on their political principles.

Such was the bargain proposed by one of these committees to the other; it was agreed to on the spot by both; and, as will here-

after be seen, members of those committees, under this bargain, voted for Mr. Sumner, and their votes were necessary to his election. Each committee afterwards reported to its respective constituents, in caucus assembled, the above arrangement to *concede* the Governor to the Democrats and the Senator to the Free-Soilers, and each caucus finally assented thereto. *Subsequently*, Mr. Charles Sumner was selected by the Free-Soil caucus as their candidate for the office of Senator; his name was sent to the Democratic caucus, and a majority of this body voted to cast their ballots in his favor. Such is a brief statement of this transaction, so far as it relates to the office of Senator of the United States, as deduced from printed statements made by parties who acted on each committee, and had prominent parts in these affairs.[1] We have forborne to say any thing of the negotiations about minor offices, desiring to present distinctly the main subject.

The bargain being struck, it remained to execute it. Mr. Boutwell was elected Governor, the Free-Soil members of the Legislature voting for him, in pursuance of their contract. Mr. Sumner was chosen by the Senate to fill the office of Senator of the United States; every Democratic Senator, twelve in number, — except Mr. Beach of Hampden, and one other who was absent, — voting for him, in execution of their compact, and their votes being necessary for his election.

The balloting in the House of Representatives was begun. It was found that certain members of the Democratic party, about ninety in number, voted for him, while others did not do so, and no choice was made. And thereupon, through the newspapers, in private conferences, and by public declarations, the members of the Free-Soil party insisted that it was a matter of compact and agreement that the members of the Democratic party would vote for a person to be selected by the Free-Soilers, and that Mr. Sumner had been selected by them; that the members of that party who did vote for him acted in pursuance of a binding contract, the consideration of which had already been paid by placing the State government in Democratic hands; that they who refused so to vote, were guilty of bad faith; that there was no liberty of choice, but an absolute and perfect obligation, springing from a contract to vote for a person to be selected by the Free-Soilers. No matter who might be presented as a candidate for their suffrages, — no

[1] See *infra*, note to page 148.

matter if it should appear, in the course of the contest, that the Democratic votes would elect a man whom every Democrat in Massachusetts would desire to place in the Senate, — they were bound, hand and foot, by this bargain: "*that the Free-Soil party had a right to the specific performance of the contract, deliberately entered into by the Democrats, the consideration for which they had already received.*"

On the other hand, the Democratic members who refused to vote for Mr. Sumner denied that they, as individuals, had engaged to vote for him. With this charge of what is called "*bad faith*," we do not meddle. It may be true or false. But it is an issue quite collateral to the main subject. The Free-Soilers assert that they bought and paid for *all* the Democratic votes. These members in effect say, the Free-Soilers bought and paid for only three quarters of them, and that they themselves were not included in the conveyance. This is very important to the honor and principle of these individuals; but inasmuch as three quarters, who are admitted on all hands to have been purchased, effected the election of Mr. Sumner, there seems to be no necessity to determine with precision just how many that purchase embraced.

In this position of parties, the balloting was resumed from time to time, and after spending ten days in fruitless attempts to make a choice, a strenuous effort was made by the Whig members of the House to postpone the matter indefinitely. Their desire was to save the valuable time of the Legislature, and to bring the whole subject of the Senatorial election, and the conduct of parties in reference thereto, before the people of the Commonwealth, and allow their judgment to operate decisively thereon. It was known to them that the pendency of this election, and the extraordinary means resorted to by the Free-Soil party to carry their candidate, were exercising a most prejudicial effect upon the business of the session; that it hung like a cloud over the minds of members; that it absorbed their thoughts and their time; and that at no period in the history of the State had so little public business been transacted in the same length of time. It was their desire to relieve the State from the enormous expense, as well as the hazard of imperfect legislation, which they were convinced must arise from the continuance of this contest; and they thought it due to the people of the State, that they should have the opportunity to make known their will concerning the transactions above

detailed, before it should have become too late to make their will felt.

In this effort they failed. The balloting was resumed from time to time; three more days were consumed; and on the twenty-sixth balloting, Mr. Charles Sumner was declared to have been elected, he having received 193 out of 385 votes, two blank ballots not being counted. It will be observed, that he had precisely the requisite number of votes; and of these, upwards of 80 were thrown by Democratic members, procured by the means stated above. Thus was declared to be elected, as one of the two representatives of the State of Massachusetts in the Senate of the United States, for the term of six years, a man who received less than a majority of the votes of the members present and casting ballots, and who goes there "standing on the publicly professed principles of a party" which had only 111 out of 393 members of the House of Representatives, and whose popular vote at the election in November last was only 27,000 out of 120,000 votes.

Time was when it would have been deemed an insult to the instinctive love of right which has characterized the people of this State, to do more than narrate these facts to bring down on the contrivers and agents of this scheme the indignation of all decent men. And notwithstanding the prevalence of party spirit, which now so controls men's minds, we do not believe that honest men anywhere can look calmly on this picture with any sentiment except unmingled disgust.

But the unblushing effrontery with which these contrivances have been avowed, and the arguments, so called, by which their authors have endeavored to defend them, do, in our judgment, render it fit that their true character, and the principles involved therein, should be plainly stated.

We think it due to the fair fame of our State, that such transactions should not go forth to the world in a silence which might be construed into an admission that they are in conformity with the usual principles and conduct of those who are trusted by the people of Massachusetts to make its laws. We think it due to the public morals that the true character of such acts should not be obscured in any minds by the miserable sophistries which have been thrown over them. And we therefore crave your candid attention to some considerations which we have to present to you.

The persons who have acted together in the election of Senator, under the bargain above set forth, have called themselves "The Coalition." We must be permitted to deny the propriety of the name. A coalition is the union of two parties for the purpose of carrying one or more measures *in which they conscientiously agree.* It is concert of action, proceeding from concert of opinion. It is a dangerous experiment, not only as respects the public confidence, but the principles of the two parties; and no coalition known to political history has ever succeeded in retaining for any considerable time the confidence of the public.

But this is not a coalition. A compact between two distinct parties, having different political principles, for the purpose of dividing public offices between them, — a compact to do this by electing a man for Governor in whom the one party does not confide, in consideration of electing a man for Senator in whom the other party does not confide, — is not a coalition, but a factious conspiracy. And when such a compact is made between those who have merely a delegated authority, held in trust, to be used, under the sanction of an oath, to place in office only those in whom the trustees do confide, *it is a factious conspiracy to violate a public trust, and as such criminal, not only in morals, but in the law of the land.* It is true, the statute law of the State has not defined this offence, as it has failed to do others. It may be because it was considered by all former Legislatures that a statute describing and punishing such a transaction would be an impeachment of their honesty, which they would not suffer as respected themselves, and were unwilling to suppose necessary to the public safety and morals as might respect future Legislatures. But the common law which pervades society, and enters into the relations of life, both public and private, with its benign but bracing influence, deems such an abuse of a public trust a misdemeanor, punishable by indictment. And there is high authority that a bargain like this, even when made by single persons, and in reference to subjects of far less public concern than this, is an indictable offence. In the year 1825 a case came before the highest criminal court of one of our sister States, wherein it appeared that A. and B. were justices of the peace, and as such had the right to vote in the county court for certain county officers; that they agreed together that A. would vote for C. for commissioner, in consideration that B. would vote for D. for clerk; and that they voted in pursuance of that agree-

ment. The statute of the State, like ours, did not reach the case. But their common law, the same as ours, declared: "The defendants were justices of the peace, and as such held an office of high trust and confidence. In that character they were called upon to vote for others, for offices also implying high trust and confidence. Their duty required them to vote in reference only to the merit and qualifications of the officers; and yet, upon the pleadings in this case, it appears that they wickedly and corruptly violated their duty, and betrayed the confidence reposed in them, by voting under the influence of a corrupt bargain, or reciprocal promise, by which they had come under a reciprocal obligation to vote respectively for a particular person, no matter how inferior their qualifications to their competitors. It would seem, then, upon these general principles, that the offence in the information is indictable at the common law."[1]

This is the manly and clear response of the common law, — the inheritance of our fathers and ourselves, — not only in that State, but wherever it prevails. And now, what are the differences between that crime and the case we lay before you? The parties to that bargain were electors in the court of a county; the parties to this bargain were electors in the Legislature of Massachusetts. The parties to that bargain were two individuals, and their compact controlled two votes; the parties to this bargain were numerous, and their compact controlled many votes; and every reflecting man must see, that a conspiracy becomes more criminal, the more persons it embraces, and the more power it wields. The parties to that bargain made it "without reference to the qualifications of the candidates;" the parties to this bargain entered into it with an open declaration that one of the candidates was distrusted by one party, and the person who was to be voted for by the other party was not even selected, nothing being known, except that he was not to act on the principles which one of the parties who were to vote for him had long professed to hold dear. The subjects of the bargain in that case were a county clerk and a county commissioner; the subjects of this bargain were the Governor of Massachusetts and one of its Senators in the Congress of the United States. And finally, in that case, it does not appear that the officers voted for by the criminals were actually elected; while in this case it is known that this corrupt agreement made one man

[1] *Commonwealth* v. *Callaghan et al.*, 2 Virg. Cas. 460.

Governor, and caused another to be declared elected a Senator in Congress.

Such is the case we lay before you for judgment. But before passing thereon, we request you to notice the grounds which have been relied on in its attempted justification or excuse.

It is alleged that, inasmuch as neither of the three political parties in the Legislature had a majority, it was *necessary* to enter into this compact. To judge of the soundness of this plea, it is only requisite to bear in mind, that Congress does not assemble until the first day of December; that the next session of the Legislature will begin on the seventh day of January; and therefore, if no election of Senator should have been made by this Legislature, the place need be vacant only about thirty days at the beginning of the long session of Congress, when no business of importance is to be expected, especially in the Senate; and out of these thirty days must come the Christmas holidays, during which no business is done. How far these parties were influenced by any idea of *necessity*, may be estimated from the fact, that by their united votes they chose Mr. Rantoul Senator, at a time when he was known to be so distant from home that he did not take his seat in the Senate until fourteen days after his election, and that too at the close of the session, when the Senate was crowded with business of the greatest importance to the country. So far, therefore, as concerns the Senatorial election, the plea of necessity is false in fact. But if it were not so, — if the like necessity existed for filling this office as for organizing the State government, — are the political institutions of Massachusetts such as to impose on those intrusted by the people with the high function of filling these great offices the *necessity* of making a corrupt bargain, by which one party wilfully surrenders its own convictions, in consideration that another party will commit a like breach of trust? We utterly deny this. We know that emergencies may arise, in which members of the Legislature, finding it impossible to place in office those men whom they believe *best* qualified, may be under a moral necessity to vote for others *who are next best*, in order to have a government. But let it not be lost sight of, for a moment, *that these delicate and difficult emergencies are precisely the occasions on which every man is specially bound to keep his mind free from all improper biases.* He has a difficult duty to perform, calling for the exercise of all the impartiality and wisdom which

he possesses. And when it is whispered in his ear, or impudently proclaimed at a caucus, "Agree to vote for a man not yet known, for Senator of the United States, and we will put your candidate into the chair of state, though we care nothing about him, and do not confide in him," — who does not know that the tempter speaks to him? And how strange is the reason for listening, — that an emergency has arisen, calling for more than ordinary circumspection, and a perfectly cool, clear, and free judgment!

It may be said by Democratic members, When we learned the name, and found it was Mr. Sumner, we were well enough satisfied with his qualifications. We have satisfactory evidence that this is not true; that not a few Democratic members voted for Mr. Sumner contrary to their own wishes and convictions, and solely because they considered themselves bound by the bargain to do so. But if there are any who can truly say, we were satisfied when we learned his name, the answer is, you had unfitted yourselves to judge. You had already placed yourselves under the influence of a tempting offer, which you had accepted. You had made a bargain, and received the consideration, and could no longer bring to the question that upright and unbiassed judgment which alone would enable you to do your duty to the State. And when the Free-Soil party were brought to the consideration of the question, which of two persons, Mr. Briggs or Mr. Boutwell, was best qualified for the place of Governor, does any man believe they were capable of deciding impartially and justly, when they found that, if they cast their votes for the latter, they could secure the prize of Senatorial power, at which they were so eagerly grasping? No one can believe it. And yet it is precisely this pressure on the judgment which renders all bribery illegal and immoral. The essence of the offence of bribery is not in the fact that one man has parted with his money, and another man has got it; nor in the fact that an erroneous decision is made, or vote given. Lord Bacon said he sold justice, and not injustice; and no man gainsaid it. The essence of the crime of giving and taking bribes consists in the pressure and strain which are thus made, and intended to be made, on the fallible human judgment of one intrusted with authority.

It has happened in this State that the vote of a single man in the Legislature elected the Governor, as the vote of a single man, in this Senatorial election, put an end to the ballotings. Suppose

a man to have stood neutral, not being wholly satisfied with either candidate, and a sum of money, or any other temptation, is held out to him to vote for one of them, and he does so. Would you say he was to be held innocent, because, on the whole, he thought the man for whom he at last voted was best qualified for the place? Would you not say to him, your crime consisted in placing yourself under influences which did not leave you free to judge? We care nothing about your acts or your judgments afterwards; you were corrupted *then*, and deserve punishment therefor.

It has also been suggested that this was not a corrupt agreement, because no individual who was a party to it received, or had reason to expect, any thing from it, to his own proper use. You cannot know that. A bargain with the Democratic party to put the power of the State into their hands, is a bargain to give them the means to reward their friends and punish their enemies. How far they who made the bargain expected to profit by it, either by obtaining offices for themselves, or their friends or connections or dependents, or by ejecting from office those whom they desired to injure, no man can tell. It is in the recesses of the mind, inscrutable, except to the eye of Him who looks into the heart, that these things lie hid. And this renders such bargains the more dangerous. The statute law can reach a case where money is given or promised. It is susceptible of proof. But nothing but the wise jealousy of the people can afford an effectual remedy for the secret, pervading, and powerful influence of hope of benefit, springing up in the hearts of leaders of a political party, when the power of the State is held out to them as an inducement to violate a trust. He, therefore, who seeks to purge this bargain of corruption by the assertion that the parties to it expected no selfish benefit, asserts what he cannot know to be true, and what in all human probability is false. It is unnecessary to refer to events to prove this. You know it must be so But if you will watch the executive appointments made, and which may be made, by this administration, you will see a practical exemplification of this truth.

And let it not be forgotten, that the giver is as guilty as the taker. Let not the Free-Soil party lay the flattering unction to their souls, that they are not to be suspected of entertaining any such selfish hopes. They held them out to others; and the tempter is by all men justly considered worse than the tempted.

But the corruption of this bargain does not consist solely in this.

Its essence is found, not merely in what was taken, but in what was yielded. It is not merely that the Free-Soilers were to have their unnamed man for Senator, but that, *in consideration thereof*, they were to vote for a man for Governor whom they distrusted. It is not merely that the Democrats were to have their man for Governor, but that, *in consideration thereof*, they were to vote for a man for Senator who, so far as is *even now* known, has but one principle of political action, and that hostile to the long-cherished and repeatedly and solemnly avowed sentiments and wishes of the Democracy of the State, — a man whose only rule of action in the Senate of the United States must be to create what every American statesman, from the time of Washington to the present moment, has looked upon as a frightful evil, — a geographical party, — and which the Democracy of Massachusetts, up to the time of this bargain and its execution, had always shown themselves too wise and too patriotic to aid or support; — a man who, from the necessity of the case, by consenting to take this office under and by means of such a bargain, must thereby consent to stand as a receiver of the fruits of a breach of a public trust, and to go into a representative assembly to exhibit there the political principle of a small minority, constituting one of the parties to the bargain, and the want of principle of both the parties by reason of which his election was made. We repeat, it is not merely in what is received, but in what is betrayed, that we must look for the true character of this transaction.[1]

Another ground upon which this bargain has been defended is, that such arrangements are common, and to be expected, in legislative assemblies. If this be so, it is time you knew it, and acted upon it. If it be common in your Legislature for members to

[1] A document is extant, prepared and published at the time by the late Hon. Henry Wilson, setting forth with great distinctness and frankness the progress and all the details of this bargain. Mr. Wilson was a prominent actor in making it, and a political beneficiary under it. He avowed the whole affair with great *naïveté*, and while Mr. Sumner's election was pending, he claimed that the Democratic party, having received the consideration for which they pledged themselves to vote for the nominee of the Free-Soil party, were bound in honor to redeem their pledge by giving Mr. Sumner their votes. They so considered it, and by their votes finally elected him. The minute analysis of the consideration paid which was made by Mr. Wilson, and the distinct display which he makes of the contract, apparently without the slightest conception of its immoral character, render his document an amusing paper.

vote against their own convictions of right, in order to induce other members to vote against their convictions of right, and thus secure to each some selfish or party ends, at the expense of the public, — it is time the people of Massachusetts swept out their halls of legislation, and purified them from this corruption. The assertion is a libel on the honesty of the State; and no man will make it who does not take his own conscious wickedness as the standard by which to measure other men's honor. That such things have been done, we are forced to believe; and the impudence with which this transaction has been proclaimed does more than all other things known to us to lead us to fear that their true character is not discerned by weak men, blinded by party spirit. That selfishness, party spirit, rashness, may lead men of loose principles, in the halls of legislation as elsewhere, to do corrupt and wicked things, we do not doubt. But that they are common, that they have become a usage, that they have passed into a rule, and may be appealed to as a principle, we beg the people of Massachusetts not to believe.

We deliberately assure you, it has not yet become *common* for those whom you select to represent yourselves so grossly to abuse their trust. And we repel with indignation the assumption that they who, by inadvertence, or recklessness, or a passionate love of power, or a blind devotion to party, or any worse motive, have become involved in this immoral and illegal compact, can find an excuse for it in the practices of any legislative assembly known to us. But we feel obliged, not only to say that such conduct finds no excuse in example, but to call on the people of the Commonwealth to bear their testimony against it, however usual it may be asserted to be. It is not uncommon for men to steal, cheat, and lie; but the moral sense of mankind does not permit the frequency of these crimes to be their justification.

And if it were admitted that it is common for members of the Legislature of Massachusetts to enter into bargains like this, it is submitted for your consideration, whether it would not be the more necessary that you should hasten to place thereon the seal of your condemnation. That public morals are essential to public order; that absolute fidelity to public trusts is the only secure basis of republican government; and that no people is safe which passes over in silence even questionable acts of its servants, — are political truths which you have not yet to learn. That it is not lawful to

do evil that good may come; that there is not one rule of right in the Capitol, and another by your firesides; that the crooked paths of intriguers and schemers are not safe ways for honest men to travel, — no people knows better than yourselves. We ask you to apply these principles to this matter. You have placed us as sentinels upon the watch-towers. We have discerned these things which seem to us to threaten your security and welfare. With an earnest desire to do no injury to any man, — with the judgment wherewith we should be content to be judged, — without passion, but without fear, we have endeavored to do our duty to the Commonwealth and to you, by making known these transactions. You will determine whether your interests are safe in the hands of men who have grasped the offices and power of the State by such means; and whether you are willing to commend to your children this example as safe to guide their steps.

The four instances of which I have given some account in this and the preceding chapter, are the only ones in which Mr. Curtis undertook, by any special effort, to act upon public opinion during the period from 1834 to 1851. They constitute exceptions to his ordinary rule of life, the exceptions themselves, however, resting upon that part of the rule which habitually governed him, — namely, to speak or act upon public affairs whenever the occasion or the topic made it, in his own judgment, his duty to do so. His reticence on the ordinary subjects of political discussion or party contest was not broken at any time before he became a judge; and, of course, it was never broken while he was on the bench. He took no part in party politics, — stood entirely aloof from all the managements of parties; and it is not known to me that during this period he ever attended a political caucus, or was ever a member of any political convention. Nor did he employ his pen in political essay-writing, whether in his own name or in anonymous communications or contributions to the press. At elections he always voted; and he generally voted for the candidates of the Whig party while that organization continued to exist.

And here it may be proper to ask, whether it was not far wiser for such a man to abstain from all party activity, and to make himself heard only when some important public interest or public duty seemed to call upon him with a more than ordinary demand, than it would have been to have become known as a politician, or to have engaged his intellect or his feelings in the discussion of public questions of minor importance. During the seventeen years which I have now gone over, he was, as a lawyer, by his varied experience in all departments of jurisprudence, and his increasing acquisitions, laying up the store of those qualifications for the judicial office which were at once recognized by the public of his own section of the country, and by the government of the Union as soon as an opportunity offered for securing his services in the national judicature. Certainly it could have been no advantage to the development of his mind and character, and no help to the public sense of his fitness for the judicial place to which he was called, if he had devoted himself to party politics. It is, moreover, worthy of note, that even the questions of public interest on which he did act, exciting as they were to most men, had no tendency to warp his mind into a one-sided condition, or to deprive him of the power of just and accurate discrimination in regard to other aspects of the same subject. He made, for example, as the reader has seen, great efforts to convince his fellow-citizens that the slave-holding States and their people had every right to the full and faithful execution of that constitutional stipulation which required the extradition of fugitive slaves. But when the demands of the slave interest — as they were afterwards asserted by those who claimed to represent the interests of the South — extended beyond that stipulation, and claimed for slavery a position which he believed neither the Constitution nor the system of the Union had given to it, his mind was found to be just as capable of an unbiassed and impartial examination of those demands as if he had never contended

for a Southern right, or counselled his fellow-citizens to obey a stipulation in favor of the Southern section of the Union. Nor did his strong convictions of the duty of obeying that provision of the Constitution, or his disapprobation of the conduct of those who opposed it, abate one jot from the even judicial temper and the perfect fairness with which he could preside at the trials of persons accused of unlawful resistance to the measure designed for its execution.

CHAPTER VI.

1851–1856.

Appointed an Associate Justice of the Supreme Court of the United States. — Letter to President Fillmore and Mr. Webster. — The "Fugitive Slave Trials" in Boston. — Judicial Life at Washington. — Letters to Mr. Ticknor.

THE death of Mr. Justice Woodbury, which occurred on the 4th of September, 1851, cast upon the administration of President Fillmore the performance of one of the most important duties that can devolve on the national Executive, — that of naming a Judge of the Supreme Court of the United States. The Circuit for which the vacancy was to be filled comprehended Massachusetts, Maine, New Hampshire, and Rhode Island. Public opinion, both in and out of the Circuit, pointed, with a near approach to unanimity, to Mr. Curtis, as the man whose services in that position it was most desirable to secure. President Fillmore had but little personal knowledge of the leading members of the bar of New England whom he had not met in public life. But he was a wise and circumspect statesman, and one who fully appreciated the responsibilities of the great office which he held. He would have felt it, to the end of his days, to be a reproach on his administration of the government, if he had selected for this position any one whom he could be said to have appointed from any motives but those high considerations of the public good, which should ever and alone be regarded in the making of judges. How steadily and faithfully he looked to the public interests will presently be seen.

Mr. Webster, who had become Secretary of State at the same time when Mr. Fillmore became President, was of course familiarly acquainted with the members of the bar from among whom this appointment would have to be made. There were reasons, in his judgment, which rendered it proper that Mr. Choate should be consulted. The President, who was in Washington, and Mr. Webster, who was at the moment in Boston, wrote to each other on this subject on the same day, and consequently their letters crossed each other in the mails. Mr. Webster's may be first quoted, as it exhibits the general opinion and wishes, as well as his own: —

MR. WEBSTER TO THE PRESIDENT.

BOSTON, Sept. 10, 1851.

MY DEAR SIR, — A very important vacancy is created by Judge Woodbury's death. The general, perhaps I may say the almost universal, sentiment here is, that the place should be filled by the appointment of Mr. B. R. Curtis. Mr. Choate is perhaps Mr. Curtis's leader, and is more extensively known, as he has been quite distinguished in public life. But it is supposed he would not accept the place. He must be conferred with, and I should have seen him to-day, but he is out of town. I shall see him as soon as possible. Every thing being put at rest in that quarter, as I presume it will be the moment I can see Mr. Choate, I recommend the immediate appointment of Mr. Curtis. There will be an advantage in disposing of the matter as soon as may be. Judge Sprague is now on his way home from Europe. His friends, no doubt, will urge his pretensions. Judge Pitman too, the District Judge of Rhode Island, is a learned lawyer, an able judge, and an excellent man. If an appointment were to be made by promotion from the bench of a District Court, it would be very difficult to overlook Judge Pitman, who has been on the bench more years, by a good many, than Judge Sprague, and working at a much smaller salary. But, in my judgment, it is decidedly better to appoint a man much younger than either of these judges. Mr. B. R. Curtis is of a very suitable age, forty-one; he has good health, excellent habits, sufficient industry and love of labor, and,

I need hardly add, is in point of legal attainment and general character in every way fit for the place. . . . I shall write you again on this subject the moment I have seen Mr. Choate, or heard from him.

We were all horror-struck this morning by the terrible news of the death, so sudden, of Mrs. Crittenden.

Yours, always truly, DANIEL WEBSTER.

THE PRESIDENT TO MR. WEBSTER.

WASHINGTON, Sept. 10, 1851.

MY DEAR SIR, . . . The vacancy occasioned by the death of Judge Woodbury will soon have to be filled, and I should be happy to see you, that we might converse freely on the subject. I believe that Judge McLean is the only Whig now upon the bench; and he received his appointment from General Jackson. I am therefore desirous of obtaining as long a lease, and as much moral and judicial power as possible, from this appointment. I would therefore like to combine a vigorous constitution with high moral and intellectual qualifications, a good judicial mind, and such age as gives a prospect of long service. Several distinguished names have occurred to me, but I do not consider myself so intimately acquainted with the New England bar as to be able to form a correct opinion. I have, however, formed a very high opinion of Mr. B. R. Curtis. What do you say of him? What is his age, constitution, and what are his legal attainments? Does he fill the measure of my wishes?

The weather is extremely hot and uncomfortable. Nothing new.

I am truly yours, MILLARD FILLMORE.

THE PRESIDENT TO MR. WEBSTER.

WASHINGTON, Sept. 12, 1851.

MY DEAR SIR, . . . I am happy to see that we concur in opinion as to Mr. B. R. Curtis. I shall wait until you can see Mr. Choate, and, if all is satisfactory, I will issue the commission at once. . . .

I write in haste, but am truly yours,

MILLARD FILLMORE.[1]

[1] These letters have been heretofore published, in the Life of Mr. Webster, by the present writer.

The President made a short visit to Boston, soon after the date of his last letter to Mr. Webster, and was then informed that Mr. Choate heartily concurred with the general wish that this appointment should be tendered to Mr. Curtis. It was made immediately after the President returned to Washington. The commission bore date September 22, 1851.[1]

With what feelings it was received by the person to whom it was addressed, will be apparent from the following letter: —

To the President of the United States.

Boston, Oct. 7, 1851.

Mr. President, — On my return home, after an absence of ten days in a distant city, where I went to discharge a professional engagement, I have received from the Secretary of State a commission as an Associate Justice of the Supreme Court of the United States. You have been pleased to appoint me to an office of great dignity and power, and of corresponding responsibility. I accept the office. The only return I can make — I am sure the only return you desire — for having, unsolicited, conferred upon me this honor, is to do my duty to my country, in this great office, with entire fidelity. This return I can and do promise to make, according to the utmost of my ability.

Will you allow me to suggest that by the act of Congress of the 29th of April, 1802, section 4, it is necessary for the President to allot the circuits anew on the appointment of an Associate Justice, and that I cannot act until such allotment shall have been made. As there is to be a term of the Circuit Court at Boston on the 15th instant, at which my presence is very desirable, I would respectfully request that such allotment may be made, and notified to me in season to enable me to sit at that term.

With the highest respect,

I am your obedient servant, B. R. Curtis.

The President, by an instrument executed under the seal of the United States, in the usual form, on the 10th

[1] Judge Curtis was nominated to the Senate, December 11, 1851, and confirmed December 20, on which day his last commission was issued.

of October, 1851, allotted to Benjamin R. Curtis the duties of Judge of the First Circuit of the United States. As the appointment had been made in the recess of the Senate, it could subsist only until the end of the next session of that body, unless it should be confirmed before the expiration of that session. But in the mean time the Judge had full authority to act. Judge Curtis took the oath of office on the 10th of October, 1851. The regular term of the Circuit Court, at Boston, commenced on the 15th of that month.

The following letter to Mr. Webster, written after he had been for a month engaged in the business of the Circuit, exhibits his views of the different functions of a judge: —

To Mr. Webster.

93 Beacon St., Nov. 16, 1851.

Dear Sir, — I thank you for the notice of Judge Patterson, which I should not otherwise have seen. It is full of good sense, and, so far as I can judge from some knowledge of his recorded opinions, it is true. But the recorded opinions of a judge, as you know, present only one side of his judicial character and mind. To write an able, learned, and satisfactory opinion of a case is certainly not easy; and in reference to the science of the law and to the ultimate decision of causes which have advanced to that stage, it is often very important. But it has seemed to me that a far more difficult and useful field of labor, speaking generally, is the safe, prompt, judicious, and wise controlling power of a judge on the Circuit. I have no doubt that every quality and attainment of which a judge is capable may there find their fullest exercise and their most difficult work. I presume you will agree with me, that there is no field for a lawyer which, for breadth and compass and the requisitions made on all the faculties, can compare with a trial by jury; and I believe it is as true of a judge as of a lawyer, that in the actual application of the law to the business of men, mingled as it is with all passions and motives and diversities of mind, temper, and condition, in the course of a trial by jury, what is most excellent in him comes out, and finds its fitting work, and whatever faults or weaknesses he has are sensibly felt.

Perhaps the necessities of the country may some day require that the judges of the Supreme Court should sit only as a court of error; but it will certainly be a loss to the country, and an injury to the judges themselves, when they cease to come directly in contact with the people on the circuits, and when they are no longer required to apply the law to evidence of facts,—a process not very satisfactory to the mind, but, in my opinion, of eminent utility.

I have been led into these thoughts by reading this notice of Mr. Justice Patterson, and asking myself what I knew about him. No doubt they are all very familiar to you, but if they agree with your own opinions you will not be sorry that I have learned these lessons which I hope to practise.

Your obedient servant,

B. R. Curtis.

Rarely has any man entered upon a high judicial position under circumstances more calculated to test the fibre of his character, than those which in Massachusetts surrounded Judge Curtis on his accession to the bench. If the cases which awaited his judicial action had been merely in the ordinary routine of civil or criminal trials, unconnected with subjects that deeply excited the public mind, there would have been nothing to call for special notice here, beyond the manner in which he appeared to be qualified for the usual duties of the place. But, as we have seen, it was a period in the history of our country when the authority of the national government was put to a severe trial. A government popular in its form, and accustomed to rely largely on popular submission to its laws, was obliged to make it manifest that it had the strength, irrespective of popular and local feelings, to execute any law which the legislative power had enacted, until it should be determined by proper judicial authority that the law was not warranted by the Constitution. It is difficult now, for two reasons, to make appreciable to younger generations, how the excitements of this period put to the proof the force and steadiness of individual character. It is difficult, in the first

place, because those excitements had relation to the subject of slavery, in regard to which the sympathies of mankind are now no longer called upon to yield to the authority of positive law; and, in the second place, because the sentiment of loyalty to the Union and the Constitution was, at a later period, by the apparent necessities of a civil war, made to take, in the popular feeling of the Northern section of the Union, the shape of opposition and hostility to the Southern section, and the interests and objects which that section appeared to assert and uphold. He, however, who would do justice to the acts and motives of men who took any part in public affairs during the decade immediately preceding our civil war, must learn that in many of the Northern communities, and especially in New England, during that period, the duty of loyalty to the Union and the Constitution rendered it necessary to encounter a local feeling, which was the direct reverse of that which afterwards blazed forth in defence of the national authority. This duty rested upon individual consciences then with the same force, and depended upon the same principles as those which were at a later period so commonly felt and acted upon by multitudes, when both the authority and the existence of the national government were put in peril by the attempted disruption of the Union which arose in the Southern section of our country. If in 1851 the arguments, the doctrines, and the feelings of men in the North, who rejected the Constitution because one of its provisions was repugnant to their feelings, or to what they deemed their interests, were sound and defensible, the arguments, the doctrines, and the sentiments of men in the South, who in 1861 rejected the bonds of the Constitution because they felt that their local interests or safety required them to quit the Union, were equally sound and equally defensible. If, on the contrary, there was a deeper ground of civil and moral obligation to maintain the Union and obey the Constitution than any local feelings or interests could alone afford, then

the Northern extremists of 1851 and the Southern extremists of 1861 were alike in the wrong.

To one who, at the earlier period of which I here speak, was placed in a judicial position which made it necessary for him to assert the authority of the national government, of course the trial of character would bear most strongly upon his power to hold the scales of justice with both a firm and an impartial hand. It is not an easy thing to do this, in the midst of a great popular excitement, when the magistrate feels a strong disapprobation of the conduct of those with whose acts he has to deal, and when he deems the excitement unnecessary and unjustifiable. If he exhibits a bias against those who are accused of unlawful acts, he exhibits that which marks him as a weak judge, although it is that which we sometimes expect of human nature. If he rises above all feeling and all prejudice, to that supreme temper of the mind which knows nothing and regards nothing but the law and the evidence, which seeks neither conviction nor acquittal save for the ends of justice, we know that the great interests of justice are safe in his hands. It is exceedingly easy to be a high-prerogative judge, — to treat the claims of government as if they were every thing, and the rights and safety of the citizen as if they were nothing. To be an absolutely impartial judge, between government and citizen, is not so easy, and it is a character as rare as it is difficult of attainment.

One of the earliest judicial duties which Judge Curtis was called upon to perform was to preside at the trial of a young man of color, who was a member of the bar, and who was indicted for a misdemeanor under the act of Congress known as the Fugitive Slave Law.

The misdemeanor consisted in the forcible rescue of an alleged fugitive slave from the hands of the Marshal, while he was held for examination under a warrant issued pursuant to the statute. The rescue was effected in open day, by a mob composed of a comparatively small number of men,

who burst into the court-room in Boston, where the negro was held by the Marshal's officers, during a temporary adjournment which had been allowed by the examining magistrate in order that the supposed fugitive might obtain the assistance of counsel. There was strong reason to believe that the rescue was a premeditated act, by persons who had combined to prevent by force the execution of this particular law in all cases. If this was the fact, the offence amounted to treason against the United States, and the rescue was an overt act in a capital crime. It was so understood by the authorities at Washington. No government that was worthy of respect could overlook such an offence. Prompt directions were given to the District Attorney to prosecute the offenders. When the grand-jury of the district came to examine the affair, it was deemed best to indict for a misdemeanor only. Among other cases, an indictment for a misdemeanor was found against the young colored lawyer above referred to, who appeared, on the evidence presented to the grand-jury, to have had some connection with the rescue. The indictment was found before Judge Curtis came upon the bench, and was returned into the District Court, whence it was removed for trial into the Circuit Court. It was tried before Judge Curtis and the District Judge, Hon. Peleg Sprague, in November, 1851.

While one of the counsel[1] for the defendant in this case was addressing the jury, he claimed, as a proposition of law, that in criminal cases the jury were the rightful judges of the law, as well as of the fact; and he urged that, if any of them conscientiously believed the act of 1850, commonly called the Fugitive Slave Act, to be unconstitutional, they were bound by their oaths to disregard any direction to the contrary which the court might give them. He was proceeding to address the jury in support of this proposition, when he was stopped by the court, and informed that he

[1] Hon. John P. Hale, of New Hampshire.

could not be permitted to argue it to the jury, but that the court would hear him, and if they should be of opinion that the proposition was true, the jury would be so instructed. The counsel then addressed the court in support of his position. On the following day, Judge Curtis pronounced the opinion of the court, holding that, under the Constitution and laws of the United States, the jury are not the judges of the law in a trial for a crime; they are to take the law from the court and apply it to the facts which they may find from the evidence, and thus frame their general verdict of guilty or not guilty.

This opinion, although heretofore accessible in the regular Reports of the Circuit,[1] it has been thought proper to include in the present collection of Judge Curtis's writings, on account of the clearness and accuracy with which it defines the respective functions of the court and the jury in criminal cases. The substance of the charge delivered to the jury, on the facts, is also printed in the second volume of this work, because of the remarkable proof which it affords of complete judicial impartiality; and in this connection it may be observed that the biographer is not the first to claim for Judge Curtis this praise, but that it has always been claimed or conceded by those who were most deeply interested in the result of the trials, and who were sufficiently cool and sufficiently free from prejudice to appreciate the conduct of a judge in prosecutions of this nature. At the meeting of the bar of the Circuit Court, held in Boston after the death of Judge Curtis, Mr. Richard H. Dana, Jr. made, among others, the following remarks: —

About twenty-two years ago, the bar, the political world, and the public were extremely excited by the Fugitive Slave trials. There was a strong tide setting for the conviction of the rescuers. I felt deeply on the subject, on account of my political opinions and as counsel in the cases. Judge Curtis presided. I regretted

[1] Curtis's Circuit Court Reports, vol. i. p. 23.

deeply the conclusions to which he had arrived on the law. I knew he would conduct the trials with impartiality. What I now wish to say is, that I felt then, and have felt ever since, that there was in the conduct of those trials more than passive impartiality. There was, on his part, an affirmative determination that the trial should be had with absolute fairness. At a critical stage of one case, he volunteered a suggestion in favor of the accused, as to the weight of testimony, which, I think, in the measuring cast, secured the verdict of acquittal. And they who remember how things stood at Washington in those days will see the force of the suggestion that Judge Curtis had not been confirmed by the Senate, but was acting upon an executive appointment made during a recess of the Senate.[1]

These and other duties at the Circuit in Massachusetts and Rhode Island being discharged, Judge Curtis repaired to Washington, and took his seat on the bench of the Supreme Court at its regular term, commencing in December, 1851. His reputation had preceded him. He was received by the other judges with the greatest cordiality and respect. All of them were men much older than himself. Mr. Justice Grier, who was of a playful humor, began at once to refer to him affectionately as "Benjamin, our youngest brother." All were gratified by this accession of young vigor and abundant learning, giving promise of assistance not a little needed, and of work sure to be effectively performed.

After he had been in Washington for a month, he wrote as follows: —

To Mr. Ticknor.

Washington, Dec. 27, 1851.

My dear Uncle, — I have now been here four weeks, — long enough to be settled both in my abode and occupations. I live at Brown's new hotel, where I have a comfortable and pleasant, though small room, and there are some pleasant people in the

[1] The charge to the jury is to be found *infra*, Vol. II. Consult the Index, *verb.* "United States *v.* Robert Morris."

house. Judge and Mrs. McLean, and Judge and Mrs. Catron, live here, and probably Judge Wayne will come here on his return from New York, where he now is. The bench is full, with the exception of Judge McKinley, and we have made uncommon good progress in our work. But it is already so great as to be beyond the ability of the court to despatch it; and when the Texas and California land-titles get here, Congress will probably see that the judicial system of the country, fitted for fourteen States, with no Circuit Court west of the mountains, is not adequate to do the business of the United States now, when there are thirty-one States, and about four times as many people, and more than five times the wealth. In the days when Chief Justice Marshall used to deliver those great opinions, the calendar had about thirty causes on it; now it has two hundred and sixteen. I think there can be no question that, when the next administration comes in, the judges of the Supreme Court will be relieved from all duty out of that court, and two sessions a year will be held; in which event, I shall live and keep house here a part of the year. I find rent, and all the necessary expenses of living, are less than in Boston, — I said to Mr. Appleton about twenty per cent less, and he replied he thought so, and he is a good judge. They [the Appletons] live in a large house on the corner of President Square, and entertain a good deal, and of course handsomely. I have dined there twice, — the last time on Christmas day. He evidently likes his position here. He said to me that, when he came first into the House, he was so entirely unaccustomed to the whole thing that he felt almost lost; but, he added, with great simplicity, "by keeping quiet, I find people talking of things that I know more about than they do."[1] I met Mr. Webster at the Seatons' last week, and he said, "I have just had the pleasure of signing your commission." This was the first intimation I had had that my nomination had been made to the Senate. The next morning the commission came. I do not hear much of politics, for there is a real and true separation of the bench from politicians here, with perhaps one exception, — and I do not know that there is any exception. But I think, from all I see and hear, Mr. Webster's chance for a nomination is very small. If the Democratic party should nominate General Cass, or some

[1] The Hon. William Appleton, an eminent merchant in Boston, who had a short time before accepted a seat in Congress, is the person here referred to.

other civilian from the North, the Whig party may possibly nominate Mr. Webster; but I doubt if the nomination would be of any value, for I think the Democrats will surely carry the next election.

My brethren here have received me very kindly, and there are some pleasant gentlemen among them. I find my duties require constant labor; but there is no more than a fair day's work to be done in each day, and I have really more leisure than I have known for ten years. The great difference between my professional labors at the bar and on the bench consists in the entire freedom of the latter from anxiety and burdensome responsibility, and the certainty when I rise in the morning that no one can force me to do any thing which I am not equal to; and, accordingly, my health has been better during the last month than any time for a year past. We have, argued and now under advisement, the case of the Wheeling Bridge, built across the Ohio under the authority of the State of Virginia. This is the first case since I have been here which involved constitutional questions on which the court are likely to divide, though I have been obliged in one case to dissent from the majority. In general, we have thus far been very harmonious in our opinions.

The court was not disturbed by the fire, and sat as usual while the building was burning. We were not aware that we were showing any peculiar coolness by doing so; for having made all necessary arrangements to have the records, &c. removed in case of need, we saw no reason why the business of the day should not proceed. But I understand people thought it was like the Senate sitting when the Gauls came. Give my love to Aunt and the cousins, and believe me

Yours faithfully, B. R. Curtis.

The subjoined letter, written to me recently while this volume is passing through the press, is from the pen of a gentleman who was a college friend of my brother's, and who was in confidential relations with President Fillmore at the time when he appointed the latter to the bench. A part of it relates to their college days; but as it was not received in season to be quoted in the chapter relating to that period, the whole is inserted here.

202 Madison Avenue, New York,
March 22, 1879.

My dear Mr. Curtis, — I had not forgotten my promise, but the day it was made I was called to Lenox on business, and have but just returned.

My friendship with your brother was a matter of our earlier and our later days, — when we were in college and when he was on the bench of the Supreme Court. He preceded me, as you know, by a year, at Harvard, at a time when a year or two makes a great difference in age, and I looked up to him always with as much respect as if I had not regarded him with affection. I do not think there was ever a period when his judgment was not as good, on such facts as were submitted to it, as it became in his maturest days. Intellectually, he had no boyhood. He was a man from the start, if there ever was one. I was frequently at his rooms, — for I was fascinated by his singular sweetness of disposition, and his kind, genial way of making me at home with my "senior," while his conversation was full of interest and instruction to me. In expressing what I particularly remember of his character in those days, I should say that it was nothing if not judicial. He knew that every thing has two sides, and he looked for both sides of every thing.

There was a long interval in our intercourse, — from the time he graduated till we met again more than twenty years afterwards. Meanwhile he had risen to the head of the bar of New England.

When Mr. Justice Woodbury died, the first name presented to the President for the vacancy thus created on the Supreme Bench was that of your brother. Mr. Fillmore determined to appoint him; and although strong interests were active in behalf of others, he never, I think, faltered in his resolution. On his visit to Boston, in the summer of 1851, he assured himself that his intention of appointing a young man, provided he was the best man, could be best carried out by the appointment of Mr. B. R. Curtis; and he offered him the vacant seat solely because he thought it his duty to do so. And I will here say, in parenthesis, that, if there ever was a magistrate guided in every action by a stern sense of public duty, that magistrate was Millard Fillmore. And I have reason to know that there was no act of his administration in which he felt more pride and satisfaction than in this single appointment.

When your brother came to Washington as Mr. Justice Curtis, we again fell naturally enough into our old relations, and slipped as easily into "John" and "Ben" as if we had just come from a game of foot-ball on the "Delta." It was a relief to him, after sitting all day on the bench, to come up to my then bachelor quarters and dine, and chat over a glass of claret into the small hours, — sometimes in company, sometimes alone. At those times he did not seem to be a day older than when he was in college; — there was the same infinite charm of simplicity, naturalness, and sincerity that distinguished him in his earlier days. He never failed to give due credit to his contemporaries. It was in their praise, and not in their disparagement, if he ever went beyond his habitual moderation in treating of men and things. If I could trust myself to speak of conversations of so long ago, I could give many instances of this; but there is one that I am not obliged to trust to my memory for. I copy from a *pocket diary*, that has somehow survived the accidents of a quarter of a century, the following entry, being that note taken on the spot which is truly said to be worth a cart-load of recollections: —

"Thursday, Jan. 29, 1852. . . . In the evening Judge Curtis, Mr. William Appleton, Crittenden, Conrad, Burnley, Rush, Hamilton Fish, and Dr. Pyne dined with me. Mr. Webster could not come, but sent me with his regrets a fine large eod that he had just received from a friend in Boston, which was, of course, the crack dish of the occasion, and we did not forget to drink his health with all the honors. Judge Curtis impresses every body most favorably by his modest demeanor and his agreeable conversation. He changes but little, — he is of the same well-knit frame, with fine, expressive eyes, and white teeth, which you notice when he smiles, — not handsome, but his face lights up wonderfully. Crittenden, who does not like or dislike by halves, is perfectly charmed with him; and Crittenden, by the way, was in great spirits to-night, and told some of his Western stories in his very best style. They turned chiefly on his early professional experiences in Kentucky, and, the conversation taking this direction, Judge Curtis bore his full share in it, and said, among other things, that he regarded Charles O'Conor's management of the Forrest Divorce Case as the most remarkable exhibition of professional skill ever witnessed in this country."

This is word for word as Judge Curtis uttered it; and, coming from such a source, it seems to me a tribute of which even Mr. O'Conor might be proud.

Yours sincerely,

JOHN O. SARGENT.

To Mr. Ticknor.

Washington, Feb. 29, 1852.

Dear Uncle, — I have no claim to be considered a correspondent of any one, for it is not possible for me to be such, but I assure you my silence does not imply forgetfulness. We are winding up the business of the session, and shall adjourn on Tuesday, the 2d of March, till the first Monday in April, and then sit for two months. I voted against this adjournment, on the ground that the law now requires us to go the circuit at least once a year, and that in two of my districts no judge of the Supreme Court will have been for a year. But I was outvoted, and must submit, and certainly, if we can do what we hope, — go entirely through the calendar, — it will be a very important work. We shall leave no cause undecided, which has been argued, when we adjourn. Judge Catron will give the opinion of the court in Mrs. Gaines's case to-morrow, against Mrs. Gaines. In this opinion I unite with Nelson and Grier. Wayne and Daniel dissent, and McLean and the Chief Justice did not sit, on account of an interest, in some way, in the result, which some of their relatives have.

We shall undoubtedly be roundly abused by newspapers and pamphlets for this decision. The lady has talent and spirit, and threatens strongly, I hear. . . .

On Tuesday, I shall give the opinion of the court on the constitutionality of the State Pilot Laws. There is involved in this the much vexed question, whether the power to legislate on commercial subjects is vested exclusively in Congress, or whether the States may legislate in the absence of Congressional regulations. I expect my opinion will excite surprise, because it is adverse to the exclusive authority of Congress, and not in accordance with the opinions of McLean and Wayne, who are the most high-toned Federalists on the bench. But it rests on grounds perfectly satisfactory to myself, and it has received the assent of five judges out of eight, although for twenty years no majority has ever rested their decision on either view of this question, nor was it ever directly decided before.

We shall leave here on Wednesday for a little excursion into Virginia, as far as Richmond, and thence down to Norfolk, and so to Baltimore and home on the 12th, if not unexpectedly delayed. I hear they keep some warmer weather down there, and want to see a little of it before coming back to ice and snow. . . .

Presidential politics are in great confusion here, and no one can conjecture who is to be nominated by any party. But I fear Mr. Webster has no chance whatever for a nomination. I will tell you my reasons when I see you. Please give my love to Aunt and to the cousins. I shall be extremely glad to see you all, which I hope to do in a fortnight.

Yours faithfully, B. R. Curtis.

Of the opinions pronounced by the Supreme Court, at this his first term of service, numbering in all one hundred and ninety-seven cases, it was assigned to Judge Curtis to write ten.[1] This continued to be about the average number of cases in which he wrote the opinion of the court in the succeeding terms, from the December Term, 1852, to the December Term, 1856.[2]

Of the discharge of his duties on the circuit, a sphere which he regarded, as the reader has seen, as the most difficult and useful field of judicial labor, what is recorded is contained in the two volumes of Circuit Court Reports which bear his name. Of that which is not recorded, and which lives as yet in the memories of survivors, there is a beautiful, and I think just description, given by a gentleman who practised before him during nearly the whole of the period of his service as a judge; and this I cannot omit transcribing into these pages: —

A young man, coming a stranger into a large and strong bar like this, (as I did in the year 1852, when Judge Curtis had just gone upon the bench,) is apt to be deeply impressed by the marked

[1] As there were nine judges, and as the opinions of the court on all questions of practice, jurisdiction, &c. were usually written by the Chief Justice, — of which character there were at this term twenty-eight cases, — the number of the other cases in which Judge Curtis wrote the opinion of the court was a large proportion to assign to the youngest judge, who had just come upon the bench. The average share of the work for each of the Associate Justices was about eighteen cases. But of course the amount of this part of the labor that was performed by the different judges varied considerably.

[2] A list of all of the cases in the Supreme Court in which he delivered the opinion of the court will be found in the Appendix.

manifestation on the part of the bench of certain moral qualities, which others, not so anxiously situated, might take for granted; and it is of some of these qualities, very conspicuous in Judge Curtis, that I wish to speak.

He was a very patient judge. I suppose he thought that it was as much a judge's duty to be patient as it was to be learned, and that his possession of much learning did not excuse him from the obligation of patience towards those who had less. And in his case, I early observed that whatever encouragement or exhilaration a young advocate might miss in the frigid and reserved and distant manner which was maintained by the bench, was more than made up by the steadiness conferred upon the speaker by the quiet and courteous attention with which he was listened to, from the beginning to the end of what he had to say. If a young advocate happened to be making bad work of it, he was at any rate not helped downward by the slightest manifestation of weariness or vexation from the bench.

He was a perfectly impartial judge. If we are to speak of this trait in its highest aspect, we cannot do better than to apply to Judge Curtis the language which he himself applied to another distinguished jurist of this bench (I mean, and I delight in this brief opportunity of doing him honor, Mr. Justice Sprague) on the occasion of his retirement from judicial life: "The bar have found in you that absolute judicial impartiality which can only exist where an instructed and self-reliant intellect is joined to a tender and vigilant conscience and a firm will." Not a word can be spared from this definition. It was all true of Judge Sprague. It was all true of his judicial comrade, Judge Curtis. We may assume now that all judges mean to be impartial, as it is here defined. But it is not possible that all, or more than a very few, should have an intellect at once instructed and self-reliant, and a conscience at once tender and vigilant, as well as a firm will; and without them all, it is most true that absolute judicial impartiality, to be useful to the world as well as meritorious in its possessor, cannot exist.

He was an absolutely independent judge, — independent not only in conduct, so that in his judicial seat he neither feared nor favored any man, but by natural sentiment, so that he could be and was single-minded, having no ends large or small to accomplish, outside of and apart from the great end of doing justice. He had an ambition, of course, to command the respect of his contemporaries,

and to make himself a lasting reputation as a wise and learned judge; but he had no judicial ambition beyond this. How he would appear, what people would say, how his or any body's personal feeling would be affected if he decided thus or thus, were thoughts of which he was simply incapable. He was that kind of man that could not lower himself to entertain such considerations. The result of the possession and steady exercise of this principle or instinct of independence was to make the administration of the law in his court profoundly respected.

Patient, impartial, independent, — possessing these three qualities in absolute perfection, he might have been much less able and much less learned than he was, and still have been a judge whose time we could look back upon with pride and gratitude.[1]

Judge Curtis was assailed by a certain class of persons for restricting the right of trial by jury, because he had denied that juries are rightfully judges of the law in criminal cases. Within a year he was abused by the same class of persons for extending the right of trial by jury beyond constitutional bounds. The subject on which the last complaint was made related to the constitutional validity of a law of Rhode Island for "the suppression of drinking-houses and tippling-shops." An action of replevin was brought in the Circuit Court of the United States for Rhode Island, by a citizen of New York, to recover possession of a quantity of wine and spirits. The defendants justified the taking and detention by virtue of certain proceedings under the law. The plaintiff having demurred to the avowry, insisted that the provisions of the law relied upon were in conflict with the Constitution of the State. This question Judge Curtis had to decide. His opinion, very carefully considered and written, was, when promulgated, severely and rudely assailed in the New York Tribune. The following letter relates to this matter.[2]

[1] Remarks of Mr. Causten Browne, at the meeting of the Boston bar held after the death of Judge Curtis.

[2] Although this opinion is contained in the first volume of Curtis's Circuit Court Reports (*Greene* v. *Briggs*, p. 311), it seems to me so valuable

To Mr. Ticknor.

Washington, Jan. 14, 1853.

Dear Uncle, — I received your circular respecting the correspondence of Mr. Webster. I have no letters, myself, of any value for your purpose, but may gather some. Our neighbor, Mrs. Dr. Lindsley, is a relative of his remotely, and has many letters from him, and perhaps may consent to send some. I know of no other person to whom I can apply, but by inquiry *may learn of some*, to use a clumsy phrase.

Mr. C. P. Curtis informs me you were somewhat disturbed by articles in the Tribune newspaper concerning my decision in the matter of the Rhode Island law for the suppression of tippling-houses, &c. I have not seen the articles; but I had no doubt, when the opinion was given, it would be attacked, not by reasoning, for that I did not fear, but by abuse, which I feared as little. It is a fact of some significance, as illustrating the position which the judiciary holds in this country, that within the period of one year I have been abused for trenching upon the right of trial by jury, and for extending that right beyond the bounds prescribed by the Constitution. I know that all the time I have occupied the same ground, now repelling those who would make the jury judges of the law, which would be destructive of liberty, and now restraining those who, in the pursuit of an object deemed by them of great importance, have disregarded principles contained in Magna Charta, and affirmed in every American Constitution which has been formed since 1776. Neither Mr. Greeley nor any one can overthrow the opinion pronounced in this case; and if their articles can even temporarily influence any portion of the public mind, it is only because there is not enough knowledge to judge, and not enough deference to suspend their opinions. I have no doubt I may and shall make mistakes in my judicial opinions. But I think I do *know* when I have got down on to the primitive foundations, whose *situs* will never be disturbed until our political fabric breaks up; and be sure this opinion rests upon them. I asked Judges Nelson and Grier to hear the opinion read before it was sent to Rhode

for the light which it sheds upon constitutional provisions common to almost every American State, that I have advised its insertion *infra*, Vol. II., as a *pendant* to the opinion on the right of juries to judge of the law in criminal cases.

Island, — I also stated its principles to the Chief Justice, — and it met the approbation of each of them. No doubt, the members of the judiciary department of the government must make up their minds to being treated hereafter by the press with very little deference, and with no more fairness than other people. But, for one, I am content, as long as I shall administer a part of this power, to do my duty to the best of my ability, and let the country take care of the consequences. It is more their affair than mine, in any just way of viewing it.

We are going to-day to dine with Mr. Everett. Anna has continued to grow better since we arrived here, and is now getting quite stout. My own health is perfectly good. Please give my love to Aunt and the cousins, and believe me

Always your affectionate nephew, B. R. CURTIS.

The judicial duties of Judge Curtis in his own circuit continued for some time longer to involve trials growing out of the Fugitive Slave excitement. In May, 1854, one Anthony Burns, a fugitive slave from Virginia, was arrested, and examined in Boston before a United States Commissioner, upon a warrant issued under the act of September 18, 1850. While the proceedings in this man's case were pending, a public meeting was held in Faneuil Hall, on the evening of May 26th, at which the Rev. Theodore Parker and Mr. Wendell Phillips made speeches, in reference to this matter, of an inflammatory character. On the same night an attack was made by a mob upon the door of the Court-House, in which the Marshal who held Burns under the Commissioner's warrant had his office; and in resisting this attack, one of the Marshal's officers was stabbed and killed.[1] On the 7th of June the United States grand-jury of the District were in attendance on the Circuit Court. It belonged, of course, to the State authorities to detect and punish the person or persons who had committed the murder; but as process of the United States had been resisted, and as the object of the attack was avowedly to

[1] The perpetrator of this deed was never discovered.

rescue the prisoner held by the Marshal, it became the duty of Judge Curtis to charge the grand-jury in regard to the offence of obstructing the execution of process of the United States. The charge which he delivered is reprinted in the second volume of this work. The grand-jury to which this charge was delivered found no bills relating to this particular offence; but upon the evidence which the government laid before the grand-jury in October, 1854, tending to show that the persons who made the attack on the Court-House were incited to that act by the speeches to which they had listened in Faneuil Hall, Messrs. Parker, Phillips, and other persons were indicted for a misdemeanor, under the statute on which the former grand-jury had been charged by the court. The trials had not come on when Judge Curtis went to Washington to attend the Supreme Court in December. The following private letters make some reference to the continued excitement in Boston during the winter of 1854–55: —

To Mr. Ticknor.

Washington, Dec. 20, 1854.

My dear Uncle, — We were truly sorry to hear of the death of Dr. Parkman.[1] We knew of his illness, and were waiting with much interest to hear of the progress of his disease. We did not suppose he was in great danger. Your letter gave us the first information of his death. I have not taken in a Boston newspaper this winter. I thought it more comfortable to leave Massachusetts behind me for three months, and the extract you sent me from a newspaper, containing the substance of Mr. Hale's lecture, is the first thing of the kind I have seen since I came here. . . .

Mr. Hale had a quarrel of a violent character with the Supreme Court of New Hampshire, some years ago, on this subject of the right of the jury to judge the law. He was entirely worsted. He renewed the contest before me in the Circuit Court with no success. You are aware that, when the people of Massachusetts voted on their proposed Constitution, the majority against the article

[1] Dr. Samuel Parkman, married to a niece of Mrs. Ticknor.

making jurors the judges of the law was greater than on any other subject submitted to them. It is the opinion of every judge, save one, now on the bench of this court, that, under the Constitution of the United States, the jurors are never the judges of the law. I say save one, and I do not know what his opinion is.

As to the individual and factious resistance of the court to which Mr. Hale endeavors to excite his hearers, I have no apprehension whatever. If one or two sufficiently wrong-headed persons on the panel should refuse to answer proper questions, good temper, gentleness, and firmness will put them obviously and entirely in the wrong, and the ample power of the court to compel obedience to its lawful commands, will reduce them to submission. It will be as hopeless for them to attempt to gain a victory in this way, as for Abby Folsom to speak at an abolition meeting.

I suppose great efforts are making, and will continue to be made, to preoccupy the public mind in reference to the trials of Theodore Parker and Wendell Phillips. This is no affair of mine. My duty is to administer the law. This will be done. Whether they are legally guilty of the charge, whether either of them ought to be convicted, whether they will be convicted, are matters respecting which I have no responsibility whatever, and, I can say with perfect truth, no wish whatever save that justice should be done. But I desire and intend, so far as in me lies, to have the law administered; if they are not guilty, for their acquittal; if otherwise, for their conviction; and I think it will be done with great quietness and calmness, and I believe with the same steadiness in their cases as in those of the colored men who are accused of the same offence.

It cannot be doubted that the position of the judges of the Supreme Court, at this time, is in a high degree onerous; and that while it exposes them to attack, such as no honest judiciary, in any country within my knowledge, have been subject to, they have not the consideration and support to which they are entitled. Their salaries are so poor that not one judge on the bench can live upon what the government pays him, and the legislative branch of the government are not friendly to them. The people, though retaining some of the respect which, in the formation of the government, made the judicial element predominant over every thing but the reserved power of the people, yet are ready to listen without indignation to the grossest charges against those who administer

the judicial power. I believe I have never spoken to you on this subject; but it has been and is a matter of grave doubt with me, whether I will longer continue to occupy the post I now hold. I can say with entire sincerity, that, if I could see an honorable retreat from my post open to me, from which the country would take no detriment, I would not hold it longer. Whether I shall continue to do so, I do not now know. While I do hold it, however, no power confided to me by the people of the United States, for the benefit of themselves and their posterity, will suffer any loss in my hands, however odious its exercise may be to a faction, or a party, or even to my native State, and however ill supported I may be by all other men.

I certainly had not intended to write in so grave a tone when I began this letter. But I have been insensibly led to speak of things which I often think of.

We are pretty well, though Anna has not been quite as well as usual since coming here. My own health is good. Present my love to Aunt and the cousins, and believe me

Yours affectionately, B. R. CURTIS.

TO MR. TICKNOR.

WASHINGTON, Feb. 6, 1855.

MY DEAR UNCLE, — I send herewith a note to Mr. Lowell, which I suppose is what you suggest, though I did not quite understand from your letter whether you desired me to send it to you. I heartily approve of his employing Mr. Milburn to give the proposed course of lectures. I think it would help to enlarge the conceptions of our fellow-citizens in Boston to listen to them.[1]

There is nothing here of very special interest. Congress is working pretty hard upon the public business, and is in a better mood to do it than I have known before. The passage of the French Spoliation Bill is creditable, but I fear the President will veto it. The politics of parties are in a very confused state just now. There are a few old Democrats who hold on to their traditions; but besides these almost all are looking over their shoulders

[1] The Rev. W. H. Milburn, sometimes called "the blind preacher," was employed at this time to give a course of lectures at the Lowell Institute, in Boston. He had been chaplain to one of the houses of Congress.

on both sides to discern from what quarter the breeze is coming. That the country is to go through a severe trial, and its institutions be hardly strained during the next few years, I have no doubt. If it depended on the virtue and wisdom of its public men, I should not have so much hope as fear. But the frame of the government is so good, that it will work pretty well under great embarrassments, and will not stop without being first subjected to very violent shocks. These I do not much fear.

I received a few days since, from Boston, a copy of an article in the Advertiser, for the kindness of which towards myself I am much indebted to the unknown writer, but I doubt the expediency of opening a newspaper discussion upon the subject. Perhaps I am not so well able to judge of its fitness as those on the spot. I can say with entire truth, that the thing which I most feel in all these matters is, that an audience of two thousand people, in the city of Boston, should tolerate personal abuse of a magistrate from a man who stands indicted in the tribunal over which that magistrate presides, and that they should applaud one who avows himself to be devoted to the destruction of his country. I do not know enough of the geology of the State to say where the *hard-pan* lies; but if it is much lower down than this, I should have some doubt of the power of that people to extricate themselves from the mud at last.

With love to you and yours, I am

Yours always, B. R. Curtis.

On the 3d of April, 1855, a jury was impanelled to try one of these indictments in the Circuit Court, held by Judge Curtis and Judge Sprague. The counsel for the defendants made a motion to quash the indictment, on various technical grounds, which were elaborately argued. When the counsel for the government had argued in support of the indictment, and the leading counsel for the defence was about to reply, he was stopped by the court, and informed that they did not deem it necessary to hear him. Judge Curtis then said that there was a fatal defect in the indictment, which had not been pointed out at the bar, but which had arrested the attention of the court. He said that

the indictment did not contain a sufficient legal averment that the Commissioner who issued the warrant was a Commissioner duly authorized to issue process under the act of 1850; and that, although such was undoubtedly the fact, the want of such an averment in the indictment was fatal. In the case that was then on trial (that of one Stowell), the indictment was thereupon quashed. In the other cases, including those of Messrs. Parker and Phillips, in which the indictments had the same defect, the District Attorney was allowed to enter a *nolle prosequi*.[1]

Two of the following letters, written from Washington in 1856, relate to the best mode of filling one of the departments of the Boston Public Library, which Mr. Ticknor was then busily occupied in enlarging, and in reference to which he went abroad in the following summer.[2] The third letter refers only to a matter of domestic interest.

[1] The Rev. Theodore Parker, whose case was never presented to a jury, thought fit to publish in a book a supposititious and imaginary speech, which he said he had intended to address to the jury on his trial. It filled 221 pages of an octavo volume with the most atrocious personal attacks upon the judge, who would have presided at the trial, if there had been one. In his Preface he said, "Of course, I knew that the court would not have allowed me to proceed with such a defence, and that I should be obliged to deliver it through the press." In this he was doubtless quite right. But he did not "deliver" this "defence through the press" until the following August. He then published one of the foulest libels that ever emanated from the press, under the form of an intended speech to a jury, that was never impanelled for the trial of his case, and directed that libel against a judge whose legal acumen had saved him from a trial, which might, if it had taken place, have been followed by his conviction. He did a worse thing than this; for in his Preface he attributed his escape from a trial to his counsel, who, he said, "rent the indictment into many pieces, — apparently to the great comfort of the judges, who thus escaped the battle, which then fell only on the head of the [District] Attorney." The indictment was quashed on an error detected and pointed out by the court, and which had not been seen or referred to by the counsel for the defence. Mr. Parker knew this, of course, just as well as it was known to every one present.

[2] See "Life and Letters of George Ticknor," vol. ii. p. 310, *et seq.*

To Mr. Ticknor.

Washington, Jan. 24, 1856.

My dear Uncle, — It will give me great pleasure to comply with your request to give the list of books on the commercial law which you ask, but it is not the work of an hour, and I must take a little time for it. I have no hesitation about English or American books, or translations from the languages of Europe, or from the Latin. The only doubt is, how far it is expedient to include French books on commercial law. The *Code de Commerce* now in force, with its most important commentators, — the great Ordinance of Louis XIV., and Valin's Commentary and his editors, — I should not hesitate a moment about. French *speculations*, as the common lawyers call them, — for we have never really believed that French commerce afforded exactly a practical field for commercial law, — are very valuable. Their writers have done more to give symmetry to the dry bones of our "cases," than one would readily believe who had not studied them. The knowledge of French is so common among merchants now, that, apart from technical terms, which do not abound in their books on this branch of the law, an intelligent man who reads the language would understand Valin or Boulay Paty as readily as Phillips or Arnold. If I were to follow my own lights, therefore, I would put in the library, alongside of a collection of the English and American Reports touching the admiralty and commercial law, and the English and American text-writers on these subjects, a choice collection of French books. Please say if this is within your plan, and I will, as soon as possible, give my attention to it.

I have been entirely well this winter, and, though I do not become reconciled to living in a small room, away from my wife and children, I bear it as well as I can. Give my love to Aunt, and tell her I try to behave well in my solitary state.

Ever yours, B. R. Curtis.

To Mr. Ticknor.

Washington, Tuesday, April 8, 1856.

My Dear Uncle, — I hope you will not consider me remiss in attention to the list of French law-books. I went to work with Dupin as soon as I arrived here, but I was dissatisfied with what I had done, and asked Judge Campbell and Mr. Benjamin of the

Senate (who is an accomplished Louisiana lawyer) to help me.[1] They readily agreed to do so; but they are both very much occupied, and I cannot urge them to hasten the work. If you are desirous of having my imperfect results, I will send them; but if you can wait a week or two, I can do better by their aid.

The spring is steadily advancing here, and green grasses and early flowers are no longer rare.

The court will not decide the question of the Missouri Compromise line, — a majority of the judges being of opinion that it is not necessary to do so.[2] (This is confidential.) The one engrossing subject, in both houses of Congress and with all the members, is the Presidency; and upon this every thing done and omitted, except the most ordinary necessities of the country, depends. Judge McLean hopes, I think, to be a candidate for the office. He would be a good President, but I am not willing to have a judge in that most trying position of being a candidate for this great office.

Please present my affectionate remembrances to your household, and believe me,

Ever yours, B. R. Curtis.

To Mr. Ticknor.

[Washington,] May 5, 1856.

My dear Uncle, — I thank you for your note of the 3d instant, which I received this morning. I shall certainly be present on the 20th, if my health does not require me to remain at home, and I hope and believe it will not. But I have been much run down by continuous labor, and have suffered somewhat from living, away from home, the life of a wanderer since last September. I shall leave here on Tuesday the 13th, if I get through with my share of the work, as I anticipate. I shall go to Pittsfield, and unless I should be more under the weather than I expect, shall come down on Monday. I have no court to bring me to Boston, for I do not now suppose I shall hold a court till next September, but I cannot stay away from an occasion which is so interesting to you, and therefore to me.[3] Whether my wife will be able to come,

[1] The Hon. J. P. Benjamin, afterwards the "Confederate" Secretary of War, and now an eminent barrister in London, is the person here referred to.

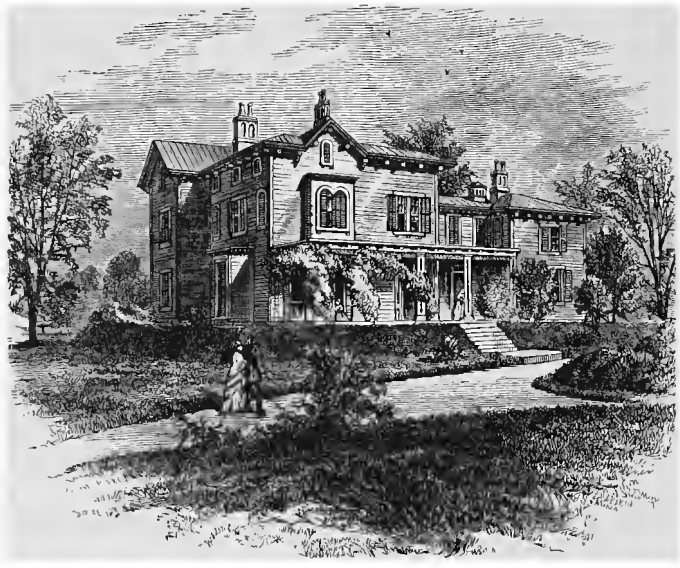
[2] See *infra*, Chapter VIII., in regard to the Dred Scott case.

[3] The marriage of Mr. Ticknor's youngest daughter, Eliza Sullivan, to Mr. William S. Dexter.

I know not. She has just got her flock safely housed at Pittsfield; I should not be surprised if she felt unable to quit the homestead and make another journey. But she must speak for herself.

I take it for granted that your house will not hold me in this emergency, and shall look for a home elsewhere, unless you say I am to come to your house, and I do not expect you to do so. With much love to you and yours, I am

Ever yours, B. R. Curtis.



CHAPTER VII.

1851–1856.

Purchase of an Estate at Pittsfield. — Country Life. — Interest in Farming. — Letters to Mr. Ticknor. — Projects and executes his Edition of the Supreme Court Decisions.

WHILE the current of human life, for those who feel strongly and think wisely concerning public affairs, flows among dangers and trials, it also flows, for those who are blest in their domestic ties, in enjoyments which public occupations can neither give nor take away. He whose enlightened patriotism makes him anxious about the public welfare finds in his private relations and interests the relief which brings cheerfulness, and the happiness which the outer world rarely disturbs. My brother was of a temperament that made domestic life most necessary to him; and he had the wisdom, as soon as his means would allow, to surround himself with the appliances which could

gratify the tastes and minister to the wants of his nature. These were always simple, and such as belong to a healthy moral organization and a cultivated intellect.

Always a lover of nature, and with strong tastes for agriculture, which he had imbibed in his boyhood, he had never, until the year 1851, owned any land on which such tastes could be indulged. Previous to that time, his summers had for several years been passed at the sea-shore, in a cottage which he built at Lynn, opposite Nahant. In the summer of 1851, he passed with his family a couple of months in Pittsfield, amid the beautiful scenery and in the invigorating air of the Berkshire hills and valleys. He was now so much attracted by an estate of three hundred acres, near the village of Pittsfield, that he became its owner, and made preparations to build upon it a handsome country residence. Occupied with these plans, he had no expectation and no wish but to resume in the autumn his usual employments at the bar. The steady income which he derived from them was as large as that of any other lawyer in New England who practised as an advocate. Without going into details, it is enough to say, that, with his facilities for meeting the most important demands of his profession, he was in the way of making for himself a very good fortune. At this time, however, his accumulations had been but moderate. He had lived liberally, because his social position made it proper, and his numerous family rendered it necessary that he should do so. But he had never lived extravagantly or ostentatiously. He was not rich enough to quit the bar, at the age of forty-two, for any public position in which the compensation would be very much less than the emoluments which he could earn as a lawyer.

His house in Pittsfield was completed in the spring of 1852, and was first occupied during that summer. It was placed on a gentle elevation, with an ample lawn in front and a noble wood behind it. Without, a large farm, which he was capable of managing skilfully, gave him an interest-

ing and healthful occupation. He was a much better farmer than amateurs generally are. He knew how to make good crops and to fatten marketable beeves without undue cost, although he was not such a cultivator as Burke, whose farming was a somewhat marvellous exercise of agricultural skill in one whose habitual pursuits were those of a statesman.[1]

It has been observed of Judge Curtis, that in the practice and the administration of the law, in its application to the various mechanical, commercial, or maritime objects with which courts of justice have to deal, he possessed a practical sagacity and facility which one might suppose was derived from an experience in the workshop, or in the counting-house, or upon the quarter-deck.[2] It was very much the same with his knowledge of agriculture. It was a pursuit to which he seemed to take, naturally and easily, from the time when he first acquired the farm which for a period of eighteen years was to him and his family a summer home of great happiness. In his boyhood, as I have elsewhere observed, he had seen a good deal of practical farming, on lands of one of his maternal uncles. Great improvements had of course been made in the period which elapsed between that time and his purchase of this Pittsfield property. But he appeared, when he began farm-

[1] Among the published correspondence of Burke, his letters to Arthur Young, the celebrated author of the Farmers' Calendar, and the best informed agricultural writer of his time, evince the most remarkable practical knowledge of farming possessed by any statesman with whose annals I am acquainted, excepting our own Webster. The editors of that correspondence say, that "farming, with him, could hardly be called a relaxation; for he entered into the business with all the eagerness, and with more than the usual information, of those who practise it for a maintenance." (Correspondence of Edmund Burke, edited by Lord Fitzwilliam and Sir Richard Burke, London, 1844, vol. i. p. 245.) The same was true of Mr. Webster, with this difference, — that he sunk a great deal of money in improving very poor land to the highest state of cultivation, whereas Burke's estate at Beaconsfield was apparently much better land than Webster's at Marshfield, and was managed with far greater economy.

[2] Remarks of Elias Merwin, Esq., at the meeting of the Boston Bar held after the death of Judge Curtis.

ing, to understand the art in its improved condition, although he had been for five and twenty years engaged exclusively in the study and practice of the law.

An anecdote, in which those who knew him will recognize a trait of his character, belongs to this period. Soon after the completion of his Pittsfield house, a mechanic in that neighborhood sold to him a patented gate, which was to open by some contrivance operated upon by the wheels of the carriage as they approached the gateway. The gate was erected and paid for, but it proved in a little while to be a complete failure. Judge Curtis brought an action against the maker for the money paid, and, after a trial, he recovered a verdict for the price of the gate and the costs. Judgment was entered; but learning that the defendant was a man who could ill afford to pay the money, he directed his lawyer to remit the whole claim, and paid the costs himself.

To Mr. Ticknor.

July 27, 1851.

Dear Uncle, — The enclosed letter will explain itself. It is not in my power to comply with William's request, and, as he desires, I send it to you. The reason why I cannot is, that I have bought "the farm," and this makes such a demand on my resources as to leave me no means at present to serve my friends. Anna went with me to Pittsfield, and, after duly considering the whole matter, I made an offer, which was accepted, and I am going there again to-morrow to close the bargain. I have just returned from Newport, where, after a trial of eight days' duration, I find that I have some strength left. In short, I am much better, but not so well as to be in any danger of forgetting the lesson which I have received, and I hope I shall not neglect the warning which a kind Providence has given me in season this time, if I will take it. My arrangements with Mr. C. P. Curtis are concluded, and on the 1st of October I begin anew with Mr. Merwin, from the county of Berkshire, as my partner and assistant.

We are all well. Mother has been with us some weeks, and will spend the rest of the summer here. Love to Aunt and the cousins.

Yours always, B. R. Curtis.

The new business arrangement spoken of in this letter was of course superseded by his appointment to the bench, in the following autumn, of which an account has already been given. The letters which follow in this chapter were, as their dates indicate, written after that event.

To Mr. Ticknor.

Pittsfield, July 13, 1852.

My dear Uncle,—I learn that you will be on the move westward about the 1st of August. Can you not take Pittsfield in your way, either out or home. We can find room for you and all yours, and shall be most happy to have a visit from you for as many days as you can allow us. Pray do not say no, if you can find it convenient and agreeable to say yes; for it will give both Anna and myself great pleasure to show you our house, to which we are becoming more and more attached. The country is extremely beautiful, and, to one whose eye is no quicker than mine, gains constantly on my apprehension of its fine points. The farm amuses and interests me, and, considering the amount of its produce we consume, is a cheap luxury; and the freedom with which we live here, far enough away from the town to be entirely independent of its requisitions, is very charming to one who likes his own ways as well as I do. I confess to no want except talk, and I have not been long enough without that to suffer yet.

I do not allow myself to be disturbed by the state of public affairs. If I were disposed to be so, there are certainly many causes. Indeed, when I look steadily at the condition of things, not in New England merely, but over the whole country, I find nothing to rely on for our future security and peace but the honest instincts of the mass of the people. In them, I would include those whose education and ability have elevated them above the average intelligence of the country, *provided* they are not politicians, or members of the third estate; but I firmly believe that if the country for five years were to be effectively governed by politicians and editors, helped by speculative men of education and talent, it would be ruined beyond hope of redemption. So far, I am a democrat, though not likely to profess publicly so shocking a creed. In the mean time, I go on quietly with my legal studies, and do not seriously fear that what I may learn of the Constitution and of the

jurisprudence of the United States will become useless in my day. The articles which George has written lately seem to me very forcible and very important. When he has published his work on the Constitution, I think there will be no man living in New England who will have done so much to preserve it. He may not find his exertions or his character appreciated now or soon; but the time will come when they will be, and he is young, and can wait.

Please present Anna's and my love to Aunt, and say we hope she will be inclined to the visit, which will give us so much pleasure.

Yours always,

B. R. CURTIS.

P. S. Since writing the above, I learn you are now at Lake George. I had previously heard you were not to leave Boston till the 1st of August. But I will not change what I have written, as it is equally applicable to your return as to your exodus.

B. R. C.

To MR. TICKNOR.

PITTSFIELD, July 19, 1855.

MY DEAR UNCLE, — My letter must have passed yours on the road. I have now only to add, that I shall be happy to accompany you over the hills of Berkshire while you are here. But I think I keep the best tavern in the county, and that in general it will be most comfortable and quite practicable to spend the nights here. When you are in Boston, please ask one of the Rogers brothers for a copy of a pamphlet they published about a curious train of boulders in this county, and we will go and see it.

Walter[1] is preparing for admission to college. . . . My anxiety to have strengthened a constitution not promising well in his childhood and early youth, has not been favorable to the acquisition of much Latin and Greek. His health is now good, and he has great power of application. I think he will go in at the time mentioned, without much difficulty.

Greenough and I have given up our Canada excursion; he because of his engagements in Boston, I because of my book, which is going very rapidly through the press, and needs my constant care.

Will you please present my respectful remembrance to Sir

[1] His eldest surviving son. An elder son, Charles Deming, and a daughter, Clara, died in Boston in 1842.

Edmund, and thank him for his request that I should see him. I certainly should have waited on him if I had come to Canada.[1]

Give my love to Aunt and the young ladies, and believe me

Yours always,

B. R. CURTIS.

The work to which reference is made in these letters was his edition of "Decisions in the Supreme Court of the United States," begun in 1853 and completed in 1856. Nearly the whole of the labor of this undertaking was performed at his country home. He projected it when he had had two years' experience on the bench.

The decisions of the Supreme Court had hitherto been embraced in fifty-seven volumes by five different reporters, Dallas, Cranch, Wheaton, Peters, and Howard. In many of the reports, the statements of the cases were encumbered with unnecessary copies of the pleadings, or with a summary of the facts which were sufficiently described in the opinions of the judges. Some of the reporters had given very good abstracts of the arguments of the counsel, while others had done but imperfect justice to the discussions at the bar; and in many cases no attempt had been made by the reporter to exhibit the views presented by the advocates. In this as well as in other particulars Mr. Wheaton was probably the best reporter that had filled the office. But it was more or less true of all these reports, that the head-notes, or what is sometimes called the syllabus of the cases, did not give an entirely exact and properly limited statement of the points decided by the court. No good and uniform model of reporting had been adopted and followed, from the first sitting of the court under the Constitution down to the time when Judge Curtis undertook to condense the whole of the previous decisions into a smaller number of volumes. It was a matter of considerable nicety to determine the limits within which he could move in effect-

[1] Sir Edmund Head was at this time Governor-General of Canada.

ing this object. The decision of the court in the case of *Wheaton* v. *Peters* had settled the point that the official reporter could not claim a copyright in the written opinions of the judges.[1] But this decision did not extend to the statements of the cases that might have been written by the reporter, or to his compilations of the arguments of counsel, or to his head-notes; and, upon the general principles of the law of copyright, whatever was the original composition of the reporter, in the sense of originality which the law attributes to productions of this nature, might be made the subject of a valid copyright. Judge Curtis did not think it needful to inquire how accurately the necessary steps might have been in fact taken, by any of the reporters, to secure a copyright in any part of the matter of their respective reports. It was enough for him that those gentlemen or their assignees might have legal rights in some part of their reports; and as his plan contemplated the composition of head-notes of his own, he could go forward freely in the use of the opinions of the judges, which had been declared by the court to be *publici juris*. Upon this basis, he proceeded to make a new edition of the Decisions of the Supreme Court.

The preparation and publication of this great work, including in the twenty-second volume a digest of all the cases, occupied him during his vacations and at his country home until the latter part of the year 1856. What a benefit to him this close study of the whole jurisprudence of the United States, as embraced in the decisions of the Supreme Court, must have been, the professional reader can easily understand. It is quite unnecessary for me to speak of the manner in which he performed this labor, for the profession and the public have stamped a value upon the

[1] This litigation grew out of an undertaking by Mr. Peters to make condensed reports of the former decisions, including those reported by his immediate predecessor, Mr. Wheaton, and by Cranch and Dallas. See the case of *Wheaton* v. *Peters*, 8 Peters's Rep. 591.

work to which no comments of mine can add any thing. I believe it is generally allowed that his head-notes are models of terse, accurate, and discriminating statement of the points decided in the cases, and more useful than any similar preceding performances. The general plan of the work has been thought to be so nearly faultless, that it has been followed by a distinguished judge now on the same bench, in a series of volumes embracing some decisions of the Court subsequent to those contained in the work of Judge Curtis.

While the seventh volume of his "Decisions" was passing through the press, he felt it to be proper to apprise the profession that he had not reprinted the reports of Mr. Peters and Mr. Howard. The following note relates to a notice which he inserted in that volume: —

To Mr. Ticknor.

Sunday, A. M.

My dear Uncle, — No foreign letter came for you, — only one from home which I did not send back, and you will receive it at the same time as this. Walter writes that he is nearly six hours in going to and from West Roxbury to Cambridge and reciting there. This is too much time to use for those purposes, and I have directed him to come and see if you can take care of him for three weeks till Mr. Curtis comes to town. If you can do so without inconvenience, I should be very glad to have him with you. I had intended while you were here to ask your advice about a Notice to be published in the next volume of my book. I have sent it to George, and stated the necessary facts to him, and will ask him to show it to you. I feel very anxious to do justice to the reporters of the court, and to claim for myself nothing which is, even in the least degree, doubtful.

Yours always, B. R. Curtis.

The Notice was as follows: —

NOTICE.

The preceding volumes, together with the first 418 pages of this volume, include all the cases decided by the Supreme Court of the

United States, and reported by Mr. Dallas, Judge Cranch, and Mr. Wheaton. Where it seemed to me that their reports of cases could not be usefully condensed, they are reprinted. I have not thought it necessary to indicate, in the preceding volumes, what has been taken, without alteration, from those reporters. I do not know how it could have been done without confusion, the alterations having been so numerous and extensive. I trust this general acknowledgment will he deemed sufficient; and that it will be understood, that, as respects these reporters, to whom the profession and the public are under great obligations, I have only revised and condensed their works. The reports made by Mr. Peters and Mr. Howard are not reprinted. So far as they are the subject of an existing copyright, I had no right to reprint them. I have, therefore, made head-notes to all the cases during the times of their reports, and, where I have deemed it needful, stated the facts of each case. It may be that I should have adopted their reports of many cases without change, if I had felt at liberty to do so. And it is due to them that I should state why I have not considered whether I should do so.

B. R. Curtis.

Pittsfield, September 1, 1855.

CHAPTER VIII.

1857.

Last Attendance as a Member of the Supreme Court. — Foreshadowing of Sectional Conflicts. — The Case of Dred Scott. — Fatal Errors of the Majority of the Bench. — Dissenting Opinion. — Correspondence with Chief Justice Taney.

THE term of the Supreme Court commencing in December, 1856, and ending in March, 1857, was the last that Judge Curtis attended as a member of that body. The following letter, written to his uncle, Mr. Ticknor, then in Europe, gives some notices of his views of public affairs at that moment, and of the condition of the Court: —

TO MR. TICKNOR.

WASHINGTON, Feb. 27, 1857.

MY DEAR SIR, — When I parted from you eight months since, you told me you did not intend to carry on a correspondence with any one, but should be glad to hear from me. I like to write so little, and am obliged to write so much, that I do no justice with my pen to my interest in friends who are absent. If I had written to you as often as I have thought of you, my letters would have been frequent enough. I have only pleasant accounts to give of those most nearly connected with me. My wife and the three youngest children have spent the winter here. . . . Though it has been a very severe winter, and many diseases epidemic, all of us have been well, and my own health quite undeviating. As to public affairs, you know Mr. Buchanan is to be our next President. His Cabinet is settled, with the exception of the Postmaster-General. It consists of General Cass, as Secretary of State, whom you know; Mr. Howell Cobb of Georgia, who did good service by the side of

Mr. Webster in 1850, and is a sagacious and conservative man, Secretary of the Treasury; Mr. Toucey of Connecticut, Attorney-General, — an excellent lawyer, and a person of rather uncommon breadth for a Connecticut man; Mr. Thompson of Mississippi, whom I do not know, Secretary of the Interior; Mr. Brown of Tennessee, Secretary of the Navy. — Judge Catron thinks well of him; Mr. Floyd of Virginia (lately the Governor), Secretary of War, — of him I have only a vague knowledge; and the Postmaster-General is not yet publicly designated. I think the Cabinet as good as the country could expect. It is no doubt composed of conservative and cautious men; but I fear it will not command the confidence of the North for any long time. And I still more fear that Mr. Buchanan has before him, both as to his foreign policy and his domestic affairs, but a stormy and violent administration. The Democratic party is greatly divided concerning Cuba, and the foreign policy of the United States. The North is now quiet, after a sectional excitement such as was never before known; but I am greatly mistaken if events do not rouse it again to an exertion to overthrow what is called "the slave-power," even greater than that recently made. . . . I do not expect the incoming administration to expire without affording that seeming occasion [for making a sectional party at the North]. The great fact of such a misfortune is, that the wisest and best men cannot belong to a party whose success is so dangerous; and consequently its management and measures must fall into such hands as now hold the political power in all the New England States. But I will not weary you with evil prognostications. I would have said nothing of public affairs, if I did not suppose you would expect to hear from me concerning them; and, if I said any thing, I must give my honest impressions, which I admit are not very cheering.

We return to Pittsfield next week, being prevented from a visit at Boston by the prevalence there of scarlet-fever, within whose precincts we are not willing to take our children. The term here has been very laborious to those judges able to work. Our aged Chief Justice, who will be eighty years old in a few days, and who grows more feeble in body, but retains his alacrity and force of mind wonderfully, is not able to write much. Judge Wayne has been ill much of the winter. Poor Judge Daniel has been prostrated for months by what was a sufficient cause; for his young and interesting wife was burned to death by her clothes acciden-

tally taking fire, almost in his presence. So that the rest of us have been kept at the oar, as Judge Story used to say, "double tides." I know probably less of Boston even than you do, for the last four months. I got so tired of Massachusetts opinions and action on all public affairs, before I came here, that I have scarcely desired to see a Boston newspaper; and beyond family letters, which Mrs. Curtis gets, and my correspondence with a very few persons there, I am not in a way to learn news of any kind from thence. George passed two months here, and argued the question of the power of Congress to prohibit slavery in the Territories, in the case of Dred Scott, before the Supreme Court, in a manner exceedingly creditable to himself and to the bar of New England. Judge Catron told me it was the best argument on a question of constitutional law he had heard in the court, — and he has been here since General Jackson's time. Please give my love to Aunt and Cousin Anna. I think of them very often, and hope I may see them again before many months. My wife desires her affectionate remembrances to them and to yourself.

Ever yours, B. R. Curtis.

As Mr. Ticknor observed in his answer, dated at Florence on the 12th of May, this letter was written "not without thought of the coming shadow of the decision of the Supreme Court of the United States in Dred Scott's case." [1] It was in fact written, as its date shows, within a little more than a week previous to the promulgation by the judges of their respective views in that too celebrated case. The opinion of the Chief Justice, which was officially treated as the opinion of the court, had been previously read in a conference of the court, in the hearing of the other judges, as it was afterwards read publicly in court on Friday, the 6th of March, 1857. The opinions of the other judges were read in court on Saturday, the 7th of March, and on that day the court was adjourned for the term. As there has never been a full and accurate account given of the part taken in this case by Judge Curtis, as his action has sometimes been misunderstood, and as he ex-

[1] Life and Letters of George Ticknor, vol. ii. p. 402.

pressed in his last illness a sense that some injustice had been done to him in connection with this case, which he expected those who were to come after him to repair, I think proper to give a circumstantial account of the whole matter.

I approach this part of my subject with unfeigned reluctance, but with a firm conviction that I have a duty to perform to both private and public history which I ought not to avoid. The course of a majority of the judges in this case of Dred Scott precipitated the action of causes which produced our civil war, and which would otherwise have lain dormant until the period of danger to the Union, arising out of the existence of slavery, had passed by. If, without such an excitement as was occasioned by what was claimed to have been the "decision" of the Supreme Court on the subject of slavery in the Territories, we could have gained ten years more in the growth of the North and in the peaceful development of the power of the Federal government within the just limits of the Constitution, Southern secession would never have been attempted. On the one hand, without the stimulus afforded by this "decision,"[1] there would have been no adequate cause for the formation in the Northern States of a geographical party, with professed efforts aimed at the supposed predominance of the "slave-power" in the councils of the nation. On the other hand, without the new and unnecessary stimulus of this supposed "decision," Southern feeling in regard to the importance of a theoretical right to carry slaves into the Territories must have died a natural death. It could not have risen to a sense of danger to their equality in the Union, merely because the people of the North were un-

[1] I am obliged, for convenience, to speak of the action of a majority of the judges in this case as a "decision," although, as will be seen hereafter, there never was a judicial majority, speaking correctly, formed upon the question of the power of Congress to prohibit slavery in a Territory, and consequently the claim that a "decision" adverse to that power had been made by the Supreme Court was erroneous.

willing to see the area of slavery extended through the Territories. It was the factitious importance given to the supposed constitutional right of such extension, by the venerable persons composing the majority of the Supreme Court, that awakened anew a jealousy which had already subsided under the tranquillizing influences of the great settlement made seven years before. The so-called "Compromise Measures of 1850" had wisely avoided the determination of the theoretical question, by the legislative department, for any of the new Territories; and they had tacitly assumed that the Missouri settlement of 1820 — by which that State had been admitted into the Union as a slave State, while slavery was excluded by agreement from all the Louisiana purchase north of the parallel of 36° 30′ — would remain undisturbed. The subsequent repeal of the latter part of that settlement, which took place during the administration of President Pierce, would not have led to a sectional conflict dangerous to the Union, if it had not been followed, before Mr. Buchanan's administration was fairly in the exercise of power, by declarations of opinion on the part of a majority of the judges of the Supreme Court, that the Missouri restriction was unconstitutional, — declarations made under circumstances which caused a general belief throughout the North that they had been made from political motives.

For a period of nearly seventy years, the Supreme Court of the United States had been looked to as the final arbiter on constitutional questions, with a confidence such as has not been reposed, on so great a scale and upon such important subjects, in any other human tribunal in which the powers of a great government have been subjected to the forms of judicature, — if indeed there has been any other tribunal of parallel functions known in history. Nobly had that confidence been earned, and well had it been deserved. It constituted one of the dearest treasures of this nation. Wise men felt that its loss would be as great

a public calamity as war, pestilence, or famine. The ravages of these, time might repair. But what could repair the injury that would be inflicted on the people of this country by the first well-grounded distrust of a tribunal from which their fathers expected, and they had experienced, such freedom from party bias, such elevation above the political passions of the day? That distrust, that first fatal loss of confidence in the high chamber of justice, now came to a large part of the people in one entire section of the Union. It came because the belief that party spirit had taken possession of the court, in the interest of slavery, even if it was erroneous, had too much to support it in what the public could see of the action of the judges. This was the first time, on any subject affecting the welfare of the whole Union, that such a belief concerning the court had seriously taken hold of the public conviction in any part of the country; and this conviction sunk deeply into the minds of men who struggled hard to exclude it, and who were pained beyond expression that they could not reject it.

This was a consequence which the judges, who concurred in declarations of opinion that slavery could go as a constitutional right into any Territory of the United States against a Congressional prohibition, should have had the wisdom to foresee and to prevent. They should have taken the utmost care, by the formation of a majority concurring accurately upon the effect of every part of the record, to make a real decision, — one that would be a judicial determination, because consistent in all its reasoning and consistent with the requirements of the case. If such a majority could not be formed, — and it never was, so formed that the constitutional question relating to slavery in the Territories could be legitimately reached by five or more out of the nine judges, — the case should have been disposed of quite otherwise than as it was. But an opinion written, read, and promulgated by the Chief Justice as the opinion of the court, followed by a separate opinion of each judge who

concurred with him in the main result, but differing upon the grounds on which each thought himself entitled to act upon the constitutional question, left their declarations of opinion upon it in the category of *obiter dicta*,[1] and left the general public to believe that there was something wrong in the whole internal history of the case. Thus a great misfortune befell the Supreme Court of the United States, — a misfortune for which the people should not be blamed, because it was not solely by the arts of demagogues or politicians that their confidence in the court was impaired. That confidence was impaired in the minds of men whom no arts of the demagogue or the politician could reach. A vast majority of the legal profession throughout the whole North, and some of the best legal minds in the South, alike rejected the supposed decision and were alike dissatisfied.

The facts in this case, as they appeared on the record, were these. Scott, a negro of African descent, brought an action in the Circuit Court of the United States for the District of Missouri, to establish the freedom of himself, his wife, and their two children. As was necessary, in order to obtain the jurisdiction of the court, he described himself, plaintiff in the case, as a citizen of the State of Missouri; and the defendant, the administrator of his reputed master, as a citizen of the State of New York. The

[1] The general reader will understand that this legal phrase describes the expression, by judges, of opinions that are not called for by the record, or which cannot be expressed consistently with the views that they take of the technical attitude of the case before them, in respect to some principal question. Thus, one judge may hold that the principal question is not brought before him, in consequence of the state of the pleadings; while another judge may hold that the pleadings are so shaped that he is judicially obliged to act upon the principal question. If the former expresses opinions upon the principal question, they are not judicial, but they are *extra*-judicial, or *obiter*, things said *by the way*. If the latter expresses opinions upon the principal question, they are judicial, because it was his duty to form and to express them, according to his view of the requirements of the record. This distinction, quite important in the administration of justice, and not the less important when constitutional questions are involved, it will be seen hereafter, has a marked application to the opinions of the different judges in the case of Dred Scott.

defendant interposed a plea to the jurisdiction, alleging that the plaintiff was not a citizen of Missouri, because he was a negro of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as slaves. To this plea there was a general demurrer, which was sustained by the court; and the defendant was ordered "to answer over," which meant that he must plead to the merits of the action. The defendant then pleaded in bar of the action, that the plaintiff and his wife and children were negro slaves, the property of the defendant. At the trial of this issue before the jury, the only evidence introduced was a statement of facts signed by the parties, in substance as follows: —

In 1834, Dred Scott was a negro slave belonging to Dr. Emerson, a surgeon in the army of the United States. In that year, Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until 1836. Dr. Emerson then removed the plaintiff to the military post at Fort Snelling, in the territory of the United States north of 36° 30′, and north of the State of Missouri, where he held the plaintiff as a slave until 1838.

In 1835, Harriet, who was the negro slave of Major Taliaferro, an officer of the army, was taken by her master to Fort Snelling, where she was held as a slave until 1836, when she was sold to Dr. Emerson, who held her as a slave at Fort Snelling until 1838. In 1836, the plaintiff and Harriet, with the consent of Dr. Emerson, intermarried at Fort Snelling. Eliza and Lizzie are children of that marriage. Eliza was born on board a steamboat, on the river Mississippi, north of the north line of the State of Missouri; Lizzy was born in the State of Missouri, at Jefferson Barracks, a military post. In 1838, Dr. Emerson removed the plaintiff and his wife and children to the State of Missouri, where they have ever since resided. Before the commencement of this suit, Dr. Emerson sold and conveyed the plaintiff and his wife and children to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis County; that there was a verdict and

judgment in his favor; that on a writ of error to the Supreme Court [of the State], the judgment below was reversed, and the same remanded to the Circuit Court [of the State], where it has been continued to await the decision of this case [in the Circuit Court of the United States].

At the trial, the jury, under an instruction from the court that upon the facts of the case the law was with the defendant, found a verdict that the plaintiff, his wife and children, were negro slaves, the lawful property of the defendant. Upon this verdict, the court gave judgment for the defendant, and the plaintiff filed exceptions to the instructions of the court, and upon these exceptions the case came up, by writ of error, to the Supreme Court of the United States.

When the record, thus made up, reached the Supreme Court of the United States, it presented two principal questions: —

First, whether Scott, by reason of his African descent from ancestors who were imported into this country and sold as slaves, independent of the question of his personal freedom, could or could not be a "citizen" of one of the States of this Union?

Second, whether Scott, who was formerly a slave in the State of Missouri, having been taken by his master into a free State (Illinois), and thence into a part of the Louisiana purchase north of the parallel of 36° 30′, where slavery was prohibited by an act of Congress known as the Missouri Compromise Act, and then brought back to the State of Missouri, was in legal effect emancipated by residence with his master in a free State or a free Territory, so that the condition of servitude would not reattach to him on his return into Missouri?

The first of these questions arose under the plea to the jurisdiction of the Circuit Court. If it should be decided by the Supreme Court that Scott was not a "citizen," by reason of his African descent, the only thing that could be done would be to direct the Circuit Court to dismiss the case for want of jurisdiction, without looking to the ques-

tions raised by the plea to the merits. But if the Supreme Court should decide that he was a "citizen," notwithstanding his African descent, then the questions raised by the plea to the merits, relating to his personal *status* as affected by his residence in a free Territory and his return to Missouri, would have to be acted upon. One of these questions, relating to his personal *status* and that of his wife and children, involved the constitutional power of Congress to prohibit slavery in a part of the Louisiana Territory which was purchased by the United States from France. Still another question involved the effect to be given to a residence in the free State of Illinois, and a subsequent return into Missouri. The Supreme Court of the State of Missouri had held Scott to be still a slave, upon the broad ground that no law of any other State or Territory could operate in Missouri upon his personal *status*, even if he did become a permanent inhabitant of such other State or Territory.

It will be apparent to the professional reader, that the judges of the Supreme Court of the United States, who held that Scott, even if a freeman, could not be a "citizen" of Missouri, should, in judicial consistency, have expressed no opinions upon the questions arising on the merits of his action, but that they should, if they were a majority, have ordered the case to be dismissed for want of jurisdiction. But the manner in which the constitutional question respecting the power of Congress to prohibit slavery in territory of the United States was reached and acted upon by a majority of the judges, requires other explanations.

The court at this time consisted of Chief Justice Taney and Justices McLean, Wayne, Catron, Daniel, Nelson, Grier, Curtis, and Campbell. The Chief Justice and Justices Wayne, Catron, Daniel, and Campbell were from slave-holding States; Justices McLean, Nelson, Grier, and Curtis were from non-slave-holding States. The case of Dred Scott was first argued at the December term, 1855.

After consideration and comparison of views, it was determined by a majority of the judges that it was not necessary to decide the question of Scott's citizenship under the plea to the jurisdiction, but that the case should be disposed of by an examination of the merits; that is to say, by deciding whether he was a freeman or a slave, upon the facts agreed upon by the parties under the plea in bar of the action. One of the questions thus arising was, as the reader has seen, whether a temporary residence of a slave in the State of Illinois worked an emancipation, notwithstanding his return to Missouri. If it did not, it might be unnecessary to act upon the question of the power of Congress to prohibit slavery in the territory of the United States, into which Scott had been taken from Illinois, unless there were circumstances in his residence in the Federal territory which ought to lead to a different conclusion. It was assigned to Judge Nelson to write the opinion of the court upon this view of the case; in which view, however, Judge McLean and Judge Curtis did not concur. Judge Nelson wrote an opinion, which, from its internal evidence, was manifestly designed to stand and be delivered as the opinion of a majority of the bench. This opinion, after referring to the question of Scott's citizenship, as arising on the plea to the jurisdiction, said: "In the view which we have taken of the case, it will not be necessary to pass upon this question, and we shall therefore proceed at once to an examination of the case upon its merits. The question upon the merits in general terms is, whether or not the removal of the plaintiff, who was a slave, with his master, from the State of Missouri to the State of Illinois, with a view to a temporary residence, and, after such residence and return to the slave State, such residence in the free State works an emancipation." The opinion then proceeded to a decision of the case upon the merits, upon the ground that the highest court in the State of Missouri had decided that a residence in the free State of Illinois had

not changed the original condition of Scott, so as to prevent that condition from reattaching upon him after his return to Missouri; that this was a question of the law of Missouri, on which the Supreme Court of the United States should follow the law as it had been laid down by the highest tribunal of that State. The conclusion reached by this opinion was, not, as was afterwards directed, that the case should be dismissed for want of jurisdiction, but that the judgment of the Circuit Court, which had held Scott to be still a slave, should be affirmed.

The astuteness with which this opinion avoided a decision of the question arising out of the residence of Scott in a Territory of the United States where slavery was prohibited by an act of Congress, and the remarkable subtilty of the reasoning that this too was a matter for the State court to decide, because the law of the Territory could have no extra-territorial force except such as the State of Missouri might extend to it under the comity of nations, — show very distinctly, that, after the first argument of the case in the Supreme Court, it was not deemed, by a majority of the bench, to be either necessary or prudent to express any opinion upon the constitutional power of Congress to prohibit slavery in the Territories of the United States. It was said in the opinion prepared by Judge Nelson, that "even conceding, for the purposes of the argument, that this provision of the act of Congress is valid within the Territory for which it was enacted, it can have no operation or effect beyond its limits, or within the jurisdiction of a State. . . . Our conclusion therefore is, upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the Federal court sitting in the State, and trying the case before us, was bound to follow it."[1] If this view of the case

[1] Of course, this question of the binding force of the State decision, upon a matter depending upon international comity, and the effect to be given in Missouri to the law of a Territory of the United States, was one on which a different view could be taken. How far Judge Curtis considered it as a

had been adhered to by a majority of the court, no judge would have placed himself on record as holding that a free negro could not be a citizen, and therefore could not obtain a standing in the Circuit Court, and at the same time as holding, under a subsequent plea to the merits, that he had no claim to freedom because the Congress of the United States had no power to prohibit slavery in the national domain. All that Judge Curtis, with his convictions in regard to the entire record, would have had to do, would have been to show that he regarded the plea to the jurisdiction as necessarily before him, as a special traverse of the plaintiff's citizenship; that the plaintiff was a citizen; and that consequently the Circuit Court had jurisdiction of his case; and then to have shown that on the merits it was necessary for him to decide the constitutional validity of the Territorial law, and to express his opinion upon it, with his reasons for regarding its effect on the *status* of the plaintiff, after his return to Missouri, as a question of more than mere local law, and not one to be determined necessarily by the views of the State court of Missouri. This was the course of reasoning which Judge Curtis felt bound to adopt, and did adopt, in the dissenting opinion which he read in March, 1857; and if the opinion of Judge Nelson had stood as the opinion of the majority, for which it was originally written, no judge on the bench would have needed to express the opinion that the restriction of the Missouri Compromise Act was unconstitutional.

At some time after the first argument of the case, but during the same term, and after Judge Nelson's opinion had been written, a motion was made in a conference of the court, for a reargument of the case at the next term.[1]

mere question of local law, or as being a broader one under the rules of private international law, and how far he regarded the last decision of the Supreme Court of Missouri as binding upon the Federal judiciary, can be seen by any one who reads his dissenting opinion.

[1] 20 Wallace's Reports, p. xi., Remarks of Judge Campbell at a Meeting of the Bar of the Supreme Court after the death of Judge Curtis.

This motion prevailed, and Judge Nelson's opinion was consequently set aside. Two questions were then carefully framed by the Chief Justice, to be argued *de novo* at the bar, in the following terms: —

1. Whether, after the plaintiff had demurred to the defendant's first plea to the jurisdiction of the court below, and the court had given judgment on that demurrer in favor of the plaintiff, and had ordered the defendant to answer over, and the defendant had submitted to that judgment and pleaded over to the merits, the appellate court can take notice of the facts admitted on the record by the demurrer, which were pleaded in bar of the jurisdiction of the court below, so as to decide whether that court had jurisdiction to hear and determine the cause?

2. Whether or not, assuming that the appellate court is bound to take notice of the facts appearing upon the record, the plaintiff is a citizen of the State of Missouri, within the meaning of the eleventh section of the Judiciary Act of 1789?

It will be seen that these questions, in substance and in terms, related to the facts set up in the plea to the jurisdiction, and to the power of the appellate court to act upon those facts, after that plea had been overruled by the Circuit Court, and the defendant had been ordered to plead to the merits, and on those facts set forth in the plea to the jurisdiction to determine the citizenship of the plaintiff. If the facts of Scott's African descent and the slavery of his ancestors, set forth in the plea to the jurisdiction, could be rightly taken notice of in the appellate court, as admitted by the plaintiff's demurrer to that plea, and if it should be held that these facts amounted in law to proof that he was not a "citizen," then there was nothing that could in judicial propriety be done but to order the case to be dismissed for want of jurisdiction. But if it should be held that on these facts — assuming that the appellate court was bound to notice them — Scott was a "citizen," within the meaning of the Judiciary Act, then, and only then, it would be necessary for the judges to act upon the merits of the case,

and as a part of those merits to determine the constitutional validity of the Missouri Compromise restriction. To meet this possible result of a decision that the Circuit Court had jurisdiction to try and determine the case on its entire merits, the counsel for Scott, on the second argument, which took place December 18, 1856, argued the technical questions arising out of the plea to the jurisdiction, the question of the citizenship of a free negro, and the constitutional validity and effect of the Territorial law, as well as the effect of the residence in Illinois and in the Territory. The counsel for the defendant-in-error, the alleged owner of Scott, also argued most elaborately all of the same questions.

After this second argument, and at some time during the same term, Mr. Justice Wayne became convinced that it was practicable for the Supreme Court of the United States to quiet all agitation on the question of slavery in the Territories, by affirming that Congress had no constitutional power to prohibit its introduction. With the best intentions, with entirely patriotic motives, and believing thoroughly that such was the law on this constitutional question, he regarded it as eminently expedient that it should be so determined by the court. In the short observations which he read in the court, referring to the constitutional questions involved, he said that "the peace and harmony of the country required the settlement of them by judicial decision;" and it is well known, from his frank avowals in conversation at the time, that he regarded it as a matter of great good fortune to his own section of the country, that he had succeeded in producing a determination, on the part of a sufficient number of his brethren, to act upon the constitutional question which had so divided the people of the United States. He persuaded the Chief Justice, Judge Grier, and Judge Catron of the public expediency of this course; and being perfectly convinced, as he somehow had convinced himself, that the appellate

court could hold that the Circuit Court had no jurisdiction of the case, because a free negro could not be a "citizen," and yet could go on and decide all questions arising upon the merits, he could conscientiously concur, as he did, in every part of the opinion which the Chief Justice, after the second argument, felt called upon to write, and which was denominated the opinion of the court, although no other judge, excepting Mr. Justice Wayne, concurred in all its points, reasonings, and conclusions.

It has been already seen, I trust, that no imputation is here intended to be cast upon the purity and good intentions of any of the judges. But it was a fatal mistake for any of them to suppose that the doctrine that slavery could go, *proprio vigore*, into any Territory of the United States, against the prohibition of an act of Congress, could be received by the people of the North, even if a majority of the judges of the Supreme Court did individually hold that opinion. It was a fatal mistake for any of them to suppose, that they could convince the judicial mind of the Free States that it was at once proper for them to hold that the Circuit Court had no jurisdiction of the case, and then to decide a constitutional question which arose only on the pleas to the merits of the action. It was not so that the legal profession had been accustomed to see constitutional questions reached, acted upon, and decided in the Supreme Court of the United States. All lawyers who knew much of the Federal jurisprudence, knew that a constitutional question, like any other question of law, can be decided by the Supreme Court of the United States, so as to bind the consciences of public or private men, only when the case, as the court finds it to be, is one to which the judicial power of the United States extends.

The action of a majority of the judges in this case, instead of promoting the peace and harmony of the country, as Judge Wayne hoped it would, was in reality most disastrous to them. Nothing that had previously happened

had afforded so much excuse for the consolidation of a sectional Northern party, in array against the supposed influence of the "slave-power" in national affairs. Nothing had been such a godsend to all the army of agitators, and to men who expected to thrive politically upon the Northern dislike of slavery. Nothing had been more injurious to the best interests of the South, whose safety required that their claim of equality in the Union should not be understood to embrace a claim to the occupation by slaves of all the Territories of the United States, with no power in Congress to prepare any of them to become free States. It is often said that a judge is to declare what he believes to be the law, regardless of consequences; and, within proper limits, this is a just and accurate theory of the judicial function. When those limits are observed, there is no more noble exhibition of human character, as there is no more necessary and salutary exercise of human independence, than is displayed by a judge who looks to nothing that may flow as an incidental consequence from his declaration of the law. This is as true of constitutional questions as it is of all others. But the judge who expects immunity from the consequences of his acts must take care that his judicial duties strictly require of him the act which he performs. If they do not, if he goes out of his way to express opinions which he is not judicially bound to express, or cannot with judicial consistency utter from the bench, he is responsible for the mischief which he does, in proportion to the importance of the office which he holds. And even if we give, as I have always certainly desired to give, all personal credit for purity of purpose to those judges who sought, in this case, to promote the peace and harmony of the country, it is too obvious that they were not, from their positions and habits of life, qualified to discover or to weigh the means by which it could be done. This was the office of statesmen and not of judges. Above all, the Southern judges were very ill qualified to

calculate with safety what would be the effect in the North of their individual declarations that slavery travelled into all the Territories, as a matter of constitutional right.[1]

Among the curious incidents connected with this case of Dred Scott there is one which has never heretofore been publicly noticed, and which strongly illustrates the vacillation of some of the judges in regard to its final disposal. At the same term at which Scott's case was first argued, (December term, 1855,) a case was argued and decided, which stands reported in the eighteenth volume of Howard's Reports under the name of *Pease* v. *Peck*. It involved the effect that should be given by the Supreme Court of the United States to the decisions of a State court upon a question of the State law. It was assigned to Judge Grier to write the opinion of the court. The decision was adverse to that of the State court on the question of State law; and the case in the Supreme Court of the United States was not on a writ of error to the State court, but it was, as in Scott's case, on a writ of error to a Circuit Court of the United States. Knowing from the first argument of Scott's

[1] Among all the strange things that were said in this case, perhaps the most unaccountable is what was said by Judge Grier, who thought that the record showed a *prima facie* case of jurisdiction, requiring the court to decide all the questions properly arising in it; that, as the decision of the pleas in bar showed that the plaintiff was a slave, and therefore not entitled to sue in a court of the United States, the form of the judgment was of little importance; for, he said, whether the judgment (of the lower court) be affirmed, or dismissed for want of jurisdiction, it is justified by the decision of the court, and is the same in effect between the parties to the suit. Yet it was solely by reason of the distinction between dismissing or not dismissing the case for want of jurisdiction, and affirming on the pleas to the merits that Scott was or was not a slave, that Judge Grier, or any other member of the court, could obtain the judicial right to declare that the act of Congress which prohibited slavery in the Territory was or was not unconstitutional and void. Perhaps no man ever said, in the compass of less than half a printed page, more that was unsound, than Mr. Justice Grier said in his few recorded observations in this case. Yet he was a man of great vigor of mind, and of no common logical power. But he had somehow become convinced that it would be useful to the country for him to agree with the Chief Justice, that Congress could not prohibit the existence of slavery in a Territory.

case that the effect of the last decision of the Supreme Court of Missouri would be involved in the consideration of the merits, — because the Supreme Court of Missouri had held Scott to be a slave, on his return into that State, notwithstanding his residence, with his master, in a free State and a free Territory, — Judge Grier, representing a majority of the court, laid down, in his opinion in the case of *Pease* v. *Peck*, a very broad rule in regard to the binding force of State decisions, in the Supreme Court of the United States, on questions of State law. The rule thus propounded was stated to be, that in all cases where there is a settled construction of the laws of a State, by its highest judicature, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry; but that when the decisions of the State court are not consistent, the judges of the Supreme Court of the United States do not feel bound to follow the last, if it is contrary to their own convictions.[1] This was deliberately and purposely laid down as the rule, not only to justify the intended decision in *Pease* v. *Peck*, but also in order to make a precedent under which the judges, when Scott's case should be finally acted upon, might be free to disregard the last decision of the Supreme Court of Missouri, and to give Scott the benefit of their own convictions upon the question of his *status*, after his return to that State, if they should differ from the State court.[2] Unfortunately, when Scott's case came to be finally acted upon, the opinion of the Chief Justice made no allusion to what had been said in the case of *Pease* v. *Peck*, but it attributed to the last decision of the State court the most stringent effect that was ever given to a State decision, and that, too, on a question of personal freedom. But the great question on this part of the case was,

[1] See the opinion in *Pease* v. *Peck*, 18 Howard's Rep. 595, 598.

[2] I make this statement on the authority of a gentleman still living, — Mr. Edward N. Dickerson, of New York, — an intimate friend of Judge Grier, who was so informed by Judge Grier himself, at the time when *Pease* v. *Peck* was decided.

whether the *status* of Scott was a mere matter of the local law of Missouri, or whether it was a question of universal jurisprudence, on which the Supreme Court of the United States was not bound by the decisions of the State court. The Chief Justice treated it as a mere question of local law. Judge Curtis treated it as a question of international law, whose rules required the *status* of Scott, as fixed by the laws of the Territory of Wisconsin, to be recognized in Missouri by the Federal court sitting in that State.

I have already stated, that, after the second argument of the case, the Chief Justice prepared, and read in a conference of the court, the opinion which was read publicly as "the opinion of the court" on the 6th of March, 1857. Of course, the judges who did not concur in that opinion had an opportunity to write their dissents from what they had heard read in the conference. Judge Curtis, who had heard the Chief Justice's opinion read in the conference-room, deemed it his duty to dissent from it throughout. When the time for acting publicly upon the case arrived, and on the last day of the term (the 7th of March), Judge Curtis's dissenting opinion was read. It was immediately filed in the clerk's office, as the rule of the court required; but the opinion of the Chief Justice, which had been publicly read on the previous day, was not filed. After the adjournment of the court, and on that day, the editor of a Boston newspaper, or his agent in Washington, applied to Judge Curtis for a copy of his dissenting opinion. It was given to him, because Judge Curtis supposed that all the opinions had been filed as the rule required, and that they would therefore be accessible to the press, and would be published for the information of the public, just as they had been read. The copy of his dissenting opinion was taken to Boston, and in a few days it was published. In the mean time, Judge Curtis had gone on a short visit into Virginia. After his return to his home in Pittsfield, in the western part of Massachusetts, without going through Boston, he was in-

formed that the opinion of the Chief Justice, from which he had dissented, had been revised and materially altered. Thereupon, on the 2d of April (1857), he wrote to Mr. Carroll, the Clerk of the Supreme Court, requesting him to send him a copy of the Chief Justice's opinion *when printed*.[1] The Clerk replied as follows: —

To Mr. Justice Curtis, &c., &c.

My dear Sir, —I am this morning in the receipt of your favor of the 2d instant, and regret that it is not in my power to send you a copy of the opinion in No. 7, *Scott* v. *Sandford*. That, as well as the opinions of yourself, Judge Wayne, Judge Nelson, and Judge McLean, we have not yet had printed. But hope to have them done in about ten days.

As, however, the Chief Justice had directed me not to furnish a copy of his opinion to any one, without his permission, before it is published in Howard's Reports, allow me to suggest that you request him to direct me in the premises.

Very sincerely yours,

Wm. Thos. Carroll.

Washington, April 6, 1857.

On the 9th of April, Mr. Justice Curtis replied to the above, and, after acknowledging its receipt, says: —

"I wish to see only this opinion of the court, and you will please send me a copy of that as soon as it is in print, and charge any expense to me. You mention that the Chief Justice had directed you not to furnish a copy of his opinion to any one, without his permission, before it is published in Howard's Reports. If, by his opinion, you mean the opinion delivered by the Chief Justice as the opinion of the majority of the court, I can hardly suppose the direction was intended to apply to and include a member of the court who has occasion to examine the opinion before its publication. If you have the least doubt upon the point, it is certainly proper for you to consult him before you send me the copy."

[1] It was the practice of the Clerk to prepare printed copies of all opinions of the judges filed in the office, before their publication by the official Reporter of the court.

In answer to this letter Mr. Justice Curtis received the following: —

To Mr. Justice Curtis, Supreme Court, U. S.

My dear Sir, — I duly received your favor of the 9th instant, suggesting that I might have mistaken the directions of the Chief Justice referred to by my letter of the 6th instant. In reply, I beg to inform you that, after mailing that letter, I called to see the Chief Justice; told him how I had understood his directions, and that I had so written you; and that he then told me that I had understood him correctly, and reiterated the direction.

With the highest esteem and regard, I remain, dear sir,

Very truly yours,

Wm. Thos. Carroll.

Washington, April 14, 1857.

Even after this second letter from the Clerk had been received, Mr. Justice Curtis could not believe it possible that one of the members of the court should be refused access to its records; and with the desire to discover the actual state of affairs, he wrote to Mr. Chief Justice Taney, on the 18th of April, and said: —

"I cannot suppose it was your intention to preclude me from having access to an opinion of the court in the only way possible for me to obtain it; and if it was not, you will confer a favor upon me by directing the Clerk to comply with my request."

To this the Chief Justice replied as follows: —

Hon. B. R. Curtis, Pittsfield, Mass.

Baltimore, April 28, 1857.

Dear Sir, — I have been in Baltimore for the last two weeks, holding the Circuit Court; and, owing to my absence from Washington, did not receive your letter until a few days ago, and could not answer it until I obtained from Washington a copy of the order under which the clerk declined to send you a copy of the opinion of the court in the case of *Scott* v *Sandford*. I herewith enclose it.[1]

[1] See page 216.

It is, however, proper that I should explain to you the reasons for giving the order. Soon after the decision was given, circumstances occurred which satisfied the court that justice to itself required that the opinion in this case should be reported and brought before the public under the usual supervision and responsibility of the officer appointed by the court to perform that duty; and that it ought not to be separated from all of the other opinions delivered by the court during the term, and hurried before the public in an unusual manner, by irresponsible reporters, through political and partisan newspapers, for political and partisan purposes. It became my duty to carry into effect this determination of the court; and I therefore gave an order to Mr. Carroll not to give a copy to any one but the official reporter.

The order in the first instance was verbal. But some time before the opinion was printed and had undergone the accustomed revision of a printed copy, Mr. Carroll mentioned to me that he had been applied to for a copy by Mr. Charles P. Curtis, and wished to know whether, from his near and intimate connection with you, he would not be excepted from the operation of the order. Upon my inquiring if Mr. Curtis had stated for what purpose he wished a copy, he showed me his letter, in which Mr. Curtis says he is about to publish a large edition of your opinion in a pamphlet, and wished "to introduce that of the Chief Justice" with yours, meaning, I presume, the opinion of the court delivered by me. I told Mr. Carroll he could not have it for such a purpose. It appeared to me that Mr. Curtis himself, upon more consideration, would feel that his plan was open to serious objections. For the publication of your individual opinion in this manner, in connection with that of the court, leaving out the individual opinions of the other judges, would hardly be respectful to them, as it would seem to imply that he thought their opinions less worthy of publication than yours; and, also, that upon further reflection he would hardly feel justified in anticipating the official reporter in the publication of this opinion of the court, and thereby taking for his own emolument the profits arising from its sale, which legitimately and justly belong to the officer appointed by law to perform that duty. And it is due to frankness also to say, that I thought it would have been as well for any gentleman, before he undertook to report the opinion of the court under his own

supervision, and in what manner and in what form he pleased, anticipating the officer of the court, to have asked and obtained leave of the tribunal to do so.

A few days after I had given Mr. Carroll the answer above mentioned to the application of Mr. Charles P. Curtis, he showed me your first letter directing him to send you a copy, and told me the answer he had given, and inquired whether he had correctly understood the order in applying it to you. I told him he had.

As I was about to leave Washington for some weeks, and desired to relieve Mr. Carroll from any undue responsibility in this matter, I put the order in writing, with the concurrence and approbation of Mr. Justice Wayne and Mr. Justice Daniel, who were the only two justices beside myself then in Washington, and authorized Mr. Carroll to show it, or give a copy of it, to any one who might apply for a copy of the opinion.

It would seem from your letter to me that you suppose you are entitled to demand it as a right, being one of the members of the tribunal. This would undoubtedly be the case if you wished it to aid you in the discharge of your official duties. But I understand you as not desiring or intending to use it for that purpose. On the contrary, you announced from the bench that you regarded the opinion as extra-judicial, and not binding upon you or any one else. And if the opinion of the court is desired by the judge, not to aid him in the discharge of his official duties, but for some other unexplained purpose, I do not see that his position in relation to a copy of the opinion differs in any respect from that of any other person. And I cannot admit that any one judge has the right to take away from the court the control over its own opinion before it is officially reported, or has the right to overrule its judgment, if he thinks proper, in a matter which nearly concerns its judicial character and standing, and more especially the judicial character and standing of the members of the court who gave the opinion.

You will observe that the order applies to every individual member of the tribunal as well as to yourself, although it so happens that you are the only one who has applied for a copy.

I am, respectfully, dear sir, your obedient servant,

R. B. Taney.

The "order of the court," which is referred to above, is contained in the following communication addressed to the clerk: —

To William Thomas Carroll, Esq.,
Clerk of the Supreme Court, Washington.

Washington, April 6, 1857.

Dear Sir, — I understand several applications have been made to you for a copy of the opinion in the case of *Dred Scott* v. *Sandford*. No one has a right to a copy of the opinion of the court until it is reported and published by the reporter. He is the officer to whom the law confides the duty of bringing the opinions of the Supreme Court fairly and fully before the public, and of making them equally accessible at the same time to every one.

I have observed that the opinion of the court has been greatly misunderstood and grossly misrepresented in publications in the newspapers. It is impossible that the court, or any member of the majority which gave the opinion, having a proper regard to their judicial positions, can enter into discussions with gentlemen who write for newspapers, in order to correct misstatements in these publications. It is due to the court, therefore, as well as to the public, that the opinion in the case above mentioned should be allowed to speak for itself, and not be brought before the public garbled and mutilated, and with false glosses attached to it. The law and the court confide it to the reporter to do this, and to no one else.

You will therefore give no copy of this opinion to *any one*, until the reporter has printed it, and has it in readiness for general distribution, so as to be accessible to any one who may choose to purchase it.

Respectfully, dear sir, your obedient servant,

R. B. Taney.

I have read this letter from the Chief Justice to Mr. Carroll, and concur in it entirely.

James M. Wayne.

I entirely concur in the opinion and instruction given by the Chief Justice to the clerk.

P. V. Daniel.

Having received the above, called forth by his simple request for a copy of the opinion of the court, Judge Curtis sent the following reply to the Chief Justice: —

PITTSFIELD, May 13, 1857.

DEAR SIR, — Your letter of the 28th ultimo came here during my absence from home on the circuit. I avail myself of the earliest practicable opportunity to reply to it. It is due to that harmony of feeling among the members of the court, which concerns not only themselves but the public interest, and it is due to the unaffected respect I feel for you, that I should reply to it frankly.

I wrote to the clerk of the Supreme Court, saying I had occasion to examine its opinion in the case of *Scott* v. *Sandford*, and desiring him to send me a copy of the opinion when it should be in print. I was told, in reply, that you had directed him not to allow any one to have a copy of the opinion until it should be published by the reporter; and that, on inquiring of you, he had been told that I was included in the prohibition. I thought there must be some mistake on the part of Mr. Carroll, and therefore addressed myself to you. It seemed to me, that when a judge called on the clerk of the court to furnish him with a copy of one of its acts, required by its rules to be entered on its records, and stated that he had occasion to examine it before its publication in the printed reports of the proceedings, neither the clerk nor any one else had a right to presume that he had not occasion to examine it for a purpose connected with his official duty, and to deny him access to it. And therefore I supposed Mr. Carroll had in some way misinterpreted his instructions.

Your letter informs me he did not, and explains the order under which he acted, and also details some matters personal to myself, which you suppose to be connected with my direction to Mr. Carroll.

As respects what you say concerning Mr. C. P. Curtis's application to the clerk for a copy of the opinion of the court, I have only to observe, that whatever application Mr. Curtis may have made was without my knowledge; that I had no connection with it whatever, and do not perceive why I should make any observations concerning it, or concerning the purpose for which you say it was desired. If any one has supposed that I was availing myself of my official relation to the records of the court to enable Mr. C. P. Curtis to obtain indirectly through me what he could not obtain

directly for himself, such person has done an injustice to me which I believe a more intimate acquaintance with my character would have saved him from.[1]

You speak of my desiring the copy for some unexplained purpose. I certainly did not think it necessary to explain to the clerk of the court the purpose for which I wanted a copy of one of its records. I thought it enough for me to say I had occasion to examine it. To yourself, if I had imagined an explanation necessary, I could have felt no objection to make it, though I do not consider myself bound to do so. But no explanation was asked; and the clerk was simply directed not to comply with my call on him. Still, though no explanation has now been asked, and though you appear to have assumed that I desired the paper for some other than an official use, I think it proper to state what my object was in calling for the copy.

I had an official duty to perform which alone caused me to apply for the copy. In my judgment, and I cannot doubt you will agree with me, a judge who dissents from an opinion of a majority of the court upon questions of constitutional law which deeply affect the country, discharges an official duty when he lays before the country the grounds and reasons of his dissent. That he may do so, it is necessary he should know, and know accurately, what the opinion of the majority is, and its grounds and reasons. For this end, opinions of the majority are read, before

[1] I find among the papers relating to this case a note in the handwriting of Judge Curtis, in which he says that Mr. Charles P. Curtis wrote to him to ask if he knew how he (Mr. C. P. Curtis) could obtain a copy of the opinion of the court. The note then proceeds: "I answered that I did not. Subsequently, he mentioned to me that he had a letter from Mr. Carroll, saying that he could have a copy for sixty dollars; upon which I made no comment." And again: "In respect to the propriety of Mr. Curtis's intentions, I do not feel called on to enter into any discussion, further than to observe, that, as he proposed to distribute the pamphlet gratuitously, he could have no intention to take for his own use the emoluments arising from its sale; and that it did not occur to me, when the subject was spoken of by him, nor does it now seem to me, on reflection, that such a publication would be disrespectful to those judges whose opinions would not be included. I remember being told that the opinions of Judge Daniel and Chief Justice Taney, in the Wheeling Bridge case, were published without the opinion of the court, and extensively circulated in Virginia and west of the mountains. I thought at the time this was done to promote the views of those in whose favor those opinions were; and it did not occur to me that such a publication was disrespectful to myself and to the other judges who concurred in the opinion of the court."

they are promulgated, in presence of all the judges; and not merely made known privately to those judges who concur in them. This opinion of the court, prepared by yourself, was so read in conference of all the judges. I was thus informed what it was, and shaped my dissent from that opinion accordingly. After I returned home, I was informed that this opinion, from which I had dissented, had been revised and materially altered. I did not know whether the information was true or false. I had no disposition to raise any question on the subject. I had understood that some difference of opinion as to the effect of the 42d rule of the court had heretofore arisen. But I did not wish to make or to have any controversy with any one respecting its application. At the same time, I thought I had a right to know, before my own opinion should be published by the reporter in a permanent form, whether any alterations material to my dissent had been made in the opinion from which I dissented, after its promulgation from the bench.

I had no doubt then, and have none now, that in publishing my opinion in a permanent form in the reports, either as it was originally written, or with such notes or alterations as circumstances growing out of changes in the opinion of the court might require, I was discharging an official duty; and that I had a right to have free access to the records of the court, to enable me to perform it in such manner as, on my own responsibility, I should elect.

In respect to the order to which you refer, I may be in error, but at present I do not perceive how the court could make an order in vacation, without allowing to all the judges opportunity to deliberate on it, and concur therein, or offer reasons why it should not be passed. If consulted, I should have urged on the judges, to the best of my ability, the propriety and expediency of not withholding from immediate publication the opinions in this case; that their publication would prevent, in the only way in which they could be prevented, those great misunderstandings and gross misrepresentations in the newspapers, which are mentioned in your letter to Mr. Carroll prohibiting the allowance of a copy of the opinion of the court. I am not able to perceive how the allowance of an authentic copy of the opinion, by the clerk, could have had any other effect than to correct misapprehensions, and put an end to misrepresentations. It was for this reason, not

only entertained but expressed at the time, that I consented to the publication of my own opinion; and when I left Washington, though, from illness and the pressure of my domestic affairs, I had not opportunity to see you, I had not the least doubt that every opinion filed in the case would immediately appear in the newspapers. I supposed that others would think as I did, that in our country it is impossible to keep from the public what passes in an open court of justice; especially in the Supreme Court, where the interests of the nation are discussed, and the people have the right to know what is done, and feel a strong desire to know it; that in such a case the usual forms of reporting would inevitably be disregarded; that if the public cannot get the opinions of the court authentically, and in the usual way, speedily enough to answer their claims, they will get them so far as, and in the best way, they can; that in England, if any similarly important case had occurred, a detailed report of every opinion, which the usages of that country require to be pronounced from the bench by each judge, would have appeared the next morning in the leading newspapers; that in our country there was the same desire and the same right to know what is done in the courts, but not the same means at present to know accurately; but that all concerned would suffer by attempting to withhold the opinions in this case after they had been regularly promulgated in open court; and I may add, that it is quite usual in Massachusetts, and I believe in other States, to publish immediately in the newspapers important opinions of the Supreme Court, without waiting for the volume of the reporter; and that the same practice was allowed by both my predecessors in office, and has been occasionally by myself.

I do not detail these considerations to endeavor to convince you that the order was erroneous. I have not the presumption to form an opinion upon your act without knowing its reasons. But I wish you to understand my views of the matter and the grounds on which I acted.

I feel a very sincere reluctance to trouble you with this long letter, but I know not how to avoid it. I have no personal feeling to express other than regret that what I consider my rightful access to the records of the court has been denied me, and, as I fear, under misconstruction of my motives and purposes.

With great respect, I am, dear sir, your obedient servant,

B. R. Curtis.

After the lapse of several weeks, Judge Taney replied as follows: —

To Hon. B. R. Curtis, Pittsfield.

Washington, June 11, 1857.

Dear Sir, — I received your letter of the 12th of May, the day before I set out for Richmond to hold the Circuit Court for the District of Virginia. And being much occupied in my preparations to leave home, I was able to give it but a cursory perusal at that time; and while I was at Richmond, my duties in court filled up all the time that in my infirm state of health I could devote to business, and left me no leisure to answer your letter.

Since my return home, I have again looked over it; and as I have no desire to continue the unpleasant correspondence which you have been pleased to commence, I should have been glad to find that there was nothing in your last letter which called for a reply on my part.

But there are some passages which cannot be passed by without notice, because my silence in relation to them might lead to erroneous inferences, unjust to the judges with whom I concurred in opinion, as well as to myself.

You say that you were informed, after you returned home, that the opinion of the court, in the case of *Scott* v. *Sandford*, was materially altered after it was delivered from the bench. I do not mean to inquire through what channel you sought or obtained information on that subject. But however obtained, if it came to you in a way sufficiently authentic to induce you to act upon it, perhaps the more usual and appropriate course between members of the same tribunal would have been to address an inquiry to the judge who delivered the opinion. And if this had been done in the present case, you would have been promptly and frankly answered. But as you now, for the first time, inform me that this information induced you to address your letter to me demanding a copy, it is proper to say that it had no foundation in truth. There is not one historical fact, nor one principle of constitutional law, or common law, or chancery law, or statute law, in the printed opinion, which was not distinctly announced and maintained from the bench; nor is there any one historical fact, or principle, or point of law, which was affirmed in the opinion from the bench, omitted or modified, or in any degree altered, in the printed opinion. You will

find in it proofs and authorities to maintain the truth of the historical facts and principles of law asserted by the court in the opinion delivered from the bench, but which were denied in the dissenting opinions. And until the court heard them denied, it had not thought it necessary to refer to proofs and authorities to support them; regarding the historical facts and principles of law which were stated in the opinion as too well established to be open to dispute. But you will find nothing altered, nothing in addition but proofs to maintain the truth of what was announced and affirmed in the opinion delivered.

There is another topic in your letter upon which I ought not to be silent. You speak of the opinion of the court as having been improperly kept back from the public when they had a right to know it. It is true that the opinion was not given to a partisan, political journal, to be published for political and partisan purposes. But it was delivered in open court, in the hearing of every one who chose to listen. It was placed in the hands of the officer appointed by law to report it, as soon as it had undergone the usual revision. And it has been published in the manner in which the opinions of the court have been published for more than fifty years; and much sooner after the close of the term than they have commonly been issued by the reporter. Yet I have never heretofore heard the court charged with improperly keeping back its opinion from the people.

It is also true, as you say, that the constitutional questions decided by the court in this case were at the time, and still are, the subjects of earnest discussion as political questions, and the public mind much excited about them. But this has often happened before; and whole States have been highly agitated upon constitutional questions of the deepest interest, at the very moment when they were brought before the Supreme Court and there decided. And it has happened, too, on such occasions, that differences of opinion existed among the members of the court, and the opinion of the majority has been elaborately contested and freely commented on by the dissenting members; and it has likewise happened in such cases that the opinion of the majority, after it was pronounced, was vehemently assailed and misunderstood and misrepresented in the political newspapers and journals of the day; — yet it was never deemed necessary, on that account, to depart from the usual and established mode of promulgating the opinion of the

court, nor the opinion of any one of the dissenting judges. The majority who concurred in and gave the opinion, and the judges who dissented, were all of them content that their respective opinions should be reported and published in the usual manner, and submitted at the same time, and in the same volume, to the sober and enlightened judgment of the public; so that each opinion might speak for itself and be compared with the others when it was read. And although this has heretofore been the uniform course of proceeding, I have never heard the court or the dissenting judges accused of improperly keeping back their opinions from the public.

And if you supposed there was any thing new and peculiar to this case which made it proper to depart from the established usage, and to publish the opinion in the public journals immediately after it was delivered, it is to be regretted that you did not suggest such a measure to the court. A proposition of that kind coming from one of its members, his reasons for it would undoubtedly have been respectfully listened to and considered. And if the majority had come to the same conclusion, directions could have been given to the official reporter to carry the plan into execution. In that case a copy of the opinion of the court and of the judges who concurred in it, as well as of those who dissented, might have been prepared and ready for the press as soon as the judgment was pronounced; and all of the opinions would have appeared simultaneously and together, so that he who read one would have the others before him, and be able to compare them together, and not be left to form his judgment of the one from what might be said of it in another and adverse opinion.

But the measures taken by you effectually prevented the publication of the opinions together or simultaneously. You never suggested (at least I never heard of such a suggestion) that you thought the established mode of reporting and publishing the opinion of the court ought, in this instance, to be departed from. And although I received a note from you in relation to the law library the day after the opinions had been delivered, and the day before you left Washington, you said nothing in it about the publication of the opinions, nor intimated that a more prompt and different mode of publication than the usual one was desirable. Nor did you apprise me of your intention to publish at once your dissenting opinion. And I learned with great surprise that, immediately on

your return to Boston, you had published it in a political journal, and that it was distributed, not only to the subscribers to the newspaper, but widely circulated throughout the country. You yourself, therefore, rendered it impossible that the opinions could come out together, as you say would have been the case in England; and equally impossible that the readers of one should have the other always at hand in order to compare them and judge between them; for the thousands, and tens of thousands, of persons who read your opinion in the journal in which it was published, and in other newspapers associated with it in political partisanship, could by no possibility have the opinion of the court before them until some time after yours had been read, and made its impression. And the far greater part of the readers among whom it was hurried and profusely scattered will never have an opportunity of reading the opinion of the court, nor of knowing any thing about it except what they learn from your version of the opinion, and your account of the proofs and authorities on which it is founded.

In this respect the case undoubtedly differed from all former ones; and for that reason made it the duty of the court to consider whether this new state of things required a more prompt or different mode of publication from the one heretofore adopted. For although, as I have already said, the opinion of the court on former occasions has been assailed in political journals and by political partisans before the opinion itself could be published, yet this is the first instance in the history of the Supreme Court in which the assault was commenced by the publication of the opinion of a dissenting judge; carrying with it the weight and influence of a judicial opinion delivered from the bench in the presence and hearing of the court.

No one could fail to see that this circumstance would encourage attacks upon the court and upon the judges who gave the opinion, by political partisans whose prejudices and passions were already enlisted against the constitutional principles affirmed by the court; and that the usual weapons of party warfare would be resorted to in order to impair its weight; and that this would more especially be the case in this instance, because the annual elections in several States were at that time approaching, and the principal points in controversy between parties were the constitutional questions decided by the court. Yet the judges who concurred in the opinion did not think that this state of things would justify the Supreme

Court of the United States in assuming the attitude of combatants in the political arena, by publishing its opinion hastily in the public journals. And the fact that the public mind had become highly agitated in several States upon these questions by the near approach of their elections, seemed to render any departure from the long-established practice of the court at such a time peculiarly objectionable. Hence the order of which you complain, and which you represent as having kept back from the people what they had a right to have. The order prevented the court from being placed in the attitude of a combatant in the political arena without its consent, but it did nothing more.

You complain also, that you were not consulted when the court came to this conclusion, and say that it was a violation of your judicial rights, as a member of the tribunal, to pass the order without first advising with you. But you will recollect that you had then published your own opinion, adverse to that of the court, without consulting the judges who gave the opinion, or apprising them of your intention; and I cannot see any just ground upon which you could claim the right to share in the control and disposition of the opinion of the court, when the avowed object of your dissenting opinion was to impair its authority and discredit it as a judicial decision.

I have now done. I had, indeed, supposed that, whatever difference existed on the bench, all discussion and controversy between members of the tribunal was at an end when the opinions had been delivered; and I believed that this case, like all others that had preceded it, would be submitted calmly to the sober and enlightened judgment of the public in the usual channels of information, and in the manner in which it has heretofore been thought that judicial decorum and propriety required. But if it is your pleasure to address letters to me charging me with breaches of official duty, justice to myself, as well as to those members of the court with whom I acted, makes it necessary for me to answer and show the charges to be groundless; and a plain and direct statement of the facts appears to be all that is necessary for that purpose. And having now made it, I have only to add that

I am, respectfully, your obedient servant,

R. B. TANEY.

To this letter Judge Curtis replied as follows: —

To Hon. Roger B. Taney,
Chief Justice Supreme Court of the United States.

Pittsfield, June 16, 1857.

Dear Sir, — Your letter of the 11th instant was received by me this morning. I read it with surprise. I did not suppose I had expressed myself in such manner as to be open to the misapprehensions your letter shows.

You say, "I have no desire to continue the unpleasant correspondence you have been pleased to commence." It is certain that our correspondence has become unpleasant; but I do not find, by reviewing it, that it began to be so by any act of mine.

In my first letter to you, I simply requested you to remove from the mind of the clerk what I then thought was some misapprehension on his part. I wrote the letter without expectation that any thing unpleasant would grow out of it.

You speak of it as "a demand made on you for a copy of the opinion of the court." It was not so intended, and no circumstances were known to me which could impress on the letter that or any other unpleasant construction. It was not until I received your letter of the 28th of April that any thing unpleasant was apparent. I cannot admit, therefore, that I have begun such a correspondence.

You speak of my addressing letters to you, charging you with breaches of official duty. I do not know where you find such charges. The only subjects you refer to specifically enough to enable me to perceive what you had in your mind are, that I complain of the order to the clerk prohibiting a copy of the opinion, and that I speak of this opinion having been improperly kept back from the public.

But if you will recur to my letter, you will find that, so far from charging you with any official misconduct in passing the order, I expressly say I had not even formed an opinion that it was erroneous, because I was not informed of the reasons which induced its passage.

I do state reasons which would have induced me, if consulted, to favor the immediate publication of *all* the opinions; and after carefully considering what you have said in your last letter on that subject, though I never supposed any one or more of the judges

should do any thing as a partisan, yet I still think it was highly inexpedient to restrain others from publishing the opinion of the court.

But, surely, there is a wide distance between a difference of opinion on a question like this, and a charge of official misconduct. I must be allowed to entertain my own opinions on all points connected with my office, and to express plainly, on proper occasions, my reasons for them; but I claim no privilege to charge any one of my brethren with official misconduct, nor have I done so. All that I said on the subject of the publication of the opinion was not by way of complaint of the order to the clerk. I stated that such was not my purpose; and that my purpose was solely to explain to you the grounds on which I acted and assumed (erroneously, it appears) that others would act, — not to controvert the propriety of the order so far as its purpose was to restrain the publication of the opinion of the court. I did not then, nor have I at any time, considered that I had a right to a voice on the question whether the majority of the judges would allow their opinion to be published otherwise than by the reporter. So far as it was the purpose of that order to prevent a publication of that document, though I must be allowed to entertain my own views upon the question of expediency, I have never had any cause to complain, and never have complained, that they who had a right to decide thought differently from myself. What I complained of was the assumption that I wanted a copy of the opinion for publication, and not to enable me to discharge an official duty; and the application of this order to restrain me from having a copy of this document, when I did actually want it to enable me to discharge an official duty. If I was otherwise understood, I regret that I did not express my ideas more clearly.

You describe to me, in your last letter, the extent of the alterations made in the opinion of the court after it was delivered, and you intimate I might have had this information earlier.

I feel no hesitation in leaving it to your own candor to judge whether, if I had received this information earlier, it would have prevented my reasonable wishes to see the document itself, that I might know what were "the proofs and authorities to maintain the truth of the historical facts and principles of law asserted by the court, in the opinion of the court delivered from the bench," which you say were afterwards added to the opinion; since it must be

admitted that these terms may embrace a wide field of examination and argument.

A large part of your letter seems designed to show that I published my opinion for political and partisan purposes, and that I could not have failed to see that it must be read by great numbers of persons who would never read the opinion of the court, and thus have an unfair effect.

I shall not yield to the desire I feel to reply at length to this part of your letter, and this for two reasons: the first is, that to carry on such a discussion without bitterness would seem to be almost, if not quite, impossible, — and therefore I do not think it would be profitable either to you or myself; the second is, that I do not deem a detailed reply to those parts of your letter necessary. It is a sufficient reply for me to declare that I have no connection whatever with any political party, and have no political or partisan purpose in view, and no purpose whatever, save a determination to avoid misconstruction and misapprehension, from which I have suffered enough in times past.

I had not the least doubt, when I consented to the publication of my own opinion, that the opinion of the court would be at once published in a similar way, and would appear as early as my own, in the principal newspapers of the country; as it undoubtedly would have done, if its publication had not been prevented by a special order. But the fact that its publication without my knowledge was restrained, or that it was not ready for publication when delivered, if such was the fact, does not authorize any one to impute to me intentional unfairness, or any willingness to do the least injustice to the reputation of others.

Being conscious of the truth of these facts, I deem them a sufficient reply to that part of your letter, and have only to add, that I remain, Respectfully, your obedient servant,

B. R. Curtis.

Chief Justice Taney replied as follows: —

Washington, June 20, 1857.

Dear Sir, — I received your letter of the 16th instant this morning, and am glad to find that there is nothing in it that requires me to do more than acknowledge its receipt, and to say that I am not aware of any thing in either of my letters that is not strictly defensive in its character. The acts of no other person are alluded

to in either of them further than was necessary to show the circumstances under which I, and those with whom I concurred, have acted, and the motives which induced us to adopt the course we have pursued.

I am, respectfully, your obedient servant,

R. B. TANEY.

The above letter closed the correspondence. Judge Curtis filed the letters among his private papers, with the following careful and deliberate summing up of the whole matter, in his own handwriting, entitled, —

SOME OBSERVATIONS ON THE ABOVE CORRESPONDENCE.

The 42d rule of the Supreme Court contains the following words: —

"All the opinions delivered by the court since the commencement of the term (January 7, 1835) shall be forthwith delivered over to the clerk to be recorded.

"And all opinions hereafter delivered by the court *shall immediately on the delivery thereof* be in like manner delivered over to the clerk to be recorded."

Instead of conforming to this rule, the opinion delivered by the Chief Justice was retained, and many material additions were made to it. I have marked in the margin of my copy the passages which I believe to have been thus inserted. I have no doubt of the correctness of my memory on this subject. I heard the opinion read twice: once in conference, and once from the bench. I listened to it with attention, and believe I know where and in what it was changed. These additions amount to upwards of *eighteen* pages. No one can read them without perceiving that they are *in reply* to my opinion.

Having thus retained the opinion contrary to the rule of the court, and inserted in it without notice to me what was designed to be a reply to parts of my opinion, when I called on the clerk for a copy of his record of it, he was prohibited from furnishing it to me; and I was thus deprived of all opportunity to see what had been inserted until the reporter's volume was issued, and it was too late to avail myself of the knowledge.

And when I complained of this, instead of answering my com-

plaint, an elaborate attack is made, after a month's reflection, upon my motives in consenting to the publication of my opinion.

In obedience to the rule of the court, I delivered a copy of my opinion to the clerk forthwith after it had been read. It then became one of the public records of the country. Any citizen had a right to a copy of it, and to print and publish it. I desired to have it printed correctly and in full, and took measures to effect this. The Chief Justice withheld his opinion, contrary to the rule, and for the purpose of altering it. The order to the clerk not to furnish a copy was quite useless while there was no original on file, unless for the purpose of concealing the fact that the original was retained to be altered. I do not believe any such order, wholly unprecedented as it was, would ever have been passed if the opinion had been ready for publication when delivered. But whether this be so or not, the prohibition to give me a copy after it was completed and delivered to the clerk to be recorded, was an act of usurpation; and the reason which is insinuated, but not stated, that it was conjectured I wanted it for publication, certainly does not render the act less offensive.

My purpose in the above correspondence was to place before Judge Taney the true character of his act, not to enter into an embittered controversy with him. I believe I have accomplished this purpose, and that he knows it.

Although I read this correspondence soon after it was closed, and have now thought it proper, in justice to my brother's memory, to include it in this Memoir, that it may furnish its own answer to some suggestions that have been made respecting his course in allowing an immediate publication of his dissenting opinion, I do not deem it necessary to add any thing to the comments which he himself made upon it, and which he left where they would be accessible after his death. I believe that those comments were deliberately made and deliberately preserved. I ought, however, to say that my brother had as high an appreciation of the judicial character and public services of Chief Justice Taney as any man who ever knew him. This is abundantly manifested in

what he said of the Chief Justice, publicly, after his decease, and which is included in the present work. Upon that eulogium I shall only say that Judge Curtis never spoke of any man, living or dead, otherwise than as he felt.[1]

The dissenting opinion of Judge Curtis, in this case, was greatly praised throughout the Northern States, for the clear, learned, and able manner in which it maintained the capacity of free persons of color to be "citizens" within the meaning of the Judiciary Act, and for the power with which he asserted the authority of Congress to exclude slavery from the Territories. These were the topics that most deeply interested the public mind at that time; and it so happened that his view of his judicial duty, under the requirements of the case, made it necessary for him to discuss them. But the practical importance of these questions has passed away. What then remains of this dissenting opinion, as of lasting value in the national jurisprudence? In my judgment, its permanent importance consists in the demonstration which it made of this proposition: — That the Supreme Court of the United States, sitting as an appellate tribunal to correct the errors of a Circuit Court, cannot, under a plea to the jurisdiction, decide that the lower court had no jurisdiction to hear and determine the cause, and then proceed to decide a question of constitutional law which arises only on a plea in bar to the merits of the action. The following impressive close of Judge Curtis's discussion of this part of the subject comprehends the whole substance of his objection to the course of a majority of his brethren: "I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri, save that raised by the plea to the

[1] See the remarks of Judge Curtis at the meeting of the Boston Bar, occasioned by the death of Chief Justice Taney, *infra*, Vol. II.

jurisdiction; and I do not hold any opinion of this court, or any court, binding, when expressed on a question not legitimately before it. The judgment of this court is, that the case is to be dismissed for want of jurisdiction, because the plaintiff was not a citizen of Missouri, as he alleged [that he was] in his declaration. Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached."

To those who do not fully appreciate the judicial functions of the Supreme Court of the United States, or who do not fully understand the limits within which it should carefully act, this may seem to have been hypercritical in its technicality. But to the instructed and enlightened student of our national jurisprudence, who contemplates the true function of the Supreme Court as the judicial arbiter of constitutional questions, these apparent technicalities will be recognized as pregnant with most important substance; for it cannot be doubted, that the temptation to be drawn into the expression of opinions on constitutional questions, because they are entering into the politics of the time, is one against which that court should be hedged by the strict and logical order of judicial action, which can alone produce a judicial, and therefore a binding determination.

From among the numerous letters addressed to Judge Curtis by individuals in widely separated quarters of the Union, respecting this dissenting opinion, I shall select two only; and I select them because they were written by persons of eminence in the legal profession, who might be considered as representatives of different sections of the Union.

From Judge Thomas.

Court House,[1] Boston, March 18, 1857.

My dear Judge, — Let me thank you for your opinion in *Scott in Error* v. *Sandford*. It seems to me to exhaust the subject. The manner and matter are alike admirable. The tone is firm, the learning thorough, the logic quiet but inexorable. A great occasion, well used for your own judicial fame, and for the vindication of the Constitution from the reproach of imbecility and inhumanity, which these new prophets bring upon it.

Very truly yours, Benjamin F. Thomas.

From Mr. Pettigru.

Charleston, S. C., March 24, 1857.

Dear Sir, — I received last evening a copy of the Courier containing your judgment in Scott's case, for which I presume I am indebted to you, and I thank you for the attention. I went through it last night, with great interest, notwithstanding its length. I am not quite satisfied with the disposal of the plea to the jurisdiction which you place on the insufficiency of the plea in abatement. That the plea was bad seems clear enough; but I am not so well satisfied that the court ought to take jurisdiction because the defendant does not know how to plead, — i. e. to argue logically. I have not seen the opinions of the Chief Justice and his adherents, and am therefore bound in duty to reserve judgment till I have heard both sides; but so far I agree with you on both points, that a colored man may be a citizen, and that the Missouri Compromise is constitutional; and [I] think further, that it was the most equitable, and indeed the only fair, way of settling the rival claims of North and South upon the Territory.

The reserve with which you have kept free from the political questions that give the case such painful interest, cannot be too much applauded, and I wish that the example may be followed as generally as it deserves universally to be commended.[2]

. . . . . .

Yours truly, J. L. Pettigru.

[1] Judge Thomas was at this time one of the judges of the Supreme Judicial Court of Massachusetts.

[2] The residue of this letter related entirely to another subject.

Note on the Dred Scott Case.

I deem it proper to say, in reference to the active exertions of Judge Wayne to bring about a change in the determination of the court in regard to the final disposal of the case of Dred Scott, after the second argument, that neither he nor Judge Grier was at all reticent on the subject, and that on the day when the vote was adopted by a majority of the judges, in conference, to set aside the opinion which had been prepared by Judge Nelson, and to have the constitutional validity of the Missouri restriction acted upon and denied, Judge Wayne spoke of the result as an important achievement effected by himself. I have therefore felt entirely at liberty to comment upon facts which became known, at the time of this occurrence, without any agency of Judge Curtis. He did not speak of these occurrences for many years, even after he had left the bench, excepting to the members of his own family, and one or two confidential friends. But the following letter, addressed to my nephew, the editor of this work, by the Hon. Clement Hugh Hill, formerly Assistant Attorney-General of the United States, shows that, shortly before his death, Judge Curtis spoke freely of what had happened in this case.

Boston, August 5, 1878.

Dear Mr. Curtis, — It will afford me much pleasure to comply with the request you made me a few days since, to write out my recollections of a conversation I had with your father, the winter before his death, in regard to the decision in the Dred Scott case, although there must be many of his old friends living who have heard the same account from him, and who perhaps recollect it more fully than I do.

One evening during the winter of 1873–74 (I think it was in December), I called upon Judge Curtis, at the Ebbitt House, in Washington, and spent more than an hour with him. He was in very good spirits and full of anecdote, and among other things gave me an interesting inside history of the Dred Scott case. He told me that the court had voted to affirm the judgment below, and

that Judge Nelson prepared, as the opinion of the court, the opinion he afterwards delivered as his individual judgment. Judge McLean and Judge Curtis were to dissent, in a brief opinion, to be drawn up, I think, by Judge McLean. I do remember Judge Curtis saying that, if the case had thus been disposed of, the opinions would have been devoid of all the bitterness which the case ultimately gave rise to. After this, it was urged upon the court, by Judge Wayne, how very important it was to get rid of the question of slavery in the Territories, by a decision of the Supreme Court, and that this was a good opportunity of doing so. I do remember that Judge Curtis said that Judge Wayne was instrumental in bringing about what followed; that he persuaded the Chief Justice to recall the case from Judge Nelson, and deliver the opinion of the court himself; and he busied himself also to persuade the other judges to concur in the Chief Justice's opinion, and particularly suggested to Judge Catron the entirely untenable ground upon which he concurred in holding the Missouri Compromise to be unconstitutional; namely, that it conflicted with the treaty by which France ceded Louisiana to the United States.

I take it that all this occurred after the second argument of the case alluded to by Judge Campbell, in his address on Judge Curtis, at the Bar meeting in Washington. (See 20 Wallace, pp. x. xi.)

Such, to the best of my recollection, is the substance of what your father told me. I have since regretted that I made no note of the conversation at the time, as he went into many details which have now escaped me. I do not think, however, that I have erred in my recollection, in any essential particular.

I remain, with great regard, yours very faithfully,

CLEMENT HUGH HILL.

With regard to the opinion prepared by Judge Nelson, and originally intended to be the decision of a majority of the bench, from which Judge McLean and Judge Curtis were alone to have dissented, it has been stated by Judge Campbell that it was not read in conference before another disposition of the case was moved.[1] This fact is not very material, since Judge Campbell admits that Judge Nelson's opinion was prepared by instruction of the majority, to be

[1] Memoir of Chief Justice Taney, p. 384.

read as the opinion of the court, and that it was, by Judge Wayne's suggestion, set aside, and that then the Chief Justice was requested to write an opinion on all the questions in the case as the opinion of the majority. We have Judge Nelson's own authority for the fact that the opinion which he read as his individual judgment in the case was the one that he originally wrote as the opinion of the court. In a letter written by him on May 13, 1871, to the biographer of the Chief Justice, he said: "I was not present when the majority decided to change the ground of the decision, and assigned the preparation of the opinion to the Chief Justice; and, when advised of the change, I simply gave notice that I should read the opinion I had prepared as my own, and which is the one on file."[1] All that Judge Nelson did to this opinion was to prefix a short paragraph in the first person, stating that he read it as his individual judgment. All the residue of the opinion is in the plural "we."

The biographer of the Chief Justice has deemed it proper to vindicate him from a charge of complicity with Mr. Buchanan, the incoming President, in regard to the decision to be given in this case. I never heard Judge Curtis intimate a word that could give countenance to this charge, or impute to Judge Wayne or the Chief Justice any motive but the mistaken supposition that the public excitement in regard to slavery in the Territories could be quieted by a judicial decision adverse to the power of Congress to prohibit its introduction. I think that he regarded this as Judge Wayne's motive, and with good reason; and that he was satisfied that Judge Wayne imparted this conviction to the Chief Justice. But I do not think that he ever, for an instant, imputed to Judge Wayne that he was influenced by Mr. Buchanan to do what he did, nor do I myself believe that such was the fact. Indeed, I do not imagine that Mr. Buchanan was a man who would tamper with the

[1] Memoir of Chief Justice Taney, p. 385.

administration of justice, and I am sure that the Chief Justice and Judge Wayne would never have brooked such an attempt.

My learned friend, the late Hon. Reverdy Johnson, in a letter of some warmth addressed, on the 6th of March, 1858, to a public meeting in Baltimore, and from which some extracts are given in the Memoir of the Chief Justice, referring to the mode in which the constitutional question of the power of Congress to exclude slavery from a Territory was dealt with in this case, said: —

> But this would seem to be obvious, that if it was the duty of the dissenting judges, Messrs. McLean and Curtis, to pass upon a question of such importance, and to argue it with unwonted zeal and rare ability, and with a practical appeal to Northern prepossession and sympathy, calculated to impress upon the public mind of that section a conviction of the right of Congress to prohibit slave labor in the Territories then or thereafter to belong to the Union, — a power so pregnant with danger to our continuance as one people, — it was equally proper that the judges who entertained a different opinion should have expressed it, and maintained it with all the ability and research within their power.
>
> Mr. Justice McLean's opinion occupies thirty-five pages of the report in 19 Howard, and Mr. Justice Curtis's opinion one hundred and three. The greater part of each is devoted to this very question, and as to the right to consider and decide it. The last-named judge concludes his with an apology for its length by saying, "These questions are numerous, and the grave importance of some of them required me to exhibit the grounds of my opinion. I have treated no question which, in the view I have taken, it was not absolutely necessary for me to pass upon, to ascertain whether the judgment of the Circuit Court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less would have been inconsistent with my sense of duty."
>
> Were these two opinions to be spread, as they were, with unexampled haste, broadcast over the land, and the rest of the court, who differed so widely and so decidedly, to remain silent? Were they by that very silence to leave the public to infer, as they might then

have fairly done, that they did not, or were unable to, maintain different doctrine? Assuming, therefore, what is I think palpably unsound, that the decision of the court on this question was in any sense extra-judicial, I hold it to be perfectly clear that the course adopted by the dissenting judges rendered it the duty of the court to correct, to the whole extent of their power, what they believed to be the serious constitutional errors which that course, if left unobstructed, was likely to fasten upon the public judgment.

Judge Curtis did not deem it necessary to take any notice of these remarks, made in a letter to a political meeting, however distinguished the writer might be; and all that Mr. Johnson said vanishes of course into air, as soon as it is remembered that every word written and read by Judges McLean and Curtis in this case was written and read as their dissent from an opinion of the Chief Justice, which they had heard read in conference, and that in that opinion the doctrine was elaborately maintained that Congress had no constitutional power to exclude slavery from any Territory of the United States. The propriety with which any member of the bench could touch this question, — the test of whether his views upon it were judicial or extra-judicial, — depended simply and solely upon his belief that the Circuit Court had or did not have jurisdiction on the facts averred in the plea to the jurisdiction. No judge who held on that plea that a free negro could not be a citizen, could judicially promulgate from the bench an opinion, under the plea to the merits, that the plaintiff was not a freeman because Congress could not constitutionally prohibit slavery in a Territory where he had once resided with his master's consent. Mr. Johnson seems to imply that, even if the views expressed were extra-judicial, it was proper, under the circumstances, that they should be expressed. The circumstances do not warrant the assertion, nor do I think that the judgment of lawyers would sustain it. The "unexampled haste" of which Mr. Johnson spoke, would

doubtless have been applied by the press to the circulation of the opinion of the Chief Justice, if it had been accessible immediately after it was delivered from the bench; for there was great eagerness on the part of the public to learn all that had been said in this interesting and exciting case.

I cannot take leave of this case and its various incidents, without expressing my regret that Chief Justice Taney did not finish the autobiography which he began at Old Point Comfort, when he was in the seventy-eighth year of his age. The fragment of his own life which he then wrote, and which has been used in Mr. Tyler's memoir of him published at Baltimore in 1872, is one of the most beautiful pieces of that kind of writing that I know of in the English language. The late Chief Justice was master of a singularly graceful and easy style, perfectly perspicuous and correct; and when he sat down in his old age, during a vacation at the sea-shore, to write an account of his own life, he commenced a work which, if he had completed it, would have been a most valuable addition to our political, juridical, and personal literature. He had lived and acted in scenes of great importance in our history, had the means of throwing much light upon the motives and characters of the distinguished persons with whom he had been associated in public life, and as Chief Justice of the United States for a period of more than thirty years, beginning with the administration of General Jackson and coming down to the early years of our civil war, he could have told of much that it would have been very desirable to know, and he would have told it in a charming way. What prevented his completion of the work which he had so felicitously begun, we are not informed.

Nor can I pass from the mention of his name, without a tribute of respect to his public and private virtues. He was indeed a great magistrate, and a man of singular purity of life and character. That there should have been one

mistake in a judicial career so long, so exalted, and so useful, is only a proof of the imperfection of our nature. The reputation of Chief Justice Taney can afford to have any thing known that he ever did, and still leave a great fund of honor and praise to illustrate his name. If he had never done any thing else that was high, heroic, and important, his noble vindication of the writ of *habeas corpus*, and of the dignity and authority of his office, against a rash minister of state, who, in the pride of a fancied executive power, came near to the commission of a great crime, will command the admiration and gratitude of every lover of constitutional liberty, so long as our institutions shall endure.[1]

I have dwelt thus long and minutely upon the case of Dred Scott, for two reasons: —

First, because I felt it to be my duty to Judge Curtis to make known accurately whatever he did, thought, or felt, concerning it.

Secondly, because we still have, and future ages to which our Constitution may descend will continue to have, a Supreme Court of the United States; and in the present and in all coming time, it is and will be important that those who occupy or shall ever occupy the exalted seats upon that bench shall understand, and take warning from, the mistakes of their predecessors.

Perhaps it may not be improper for me to state that my professional connection with this case, dating only from the third day previous to the second argument, did not lead me, at that time, to examine any of the technical questions arising out of the state of the record, or the question of the citizenship of a free negro. The Hon. Montgomery Blair, who had sole charge of the case for Scott, requested me to

[1] I refer to the case of John Merriman, a citizen, who in 1861 was imprisoned in Fort McHenry, near Baltimore, by a military order; and in whose case the writ of the Chief Justice of the United States was refused entrance into the fort, upon the excuse that the President had suspended the writ of *habeas corpus*.

assist him in the argument about three days before the case was called. I told him that there was not sufficient time for me to make any investigation of the technical questions arising on the pleadings, or to be of much service to him on the question of the capacity of a free negro to be a "citizen;" but that I thought I knew enough of the constitutional history of the country to be able, on very short notice, to maintain the affirmative of the proposition that Congress could prohibit the existence of slavery in any Territory of the United States, if it saw fit to do so, and that, if he would assign to me one hour of the time allowed by the rule of the court for the argument of his side of the case, I should be happy to assist him by a discussion of this constitutional question to the best of my ability. Mr. Blair very politely acceded to this arrangement, and I argued the constitutional question thus assigned to me. Two Senators, each of whom represented a slaveholding State, Mr. Crittenden of Kentucky and Mr. Badger of North Carolina, both of the highest rank as lawyers, Mr. Seaton, the wise and accomplished editor of the National Intelligencer, and other friends, urged me to write out and publish my argument. I did so, and it was printed by Mr. Seaton in his paper. I mention this, not as proof of merit in the argument, but because I was convinced, by this and many other occurrences, that some of the ablest minds in the South, at that time, did not regard it as supremely important to their sectional interests to have it judicially proclaimed that the Missouri Compromise restriction was unconstitutional. But at the time I made the argument, on a constitutional question about which I felt no doubt, I little thought what turn the case was to take, although I had a strong presentiment that great public mischief would be done, if the extreme views about slavery that were maintained by our opponents should prevail, by any thing short of a judgment arrived at by the strictest requirements of the record, and in entire judicial consistency. Of course,

there has been, and perhaps will continue to be, a great difference of opinion in regard to the judicial propriety of the final judgment in this case; but I think there can be no sound opinion, among lawyers, which will justify the assumption that a majority of the court "decided" that Congress could not prohibit the existence of slavery in a Territory of the United States.

CHAPTER IX.

1857.

Resignation of Office. — Reasons for the Step. — Correspondence occasioned by it.

JUDGE CURTIS, after his return to Massachusetts in the spring of 1857, expressed to me strong doubts about continuing to hold his office, and requested me, after I should have reflected upon the subject, to write to him concerning it. I may say, that from the first I understood the controlling reason for his resigning was the inadequacy of the salary; but I also understood that he no longer felt that confidence in the Supreme Court which was essential to his useful co-operation with its members, and with which he certainly began his connection with it. The correspondence with the Chief Justice, which is given in the preceding chapter, had no influence upon the determination to which he finally came. It will be observed, that that correspondence commenced in April, and was not terminated until after the middle of June. My first conversation with my brother, on the subject of his proposed resignation, occurred before this correspondence began; and in that conversation he expressed to me fully the reasons for resigning on which he finally acted. So far as his feelings concerning the court entered into those reasons, they sprang entirely from what occurred in the Dred Scott case before the adjournment of the court in March; and I am sure that they would have been the same, if the correspondence with the Chief Justice had never taken place. I am firmly convinced that his feelings

in regard to the court received no color even, from any thing that was personal between himself and any of the judges. His personal relations with all of them had always been of the kindest and most agreeable nature; and although the correspondence with the Chief Justice shows a personal conflict, and evinces a feeling that he had been improperly treated, the real ground of his dissatisfaction with the course of a majority of his brethren lay entirely behind that occurrence. To state that ground with proper accuracy, it was a conviction, more or less justified by what occurred before the adjournment of the court, but held with entire sincerity, that he could no longer expect, on constitutional questions, to see the court act with that judicial propriety and consistency, and that freedom from political considerations, which could alone enable it to retain the confidence of the country. The pecuniary reason for resigning was the leading and decisive one; the other, as will presently be seen, although secondary and subordinate, had a material influence.

His friend and classmate, Dr. Robbins, has said of his resignation, that "it touches the only part of Mr. Curtis's professional life upon which a shadow has rested;" and he alludes to "expressions of censure, mingled with those of regret, in private conversation and the public press;" and he says that "even those who felt entire confidence in the purity of his motives and the validity of his reasons found it difficult heartily to approve his course, on account of their deep sense of the loss of his services to the country."[1] Although I shared fully in the regrets which were felt, and was perhaps as likely as any one to appreciate the loss of such a man from the bench, I never sympathized in any degree with the censure to which Dr. Robbins alludes, and which undoubtedly was to some extent expressed. If there is any "shadow" resting upon his fame, on account of this resignation, it is proper that it should be dispelled;

[1] Memoir read before the Massachusetts Historical Society.

and to this end, his own feelings, and the feelings of those who stood nearest to him, should be laid fully before the reader.

My own opinion in regard to the step which he contemplated was expressed in a letter, which I have always been thankful that I wrote to him, and from which some extracts may now perhaps be appropriately given.

JAMAICA PLAIN, July 3d, 1857.

DEAR BROTHER, — . . . It is now twelve years, this very month, since Judge Story made known to me his purpose to quit the bench. I remember all his arguments and all his predictions respecting the court. . . . He looked at a resignation from much the same point at which you now stand, with the allowance for the difference of your ages, and with the further allowance, that he did not feel the pressure of pecuniary considerations, or the demands of his family. . . . He determined to resign; — but Providence did not leave him to act upon his intention.

The lapse of twelve years, and much more knowledge of the institutions of the country than I then had, have not convinced me that we ought to regard the Supreme Court as certainly destined to final disgrace. [Some reasons were here urged to show that the question seemed to be, whether he could do the most good by resigning or remaining.] Undoubtedly, a serious lesson will be taught, which cannot fail to be felt by the country, by the resignation of a judge at your time of life, for the reasons which will govern you, and which, whether stated or not, will be apparent to the whole public. It will be certain that you resign on account of the inadequacy of the salary, and on account of the undeniable fact, that the conduct of the court has not been such as can command the approbation of sound lawyers, or the respect of sound men, who regard the proprieties of judicial conduct as an important part of the administration of the law. Whatever is involved in this lesson, your resignation would certainly teach in a rather striking way; for you are at an age, and you have tastes and capacities, to make a long judicial life most desirable to you, if you could have it upon the conditions which it is so clearly the public interest to provide, and which can alone make it attractive to men like you. . . .

Whether you can do most towards this end by leaving the bench,

and leaving men to reflect on what may have driven you from it, or by holding on and maintaining the standard by which your course has hitherto been guided, is the real question, in my apprehension, so far as the interests of the country are concerned; and if there were no private interests of your own to come in and decide that question, I should certainly beg you to hold on.

But there are such private interests; and upon this part of the subject I must say that, while straitened circumstances and narrow means are hard enough for all educated men and their children, a poor judge is, of all conspicuous and important men, the least desirable spectacle. There are very few things that a judge can do to better his fortunes; and if a man has not independent means of his own, and the public will not make him independent, it must be a stronger case of public duty than I have ever seen that can impose upon him a moral obligation to sacrifice his own comfort, and the just expectations of his family, to the public advantage. . . .

I am very glad to find, by a note which I received from Uncle this morning, that he will be here soon. I have known very few men who take broader as well as more accurate views of any question of duty than he does, and I hope you will not feel obliged to act until you see him. . . .

Yours always, G. T. C.

On the same day on which this letter was written, and therefore before he received it, he wrote to Mr. Ticknor, whose wife and daughter had embarked for home on the 30th of June, from Havre, in a steamer which touched at Southampton, and left him in England to complete some business relating to the Public Library in Boston.[1]

To Mr. Ticknor.

Maplehurst,[2] July 3, 1857.

My dear Sir, — I thank you for your very interesting letter, which came to me a fortnight since.[3] Since that time I have been in Boston until yesterday. I got none but good accounts of Lizzie.[4]

[1] Life of George Ticknor, vol. ii. p. 356.

[2] The name of his country place at Pittsfield.

[3] This letter is contained in the Life of Mr. Ticknor, vol. ii. p. 402.

[4] Mrs. W. S. Dexter.

Mother saw her a few days since, and thought her going on well. You speak of returning in September. Before that time I shall have come to a decision upon a matter of great moment to myself, — whether to continue to hold my present office. The expenses of living have so largely increased, that I do not find it practicable to live on my salary, even now; and, as my younger children will soon call for much increased expenses of education, I shall soon find it difficult to meet my expenses by my entire income. Indeed, I do not think I can do so without changing, in important particulars, my mode of life. Added to this, I cannot have a house in Washington, and I must either live apart from my family from four to six months every year while I go there, or subject them to a kind of vagrant life in boarding-houses, neither congenial nor useful. I had hoped it would prove otherwise, and looked forward to being able to have a house there for six months in a year. But what with the increase of luxury and the greatly enhanced prices there, I have now no hope of being able to do this. I can add something to my means by making books, but at the expense of all my vacations, when perhaps I ought not to labor hard. The constant labor of the summer has told on my health during the last two years. Such is the actual state of the case as respects my duty to my family. Then as regards the court and the public, I say to you *in confidence*, that I cannot again feel that confidence in the court, and that willingness to co-operate with them, which are essential to the satisfactory discharge of my duties as a member of that body; and I do not expect its condition to be improved. On the other hand, I suppose there is a pretty large number of conservative people in the Northern, and some in the Southern States, who would esteem my retirement a public loss, and who would think that I had disappointed reasonable expectations in ceasing to hold the office; and particularly in my own circuit I believe my retirement would be felt to be a loss which would not presently be fully supplied. But I do not myself think it of great public importance that I should remain where I believe I can exercise little beneficial influence; and I think all might abstain from blaming me when they remember that I have devoted six of the best years of my life to the public service, at great pecuniary loss, which the interest of my family will not permit me longer to incur. I have no right to blame the public for not being willing to pay a larger salary; but they have no right to blame me for declining it on account

of its inadequacy. These are the principal views which have occurred to my own mind. I am now forty-seven years old, and must decide the question finally without more delay. I believe I have ten or twelve years' work in me, if my life and health be spared, which, without too much labor, would enable me to make a competent fortune for my own old age, if I should live to old age, and for my family after I shall be gone. I want your advice. I wish it could be given after an oral explanation; but I must decide between this time and September 1st. I have no time to lose, and, looking at the public convenience, the first day of October next is the proper time for my retirement from office, if I am to retire. Among all my friends, there is no one whose judgment on this question would have more influence with me than yours; for while I know your affection for me would cause you to look carefully after all that bears on my private welfare and my private duties, I believe also you would take a just and comprehensive view of my public duty. If you will let me hear from you at your earliest leisure, you will aid me in this important affair.

We are all well, though Lois[1] has had the scarlet-fever severely. Neither of the others took it. Walter[2] had not been well for some time, and I took him home just before vacation began. The change of air has been serviceable to him, and he is recovering. Please give my love to Aunt and Cousin Anna, and believe me ever

Affectionately yours,

B. R. CURTIS.

Mr. Ticknor did not receive this letter before he returned home, and he first learned of my brother's resignation when I met him on board the steamer on which he arrived at Boston early in September, after it had become public. The following note expressed in substance what I am sure he would have said if he had answered my brother's letter; and although it was expressed with feminine feeling, it comprehended all that could be truthfully said by those who felt at once the public and the private considerations bearing upon such an occurrence.

[1] Now Mrs. William G. Low, of Brooklyn, N. Y.

[2] His eldest son, then at Harvard.

FROM MRS. TICKNOR.

PARK STREET, Sept. 5, 1857.

MY DEAR JUDGE, — I feel very grateful to you for your kindness in writing to me to tell me of the great change you have made. I am so sorry that I really don't know what to say to you about it. I cannot doubt that your decision is just and right, but it is a mournful thing that it should be so. That a country so overflowing with wealth will not sufficiently recompense those who would willingly labor for its highest good, and that in its present confused and excited condition it should lose your influence and authority in just the place you are leaving, are sad facts, which trouble me much. But I will try to look most at your release from heavy labor and anxiety, and trust that you will no longer suffer from separation from those you love best. Your uncle will lament, as I do, the loss to the country; but he has also the same reliance upon your judgment. I look for him next Thursday, such is the blessed punctuality of steam. . . . He has had two months of great enjoyment in England. But for his love of work, of which he will find an abundance here, I should fear he might find Boston a little dull. Pray give my love to all with you, and congratulate your wife for me upon the adieu to Washington.

Always affectionately yours, ANNA TICKNOR.

I trust it is now apparent that his resignation was not determined on without due consideration; and that the question was one which a man must decide for himself, with a full right to expect that his decision would be regarded as correct. I have therefore only to give, as matters that may have some interest for the reader, the official and unofficial letters which accompanied or followed the resignation.

TO THE PRESIDENT.

BOSTON, Sept. 1, 1857.

SIR, — I hereby resign to you the office of Associate Justice of the Supreme Court of the United States, which resignation is to take effect on the first day of October next.

I have named that day because I shall then have discharged my-

self of all judicial business pending before me, and no suitor will be inconvenienced by my retirement.

My private duties are inconsistent with a longer continuance in the public service.

With great respect, I am your obedient servant,

B. R. CURTIS.

FROM THE ATTORNEY-GENERAL.

ATTORNEY-GENERAL'S OFFICE,
Sept. 14, 1857.

SIR, — I am directed by the President to inform you that he received some days ago your letter of the first instant resigning your office as Associate Justice of the Supreme Court, and caused it to be filed in this office. This morning he received a duplicate of the same letter, which he has disposed of in the same way. The President gives you his thanks for postponing the time of your retirement to a period when no suitor will be inconvenienced by it.

I am, with great respect, yours, &c.,

J. S. BLACK.

TO EX-PRESIDENT FILLMORE.

BOSTON, Sept. 1, 1857.

DEAR SIR, — Having received from you, as the President of the United States, the appointment to the office of Associate Justice of the Supreme Court of the United States, and having come to the conclusion to resign that office, it seems to me proper that I should state to you why I have done so.

The greatly increased expenses of living have rendered the salary attached to the office inadequate to provide a suitable home for my large family in Washington while attending the court there, and to pay my other necessary expenses. I am obliged to expend, in addition to my salary, my entire private income. By leaving my family at my place in the country throughout the year, I might be able to live on the salary, though this is not certain; but it does not consist with my views of my imperative duties to them to pass eight months of the year away from those whom the providence of God has placed nearest to me, and subjected to my care. This alone would be sufficient to decide me to retire from the public service and return to the bar.

Nor do I think that, in the present state of the court, or in any state of it which can reasonably be anticipated in my time, my con-

tinuance on that bench ought to be deemed of such public importance as to weigh much in favor of my continuing there. You will readily understand that this is a subject on which I cannot go into details, and cannot without indelicacy even offer reasons in support of the opinion I have expressed; but I can say it is an honest opinion, founded deliberately upon a careful scrutiny of the subject.

I have held this great trust six years under your appointment. I can assure myself of nothing concerning it, save that both in holding it and resigning it I have endeavored to do my duty.

With much respect, I am your obedient servant,

BENJAMIN R. CURTIS.

Mr. Fillmore's reply was as follows: —

BUFFALO, Sept. 4, 1857.

MY DEAR SIR, — Your letter of the 1st, informing me that you have determined to resign the office of Justice of the Supreme Court of the United States, has just come to hand, and I have perused it with surprise and regret. I had no suspicion that such a calamity was to befall the country at this time. I have always looked back to your appointment as one of the most fortunate acts of my brief administration, and one to which I and my friends could always point with proud satisfaction. This feeling was greatly increased by your unanswerable arguments in the opinion delivered by you in the Dred Scott case.

I cannot, of course, know what your duty to your family may require, but I am sure I cannot be mistaken in saying that your duty to your country requires that you should not resign. I beg of you not to despair, though there may be much to discourage; yet I am sure your services and abilities are appreciated by the bar and the intelligent portion of the public. I am sure no man has, in so short a time, gained a more enviable judicial reputation; and there is no man to whom the country looks with more hopeful confidence than to yourself; and I greatly fear that your resignation, especially at this time, will not only impair the confidence of all good and intelligent men in the stability of our institutions, but that the appointment of a successor may be *most unfortunate.* I will not be more explicit in my apprehension on this point. You may know who will probably be selected, but I confess I fear the worst.

I trust you will pardon me, therefore, for the earnest solicitude

which I feel on this subject, and excuse me if I urge you again and again to reconsider the subject, and, if you cannot make the sacrifice of holding the office permanently, at least consent to submit to it for a time, until a reasonable hope can be entertained that the vacancy will be well filled.

I write in haste, giving my first impressions, and must ask your indulgence for the freedom with which I have spoken.

I am truly yours,

MILLARD FILLMORE.

FROM JUDGE PITMAN, OF THE DISTRICT COURT OF RHODE ISLAND.

PROVIDENCE, Sept. 20, 1857.

DEAR SIR, — It was with much sorrow that I received yours of the 1st instant, informing me of your resignation of the office of judge of the Supreme Court of the United States. There is a universal sentiment of regret at this determination of yours among all whom I have heard speak on the subject; but you are the best judge of the duties which you owe to the public, and to yourself and family. My loss as one of the public, I fully appreciate; and also the loss of an associate in this district, whom I so much esteem, and I fear whose place will not be filled to my satisfaction. I deem it a sad misfortune, and one which indicates badly for the future, that an honest judge will not find himself pleasantly situated on the bench of the Supreme Court of the United States. It seems to be expected that judges are to lend themselves to support the party to which they owe their promotion. And I fear that a court as independent as the Constitution could make it, and which has heretofore been looked upon with so much confidence to protect us from the madness of the times, will now be considered as one of the instruments of a party. I intended to have written you some time since, thanking you for your most able and independent opinion in the Dred Scott case. It will stand to give you eternal honor, when the unfortunate opinion of the majority will have been consigned to the contempt which it merits; if, indeed, we shall ever recover from the downward tendency which so strongly foreshadows our destruction. . . . I hope I may have the pleasure of seeing you again at the bar, if I may not be favored with your presence on the bench; and I wish all the prosperity and happiness in your return to the bar which you so well deserve.

Whoever may be your successor, I have no reason to expect that my situation as judge will be much longer prolonged, and therefore it may be of little consequence to me personally.

I am very truly your friend and obedient servant,

JOHN PITMAN.

FROM JUDGE HARVEY, OF THE DISTRICT COURT OF NEW HAMPSHIRE.

CONCORD, Sept. 5, 1857.

DEAR SIR, — On my return home last night, after an absence of a few days, I found your letter of Sept. 1, in which I am informed that you have come to the conclusion to resign your office of Associate Justice of the Supreme Court of the United States.

No intelligence could have been more unwelcome or unexpected by me.

At my time of life, now so far advanced in years, and having already outlived two of your predecessors, both of whom were younger than myself, I had no reason to expect, and indeed the thought never occurred to me after your appointment, that the office would ever become vacant again, from any cause, during my life.

I am sorry to learn that that event is now about to take place. Most sincerely do I regret it; but I have no doubt you have fully considered the subject, and have the best of reasons for it.

Your uniform kindness towards me, at all times, will ever be remembered, and believe me, dear sir, I am, with great respect and regard, Yours most truly,

MATTHEW HARVEY.

FROM JUDGE WARE, OF THE DISTRICT COURT OF MAINE.

PORTLAND, Sept. 6, 1857.

DEAR SIR, — I hardly need say to you that it was with very great regret that I learnt from your letter your determiuation to vacate the office you now hold on the bench of the Supreme Court. It came to me entirely unexpected, and though, on a little reflection, my surprise is diminished, my regret is increased. I may add, that the feeling of the public, and especially of the bar, is one of unmingled sorrow. I can easily comprehend that you may have various reasons for wishing tc withdraw from the court. The powers which

have always been supposed to be vested in it, of controlling and annulling the legislation of not only the States but of the United States, when exercised on ordinary subjects of legislation in the most cautious and temperate manner, is one of very great responsibility. But when it touches great political questions, involving the interests and passions of the whole nation, the responsibility is fearful. I do not ask any man, and I can hardly blame him for declining it.

I do not understand, for a certainty, from your letter, whether it is your intention not to attend the September term of the court in this district, though I infer, from the tenor of your letter, it is. All the business on the docket at the Circuit term was, I believe, disposed of that was ready. Since, there has been one Admiralty appeal entered that will be ready for hearing at the next term; and this is all that I know of which cannot be disposed of without your presence. Some of the bar have expressed a wish to know beforehand, for a certainty, whether you contemplate coming at this term or not.

With sentiments of great respect,

ASHUR WARE.

FROM CHIEF JUSTICE TANEY.

FAUQUIER SPRINGS, VA., Sept. 7, 1857.

DEAR SIR, — Your letter informing that you have resigned the office of Associate Justice of the Supreme Court did not reach me until the day before yesterday.

My own experience has long since shown me the inadequacy of the salary attached to the office. At your time of life, you may reasonably expect many years of health and strength enough for judicial and professional labors. And I have no doubt you have judged wisely in returning to the bar instead of remaining on the bench, and diminishing yearly the provision you had made for your family before your appointment.

Respectfully, your obedient servant,

R. B. TANEY.

FROM MR. JUSTICE NELSON.

COOPERSTOWN, Sept. 4, 1857.

MY DEAR SIR, — Your favor of the 1st instant has taken me altogether by surprise; and personally, as well as publicly, I sin-

cerely regret your determination. I was fully aware of the sacrifice you made pecuniarily in accepting the judgeship, but had hoped that you had made up your mind to submit to it. I do not, however, question the wisdom of your decision; on the contrary, I am free to say, if I was not in this place, with my knowledge and experience of its responsibilities and sacrifices, I should never hold the office. I have the advantage of you, however, as my age is such that, in the ordinary course of life, my period of judicial labor is short. You had a long term in prospect, and from the condition of the members of the bench were unable to tell who would be your associates. A few years must work an extensive change. God grant the successors may be worthy of the place and the Republic! Though we shall be separated as to judicial labors, I trust you may be with us in an equally honorable and useful service, at our stated term, as a counsellor and friend of the court. And if I should see you advanced as a member of a still higher court in the other end of the Capitol, there is no friend who will witness it with sincerer satisfaction. . . .

Very truly and sincerely yours,

S. NELSON.

FROM MR. JUSTICE CATRON.

TULLAHOMA, TENN., Sept. 8, 1857.

MY DEAR SIR, — I have just received your note informing me that you had transmitted to the President your resignation as Associate Justice of the Supreme Court of the United States. I had seen such an annunciation by telegraph four days since, which I supposed to be true from a conversation you and I had last winter. I regret that you felt constrained to take the step, on several accounts: the bench has been filling up for some years past with *lawyers*, and that of the best the circuits afforded, with characters suited to the position; the loss of one of these is matter of public concern.

On personal grounds, I regret your resignation very much. Men may be good lawyers and good judges, but so disagreeable in their official relations and social intercourse as to distress one greatly. I have suffered much from it; but I say it in all sincerity, that in your case I never heard a word, nor saw an act, calculated even to irritate. Your conduct afforded me pleasure in the consultation-room, and your conversation delight over the social glass.

That we may again meet I sincerely hope. If I can be of any service to you or yours, or to your friends, command me freely. Present my best regards to Mrs. Curtis, — in which Mrs. Catron joins me, and includes yourself.

With great regard, yours truly,

J. CATRON.

FROM MR. JUSTICE WAYNE.

WASHINGTON, Sept. 21, 1857.

MY DEAR SIR, — I have been very much of a wanderer for three weeks on my way to this city, and your friendly letter, for so I esteem it, has overtaken me here; but I have returned in good health, and Mrs. Wayne is well.

I need not assure you how much I regret your resignation, both on my own account and that of the public; but having the fullest confidence in your judgment, I cannot doubt your having done well, both for yourself and family. What are we in social life without adequate means to live up to our positions, and to give to our children the chances of doing so too, with the aid of something to begin life? How uncertain too is life! We know not when we shall be called away. God grant that yours may be spared for many years, for honor, happiness, and usefulness. But I shall miss you much, privately as well as officially, — all of us will feel it. But though separated from those relations in which we were, I shall ever cultivate for you and yours a very sincere friendship. Write to me at any time, particularly if I can serve you in any way. Present Mrs. Wayne and myself to Mrs. Curtis and your children. We shall leave here on Thursday for Cincinnati, and perhaps further west, maybe Kansas.

I am sincerely your friend,

JAMES M. WAYNE.

FROM MR. JUSTICE CAMPBELL.

WASHINGTON CITY, Sept. 3, 1857.

DEAR SIR, — Your letter of the 1st instant was received this morning.

I greatly regret the decision you have made to resign your place on the bench of the Supreme Court. Had I been aware that such a measure was in contemplation, I should have placed before you an earnest remonstrance on the subject. There are public con-

siderations which in my judgment render your resignation a misfortune to the country.

I hope you will not consider it obtrusive or unbecoming in me to express to you my high appreciation of the very great abilities you brought to the performance of your duties, and my respect and veneration for the integrity with which those duties were habitually and consistently discharged on your part. It is a great satisfaction to me that our relations on the bench have uniformly been those of courtesy and kindness, and I trust that they may from time to time be renewed, notwithstanding this official separation.

Mrs. Campbell joins me in sincere regret for the decision you have made, and in the expression of esteem and respect for Mrs. Curtis and yourself.

Very truly yours, J. A. CAMPBELL.

I find no letter from Judge Grier, but his sentiments were expressed in the following: —

FROM MR. E. N. DICKERSON.

NEW YORK, Sept. 16, 1857.

MY DEAR SIR, — It was with very great regret that I learned from Judge Grier, who was staying with me at Rockaway, your resolution to resign your office of Associate Justice of the Supreme Court. We had been talking about the newspaper rumor at the table in the evening, and we agreed to discredit it as an idle trick of some country editor to set aspirants for office in an excitement; but in a few minutes your letter arrived which overturned our theory. You can't conceive how much regret Judge Grier exhibited, and how much we all felt that a serious public loss had been sustained. Judge Nelson has expressed the same feeling with great sincerity, and every gentleman at the bar whose opinion is worth repeating has joined in a common expression of regret.

Since it was made public, the feeling has been so universal that I have hoped you would have reconsidered your determination and yielded to the general desire of the bar and country, and I am now actuated by the hope that you will see, in the manner your resignation has been received, an inducement to withdraw it. I sin-

cerely hope that such may have been the effect, and that you will relieve the anxiety which every one feels about the appointment of your successor, by retaining a position which you have so highly honored, and from which you can be so ill spared.

My kind remembrance to Madame and to the children.

Very sincerely your friend,

EDW. N. DICKERSON.

FROM JUDGE MCLEAN.

CHICAGO, July 12, 1857.

MY DEAR JUDGE, — I have just received your note, and have read the latter part of it with the deepest concern. I beg you not to act until another winter at Washington.

The court can never retrieve what it has lost. But should we, under such circumstances, abandon it? We may do the country some service by remaining, at least another term. . . .

Again I entreat you to postpone action until you attend another term.

I have no doubt wharfage is a maritime lien. It is given in Michigan by statute, and does not depend on possession. The District Judge held, the twelfth Admiralty rule limited the maritime lien to material-men. In this, I think, he was mistaken.

When you receive this, please write to me, directed to Cincinnati.

I have about seven hundred cases on the docket at this place. Mrs. McLean is not with me. My regards to Mrs. Curtis.

Very truly yours,

JOHN MCLEAN.

FROM THE SAME.

CHAPEL WOOD, July 30, 1857.

MY DEAR JUDGE, — Your favor of the 23d instant I have received and read with attention. Your reasons for the step you propose to take are strong, and especially those which relate to your family. I frankly admit, much as I should deplore your loss on the bench, both from public and private considerations, if the future did not promise more than the members of the court now realize, I could not object to your resignation.

I think it is probable that at the next session of Congress we

shall be relieved from circuit duties; and there is some ground to hope that our salaries may be increased to eight or ten thousand dollars. If you could be assured that these changes would be made, would it not change your present purpose?

I have no recent or reliable information from the party in power in regard to either of the above subjects. But I judge, from the party sagacity of the friends of the Administration, that they will not suffer so favorable an opportunity as the next session will afford to pass without an increase of their patronage by creating circuit judges and giving permanency to their constitutional views. Nothing of this kind could be expected from the Whigs, if they were in power, as they are always divided among themselves, and especially in making appointments to office. This measure will enable the judges to be with their families while in the discharge of their duties. . . .

If you have not some local arrangements which will not admit of a postponement, is there not enough in the possible, not to say probable, events of next winter to justify a delay of your resignation some three or four months?

Would you not feel a little awkward at the bar? There is no instance in our history where a judge of the Supreme Court left the bench and afterwards engaged in the practice of law. Chief Justices Jay and Ellsworth resigned, but neither of them afterwards appeared at the bar. . . .

The strongest consideration that I can present against your resignation is, that our country is in a great crisis, and unless there shall be a thorough reform in the administration of the government, it will be overthrown in twenty years. On the bench, being in a minority, we cannot do much, except by maintaining the great principles of the Constitution. . . .

Having before you all the circumstances and facts which have a bearing upon the question of resignation, you are more competent to decide than your friends can possibly be. While I shall most sincerely and deeply regret the separation, I trust, should you leave us, that your cherished hopes may be more than realized at the bar. In that event, there will be only left for me to remember with great interest the intercourse we have had on the bench, for the last seven years.

Very sincerely yours,

JOHN MCLEAN.

FROM THE SAME.

CHAPEL WOOD, Sept. 6, 1857.

MY DEAR JUDGE, — In our papers of yesterday, it was announced that you had resigned your seat on the bench, and the receipt of your very kind letter confirmed the report. Although I had reason to believe, from your last letter, that you would come to this determination, yet I cherished a hope that you would postpone the resignation, — at least until after our next term. But I feel bound to say, the reasons you give show such a high moral obligation and Christian duty, that I cannot say you have erred.

My nature is so selfish, that I felt a regret that I cannot describe, both in regard to personal considerations and also for the irreparable loss sustained by the bench. When Story left us, the same sensation oppressed me. One change after another, since I have been a member of the court, has occurred, until I have lost the interest and pride I once felt in the tribunal. In 1830, when I first took my seat, the court commanded the respect and veneration of the country; but it can never hope to regain so elevated a position in the future. While I remain a member of it, I shall endeavor to think of the time past, rather than of the present, or the time to come.

In our journey through life, the most interesting associations are broken, and we are thrown upon the past to cherish in our memories and in our hearts whatever sweetened our labors and contributed to our happiness.

I hope, my dear Judge, that your expectations will be more than realized at the bar, and that your days may be peaceful, prosperous, and happy. And rest assured, that no change of circumstance or place can lessen the esteem and affectionate regard of

Your friend, JOHN MCLEAN.

Mrs. McLean unites with me in regards to Mrs. Curtis and yourself.

FROM THE HON. REVERDY JOHNSON.

SARATOGA SPRINGS, Sept. 11, 1857.

MY DEAR JUDGE, — A letter just received from your brother, to whom I wrote on the subject, confirms the report of your resig-

nation. Your private reasons, as he states them, are controlling; but I cannot tell you how sincerely I regret your leaving the bench. The loss to the public no one knows better, I think, than I do; while to me personally it is especially painful. I may be pardoned, I hope, in saying, even to yourself, that I have never known a mind more peculiarly fitted for judicial duty than yours. That the change will be to your benefit in a pecuniary sense, I am sure. This will be the consolation of your friends, — it is the only one they will have. That your life may be long spared, and your success be all that you wish, is the ardent hope of

Your friend and servant,

REVERDY JOHNSON.

FROM THE SAME.

BALTIMORE, Sept. 22, 1857.

MY DEAR JUDGE, — Thank you for your kind reply to my note from Saratoga. As I then said, your reasons for retiring were conclusive, but I yet wish that you had delayed it until after the next term of the Supreme Court, as your reasons would be (as I think they are) by many persons misunderstood, not only unjustly to yourself, but to the other members of the court. I hope you will not think it amiss, that I have taken steps to put the matter on its true footing. An editorial to that effect will perhaps, in a few days, appear in the Courier and Enquirer, New York. You know how sincerely, with yourself, I value the high character of the court, and how deeply we should feel the loss of it, in public opinion. The sooner, therefore, that every misrepresentation is corrected, the better; and with that view I have done what I state. Who your successor will be is yet uncertain. . . .

It would much increase the true concern of losing you from the bench, if I thought that I was not often to meet you. It is in all sincerity that I assure you, that much of the gratification I have had in attending the Supreme Court was that you were of it. Wishing you every success and happiness in life, I am, as ever,

Faithfully your friend,

REVERDY JOHNSON.

I do not know that Mr. Johnson's intended explanation of the reasons for the resignation was ever published; but

I presume it was not, as I find the following on the back of his last letter, in my brother's handwriting: —

Replied on the 27th, and said in substance that the only cause justifying my resignation was the insufficiency of the salary; but that I had never authorized any one to *deny* that my regrets were diminished by the *state of the court*, — that I could not do so with truth, and *therefore*, to prevent misapprehension, wrote, &c.[1]

After all the serious regrets expressed by these grave and learned persons, the reader will be amused by a sally, which came from one whose brilliant mind afterwards suffered an eclipse, that never passed away until death released it from the frail tenement which had been overmastered by its eager and incessant activity: —

FROM ST. GEORGE TUCKER CAMPBELL, OF PHILADELPHIA.

September 28, 1857.

MY DEAR JUDGE, — Is it a fair question to say why? Now that you have stepped down to the level of your fellow-craftsman, that indefinite feeling of restraint is gone, and I feel at liberty to ask questions.

I knew from our conversations while you were on the bench, that you doubted; but that was a year since.

Do you return to active practice, or the dignified retirement of writing *law* books? — because I feel certain that you cannot mean to live without law.

Honor bright, is it politics? I hear, the Senate. I should be glad of this, patriotically as well as selfishly, for then you would travel this way, and perchance we might meet in Washington. Do you mean to practise there? Or, in fine (this letter won't reach you till you have left the bench), what the devil do you mean to do? It will be a queer sensation to be *decided upon*, after having had the last word for some time. I am sincerely glad that you have so decided. It will be more pleasant to meet and see you. A judge is a chilly thing always; — if he is not, he is undignified; — the line between is shady. Let me have a word from you at your

[1] The words printed in Italics are underscored in the original.

leisure, and I look forward with sincere pleasure to the day we meet on the same level again. With my kindest regards to Mrs. Curtis, believe me,

Very sincerely, ST.G. TUCKER CAMPBELL.

P. S. If you haven't resigned, burn this without reading it. It's rather *free* to a judge.

ST.G. T. C.

CHAPTER X.

1857–1874.

Return to the Bar. — Death of Mrs. Anna W. Curtis. — A National Reputation. — A great Practice of Seventeen Years. — Its aggregate Pecuniary Results. — Some Opinions on Constitutional and other Questions. — Address to Judge Sprague on his Retirement from the Bench.

JUDGE MCLEAN'S anticipation that my brother "might feel a little awkward at the bar" proved not to be correct as soon as the trial was made; and whatever doubts Judge Curtis may himself have had were immediately dispelled. Within a week after his resignation took effect, he received seven retainers in important cases. He established himself in an office in Boston, in a central position where lawyers "most do congregate," and having engaged an old and faithful clerk who had served him before he became a judge, he began to lead the life of a "barrister" in the first week of October, 1857. Writing in the summer of 1858 to Mr. Greenough, his brother-in-law, who was then absent in Europe, he said: —

I expect to find it dull enough in town, during so much of the summer as I am to be here. But as one purpose of my return to the bar is to earn some money for my wife and children, I must stay here and work while work is to be had, and I am able to do it. Thus far I have not been disappointed in my expectations, and if I have health and no bad fortune, for the next ten years, I can place them where I should desire to, — not with wealth, which I do not desire, — but with a competence. I wish I were with you in England for three months. I desire it above all other mere grati-

fications. But I feel no assurance that the wish will ever be fulfilled. Each year I say to myself, perhaps I may go next year, but the next year brings its own incompatibilities.[1]

As affording some measure of a very important branch of the practice on which he entered in the autumn of 1857, I have examined his Opinion Books for the whole period after his return to the bar. These opinions are not brief answers to specific questions, without the processes of reasoning which led to the results. They are full discussions of the cases, — such discussions as would be given by a court in pronouncing judgment. His known judicial habit of mind led parties and their attorneys to resort to him as an authority, whose view of their controversies would be of great value to themselves, and might prevent the necessity of litigation. It often proved so; for although in the vast number of cases that were submitted for his opinion, during the seventeen years of his second period of practice, he was called upon, in a great many instances, to defend as an advocate the views that he had expressed as a counsellor, in many other instances his written opinion settled the controversy, although it had not been asked for by both parties. The examination which he made of the subject was so thorough, the reasoning was so sound, the learning appropriate to the question was so accurately applied, and there was so much confidence felt in his fairness of mind, that his opinions carried with them great weight.

No man is infallible; and it is not meant to be implied that in the great body of legal discussion which now lies be-

[1] The tranquillity and happiness of his domestic life remained unbroken from the time of his second marriage, in 1846, until the month of April, 1860. On the 24th of that month, Mrs. Anna W. Curtis died in Boston, leaving three children. She had inherited from her father (Mr. Charles Pelham Curtis) his calm and equable temperament, to which was added a firm and decided, though most amiable character. Her reading was unusually large and varied, and her musical talent and tastes had been much cultivated. Her married life was one of entire devotion to her husband and to the care of his children.

fore me in Judge Curtis's Opinion Books, kept from October, 1857, to June, 1874, he was always right in his reasoning or his conclusions. But probably there is no similar record extant, concerning such a variety of subjects, arising in the practice of an American lawyer, in which so extensive a field of jurisprudence has been covered by such careful and thorough discussions, uniformly based upon an exact statement of the case that was to be considered. At first, the applications for his opinion came from his immediate neighborhood. But they soon began to come from other quarters of the Union; showing that his judgment upon important questions was held, in communities where the local law would enter into the treatment of the subject, or where some question of Federal jurisprudence was involved, or the conflict of laws would have to be considered, in as high estimation as it was in his own State or city.

In these opinions, filling nearly one thousand closely written pages, of two folio volumes, and covering a considerable proportion of the controversies arising in different regions of the country, during a period of seventeen years, — some of them relating to great operations of public importance, and embracing questions of State or Federal Constitutional Law, and some concerning merely private interests, — the style in which they are written is uniformly the same. Lucid, exact, logical argument, embracing all the proper suggestions of an opposing view, marks the whole. While there is no redundancy, the same condensation of thought and expression that is necessary in oral discussions at the bar, when an advocate is limited by a rule of time, and in which Judge Curtis was so great a master, is not always found in his written opinions given as a chamber counsel, nor was it always needed in such writings. In these discussions, he often enlarges more than he would have done at the bar; and this was done, because the discussion was to go into the hands of others, to whom

a more ample treatment of the subject would be useful. But, in general, these opinions are full of the same clearness and force of reasoning, that characterized his oral arguments.

As a source of professional income, his written opinions brought an important part of his receipts; although his charges for these or any other professional services were never immoderately high. He was aware that his clients were, in general, obliged to compensate him according to his own measure of the value of his services; or, as he once expressed it, that they were at his mercy, in the matter of fees. He was therefore in the habit of making a careful, and even judicially fair, estimate of what it was proper, under all the circumstances, that they should pay. He very rarely met with any complaint; and he did not always require that payment of any amount should be made. "I have known him," said a gentleman of the Boston bar, "in cases where he had thought that the judgment had fallen too hard upon his client, to turn and relinquish every dollar of his fee, in order to soften the adverse blow, and that, too, without a word, without any open demonstration, and probably without any body knowing it except myself, his book-keeper, and client."[1] Almost invariably, however, when there were not peculiar circumstances calling for such sacrifices, whatever he named as his compensation was paid without any hesitation.

Another large part of his professional income was of course derived from his practice as an advocate in the Federal courts, and in the courts of his own and of other States. In the Supreme Court of the United States, during this period, he argued forty-six cases, involving every variety of subjects that come into discussion in that tribunal.[2] In

[1] Remarks of Hon. Charles L. Woodbury at the meeting of the Boston Bar held after the death of Judge Curtis.

[2] Reported in the volumes from the 20th of Howard to the 19th of Wallace, inclusive.

the Supreme Court of Massachusetts, in the same period, he made arguments *in banc* in eighty cases.[1]

From these various sources, a large professional income flowed in upon him with great steadiness after his return to the bar. Judging from all the means that are before me for such a computation, it appears that during these seventeen years, from October, 1857, to June, 1874, his aggregate professional receipts were about $650,000. But the fortune which he left to his family was much less than this amount. He always lived liberally, but without any ostentation, and he was not always fortunate in his investments. Yet his wish to leave a competency to his family was fulfilled.

Instructive and important volumes might be made by the publication of the opinions to which I have referred in this chapter. But many of them relate to private concerns, which it might not be proper to bring before the public, since they did not become subjects of public litigation. If, therefore, any collection of them shall hereafter be published, it must be one carefully selected. There are some of them, however, which relate to public and constitutional questions, on which Judge Curtis's views will be regarded as important, and which I include in the present volume, as some of the most interesting specimens of his method of treating such subjects. Taken as the complement of his judicial opinions on constitutional questions, — and they lack only the authority of judicial position to enhance their value, — the opinions given in his private practice warrant a very high estimate of his rank as a constitutional jurist. Indeed, giving its proper scope to the term Constitutional Jurisprudence, I do not think that he should be regarded as less eminent or less accomplished in that department than he was in any other.

[1] Embraced in the Reports of that court from the 10th of Gray to the 112th of Massachusetts, inclusive.

CONSTITUTIONAL LAW. — REMOVAL FROM OFFICE.

Opinion.

My opinion has been requested upon the question whether the Governor of Massachusetts, either with or without the advice and consent of the Council, has power to remove the "Superintendent of Alien Passengers," during the term of three years for which he was appointed and commissioned.

The act of June 6, 1856, by which this office was created, provides, in its first section, that "the Governor and Council shall upon the passage of this act appoint a suitable person *for the term of three years*," &c.; and the second section enacts, "At the expiration of the said term, and hereafter, whenever a vacancy shall occur, there shall be appointed to fill the vacancy in said board, a person *who shall hold the office for a term of three years*."

The Legislature have thus created an office, and enacted that its term shall be a term of three years.

There can be no doubt that the Legislature had power to create this office and prescribe how it should be filled and upon what tenure it should be held.

Not being one of the officers provided for in the Constitution, it falls under the clause which confers on the Legislature power "to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said Commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties *and limits* of the said civil and military officers," &c. It was at the option of the Legislature in creating this office and fixing its tenure, to make its tenure during good behavior, or during a fixed time absolutely, or during the pleasure of the Governor; and it is very clear that the Governor has no power to change the tenure which the Legislature has fixed. This being so, it is clear he cannot remove at pleasure an officer who, by force of the law creating the office, holds for a fixed term of years, and whose tenure is not by law made subject to his will. In reference to such offices as this, it should be observed that the Governor derives all his powers, even his power of appointment, from the law which creates it. For our State Constitution does not contain a general provision, like that in the Constitution of the United States, conferring on the President the power to appoint to all officers estab-

lished by act of Congress, unless Congress should enable the courts of law or heads of departments to appoint inferior officers. And when the Governor exercises the power which this law gives him, he must, of course, act in conformity with it, and appoint for three years; and having done so, his whole power is exhausted, until a vacancy occurs, by the expiration of the term, or by death or resignation.

I am not aware that any court, or any legislature, has ever considered that it is incident to appointing power to remove at pleasure an officer required by law to be appointed and commissioned for a fixed term of years, and not by the terms of that law subjected to such removal. The great debate which took place in Congress in 1789, which settled the practice of the Federal government, proceeded upon the ground that the appointing power, if not controlled by law, had by implication the power to remove. But no support was given to the theory that, even under the Constitution of the United States, the Executive could turn a tenure for a fixed term of years into a tenure during pleasure; and the practice, both of Congress and of our State Legislature, has been, when establishing offices to be held for a term of years, to add *unless sooner removed*, &c., — thus qualifying the tenure, and admitting the necessity of such qualification to enable the executive to remove.

In *Avery* v. *Tyringham*, 3 Mass. R. 177, Chief Justice Parsons says, it is a general rule that an office is held at the will of either party, *unless a different tenure* is *expressed in the appointment*, or is implied from the nature of the office, or results from ancient usage. In *Ex parte Hennen*, 13 Peters, 259, the Supreme Court of the United States said, all offices, the tenure of which is not fixed by the Constitution, or *limited by law*, must be held either during good behavior, or at the will of some department of the government.

In *Marbury* v. *Madison*, 1 Cranch, 162, it was held by the Supreme Court of the United States, that, where the law creating an office provided that the person appointed should hold the office for five years, the officer was not removable by the Executive.

The case of *Hoke* v. *Henderson*, 4 Devereux's R. 1, contains a very able and instructive discussion of this subject; it was there held that the tenure of an office prescribed by the Legislature was part of the right of the incumbent, of which he could not be deprived. In *Smyth* v. *Latham*, 9 Bing. 702, it was ruled by the

judges of England, on error, in the Exchequer Chamber, that when an office is created by a statute, the question as to its duration and tenure is no other than an inquiry into the meaning and intention of the statute itself.

I think this is as good law here as it is in England. And that where the Legislature have, as in this case, shown a clear intention to have the tenure of the office a term of three years, and have not conferred upon the Governor any power to shorten the term, he has no such power by any implication. Such an officer holds for a term of three years by as firm a title as if the Constitution had fixed the term of three years as the duration and limit of his right; for the Governor has no more implied power to disregard or qualify a constitutional law enacted by the Legislature, than to disregard or qualify the fundamental law enacted by the people. And, to hold for three years is as much a right of an officer appointed to an office having that tenure by law, as to hold during good behavior, where that is the legal tenure. In one case no more than in the other is it a tenure at the pleasure of the Executive.

In my opinion, the Governor has not the power of removal under the law in question.

B. R. Curtis.

April 20, 1858.

MARINE INSURANCE. — GENERAL AVERAGE.

Case.

The ship Star of Hope sailed from New York on the 10th day of February, 1856, bound for San Francisco. Nothing material occurred on the voyage until the 14th of April, when, being in latitude 46° 54′ south, longitude 68° 36′ west, a great steam and smoke were discovered ascending from the fore and aft hatchways. Investigation was immediately made, and the conclusion was that the cargo was on fire. The hatches were secured, and measures taken to exclude the air from the hold, and it was decided to make for the nearest port for safety. San Antonio, on the coast of Patagonia, being the nearest port, the vessel's course was shaped therefor. On the 18th of April, they made the land, and approached with a signal for a pilot, and, the lead being kept going, found eight, seven, six and a half, five, and four fathoms of water. No pilot appeared, and the master, under the apprehension that the ship would blow up, having a quantity of gunpowder

and spirits on board in the hold, determined to run into the harbor without a pilot. In making the attempt the ship grounded, and struck heavily, and there sustained much damage.

The master hoped to be able to get into the harbor safely without a pilot, and believed he probably could do so; but he was ignorant of the navigation, found by the lead that the water was shoaling from six to four fathoms, and was aware that there was danger that the vessel would take the ground.

The question is whether this stranding is to be considered so far voluntary that the damage which it caused is a general average loss.

Opinion.

The master decided to take the risk of attempting, without a pilot, to run into a place unknown to him, to obtain assistance to extinguish fire, which was believed to threaten the speedy destruction of the vessel and cargo, and all on board. It was an act entirely out of the usual course of navigation, and aside from the duties which devolved on the ship-owners, as carriers of the cargo on that voyage. It was an attempt to obtain safety from an impending peril by the use of extraordinary means; and it is not to be confounded with the hazards, which ship-owners undertake, of carrying such sail, and steering such courses, and making such manœuvres, while in the prosecution of the voyage, as its exigencies may require.

The only ground upon which I can suppose the stranding can be denied to be voluntary in contemplation of law, is that the master hoped and expected that he might get in without taking the ground, and therefore the stranding was unintentional. But the master's hopes and expectations were one thing, his intention another. He decided to attempt to get into the harbor. He intended to take the consequences of that attempt. He hoped those consequences would not be injurious to the vessel; but whatever they might prove to be, he voluntarily encountered them. And when one of them proved to be stranding, his hope that it would not happen does not prevent the stranding from being one of the consequences which he voluntarily encountered.

It is true, that if, while seeking a port of necessity, a peril, wholly unanticipated, and not necessarily arising from the change of course, casually falls on the vessel, without human choice or

agency, it must be borne by the vessel. But this is not such a case. The peril of stranding by running into an unknown port without a pilot, when the lead shows the water is shoaling from six to four fathoms, is necessarily involved in an attempt to enter; the sanguine expectations of the master that he may escape, cannot change its character into a mere casualty, nor, when such a voluntary attempt results in an actual stranding, can it be said to have been independent of human agency. It was human agency which made the attempt, and the attempt necessarily involved the peril. I think it now settled, by the cases of *The Col. Ins. Co.* v. *Ashby et al.*, 13 Peters, 331, and *Barnard* v. *Adams*, 10 How. 305, that it is not required that the voluntary act should necessarily inflict a loss, nor that the master should intend to destroy, or even injure, the particular subject.

It is enough that a particular subject, as in this case the ship, is voluntarily exposed to a distinct and extraordinary peril, for the general benefit. The voluntary sacrifice is made when the ship is intentionally exposed to such a peril. What befalls thereon are the consequences of that sacrifice; and be they more or less than was anticipated, they are all voluntarily suffered, in judgment of law.

This is well illustrated by the case of goods put into lighters to relieve a stranded vessel. The intention is not to destroy or injure them. All concerned may expect them to be safe. But all concerned intend to expose them to a distinct and extraordinary peril by placing them on board lighters; and if, contrary to expectation, they are lost or damaged, they are to be paid for in general average.

My opinion is, that the attempt to run into San Antonio without a pilot, exposed this vessel to the peril of stranding; that this was an extraordinary peril, assumed for the general benefit; that it is not inferable that it was an unknown peril, since it is not conceivable that any competent master could have failed to recognize it as one of the risks of his attempt to get into an unknown port without a pilot, with such soundings as he appears to have had; that his hope, or even expectation, of avoiding the peril does not change the character of the stranding which actually resulted from his attempt; and that the intention to encounter that peril rendered all its actual consequences voluntary sacrifices.

B. R. CURTIS.

February 2, 1858.

FIRE INSURANCE.

Opinion.

My opinion has been requested upon the question of the valuation to be put by Messrs. Little, Brown, & Co. upon the printed sheets of books destroyed or damaged by fire in their store-house at Cambridge.

The policies contain no valuation, and no special clauses to afford a rule of valuation, differing from that prescribed by the law. The object of the contract is to indemnify the assured; and the law adjudges this object to be accomplished, if the insurer pays to the insured an amount equal to the value of the subject insured, as its value was when the risk was taken. This value is ordinarily measured by the rule that a thing is worth what it can be sold for; and the market value is the standard by which the amount to be paid is usually measured.

After an attentive consideration of this case, I can perceive no sufficient reason why the rule that a thing is worth to the owner its market price, should not be applied to measure the amount of this loss. And I am of opinion that it would be applied by a court of law. These printed books, in the form of folded sheets, were in a condition to be put into the market at established prices. It may be suggested that they could not have been offered for sale, in the quantities burnt, without reducing the market price. This must often be true where a large quantity of an article is burnt. But I do not think such a suggestion from underwriters was ever allowed to affect the valuation.

It would be highly inexpedient, as well as unjust, to allow it to do so. It would be inexpedient, because it would substitute in place of a known standard, viz. the actual market price, mere speculations concerning the effect upon that price of putting a large quantity of the article into the market. And it would be unjust, because, if not burned, there is no ground for saying the owner would thus have forced sales and reduced the price.

Neither, as it seems to me, should the fact, that Messrs. Little, Brown, & Co. were the manufacturers change the rule which makes the market value the standard of the valuation, as between insurer and insured.

If they by the use of their capital and skill have produced an article which sells in the market for more than it cost them, I do

not perceive why they should not be indemnified for its loss by receiving what it would have sold for. If the article were given to them, and so cost them nothing, it would hardly be asserted that nothing should be paid by the underwriters. The cost of the subject of insurance is of no importance in fixing its valuation, save in those cases where the cost indicates the market value.

Mr. Phillips (Vol. II. p. 40), after laying down the rule, "the amount of insurable interest in goods is their market value at the time and place of the commencement of the risk," says their cost is the most satisfactory proof of their value, *in case they are purchased near the time when the risk commences.* If they are not purchased, but manufactured, the cost of making them has never been deemed the measure of their value. It would be not only an arbitrary, but a generally false assumption, to establish such a measure. For if the value of manufactured products did not generally exceed their cost, who would make them?

The distinction between articles purchased and made is so plain, that it seems not to have been thought necessary to point it out. But Mr. Stevens does so incidentally: "Goods which are either of the proprietor's own manufacture, or have been brought from distant places to the port of shipping, where there is no regular sale for them, merely for the purpose of being forwarded from thence, must not be valued according to the price for which they might be sold at the place of loading, but their value at the place where they came from, together with the expenses, must be the basis of the value to be insured."

My opinion is that the insurable interest of Messrs. Little, Brown, & Co. in these books was their market value at the time the risk attached.

B. R. CURTIS.

BOSTON, April 10, 1858.

PROCESS IN ADMIRALTY.

OPINION.

My opinion has been requested upon the question whether, upon a decree *in personam* in the District Court of the United States for the District of Ohio, (there being no rule of that court on the subject,) an execution may issue, commanding a levy *on the lands* of the respondent. The process act of May 19, 1828, sect. 3

(4 Stats. at Large, 281), provides that writs of execution upon *decrees* rendered in any of the courts of the United States shall be the same in substance in each State as those then used in such State, saving to the courts in those States where there are not courts of equity the power to prescribe the mode of executing their decrees in equity.

By the act of August 23, 1842, sect. 6 (5 Stats. at Large, 518), the Supreme Court is empowered to regulate "the whole practice" of the District and Circuit Courts.

By the 21st Admiralty Rule, the Supreme Court has regulated the practice of the District Courts as respects the execution of decrees for the payment of money; and has empowered those courts to issue writs of *fieri facias*, to be levied on the goods and chattels of the defendant; but no authority is given to issue writs of *levari facias* to be levied on lands.

The argument that *expressio unius exclusio alterius*, seems to me, in this case, to be irresistible. For how can this rule be said to regulate the practice of the District Courts, if the libellant, instead of proceeding to execute the decree in the mode prescribed by the rule, may proceed in a totally different manner.

In my opinion, this rule was designed as a substitute for the authority contained in the third section of the act of 1828, if that extends to admiralty decrees, and not as a supplement thereto; and consequently the present power of District Courts to execute their admiralty decrees is found in this rule, and nowhere else.

I think it extremely doubtful whether the third section of the act of 1828 was designed to cover the execution of admiralty decrees. The provision for the execution of decrees in equity in those States having no courts of equity, and the absence of any special provision for the execution of decrees in admiralty when it was known that no State could have courts of admiralty, tends strongly to show that the decrees there spoken of were decrees in equity only; and that the execution of admiralty decrees was intended to be left to the second section of the act of 1792 (1 Stats. at Large, 276). This enacted that executions in suits of admiralty and maritime jurisdiction should be according to the principles, rules, and usages of courts of admiralty, subject to alteration by the Supreme Court. I take it to be clear that, by the rules and usages of courts of admiralty, no execution ever issued against lands.

It is said by Doctor Browne (1 Browne's Civ. and Ad. Law, 361 n.), that a stipulation in the admiralty does not bind lands; and this seems to be admitted by Doctor James in arguing *Grunway* v. *Barker*, Godbolt, 260, for he justifies the insertion of *heredes* in the stipulation, as meaning personal representatives.

If there was no authority for executing an admiralty decree by process against lands, under the act of 1792, and the act of 1828 was not intended to apply to such decrees (and I am strongly inclined to this view), then it is certain there is no power residing in a court of admiralty to issue a *levari facias*, or any other process against lands.

But I prefer to rest my opinion on the other ground, viz. that the 21st Rule was designed to cover the whole subject, and that alone is the present regulation respecting the execution of the admiralty decrees of the District Courts.

Judge Conklin in his Practice, p. 775, was of this opinion.

B. R. CURTIS.

June 26, 1860.

Accord *Ward* v. *Chamberlain*, 9 Am. Law Register, 171, in reference to which case the above opinion was taken by one of the counsel.

CONSTITUTIONAL LAW.

CASE.

Constitution of the State of Missouri, Art. IV. Sect. 6.

"The Governor shall have power to remit fines and forfeitures, and, except in cases of impeachment, to grant reprieves and pardons."

Revised Statutes of Missouri, 1855, Chap. XVI.

BANKING — ILLEGAL — CURRENCY.

Section 4. "No corporation within the limits of this State (the Bank of the State of Missouri and its branches inclusive), money-broker, or exchange-dealer, shall pass or receive, within the limits of this State, any bank-note or other paper currency of any kind, promising or ordering the payment of money or other thing, of less denomination than five dollars. Provided, however, that said money-brokers and exchange-dealers may buy, take, and receive

such bank-notes, post notes, and currency for the purpose of send ing the same out of the State."

Sect. 9. "The charters of all corporations within the limits of this State (the Bank of the State of Missouri and its branches inclusive), violating or evading any of the provisions of this act, shall be forfeited for any such violation or evasion; and the fact of the forfeiture, or any violation or evasion of this act, or any part thereof, may be pleaded in bar to any suit brought by them, and, if denied, the trial of the question of such forfeiture, violation, or evasion shall be adjourned, under the direction of the court, and change of venue awarded, upon the application of the defendant, to some county in which such corporation is not situate."

Opinion.

The first question is, whether the above-recited provision of the Constitution of Missouri empowers the Governor to waive a forfeiture of its charter, which has been incurred by a corporation created by the Legislature by breach of either an express or implied condition of the legislative grant; and if this general question can be answered in the affirmative, the inquiry remains whether the forfeiture can be waived by the Governor in this particular case.

I think the words of the Constitution were designed to describe fully the power to remit penalties which might be incurred by the breach of penal laws, but were not intended to authorize the Governor to affect the title of the State to civil remedies for enforcing its title to money or property, or rights corporeal or incorporeal.

Thus, if a grant of land should be made on a condition for breach of which the title granted was to be forfeited, this would not, in my judgment, be such a forfeiture as was contemplated by the Constitution. So if an incorporeal right, as to take tolls or the like, were granted on a condition, I do not think the Governor could waive a breach of the condition.

The determination of a title by breach of a condition, reserved in the grant, though often called a forfeiture, and in many cases treated as such by courts of equity, under their jurisdiction to relieve against penalties and forfeitures, is clearly distinguishable from that class of naked forfeitures which are enacted merely as punishments.

The former are created by virtue of the disposing power of the

grantor, and are a species of control over the title which he reserves to himself when he makes the grant, and, being assented to by the grantee through the acceptance of the grant, they are the result of a compact between the parties; while the latter are created by the legislative will, qualify no grant, afford no remedy for the breach of any compact, but are naked penalties for the punishment of offences against the public.

The breach by a corporation of a condition expressed in its charter, or implied by law from its provisions and acceptance, whereby the charter is forfeited, and the title to its incorporeal rights is either *ipso facto* terminated, or rendered liable to be seized to the use of the State by proper legal proceedings, seems to me to come clearly within the first-mentioned class of forfeitures.

Such conditions are qualifications or restrictions upon the title to the things granted, reserved by the grantor in pursuance of his right of disposal, assented to by the grantee, and so resulting from a compact, and capable of being enforced by the grantor, by civil remedies appropriate to the nature of the things granted.

It has been repeatedly held, in the State of Missouri, that a writ of *quo warranto* is within the meaning of the Constitution of that State, and that an information in the nature of a *quo warranto* comes within the same class of proceedings. (3 Mo. 278; 4 Ib. 302; 8 Ib. 330.)

And though there has been some diversity of decision upon the point, it seems to me this decision is clearly correct. At all events, I suppose the law of that State is so settled.

In *The People* v. *Phœnix Bank*, 24 Wend. 431, it was held by the Supreme Court of New York, that, when a corporation was created by the Legislature, a forfeiture could not be pardoned by the Governor, but only by the power which made the original grant. And it is said, and I think correctly, that though the king can pardon a forfeiture of a charter which he has created, he has no such power in reference to corporations created by act of Parliament.

But if I were of opinion that, in general, the Governor of Missouri could waive a forfeiture of a charter granted by the Legislature, so as to bar the State of its remedy by an information in the nature of a *quo warranto*, I should still think it could not be effectually done in this particular case.

There seems to be a settled and a reasonable distinction between

cases in which the breach of a condition enabled the grantor to revest the title in himself by proper proceedings, and cases in which the breach of a condition *ipso facto* determines the title. To the latter class of cases the doctrine of waiver of the breach does not apply. *People* v. *Manhattan Company*, 9 Wend. 351; *State* v. *Fourth Turnpike*, 15 N. H. Rep. 162.

In general, the breach of a condition of its charter only subjects the corporation to proceedings by the State to have the forfeiture declared and the franchises seized to the use of the State, and cannot be taken advantage of collaterally, nor by private persons. But this law expressly provides that any private person sued by the corporation may plead "the fact of forfeiture," and the venue is to be changed to obtain a proper jury to try the issue.

By "the fact of forfeiture" cannot be meant a judgment in *quo warranto*, for a plea of such a judgment would not be triable by a jury. Besides, after such a judgment, the corporation can prosecute no suit; and the provision that a private person sued might plead such a judgment, would be merely superfluous. And, unless the forfeiture so pleaded results from, and is perfect by reason of, the breach of the law, so that *ipso facto* the charter is forfeited, it is difficult to see how "the fact of forfeiture" can be pleaded at all. Otherwise, it would not be "the fact of forfeiture," but merely a liability to forfeiture on a judicial finding of the breach of condition, to be followed by a judgment, and execution seizing the franchises, which would be capable of being pleaded.

I think, therefore, there is strong reason to believe that the intention of the Legislature to have the act in question, when done by a corporation, operate *ipso facto* as a forfeiture, does sufficiently appear; and in such a case the forfeiture could not be waived so as to restore the existence of the corporation.

But, aside from this, the act gives to every private person an absolute right to plead the fact of forfeiture as a full defence to any suit brought by the corporation.

That such a private right cannot be affected by the pardoning power, is an ancient and established doctrine of the common law. 3 Inst. 236; Bac. Abr. *Pardon*, B. Chief Justice Marshall said, concerning this power: "As the power has been exercised from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation

and effect of a pardon; and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."[1]

Though the language of the Constitution of Missouri, quoted in the case stated, is comprehensive, it certainly does not confer on the Governor more extensive powers than belong to the Crown in England. Lord Coke says (3 Inst. 233): "A pardon is a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical." And as it has been settled there, for many centuries, that this pardoning power can affect no private right, so I think the power conferred on the Governor of Missouri cannot take away the right to this plea of forfeiture conferred by law upon all those sued by the corporation.

B. R. CURTIS.

August, 1860.

The following opinion relates to the question of a remedy for a branch of the Cayuga tribe of Indians, seated in Canada, to enforce their claims to an annuity pledged to their tribe by the State of New York.

OPINION.

1st. Can any proceedings be taken before the Supreme Court of the United States, for the recovery of the arrears of the annuity, and for securing its continuance as a matter of right?

The second section of the third article of the Constitution of the United States grants to the Supreme Court original jurisdiction over controversies between a State and foreign states, citizens or subjects.

By an amendment, jurisdiction over controversies between a State and citizens or subjects of a foreign state, was withdrawn from the court. To sustain a suit against the State of New York the matter in controversy must be of such a nature as to be a fit subject of judicial cognizance and redress, and the party complaining must be a "foreign state" within the meaning of those words in the Constitution.

Upon the first of these requirements no difficulty is perceived.

[1] *United States* v. *Wilson*, 7 Peters, 150.

To enforce the performance of a contract to pay an annuity, whether perpetual or for a term of years, or of uncertain duration depending on contingent events, and to apportion its payment among those justly entitled thereto, are strictly subjects of judicial cognizance, and the judicial power is sufficient to afford the needful redress.

In respect to the other requirement, that a foreign state should be the party complainant, more difficulty is felt.

In the case of The Cherokee Nation against the State of Georgia, reported in the fifth volume of Mr. Peters's Reports, the question was directly presented to the Supreme Court, whether the Cherokee nation could sue as a foreign state; and it was decided they could not.

A majority of the judges held that the Cherokee nation were a distinct political society, capable of managing their own affairs, including some of those which appertain to its own government, and so might be deemed to be in some sense a state; though this was denied by Justices Johnson and Baldwin. But five out of seven of the judges decided that the Cherokee nation, being seated within the territorial limits of the United States, and in a dependent condition, could not be deemed a *foreign* state.

Since that decision, no question directly affecting the present inquiry has arisen in the Supreme Court.

After an attentive consideration of the history and present condition of that part of the Cayuga tribe or nation of Indians now seated in Canada, so far as their history and condition have been laid before me, or are within my own investigations, I am of opinion they are not competent to sue, in the name of their tribe or nation, as a foreign state, in the Supreme Court of the United States.

Assuming, what is settled in the case of the Cherokee nation, that the words "foreign state," in this clause of the Constitution, were not intended to include any Indian nation within the territorial limits of the United States, I think there are strong reasons to conclude, that the same words were not designed to include Indian nations or tribes residing within the dominions of the sovereign of Great Britain, in a condition which resembles a state of pupilage, and dependent on the will of that sovereign for such powers and privileges as they may be permitted and enabled to enjoy;—among which powers, I suppose it must be conceded, is not included the rightful authority to act as a foreign state by entering into negotiations with the United

States, forming alliances or treaties with them, holding themselves responsible for wrongs done to the government or citizens of the United States, claiming redress for invasions of their territory, or other infractions of their rights by the United States, or by those for whose conduct the government of the Union is responsible to foreign nations.

In all things which appertain to accountability for wrongs done to the United States and redress of grievances suffered from the United States, or its citizens, I suppose it to be clear that all the Indian tribes in North America, out of the limits of the United States, are subject to the will of the government of Great Britain, which, under all circumstances, would act for them, as for any other community within the empire, according to the dictates of its own policy. And, as it would not be admissible for the political power of the United States to treat an Indian tribe seated in Canada as a foreign nation, so neither can the judicial power treat them as a foreign nation, and allow them to sue, in that capacity, in the courts of the Union.

But if this were not universally true, there would be great difficulties in the way of an admission that the part of the Cayuga tribe or nation of Indians now seated in Canada are to be deemed a foreign nation, capable of suing in that capacity in the Supreme Court. Without going into details, it may be mentioned that neither the United States nor the government of Great Britain have ever treated this band as a separate and independent nation for any purpose.

2d. But the question still remains, whether a suit may not be brought in the Supreme Court of the United States in the name of her Majesty the Queen of Great Britain, etc., in behalf of the Cayugas, to enforce their claim.

Upon a question some of the elements of which are of novel impression, it would not become me to express a confident opinion. But after an attentive consideration I think such a suit may be maintained.

The right to receive an annual payment, in consideration for a transfer of their lands, belongs to a tribe or nation of Indians, who occupy a portion of her Majesty's territory, and who, while they are, for some purposes, a separate political community, are also in a state of pupilage, resembling the relation of a ward to a guardian. Their rights and claims are under the care and protection of the

Crown, upon principles, and by reason of causes, which have been long in operation in the United States, and which must be felt and acknowledged here. And if the sovereign should think fit to act as their trustee, in enforcing a claim of this nature in a court of justice, I believe the right to do so would be acknowledged.

In case such a course should be deemed suitable and proper, it would be important for the Cayugas, acting through their recognized and competent authorities, to prefer a petition to the Crown to take cognizance of their claims, and act in their behalf in reference thereto; and to this end, that a formal transfer should be made to the Crown of the agreements between the State of New York and the Cayuga nation upon which the present claims depend.

What is said above answers the second question proposed.

3d. In answer to the third question I have only to say, respecting the merits of the claim, that I concur in opinion with the Secretary of State and other officers of the State of New York, composing the board to whom the petition of the Indians was referred by the Legislature of that State in the year 1849, whose report is among the papers submitted to me. I believe their conclusions and the reasons on which they rested are sound and just.

I should hope that a renewed presentation of this claim to the Legislature of New York would be successful. If not, I know of no remedy other than the one I have indicated.

B. R. Curtis.

April, 1860.

SCRIP OF A MUNICIPAL CORPORATION PAYABLE TO THE HOLDER.

Opinion.

A certificate of the loan made on the credit of the city of Augusta in the State of Maine, under the authority of an act of the Legislature of that State, entitled, "An Act to authorize certain cities and towns to grant aid in the construction and completion of the Kennebec and Portland Railroad," together with the coupons for interest thereon, has been shown to me, and my opinion has been requested upon the question, whether the *bona fide* purchaser of one of those coupons can maintain an action in his own name thereon, at the common law, independent of any statute remedy.

I am of opinion that such action may be maintained, and I will

state succinctly the reasons for that opinion. The certificate contains a promise, for value received, to pay one thousand dollars to its *holder*, in twenty years from its date, and also to pay the semi-annual coupons *thereunto attached*, as the same shall severally become due.

It is not under seal. There can be no doubt that this scrip is, in legal effect, a negotiable promissory note, payable to its holder or its bearer, which, in this connection, are synonymous terms.

The distinction between this scrip and an ordinary promissory note is, that, instead of promising to pay the principal sum, and the interest thereon to the holder of the paper without more, it promises to pay the principal sum to the holder, and makes a distinct promise, though not expressed to be to the holder of the scrip or to the holder of the coupons, to pay the semi-annual coupons thereunto attached, which coupons are, severally and upon the face of each, promises to pay the semi-annual interest.

What then is the legal effect of such a coupon as this, attached to what is undoubtedly negotiable paper, promising to pay the semi-annual interest upon the principal sum?

If the promise contained in each coupon had been expressly made to its holder, it would admit of no doubt that each coupon was, in legal effect, a negotiable promissory note, payable on its presentation by its lawful holder, though separated from the bond not only physically, but in actual ownership.

Such was the decision of the Supreme Court of the United States in the two cases of the *Board of Commissioners of Knox County* v. *Aspinwall*, and *Same* v. *Wallace*, reported in 21 Howard, 539, 546. The statement of these cases and of the points argued by counsel, is so imperfect, that I have obtained from one of the judges his printed copy of the record and briefs. From these it appears that the form of each coupon declared on was as follows: —

"Ohio and Mississippi Railroad Subscription, County of Knox, Indiana, will pay the bearer sixty dollars at North River Bank in the city of New York, on the first day of March, 1857, being annual interest on Bond No. 59.

A. V. Smith, *Auditor.*"

The declaration was on the promises contained in the coupons, and did not aver that the plaintiff ever owned the bonds, and at the trial it was admitted he never did own them.

Among the points taken by the counsel for Knox County were these: that no action lies on the coupons; that the declaration did not state facts sufficient to authorize an action of assumpsit; and that the plaintiff, not having produced the bonds at the trial, could not recover.

The court held, in both cases, that an action of assumpsit by the holder and owner of the coupons was maintainable.

These cases are not distinguishable from the one I am considering, save by the fact that each of those coupons was expressed on its face to be payable to its bearer.

The question is, whether each of the coupons now before me, *when rightly interpreted and understood,* does not, in legal effect, contain a promise to pay to its bearer.

Its language is, The city of Augusta will pay. This is an express promise. And it is not perceived how any just effect can be allowed to these words, without holding that they were intended to create an obligation legally binding on the promisor.

The question is, to whom it appears, by legal and competent evidence, it was agreed this stipulated sum should be paid. I say by legal and competent evidence; for, certainly, the action being founded on an instrument alleged to be negotiable, we must find enough in that instrument, when rightly interpreted, and when its just legal effect is given to it, to support its negotiability.

But it by no means follows that we are to look only at what is written on each coupon, to ascertain its just legal effect.

One great rule for the interpretation of all written contracts is, that the judge who is called upon to interpret them has a right to know, and if possible should know, all that the parties knew respecting the subject-matter of their contract. And another equally well-settled rule is, that, when a contract makes express reference to some other writing, the writing thus referred to should be seen, and its bearings on the contract considered, in conformity with the reference made to it.

Now each of these coupons is entitled "City of Augusta Loan," — and contains the words and figures on the margin, "(Bond — No. 107)," or some other number of reference to a particular bond. And no lawyer will doubt that it is admissible to show that, when issued, they were attached to another instrument thus referred to, and that the meaning of the parties to the contract in the coupon is to be gathered, not solely from what is said therein, but from

that in connection with the other paper thus expressly referred to, and the circumstances which made part of the original transaction. Taking all these into view, the question is, whether it does not sufficiently appear to have been the intention of the promisors to create obligations distinct from the scrip, to which they were attached, and payable to any lawful holder who should present them for payment.

The first material circumstance to be noticed, and in my judgment it is most material, is, that these are obligations of a municipal corporation, whose power to contract in this behalf is derived solely from a special act of the Legislature; and that this act not only authorized, but required, the city to make separate contracts for the principal and interest. The third section of the act required the treasurers of the city to make and issue *the scrip* of such city "*for the amount granted by such city*, in convenient and suitable sums, payable to the holder thereof on a term of time, not less than twenty nor more than thirty years, *with coupons for interest attached, payable annually or semi-annually.*"

Here is an explicit direction to make the scrip for the principal sum; and as to the payments of interest, they were to be secured by coupons attached to the scrip, payable annually or semi-annually.

It is plain, therefore, that it was the intention of the Legislature that the city should so contract, that the holder of scrip and coupons attached should not be in precisely the same condition as the holder of a promissory note, payable to bearer, on time, with interest annually or semi-annually. In such a case there is but one promise, — to pay the principal and the interest; and the interest is an incident inseparable from the principal; it can be demanded only by the lawful holder of the note, by virtue of the single promise contained in it. The special and particular requirements, industriously introduced by the Legislature, that the scrip shall be for the principal sum, and that the obligation to make each payment of interest shall be contained in a *separate paper*, originally attached to the scrip, but, as its name imports, *severable therefrom*, satisfy my mind that it was not intended that the obligations to pay interest should be inseparable from the obligation to pay the principal; but that they should be distinct and separate promises, severable therefrom.

When a corporation is empowered by the Legislature to do a

particular act in a particular manner and form, it is incumbent on the corporation to observe that manner and form (*Head* v. *Providence Insurance Co.*, 2 Cranch, 127); and when it has undertaken to do the act, and there is nothing to show decisively that the corporation intended to deviate from the authority granted, it is to be presumed that the corporation intended to act in accordance with its legal duty, and obey the requirement of the Legislature. And in this case, unless there is something which decisively proves the contrary, it should be presumed that the intention of the city of Augusta was to make a promise to pay each instalment of interest, distinct from its promise to pay the principal, and capable of being severed therefrom, and enforced by the lawful owner of such distinct promise.

Before considering whether this contrary intent does appear, it will be well to have distinctly in view what they who assert it must maintain. They must maintain that it was the intention of the city to enter into no separate obligation to the holder of a coupon; that, lawfully to demand the interest, he must be the holder of the bond, and ought to produce it, to show that he is its lawful bearer; and that the city is in the same condition as it would have been in if it had promised, in the ordinary way, to pay to the bearer of the bond the principal sum, with interest semi-annually.

But this is inconsistent, not only with the separable character of the coupons, but with their express terms; for each does contain a separate promise to pay, and that *not upon presentation of the bond, but of the coupon.*

Now, if each coupon is in legal effect payable to bearer, the production of the coupon alone, and payment thereof in good faith by the city, is a legal discharge; though the bearer should, in point of fact, not be the lawful holder of the coupon. (Byles on Bills, 173, 174.)

But if only the holder of the bond can legally demand payment of the coupon, payment of the coupon without the production of the bond would be made at the risk of the city. The intention of the city to obtain a full and lawful discharge by each payment cannot be doubted. How came the city to agree to pay without the production of the bond, and upon the presentation of the coupon alone, unless the title to the coupon, evidenced by its production, was to be a title to receive its contents?

And how can possession of the coupon be a title to receive payment, or any evidence of such a title, if the real title rests in the holder of the bond which is not produced?

It may be urged that these coupons are not payable to *bearer* or *holder*. They are not, in terms; but the question is, if they are not so by legal intendment upon all the facts.

A note payable to —— is a valid negotiable note, and authorizes any holder to insert his own name. *Crutchley* v. *Clarence*, 2 M. & S. 90; *White* v. *W. & Mass. R. R.*, 21 How. 575.

The law intends that a valid contract was meant to be made by the express promise to pay, and that justice requires that no unfair and deceptive intention should be attributed to the promisor. It therefore attributes to him an intention to pay any lawful holder.

In *Gibson* v. *Minet*, 1 H. Bl. 569, a majority of the judges held that a bill not made payable to any payee, or to the drawer's order, or to bearer, was in legal effect payable to bearer.

I should not be willing to say that, in my opinion, there is any universal rule of law to this effect. In my judgment, whether such a promise is payable to any one who becomes its holder in good faith, or is no promise at all, must depend upon the surrounding circumstances under which it was issued and received. Where those circumstances evince an intent to have the paper operate as a binding negotiable promise, I think the law allows it so to operate. There is no technical difficulty in the way.

Take the case of a guaranty, not addressed to any particular person. As Chief Justice Marshall has said, it is a promise to all the world. *Lawrence* v. *Mason*, 3 Cranch, 493. And a succession of persons may act on it, and it enures to the benefit of each. *Union Bank* v. *Coster's Ex'rs*, 1 Sand. S. C. R. 563; S. C. in error, 3 Comst. 214; *Lonsdale* v. *La Fayette Bank*, 18 Ohio, 126.

So a promise to accept bills enures to the benefit of any one who takes any of them on the faith of the promise; and though he cannot treat it as an acceptance, he may sue on the promise to accept *in* his *own name*. *Boyce* v. *Edwards*, 4 Pet. 111; *Russell* v. *Wiggin*, 2 Story, 113.

The same law has been applied to an offer of a reward for the detection of an offender, the recovery of property, the restoration of a lost child, and the like. *Loring* v. *Boston*, 7 Met. 411; *Tallich* v. *Barber*, 1 M. & S. 108.

In these and many similar cases, where an assurance is held out to all the world, it operates as an original promise to every one who acts on such assurance, precisely as a promise to pay to bearer does. Such a promise is not merely one promise to the original taker which he sells to a subsequent bearer; it is an original and independent promise to every lawful bearer. *Bulland* v. *Bell*, 1 Mason, 251; *Bank of Kentucky* v. *Wistar*, 2 Pet. 318; *Smith* v. *Clapp*, 15 Pet. 125; *Gorgier* v. *Melville*, 3 B. & C. 45.

When, therefore, it appears, as in this instance I think it does appear, that the intention of the promisor was to make promises to pay interest on a sum secured by a negotiable instrument, and to make each of these promises to pay interest by a distinct writing called a coupon, for the purpose of having it severable from the promise to pay the principal; and when his promise is to pay upon the presentation, not of the principal instrument, but of the coupon alone, in my judgment such general assurance operates as a promise to pay to any one who may lawfully present the coupon for payment; and a requirement that not only the coupon, but the bond also, should be presented, would materially change the legal effect of the promise, and would not be sanctioned by law. *Scott County* v. *Aspinwall*, 21 How. 539.

And the supposition that it was the intention of the city to pay on the presentation by the holder of a coupon on the holding of which the title to payment did not depend, and on the production of the bond on the holding of which the title to payment did depend, is so preposterous that I cannot entertain it.

In my opinion, a written promise to pay a sum certain, at a time certain, on presentation of the writing at a place certain, is a promise to pay to the person who shall then and there *present* the written promise for payment; it cannot be distinguished from, and is the same in legal effect as, a promise to pay to the holder or bearer of the writing.

We are required so to construe the promise by the manifest leading intentions of the parties.

First, because, having adopted this peculiar and separate form of contract to pay interest, it is not to be supposed they intended that the parties should be in precisely the same condition as they would have been in if it had not been adopted.

Secondly, because it is most beneficial to the holder of the scrip, and not in the slightest degree more burdensome or hazardous to

the promisor, to have the coupons severable from the scrip, and negotiable, as the scrip is, by delivery.

Thirdly, because, as the promise is to pay on presentation of the coupon, and the city has no right to require the scrip to be produced, (see *Scott County* v. *Aspinwall*, 21 How. 539,) it is essential to the security of the city that the coupons should be held to be payable to bearer.

Fourthly, because, in legal effect, a general promise in writing to pay a sum certain, on the presentation of the writing at a place certain, is a promise to pay to him who shall present the writing; that is, to its holder, or bearer.

There is another view of this matter to which I attach importance.

I understand it to be capable of proof by abundant evidence, that, at the time the act of the Legislature respecting these bonds was passed, and at the time they were issued, it was a general usage of the commercial world, both in this country and in England, to treat such coupons as negotiable; that they were passed from hand to hand, as if payable to bearer, and were presented by and paid to the holder, without further inquiry as to his title after the production of the coupon.

Now I agree at once, that such a usage cannot, *per se*, make a contract negotiable which by law is not negotiable, and that the evidence of such a usage is not admissible for any such purpose. But it seems to me equally plain, that when the law *has* made negotiable a written promise to pay a sum certain on a day certain to the holder or bearer of the promise, and the question arises whether a writing contains a promise *to pay to its holder or bearer*, and the terms of the writing will not be contradicted by so interpreting it, it is admissible to show a general usage of commerce so to interpret and act upon all similar writings. In other words, that the parties will be held to have contracted in reference to such a usage, and with the understanding that the contract in question will be interpreted and acted on in accordance with the usage. And if the usage was to treat such contracts as intended to be payable to bearer, and their terms are not contradicted by so treating them, the legitimate conclusion is, that they were designed to be, and in legal effect are, payable to bearer.

Numerous cases might be cited in support of this position, but it is enough to refer to *Williams* v. *Gilman*, 3 Me. R. 276;

Emmons v. *Lord*, 18 Me. R. 351; and *Renner* v. *The Bank of Columbia*, 9 Wheat. 581, where Mr. Justice Thompson has carefully examined the subject.

I have carefully examined two decisions of the Supreme Court of Maine, made in *Myers* v. *Y. & C. R. R.*, 43 Me. R. 232, and *Jackson* v. *Same*, in manuscript. Each is clearly distinguishable from the case under consideration.

In each of these cases the bonds maintained express promises under seal to pay the interest, and in the first case there was sufficient reason to hold, and this seems the only point decided in that case, that the papers declared on were improvidently issued, without consideration. In the last case it was held that, as there was a covenant in the bond to pay the interest, assumpsit did not lie on the coupon, and that there was not enough upon the face of the coupon to show that it was the design of the corporation to make a negotiable contract.

As it seems to me that, in the case now under consideration, there is enough to show a design to enter into separate negotiable contracts, to pay the interest, and as the bonds or scrip are not under seal, I conceive that the decisions of the Supreme Court do not apply to this case. It is observable, also, that this scrip contains no promise to pay the interest, and that the promise to pay the coupons does not purport to be made to the holder of the scrip, but is general, and not limited to any party.

In reference to cases like this, I am forcibly impressed with the truth and importance of the language of Lord Cottenham, when, speaking of a question of parties, he said he thought it the duty of the court to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy. *Taylor* v. *Salmon*, 4 M. & Cr. 141. The progress made by the courts of common law, particularly in this country, in adapting its rules to the actual affairs of men, affords, in my opinion, the strongest argument in favor of our unwritten system of law; and this progress has been made, not under a claim of right to alter the law, but by treating ancient rules, established under very different circumstances, with

the strictness which is appropriate to them, and by admitting exceptions which changes in the affairs of men have both assumed to exist and have rendered necessary. On this subject, instructive lessons may be learned from *Beverly* v. *Lincoln*, 6 Ad. & El. 829; *Bank of Columbia* v. *Patterson*, 7 Cranch, 299; and upon this very matter of the negotiability of instruments, from *White* v. *Vt. & Mass. R. C.*, 21 How. 575. Vast amounts of money have been lent in good faith upon securities like those now in question. A decision, or a course of decision, which should subject such contracts to narrow and technical views wholly in conflict with the understanding and practice of all concerned in them, would, in my opinion, be inconsistent with the just rights and obligations of the parties, and with a proper application of the law. My conviction is perfect, that in the courts of the great commercial States, and in the Supreme Court of the United States, they will not be so treated; and I should be greatly disappointed and surprised if they should be so treated in the Supreme Court of the great commercial State of Maine. Certainly the Legislature of that State, which is the expositor of its public policy, has shown any thing but such a disposition. By the act of April 4, 1857, apparently assuming that such coupons are transferable, and so may previously have been transferred apart from the bonds to which they were attached, it is enacted, that assumpsit may be maintained thereon by the holder for value; thus giving a remedy which, aside from the act, could not be had at the common law, where there was a promise under seal.

This is an important question, and I have given it the fullest consideration. The best opinion I can form is, that the bearer of each coupon has the right to present it and demand its contents; that the city has promised on each coupon that its contents shall be paid to him who lawfully presents it for payment; that this is, in legal effect, a promise which enures to each bearer of a coupon; and that, if not paid, he has a right of action to recover its amount.

May 11, 1860.

CONSTITUTIONAL LAW. — FOREIGN INSURANCE COMPANIES.

Case.

The laws of New York, Massachusetts, and several other States require from the agencies of insurance companies incorporated by

or organized in foreign countries, a deposit of securities, varying in amount from $20,000 to $200,000, to be placed with their comptrollers or other State officers, as a condition precedent for engaging in the business of insurance.

They also impose discriminating taxes upon the premiums or business of such agencies, varying in amount, but in excess of the taxes imposed upon domestic companies or associations engaged in the same business.

The question for consideration is, whether such enactments can be constitutionally made with respect to the association or partnership known as "The Liverpool and London and Globe Company," whose legal status is defined in the accompanying paper, prepared for and submitted to the trustees of that association.

Opinion.

The Constitution of the United States (Art. 4, sect. 2) secures to the citizens of each State "all privileges and immunities of citizens in the several States." There can be no doubt that among these privileges and immunities is included an exemption from impositions either of taxes or other burdens greater than are imposed by State laws on their own citizens, under the same circumstances. (See *Corfield* v. *Coryell*, 4 Wash. C. C. R. 371; Story on the Constitution, sect. 1805, 1806; 2 Kent's Com. 71 marg. page; *Scott* v. *Sandford*, 19 How. 583, 584.)

This article, however, has no reference to corporations; and any State may exclude foreign corporations from transacting business within its territory, and consequently may prescribe the conditions upon which they may be permitted to do so.

But the association now in question is not a corporation. No political person has been created by the law of England. The company consists of natural persons, associated together by contract for the purpose of conducting the business of insurance for their joint profit, and cannot be distinguished from other commercial partnerships. The facts, that the business of the association is managed by trustees, who are the active partners, and that one of the countries where their business is conducted has a municipal law dispensing with the necessity of joining all the partners in suits by and against the association, cannot change its legal character. It is still a partnership, and, as in other partnerships, each person who

participates in the profits is liable to third persons, and the members are liable *inter sese*, according to the stipulations of their articles of association.

The true inquiry, therefore, is whether the State of Massachusetts (for instance) can impose on a partnership, consisting partly of citizens of New York and partly of British subjects, any tax or burden greater than is imposed on its own citizens, transacting the same business within the State.

If the partnership consisted wholly of citizens of some other State than Massachusetts, the right of exemption from such greater tax or burden, under the fourth article of the Constitution, would be clear and indisputable; and, in my judgment, the fact that aliens are associated with citizens does not constitute a material difference; not only because, from the necessity of the case, it is impracticable to impose the greater burden on the alien without imposing it on the citizen, which is forbidden; but because the privilege of associating themselves with alien friends as partners, and of reaping all the benefits of such association, is one which is enjoyed by citizens of Massachusetts without restriction, and consequently no burden or restriction can be imposed upon citizens of New York, who desire to form such associations and transact business within the State of Massachusetts.

Though my opinion has not been specially requested upon the true construction of the law of Massachusetts, on the subject of taxing foreign insurance companies, yet I think I ought to say that it seems to me doubtful whether those laws are applicable to any but *incorporated* companies. But if ch. 58, sect. 78, of the General Statutes of Massachusetts should be construed to include unincorporated companies, then there is not in fact any discrimination between unincorporated companies consisting of citizens of Massachusetts, and those consisting of citizens of other States. Whether, under the Constitution of the State, the Legislature can impose a tax on its own citizens and others who carry on the business of insurance as individuals, is extremely doubtful, to say the least. It is deemed here to be "a fundamental maxim of our social system, that all burdens and taxes laid on the people for the public good shall be *equal*," (per Shaw, C. J., 16 Pick. 509,) and I do not think it can be successfully maintained that a special tax on one kind of business only is equal. Speaking of the State of Massachusetts,

I should expect it to be held, either that the differential tax applies only to corporations, or that it is not warranted by the Constitution.

Of course I do not express my opinion upon the meaning of the laws of any other State, for I have not examined them; but my opinion is, that a law of any State which requires this company to pay a greater tax, or to bear a greater burden of any kind, than the laws of such State impose on its own citizens, who may choose to engage as natural persons in the business of insurance, is in conflict with the Constitution of the United States, and therefore is inoperative.

The question whether the treaties between the United States and Great Britain prevent the States from imposing on the business of this association a tax or burden not imposed on the citizens of such States who conduct the like business, is attended, I think, with some difficulty; but I am inclined to the opinion that such tax or burden cannot be imposed.

If the association consisted exclusively of British subjects, it seems to me no State could prohibit them from carrying on "trade or commerce" within its limits; and if so, no State can, in my judgment, impose differential taxes upon them by reason of their trade or commerce. The power to tax them *qua* foreigners is a power to exclude them; and I do not perceive that the objection is diminished by the fact that the tax falls on *some* citizens, because they are their associates in business. It is not the less a discrimination against them, because the discrimination is also against some citizens merely because associated with them. Such discrimination tends directly, not only to exclude the foreigner from the business, but to deprive him of the free liberty of conducting it in partnership with our citizens; and if this business can be deemed "trade" or "commerce" within the meaning of the treaty of 1794, then, in my opinion, the States are precluded by the treaty from levying a differential tax thereon.

My doubt is whether those words are broad enough to include the business of fire and marine insurance. I am, however, strongly inclined to the opinion that they are. They should receive a liberal interpretation in accordance with the liberal and humane spirit of the treaty, and so as to produce that mutual satisfaction and good understanding, and those reciprocal and equal benefits, which formed its inducements and objects.

It has been long settled that the general meaning of the word commerce in our Constitution is *intercourse;* and I perceive no sound reason why the same word in this treaty should not include that intercourse, the purpose of which is the formation of a class of contracts known to the general commercial law of the world, and which are of such vast importance to the trade and commerce of all nations.

These contracts are among the most important instruments through which commerce and trade are rendered practicable and safe; and it seems to me, one whose business it is to make them may be said to be engaged in commerce, as this word was intended to be used in the treaty of 1794 with Great Britain.

B. R. Curtis.

January 5, 1865.

CONSTITUTIONAL LAW. — FREEDOM OF TRADE.

Case.

It has been the practice of wholesale merchants, both in this and other countries, to employ persons to travel over the country and solicit orders for merchandise. This practice has been extensive and long continued. It has long been, and is, a recognized and important means of carrying on *wholesale* ***business***. It has nothing whatever to do with retail trade, and is wholly distinct from the trade of "hawkers and pedlers," who travel from place to place to sell their wares at retail to consumers. The persons thus employed are the representatives and agents of established wholesale merchants and manufacturers, whose places of business are fixed and permanent, and in whose behalf orders are obtained, and on whose responsibility they are executed.

A law has been enacted by the State of Maine, in the following terms: —

Sect. 1. No person, except as hereinafter provided, shall travel from town to town, or place to place, in any town in this State, on foot or by any kind of land or water, public or private conveyance whatever, carrying for sale or offering for sale any goods, wares, or merchandise whatever, whole or by samples, under a penalty of not less than fifty nor more than two hundred dollars, and the forfeiture of all property thus unlawfully carried.

Sect. 2. The county commissioners in their counties may license, for the purposes aforesaid, any person applying who proves to their satisfaction that he sustains a good moral character, has been five years a citizen of the United States, and has resided the year preceding in some town in the county where the application is made; and such licenses shall expire in one year from their date; shall not be transferred or assigned without the consent of the board granting the same; and the applicants shall pay therefor to the county they are to travel in: — if on foot, or in any boat or other water craft, ten dollars; with a carriage drawn by one animal, fifteen dollars; and drawn by two animals, twenty dollars; and shall present to the commissioners, with their application, a certificate of good moral character from the municipal officers of the town where they reside, which shall be attached to their license.

Sect. 3. No person licensed as aforesaid shall sell, carry, or offer for sale any property belonging to persons not five years residents of this State, or any jewelry, playing cards, or other property prohibited by law, under the penalty provided in Sect. 1. But nothing in this chapter shall prevent any citizen of this State from selling any fish, fruit, provisions, farming utensils, or other articles lawfully raised or manufactured in this State.

Sect. 4. Every person shall exhibit his license at all times when required by any justice of the peace, or any constable or other peace officer; and a refusal to do so shall be deemed evidence of not having any; and if afterwards prosecuted, the production of his license at the trial shall not avail him in defence, but he shall be dealt with as unlicensed; and the carriages, goods, wares, and merchandise of any person thus refusing may be seized by a warrant from any justice of the peace, and detained until the payment of any fine to which said person is liable.

Sect. 5. All penalties and forfeitures herein provided may be recovered by indictment, or action of debt, one half to the use of the town where the offence is committed, and the other to the use of the person prosecuting therefor; and any justice of the peace may cause the arrest of the accused, on complaint, and seizure of the property alleged to be forfeited, and detain the same until trial in the proper court; and in case of conviction, the property shall be decreed forfeited to the uses aforesaid; to be sold in like manner as goods taken on execution.

Sect. 6. Every person licensed shall have painted on every car-

riage employed by him, in letters at least one inch wide, his name, and the words, " Licensed by C. C."

Your opinion is requested, whether this is a constitutional and valid law, so far as it operates upon persons not citizens of Maine, and upon their property.

OPINION.

So far as it respects the commerce or the persons of citizens of other States, the substance of this law is: — 1. That citizens of other States are absolutely prohibited from going from place to place within the State of Maine, and offering for sale, in whole or by samples, any goods, wares, or merchandise whatever. 2. That citizens of the State of Maine are prohibited from going from place to place within that State, and offering for sale, in whole or by samples, any goods, wares, or merchandise *belonging to citizens of other States.* 3. That citizens of the State of Maine may sell without restriction any articles lawfully raised or manufactured in that State.

The Constitution of the United States empowered Congress " to regulate commerce with foreign countries and among the several States."

It is clear that a merchant who is a citizen of any State other than Maine, and who has his domicile and his established house of trade in the State of which he is a citizen, and who sends his agent into the State of Maine to obtain orders for merchandise, which he executes by sending the merchandise to the purchaser in Maine, is thus engaged in commerce between his own State and the State of Maine, within the meaning of the Constitution. It is equally clear that the agent who goes into the State of Maine to obtain such orders, is also engaged in such commerce. For it has been settled by the Supreme Court of the United States, that one signification of this word " commerce " in the Constitution is *intercourse;* and that the power to regulate it granted to the Congress extends to the regulation of the persons by means of whom intercourse for the purposes of traffic is carried on. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Cooley* v. *Board of Wardens*, 12 How. 299. Nor can there be any doubt that a law of Maine which prohibits merchants in other States from using any accustomed and regular means to carry on traffic, or intercourse for the purposes of traffic, between their own States and the State of Maine, is not only a law regulating com-

merce among the several States, but is a law which, so far as it operates at all, operates *to prohibit* such commerce; and the first question which arises is, whether the State of Maine has power to prohibit the use of one of the long established, regular, and important means of carrying on commerce between other States and that State. Upon this question I do not entertain any doubt. There has been some diversity of opinion in former times, among the judges of the Supreme Court, upon the question whether Congress has the exclusive power to regulate commerce among the several States and with foreign nations, or whether the several States may legislate *in some cases*, upon this subject, in the absence of Congressional legislation. But I am not aware that the exercise, by a State, of the power absolutely to prohibit the use of one long established, regular, and important means of carrying on such commerce, has even been supposed to be constitutional since the decision of *Gibbons* v. *Ogden*, in 1824.

It must be borne in mind, that this is a question of the existence of power, and not of the expediency of the particular use made of it. It must be remembered, that it is not the purpose of this law to regulate the conduct of foreign merchants or their agents, when they come within the State of Maine for the purpose of using a regular and accustomed means of lawful traffic between the States. As respects foreign merchants and their agents, who come within the State for the purpose of using this means of traffic, it is not a law of regulation, but of prohibition. They are not permitted to use this well-known, usual, and important means of traffic by complying with certain conditions and observing certain regulations. They are absolutely prohibited from using this means. Now if the power exist to prohibit one customary and important means of carrying on commerce between the States, where are the limits of such power? Why may it not be employed so as to greatly embarrass and even to annihilate it? If a State may prohibit merchants of other States from sending their agents into the State to go from place to place and obtain orders for goods by exhibiting samples, what is to prevent the prohibition to send an agent at all to obtain orders for goods? Or what the prohibition to come for that purpose himself? Or the prohibition to solicit orders through the mail, or even through advertisements in newspapers within the State? I can perceive nothing in the nature of the power, or the subject upon which it is exercised, or the nature of the particular

prohibition in question, which can distinguish it from either of the other prohibitions mentioned, or from many others which might be mentioned. Their exclusively *internal* commerce the several States may regulate. They may pass laws to regulate travelling only from town to town within the State. But they cannot prohibit merchants in other States from carrying on commerce within their several limits, or from using any of the known and established means and instruments for that purpose.

But in my opinion this is not the only valid objection to this law. The Constitution provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The law of Maine, now in question, prohibits citizens of other States from using this known, regular, and accustomed means of selling their own property within the State of Maine, by employing even duly licensed agents within the State for that purpose. It confines the privilege of using this means of traffic to citizens of the State of Maine. A citizen of Maine may employ a duly licensed person to travel from place to place, and solicit orders to buy his merchandise by sample. A citizen of Massachusetts is prohibited from exercising this privilege. If it be among "the privileges" intended to be secured by the Constitution, the law in question is inoperative and void as against citizens of States other than Maine. And I have no doubt that the privilege of employing a duly licensed agent to solicit orders for goods by sample is among the privileges secured by this clause of the Constitution.

In one of the Articles of Confederation (Art. 4), there was this clause: "The people of each State shall, in every other, enjoy all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively," &c. As well because of the mention of "duties, impositions, and restrictions," which under the Constitution were no longer to be left in the power of the States, as because of ambiguities in the article which are pointed out by the Federalist (No. 42), the language of this article was not inserted in that corresponding provision of the Constitution designed to create a general citizenship. The general words "privileges and immunities of citizens" were substituted in place of the particular enumeration of privileges in this 4th Article of the Confederation. But considering that it was among the declared objects of the Constitution "to form a more

perfect union," and that the power to regulate commerce among the several States was conferred on Congress, there can be no doubt that among the privileges and immunities of citizens secured by the Constitution is the privilege of using all such instruments and means of traffic as are allowed by the laws of the State to be used therein by its own citizens. It may be admitted that, in the exercise of their police power, the States may pass laws which indirectly affect commerce among the several States. For instance, they may regulate sales at public auction, and may prohibit any one but a duly licensed auctioneer from making such sales. But they cannot prohibit citizens of other States from selling their property at public auction, through a duly licensed auctioneer, so long as they permit their own citizens to do so.

The right to take, hold, and dispose of property, in the same manner, and under no greater restrictions or burdens than are imposed on their own citizens, is among the clearest and most important of those privileges and immunities conferred by the Constitution. And inasmuch as this law prohibits citizens of other States from using an established, long-accustomed, and important means of selling property, which it allows to citizens of Maine, I have no doubt this prohibition is inoperative and void.

I think also it would be found to be impossible to maintain the validity of that discrimination which this law attempts to make between articles the growth or manufacture of Maine, and those which are the growth or manufacture of other countries or States. In the former a citizen of Maine may deal without restriction; but not in the latter. This law therefore imposes on the traffic in all merchandise grown or manufactured by a citizen of Massachusetts, within his own State, burdens and restrictions not imposed on like articles grown or manufactured in Maine by its citizens. If a citizen of Maine own articles grown or manufactured in Maine, he may sell them unrestricted by this law. But if he own merchandise grown or manufactured out of Maine, he cannot. I greatly doubt the power of a State to make any regulation of traffic which thus discriminates between articles of its own growth or manufacture, and articles grown or manufactured in other States and in foreign countries. This discrimination is not the exercise of a police power. It is not an inspection or health law. It is not designed, like laws regulating hawkers and pedlers, and auctioneers, to secure the inhabitants of the State from imposition, or

to regulate the internal commerce of the State. It is a regulation of commerce, the only purpose and effect of which is to give to producers in Maine, and all who traffic in their products, a privilege and immunity not allowed to producers elsewhere, and to those who traffic in their products; and, to the extent it operates, to encourage and protect the former, and to burden and restrain the latter.

I think such a regulation is not within the power of a State. While my opinion is that the power to regulate commerce among the several States and with foreign nations is not in all cases an exclusive power, and the States may make some commercial regulations which, in the absence of Congressional legislation, will be valid, yet when the subject in question is one which from its nature demands uniform regulation for the general benefit of the nation, there is no room for doubt, and so far as I know it has not been doubted for many years, that the power of Congress is exclusive and the States cannot legislate thereon. And such is the settled doctrine of the Supreme Court. (*Cooley* v. *Board of Portwardens*, 12 How. 318–320.) Now if each State may discriminate in favor of its own products and manufactures, according to its own views of its own interest, it is in the power of the States to create a condition of things quite as bad, as respects commerce among the States, as that which existed when the Constitution was formed.

The general good of the nation demands uniform rules, operating equally on the entire internal commerce of the nation, without regard to State lines, and unembarrassed by partial, conflicting, and vexatious State regulations. In other words, it demands entire freedom, except so far as Congress, for the general good, may find it needful to impose restrictions.

In my opinion, therefore, this State regulation of commerce, which attempts thus to discriminate between products of Maine and those of other States and countries, is in conflict with the Constitution of the United States. And if this be so, there is no part of this law, and no provision in it, which is operative or valid as to sales, or offers to sell by sample, any goods, wares, or merchandise, the growth or manufacture of any other State or country than the State of Maine. And as citizens of Maine may sell without restriction by this law any article which is the growth or manufacture of that State, citizens of other States may sell without regard to this law any article which is the growth or manufacture of any

other State or country. It is only in this way the growths and manufactures of other States, and the privileges of their citizens, can be protected against the unconstitutional operation of this law. It is impossible to say that the clause which declares the law shall not affect the sale of articles the growth or manufacture of Maine is inoperative. The Legislature of Maine had the power to make this provision, and by force of it no sale of such an article can come within the law. But the Legislature had not the power to enact that the sales of other articles should come under a different rule of restriction from that which governs the sales of the products and manufactures of Maine; and the courts must declare that the attempt to bring the former under a different rule is inoperative and void.

My opinion is, that the law has no force as against persons offering for sale by sample merchandise belonging to citizens of States other than Maine, especially if such merchandise be not the growth or manufacture of Maine.

B. R. Curtis.

June 2, 1865.

CONSTITUTIONAL LAW. — EX POST FACTO LEGISLATION.

Opinion.

My opinion has been requested upon the question whether the fourteenth section of the act of March 3d, 1863, (12 Stats. at Large, 741,) enables the United States to maintain an action, or proceeding, for the recovery of a fine, penalty, or forfeiture incurred by reason of an act done or omitted more than five years before the passage of that act.

Ex post facto laws are forbidden by the Constitution of the United States; and in my opinion, if the law in question were so interpreted and applied as to maintain an action or proceeding to recover a fine, penalty, or forfeiture for a past act not otherwise recoverable, because completely barred, it would be an *ex post facto* law, within the prohibition of the Constitution.

It is true that, strictly speaking, such a law has not the effect to make an innocent act criminal, nor enhance the punishment or aggravate the crime, or perhaps to change the rules of evidence existing when the offence was committed; and these are the effects usually specified as descriptive of the character of an *ex post facto*

law. But I am of opinion that they are but instances, and do not exhaust all cases in which a law may be *ex post facto* under our Constitution; and that the reason why they are instances is because, in each of them, a law enacted after the act done introduces *a new rule of decision, by force of which the citizen may be convicted and punished* as he could not have been under any rules of decision existing when the act was done.

If a law introduces and makes obligatory on the courts any rule of decision, by force of which a citizen becomes punishable for what he was not, at the passage of the law, punishable, such law is, as to his case, *ex post facto;* and it is not material what is the precise character of the rule, or by what precise mode of operation it is to have this effect.

In the case proposed, it was incumbent on the prosecutor, at the time of the passage of this act, to prove that the accused had committed the offence within five years before the institution of the suit or proceeding. Failing to prove this, the prosecution must fail. Now, a law which dispenses with this proof, and requires a conviction whenever the offence was committed, relieves the prosecutor from one of the requirements of the existing law, and thereby subjects the citizen to conviction and punishment, which could not have been awarded under the law existing when the act was done, nor until the new rule was enacted.

A statement of the exact case will make this plain. Suppose an information of debt for a penalty. Plea, the statute of limitations. Demurrer by the prosecutor. The day before this act took effect, the judgment of law is for the citizen. If the day this act takes effect, the judgment of law is for the prosecutor, does not this act subject the citizen to a penalty? Without it, the law commands a judgment in his favor; with it, the law commands a judgment against him. What change in the law has changed the judgment? This legislative act only; and if this law alone has changed a judgment for the citizen, by reason of a past act, into a judgment for the government, for *a penalty,* how can it be that this act is not *ex post facto?*

I can see no distinction in principle between such a case and the enactment of a new rule of evidence, or dispensing with any legal element necessary to a conviction when the act was done.

In truth, the new law does dispense with one of the elements necessary to a conviction; for the law previously made the time of

instituting the proceeding an essential element necessary to a conviction, — just as essential as the *corpus delicti* itself.

In the leading opinion of Judge Chase on this subject, (*Calder* v. *Bull*, 3 Dal. 390,) it is said that "the prohibition is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation." It is plain he did not mean to include only those acts which themselves prescribe the punishment, for he expressly instances those which merely change the rule of evidence. What he intended was protection against all legislative acts having a retrospective operation, to render the subject punishable who without such acts would be dispunishable; whether such acts should newly define the offence, or establish new rules for its proof, or take away a defence given by the existing law, complete and perfect at the time of the passage of the retrospective act.

There is certainly some want of comprehensiveness in the definitions which have been attempted of *ex post facto* laws. Perhaps as good a description as is to be found in our books, is that of Chief Justice Richardson in 3 N. H. Rep. 476. "It therefore seems that a retrospective law for the punishment of an offence, within the meaning of our Bill of Rights, must be a law made to punish an act previously done, or to increase the punishment of such act, or in some way to change the rules of law in relation to its punishment, to the prejudice of him who committed it. In other words, it must be a law establishing a new rule for the punishment of an act already done." Close analogies might be added in favor of this conclusion.

The Constitutions of some States guard rights of property against retrospective laws. Under these it has been held, that a law so extending the statute of limitations as to cut off *existing* rights of property (*Kennebec Purchase* v. *Laborer*, 2 Greenl. 275; *Webster* v. *Cooper*, 14 How. 495), or a law repealing a statute of limitations as respects claims already barred, is inoperative and void. (*Willard* v. *Harvey*, 4 Foster, 344; *Briggs* v. *Hubbard*, 19 Vt. 86.)

Surely, the rights of the citizen in respect to his personal liberty and his security against penalties, which are protected by the article now in question, are not to receive a less liberal interpretation; and if a right of private action barred by the statute of limitations cannot be revived by the Legislature, because prohibited from

affecting the rights of property involved in civil actions, how can the rights of persons involved in penal actions be affected by the Legislature, by reviving such rights when completely barred? If the former kind of retrospective laws is void as interfering with civil rights, how can the latter be held operative when they act in the same way, and to the same extent, to subject citizens to fines and forfeitures?

If, therefore, it were necessary to understand from the repealing act of Congress now in question, that it was the intention of the Legislature to have this law so act as to render punishable acts not punishable by law when it was passed, I should say, without hesitation, such intent cannot prevail. But it is not necessary to attribute to Congress any such purpose, not only inconsistent with the Constitution, but repugnant to the whole course of modern legislation.

In *Adams* v. *Woods*, 2 Cranch, 336, Mr. Chief Justice Marshall, in considering whether an act of limitations should be construed as extending only to offences theretofore enacted, says: "In expounding this law, it deserves some consideration, that, if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain for ever liable to a pecuniary forfeiture."

Add to this, that, if it be possible so to construe a law as not to operate on existing vested rights, it shall be so construed. (*Dash* v. *Van Kleeck*, 7 Johns. 477; *Moon* v. *Darden*, 2 Ex. Rep. 722.) And that, if otherwise construed, it is an *ex post facto* law. In such a case I do not think the intention of Congress to make this law operate on cases where the statute of limitations had already constituted a complete bar, can be found or assumed. Its terms do not import any such violent infringement of principles or rights. It simply repeals two statutes of limitations so far as they embrace a class of cases.

That it was the intention of the Legislature to have *all past cases* of that character tried without regard to lapse of time, is not expressed, and surely is not to be implied.

B. R. CURTIS.

May 3, 1865.

CONSTITUTIONAL LAW. — OBLIGATION OF CONTRACTS.

Case.

The Legislature of Michigan on the 15th of February, 1859, passed the following act.

An Act

To encourage the Manufacture of Salt in the State of Michigan.

[See Laws, 1859, page 551.]

Sect. 1. *The People of the State of Michigan enact,* That all companies or corporations formed, or that may be formed, for the purpose of boring for and manufacturing salt in this State, and any and all individuals engaged, or to be engaged, in such manufacture, shall be entitled to the benefits of the provisions of this act.

Sect. 2. All property, real and personal, used for the purpose mentioned in the first section of this act, shall be exempt from taxation for any purpose.

Sect. 3. There shall be paid from the treasury of the State, as a bounty, to any individual, or company, or corporation, the sum of ten cents for each and every bushel of salt manufactured by such individual, company, or corporation, from water obtained by boring in this State: *Provided,* That no such bounty shall be paid until such individual, company, or corporation shall have at least five thousand bushels of salt manufactured.

Approved, February 15, 1859.

This act took effect May 16, 1859.

The questions submitted are, —

1st. Whether the second section of this act amounted to a contract with such persons or corporations as should thereafter use real and personal property for the purposes mentioned in the first section of the act, that while so used such property should be exempt from taxation, so that the repeal of the act would impair the obligation of a contract, and therefore be invalid.

2d. Whether the Legislature had the power, by a repeal of the third section of the act, to deprive of the bounty therein mentioned all persons who should manufacture salt after such repeal took effect.

Opinion.

Upon the first of these questions I am of opinion that the second section of the act does contain a grant of the right of exemption from taxation, which grant became operative, and amounted to a contract, when accepted by employing real and personal property for the purpose mentioned in the first section. The language em-

ployed is clear and explicit. The exemption promised is complete. There is no limitation of time during which the exemption is to exist. Its duration is made to depend only on the continuance of the special use of the property. In my judgment this is clearly a contract, the obligation of which would be impaired by a repeal of this section.

It comes fully within the principles settled by the Supreme Court of the United States in *New Jersey* v. *Wilson*, 7 Cranch, 164; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *State Bank of Ohio* v. *Knoop*, 16 How. 369; *Dodge* v. *Woolsey*, 18 How. 331; *Jefferson Branch Bank* v. *Kelly*, 1 Black, 436.

This case is also clearly distinguishable from *Rector, &c.* v. *Philadelphia*, 24 How. 300. The exemption from taxation in that case was a mere gratuity. There was no consideration for any contract, and the law was held to be repealable. Here the application of the property to the use which the Legislature desired to encourage, amounts to a valuable consideration for the grant.

The second question is attended with more difficulty. In terms, the promise of the State to pay a bounty is explicit. The purpose to induce persons to engage in the manufacture of salt, by this offer of a bounty on its production, is equally clear. The acceptance of this offer, and the making of the investments of capital necessary for the manufacture, constitute an adequate consideration for a complete contract, and, at first view, it may seem impossible to distinguish the case presented by the second section from that presented by the third section. But, after much reflection, I am of opinion that such a distinction exists, and that it is quite certain that the Supreme Court of the United States would fix upon it.

This distinction is found in the nature and the subject-matter of the offer itself.

In its nature it is the offer of a gratuity. It is true that the producer, to entitle himself to it, must first produce the article on which the bounty is to be paid. But this is true in all cases of bounties. It is also true, that in this case the producer must invest capital in the manufacture. But this again is also true of the means of production of all things on the production of which governments have offered bounties. The question is, whether the offer of a bounty on an article, when viewed in reference to the nature and circumstances of the offer and the practice of governments in

such cases, binds the government to continue to pay the bounty so long as any one shall continue to produce that article; or whether it is a measure dependent on the policy of the government, and to be changed at its pleasure; and I am of opinion that the latter is the true character of the offer, and that there would be no reasonable chance of inducing the Supreme Court of the United States to take a different view of it.

The practice of governments, both of the States and of the United States, has been to consider such offers dependent on the pleasure of the legislative power. Considerations derived from the expediency of continuing such offers, and the intrinsic injustice of withdrawing them, have been relied on. I am not aware that they have ever been treated as necessarily of continuing obligation. They are measures of policy usually dependent on temporary causes, and generally experimental merely, and where, as in case of the fishing bounties, the causes which have produced them have been supposed to be continuous, I do not think it has ever been supposed that the government might not judge freely whether to repeal or continue them. I think the offer of a bounty on production, like the offer of a reward for detection of crime, or any similar public service, may be withdrawn at any time before the service is performed; and that whatever previous preparations for the service may have been made must be taken to have been made subject to the public right to withdraw the offer, and not upon the faith that it would be perpetually continued.

The decisions made upon the first question above proposed, though they have upheld, with a firm hand, the validity of an exemption from taxation founded on an investment of property made on the faith of it, and the acceptance of such an offer, have also asserted with equal strength the principle that contracts are not to be deduced from legislation when there is any reasonable doubt of the intention of the legislative power to propose them. In the present state of the Supreme Court of the United States, I should not anticipate any extension of these principles, and I ought to add, that I am quite satisfied that there ought not to be any such extension of them as would make the offer of a bounty by a State, on the production of any article, an irrepealable contract to pay that bounty so long as any one should choose to produce it.

B. R. Curtis.

Boston, May 16, 1867.

A case which came before Judge Curtis as an arbitrator, in 1868, by the voluntary submission of the parties, related to the proprietary rights of the States to their lands under the water of the sea, and to the right of laying submarine telegraph cables on the shores of a State. The questions arose in the following manner: —

Charles Havard and C. C. Leigh obtained, from the Legislature of the State of New York, an exclusive right and privilege, for a period of years, to land and work a telegraphic cable between the empire of France and the State of New York. By an agreement in writing, executed in London, July 31, 1868, they sold and conveyed this right to Emile d'Erlanger, for the sum of £12,000; part of which sum was paid in cash, and the balance was made payable on the following condition: That the Hon. Salmon P. Chase, Chief Justice of the United States, should, as an arbitrator between the parties, decide and certify that in his opinion this grant would legally and effectually enable the grantees, or their assigns, to prevent and hinder the laying and working of a telegraphic cable from the empire of France to any part of the waters, reefs, islands, shores and lands of the State of New York, by any person or persons claiming authority to do so under or by virtue of any concession granted, or which might thereafter be granted, by the Congress of the United States, or by the State of New York, or under or by virtue of the riparian and proprietary rights of any owner of land lying on the shores of the State of New York, or any of the islands on the coast of the State. The agreement of submission further provided, that if Chief Justice Chase should decline to act as arbitrator of these questions, he should have power to appoint a substitute arbitrator, whose opinion and award in the premises should be final between the parties.

Chief Justice Chase declined to act, for the reason that the questions were of such a nature that they might, in some other case, come before him judicially; and he

appointed Judge Curtis as his substitute. Judge Curtis heard the parties in the city of New York, in December, 1868,[1] and soon afterward made the following

AWARD.

Pursuant to the agreement, a copy whereof is hereunto annexed and marked A, and to the nomination by the Hon. S. P. Chase, Chief Justice of the United States, of the undersigned to act in the premises, a copy of which nomination is also hereto annexed and marked B, the undersigned has met and heard the parties by their respective counsel, and, pursuant to the authority conferred on him by the said paper writings, copies whereof are annexed as aforesaid, has made his decision in the premises in manner following: —

I do hereby express my opinion, and declare that in my judgment the said parties of the second part named in the said agreement, a copy whereof is marked A, as aforesaid, have acquired under the said two acts of the Legislature of the State of New York referred to in the said paper writing marked A, and under the assignment and transfer made by the original of the said paper writing, a copy whereof is marked A, such an exclusive right and privilege to land and work a telegraphic cable between the empire of France and the said State of New York as will enable the said parties of the second part legally and effectually to prevent and hinder the laying and working of a telegraphic cable from the empire of France to any part of the waters, reefs, islands, shores, and lands of the State of New York by any person or persons claiming authority to do so under or by virtue of any concession granted, or which may hereafter be granted, by the Congress of the United States, or by the said State of New York, or under and by virtue of the riparian and proprietary rights of any owner of land lying on the shores of the said State of New York, or any of the islands on the coast of the said State.

In testimony whereof I have hereunto set my hand, this twenty-sixth day of December, A. D. eighteen hundred and sixty-eight.

B. R. CURTIS.

[1] For the assignee, in opposition to the exclusive character of the grant, the questions were argued by Mr. W. W. MacFarland. Mr. George Ticknor Curtis argued for the assignors, in support of their claim to receive the balance of the purchase-money.

Opinion.

In the matter of the arbitration between Charles Havard and others, of the first part, and Emile d'Erlanger and another, of the second part, under an agreement bearing date July 31, 1868.

For the information of the parties and their counsel, but not intending to make the same any part of his award in the premises, the undersigned states the following grounds and reasons for the formal award which he has separately made and certified.

First. I am of opinion that, at the dates of the several acts of the Legislature of the State of New York now in question, that State was the proprietor of the soil on its maritime border below high-water mark, as far to the seaward as the laws of nations recognize ownership of land under tide-waters, saving such specially described parts thereof as before those dates had been granted in fee simple to the United States, to municipal corporations, and to private persons. No one of these grants appears to have extended a considerable distance below low-water mark, and the soil of the State does extend some miles to the seaward of each and all of them.

Second. The State of New York being the proprietor of this soil, its Legislature had power to make the grant now in question. That grant is of *the exclusive right*, for the period of twenty years, to lay, construct, maintain, and operate telegraphic cables in and over the waters, reefs, islands, shores, and lands over which the State of New York has jurisdiction, to connect the State of New York with the empire of France. There is a proviso to the act which shows the grant was applicable only to such cables as should be landed from the ocean directly on the shore of the State of New York; and not to any cable landed from the ocean within some other jurisdiction and connected thence with the State of New York.

If this had been a transaction between private persons, the rights derived from it might be found to rest, in part at least, upon an executory contract; but I am of opinion that the Legislature of the State, dealing with its domain, had the power to make a complete executed grant, such as is described in this law; which in my opinion vested in the grantees an exclusive interest in the soil under tide-water, which belonged to the State so far as the same can be used for the purposes described in the grant. I think it clear that, by reason of the prohibition in the Constitution of the United States to impair the obligation of a contract, the State of New York can pass no law revoking or impairing this grant.

It has been argued with much force and ability, that the State held that part of its domain under tide-water in trust for public uses; that though the only public uses designated by legal writers and judicial opinions are those of navigation, anchorage, and fisheries, yet the extent of the *jus publicum* is not to be measured by the specific instances in which it has heretofore been found useful to assert it; and that the soil of the sea, so far as the State is its proprietor, is held subject to a public right to lay telegraphic cables thereon, and repair and work them.

After much consideration I am unable to come to this conclusion.

I must begin with the clearly established position that the State is the proprietor of this soil, and before I can declare this ownership to be restricted, I must find such restriction either expressed or satisfactorily implied in settled rules and principles of law, applicable to the subject. I am unable to find either the one or the other. Not only is such use not expressly included within the *jus publicum*, but it is of such a nature as to be distinguished from those uses which are within the *jus publicum*. Neither of the defined uses within the *jus publicum* involves the exercise of any permanent right *in the soil itself*. The right to sail over, or temporarily to cast anchor on this soil, or the right to take fish floating over it, or shell-fish resting on it, is distinct from a right permanently to occupy this soil by a structure placed thereon. The former rights may be exercised and enjoyed by the public. Like a right of way on land, each one in his turn, and according to his wants, may enjoy the right, but his use is transitory, and his right must be exercised only in such reasonable time and manner as not to interfere with the common right of others. They are rights which may and do exist in common, and be enjoyed by all equally. But the right to place permanent structures on the soil, and keep them there, and have unobstructed access to them for use and repairs, cannot be in any proper sense a public and common right. A right to possess and use the soil permanently and exclusively is in its nature a several and private, and not a common and public right.

It is true that a telegraphic cable is designed to be used by the public, and, looking to that ultimate design only, this use of the soil may be considered a public use; just as the soil belonging to a private person, taken under the power of eminent domain, for the construction of a railroad, is taken for a public use. But soil so

taker is appropriated also to the private use and ownership of the railroad corporation, which takes and exclusively owns it for all the purposes of a railroad, and within the limits of the authority conferred by its charter such a corporation controls the use of this property, for its private advantage, as effectually and absolutely as a private person controls the use of his own house.

In this and other similar cases, property belonging either to private persons or to the domain of the State is acquired and held as private property; but by the act which enables its acquisition it is made subject to certain defined public uses.

It is a settled question in American constitutional jurisprudence, that the power of eminent domain is broad enough to take property for such individual ownership, if some public necessity is the ultimate reason for the grant. But in all such cases the public use, so far as it exists, is impressed on and arises out of the act of taking by force of the controlling legislative authority which enables the act of taking; and this impresses on all the property taken, whether it be private property, or whether it be a part of the public domain, those defined public rights which the legislative power has deemed to be at once the consideration for its grant of power to take property, and the reason for the delegation of that power.

In other words, it may be said, that the reason why the legislative power may authorize the taking of private property and appropriate the domain of the State to the ownership of individuals and private corporations is, that the legislative power, at the same time that it makes such grants, makes the property so acquired subject to certain defined public necessities. But what I have to consider in this connection is not the legislative power to subject either the lands of private persons, or the domain of the State, to that individual ownership, and that subservience to public wants impressed by the act enabling their acquisition, but the question whether, independent of any specific action of the legislative power, the maritime soil of the several States is held to any other public use besides those of navigation and the fisheries, and I am of opinion that it is not subject to any other public rights. I am of opinion that the maritime States hold that part of their soil below high-water mark by as absolute a title as they hold their State Houses; and may make such grants thereof, exclusive or otherwise, as they may consider suitable and expedient.

There is another point of view from which this subject may

be looked at, and which leads more directly to the consideration whether the Congress of the United States can in any effectual manner interfere with the grant made by the State of New York.

By the Declaration of Independence, followed by the treaty of peace with Great Britain, the State of New York became a free, sovereign, and independent State, and in that capacity the absolute owner of its entire maritime border below high-water mark, subject only to some possible restrictions from grants to individuals which are of no importance in this connection. This absolute ownership still continues wholly unimpaired, save so far as the Constitution of the United States has restricted its exercise. The only clause of the Constitution which needs to be here considered, is the grant to Congress of the power to regulate commerce between the several States and with foreign countries. This grant of power to the Federal government at the same time restricted the State of New York from making any use of its maritime frontier inconsistent with the power of Congress to regulate foreign commerce, and conferred on Congress the power to regulate that commerce.

It must be admitted that the word "commerce" in the Constitution extends to mere intercourse, and is not restricted to traffic; and that consequently that kind of communication with a foreign country which is carried on by means of a telegraphic cable is commerce with a foreign country within the meaning of that clause of the Constitution, and consequently may be regulated by Congress.

It is a theory of recent origin, that, under its power to regulate commerce, Congress may empower individuals, or a corporation created by it, to take lands and erect structures to carry on that commerce. I do not find it necessary to enter into any inquiry on this disputed power. Because I do not understand that I am to decide what may be taken away under the power of eminent domain, but what was effectually granted. I must assume that both these parties knew that all property in this and other civilized countries is held subject to the power of the government to take and pay for it, and therefore it is not a question whether some power in the United States may subject what is granted to some permanent public use, after making just compensation for what may be thus taken, but only whether the exclusive rights in question are effectually granted.

Looking at the subject in this point of view, the only inquiry is,

whether Congress, by force of its power to regulate foreign commerce, can empower an individual or a corporation to lay a telegraphic cable over the maritime property of the State of New York without taking it for a public use, and making compensation therefor to those to whom the State has granted its rights; which compensation must of course be adequate to make good the damage inflicted.

And I am clearly of opinion, that Congress has not this power. The State of New York holds not only its maritime frontier, but all its territory, subject to the power of Congress to regulate commerce between the States and with foreign nations. So does each individual owner of lands and all other property. But the power to regulate commerce certainly no more enables Congress to take the private domain of a State to advance its policy of promoting commerce with foreign nations, than it enables Congress to take the private domain of individuals without compensation. It is a question into which I do not find it necessary here to enter, under what conditions Congress can interfere with the private domain of a State without its consent. But certainly Congress, under its power to regulate commerce, or under any other power, cannot take away from the State or its grantees that estate or interest in its domain which the State holds, or has granted to private persons, without first lawfully subjecting it to a public use and making provision for just compensation.

It is true, if the State held this part of its public domain in subjection to a specific public use, and the regulation of that public use was under the control of Congress, no compensation would be demandable for such regulation. But it has already been stated, that in my judgment the State does not hold this part of its domain subject to this particular use, and consequently an exemption from the duty of compensation cannot be claimed on this ground.

It is hardly necessary to add, that the riparian owners whose lands are bounded by the shore, or who have special grants from the State of defined parts of the soil under tide-water, have no such rights in the soil of the State below these granted limits as enable them to interfere with the grants of the State now in question. And in these respects the United States, as grantees of certain defined parts of the soil, stand on the same footing as private persons, and have no other or greater rights.

B. R. Curtis.

LOANS BY NATIONAL BANKS.

Opinion.

My opinion has been requested on the following questions: —

1st. Would a loan of more than ten per cent of the capital of a national bank to any one person, corporation, or firm, be valid or void in law?

The 29th section of the National Banking Law is as follows: "That the total liabilities to any association, of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, SHALL *at no time exceed one tenth of the amount of the capital stock paid in.* PROVIDED, that the discount of *bona fide* bills of exchange drawn against actually existing values, or the discount of commercial or business paper actually owned by the person or persons, corporations, or firms negotiating the same, shall not be considered as money borrowed."

Such a loan as is mentioned in the first question, being in contravention of an express prohibition of the law which governs and limits the powers of such banks, would create no legal rights of the bank or liabilities of the borrower capable of being recognized, or enforced, either directly or indirectly, in a court of law or equity. This follows not merely from the principle that an illegal contract cannot be enforced, but from an absolute and total incapacity of such a corporation to become a creditor for a prohibited amount.

2d. Would such contract of loan be valid to the amount of the ten per cent of the paid-in capital, or void as to the whole contract?

If a series of loans should be made from time to time, until their amount exceeded ten per cent of the capital of the bank, only such loan or loans as were in excess of the ten per cent would be made in contravention of the law which created the corporation, and therefore would create no legal rights in the corporation; the prior loans would be valid. But if *one* loan of more than ten per cent should be made, the entire contract, being in contravention of the law, would be inoperative to create any legal right in the corporation.

3d. Could a bank maintain an action at law, or in equity, to collect money of a person, corporation, or firm to whom it had loaned more than ten per cent?

The answers already given cover the subject of this question.

4th. Does or does not the section apply directly to the person of the debtor, and limit the amount of his debt to the bank? and can he be indebted beyond the limit specified in the law?

A person cannot be legally indebted to a bank for an amount prohibited by law.

5th. What is meant by the term *liabilities*, (observe the word appears *three* times in the section,) and does it, or does it not, mean to include indorsements, as well as direct debts?

The word *liabilities* includes every form of liability, absolute and conditional, except those included in the proviso. The liability of a drawer or indorser of a bill of exchange *not* drawn against actually existing values, and the liability of an indorser of a note, *not* being business paper, owned by the indorser and discounted for him, are included.

This is clear, not only because the word *liabilities* is broad enough to include the contracts of drawer and indorser, but because the proviso has excepted certain drawers and indorsers specially described, thus leaving all others within the prohibition.

6th. If the bank, having loaned over the amount, or say three times the amount, the law allows to one person, firm, or corporation, and having received, and holding large quantities of collaterals, could or could not any legal creditors of the debtor, by proper action (say trover), sue the bank, and apply such securities to the payment of these debts, if the contract of loan was illegal?

If the bank holds collaterals for a *void* contract, any creditor of the general owner of those collaterals may reach them, and subject them to the payment of his debt, by resorting to proper legal proceedings for that purpose. What proceedings would be proper must depend on the laws of the place where they are to be had. If the creditor has recovered a judgment at law, and his execution has been returned *nulla bona*, he may then have the aid of a court of equity to reach and apply the collaterals to the payment of his debt. In some States the process of garnishment would be sufficient.

7th. Would the deposit of stocks and bonds with a bank as general collateral, where money is loaned thereon in excess of the amount allowed by law, be such a transaction as to come within the *proviso* in the 29th section?

I answer this question in the negative.

8th. Would the forfeiture provided in the 53d section operate

to sustain the right of the bank to recover on such contract, and leave them subject to be proceeded against by the Comptroller?

I answer this question in the negative. Corporations cannot maintain actions on contracts which they are prohibited from making, whether such acts are or are not cause of forfeiture of their charter.

B. R. CURTIS.

BOSTON, May, 11, 1868.

In March, 1865, the Hon. Peleg Sprague who had held the office of Judge of the District Court of the United States for the District of Massachusetts during a period of three and twenty years, retired from the bench. Judge Curtis, in compliance with the request of the bar, prepared and presented to Judge Sprague the following Address of the Bar of the United States Courts: —

ADDRESS.

TO THE HONORABLE PELEG SPRAGUE: —

SIR, — The members of the bar of the courts of the United States, in which you have presided during the last twenty-three years, cannot allow you to withdraw yourself from the office of judge without an expression of their high estimate of your public services, their profound respect for your judicial qualities and attainments, and their grief for the physical disability which has caused your retirement. They esteem it to be due to their country, to you, and to themselves, that they should bear their testimony to the great value of those services, and to the rare combination of intellectual and moral powers which alone could make them possible.

They have found you to be not only thoroughly instructed in the common law, but master of those special branches of jurisprudence and legislation which it has been your peculiar province to administer.

They have found in you such power of analysis as they have not known surpassed, united with sound judgment to weigh its results.

They have found in you that absolute judicial impartiality which can exist only when a tender and vigilant conscience is joined to an instructed and self-reliant intellect and a firm will.

And these great powers and attainments have been used by you

so steadily, so patiently, so continuously, through more years than are comprised in the professional life of most of us, that we have scarcely known, and your patience and courtesy have never allowed us to realize, that during much of the time you have been a sufferer from physical pain, and that during all the time you have been in a great measure unaided by that precious sense of sight, without which such labors as yours would have seemed impossible.

We are heartily thankful for the great benefits you have conferred, not on us only, but on this community, and on our country, whose judicial bench you have strengthened and illustrated.

We deplore the cause which has seemed to render your retirement necessary.

Would that it were in our power to do something to alleviate your condition, instead of giving expression to our sorrows and to our affectionate respect.[1]

B. R. Curtis,
Charles G. Loring,
Sidney Bartlett,
J. H. Clifford,
T. D. Eliot,
George Lunt,
G. S. Hillard,
H. W. Paine,
John C. Dodge,
R. H. Dana, Jr.
C. L. Woodbury,
S. H. Phillips,
Committee of the Bar.

Boston, March 27, 1865.

[1] In explanation of some of the allusions in this address to the physical infirmities of Judge Sprague, it may be stated that for many years he had been, though not blind, deprived of all use of his eyes in either writing or reading. Yet such was his extraordinary power of memory, and the discipline to which he had subjected himself, that he would preside at a long and complicated trial, and charge the jury with perfect accuracy, without misrecollecting or misstating any part of the testimony. The writer of this work has personally known him to do this in a patent cause lasting through many days, without recourse to a note of any kind. Whenever a dispute arose between counsel as to what a witness had said, Judge Sprague's recollection of the testimony was always received with implicit and unquestioning submission. Such intellectual feats would have been almost incredible, if they had not been repeatedly witnessed.

CHAPTER XI.

1860.

Change of Religious Sentiments. — No Change in Religious Character.

I HAVE, in a former chapter, spoken of the early religious impressions which my brother derived from the influences that surrounded his youth. His religious sentiments and opinions continued to be those generally held by the Unitarians of New England, until he was past the middle period of life. Immediately after his residence in Boston began, he became a constant attendant at King's Chapel, where there has been in use, since the year 1785, a modified form of the Liturgy of the Episcopal Church, adapted to the opinions and tastes of a congregation which at that time became Unitarian. So long as Dr. Greenwood, the fervent and admirable preacher who was the minister of the Chapel when Judge Curtis became a member of its congregation, lived, and through the ministry of his successor, Dr. Peabody, my brother was satisfied with the preaching which he there heard. But as he grew older, and gave more study to certain parts of doctrinal religion than he had at an earlier period of his life, he felt obliged to relinquish the fundamental dogma of the Unitarian belief, and to accept the doctrine of the Trinity. It happened that, at about the time when his mind began to tend in this direction, a very distinguished Unitarian preacher, the Rev. Dr. Huntington, now a Bishop in the Episcopal Church, officiated a good deal at King's Chapel, after the death of Dr. Peabody. Dr. Huntington's mind, at this time, was

tending towards a similar change; and his sermons gave evidence of it. They found a sympathizing hearer in Judge Curtis.

Aware that Bishop Huntington would be able to say all that needs to be said in regard to this change in my brother's religious views, I wrote to him when I had determined to prepare this Memoir, and received from him the following reply: —

Syracuse, Oct. 1, 1878.

My dear Sir, — Till 1860, I knew nothing of the religious convictions or relations of Judge Curtis, except that he was a regular and reverent worshipper at the King's Chapel. In that year, Emmanuel Parish was organized. I had just passed into the Episcopal Church, and it was understood that I should become its rector on being ordained Priest, as I did. The Judge and his wife appeared in the congregation, with the children, except Minnie, who, you know, continued a Unitarian. Bessie had been married. If her connection with the "Advent" had any bearing, direct or indirect, on her father's change of views, I never knew it, either from him or otherwise. His coming to "Emmanuel" at the time struck me as a sign that he was in earnest, because the service was temporarily held in a hall, and his preference was known to be for what is settled and stable.

At an early day, he came to me to say that he desired to come to the Holy Communion with Mrs. Curtis; that I might not unnaturally imagine he came as a Unitarian, but that he did not; that thought and inquiry had led him to accept the doctrine of the Trinity and the system of the Church.

Confirmation was mentioned as a Church ordinance. He said that his education and habits had not prepared him to conform to that rite, and that it did not seem to him then to be necessary or a duty; but that he should not in any case take the sacrament of the Supper without my express consent. My reply to him was what it has usually been in like cases; namely, that I thought he had a right to come, under the language of invitation in the Prayer-Book, till he should feel disposed to take the more definite step, and that he would be welcome. From that time he was a regular communicant.

In this conversation, or in some other, he mentioned that of the

sermons he had heard me preach formerly at King's Chapel, where I used to officiate a good deal when I was preacher to the University at Cambridge (there being no pastor), he had been most interested in those which indicated the movement of my mind away from Unitarianism, towards what are called in New England "Orthodox" or "Evangelical" opinions, but which I rather designate as Scriptural and catholic beliefs. You know what he meant. I cannot recall his words, — always so clear and precise on every subject. But neither you nor I would be likely to suppose his conclusions were the result of any thing but independent processes of his own mind.

After that, I do not think he referred to those processes. He implied that they were deliberate and final. In his great kindness and that of his family, I was often a guest at his house, — sometimes to render the offices of the Church. . . . The Judge always conversed on theological and religious subjects naturally, moderately, and devoutly. He recognized himself freely as a Churchman. He took an interest in parish affairs, and I think was a vestry-man. His name being brought forward in the Massachusetts Convention, he was elected a Deputy to the General Convention held in New York in 1868, and I remember his saying that he had never been more impressed by any public body of men.

Whether I was correctly informed when I was told that it was his practice to make some devout daily observance of worship in his family, you doubtless can tell better than I.[1]

If I have said more or less than you desired, I hope you will pardon it. . . .

Very sincerely yours,

F. D. HUNTINGTON.

P. S. — It would be mortifying if any thing I have written should appear ungracious to my old and life-long friends among the Unitarians, to whose learning, character, and good-will I am greatly indebted, and whom I never loved and honored more than now.

It is not to be inferred, from this change of religious belief, that there was any change in his religious life. The

[1] The Bishop was correctly informed on this point.

substratum of his religious character remained always the same, from his youth onwards. I cannot adduce better testimony of this, or give a better idea of what his religious character was, than by quoting from the Memoir read before the Massachusetts Historical Society by his friend and classmate, the Rev. Dr. Robbins, who has himself always been a Unitarian: —

Any sketch of Mr. Curtis would be imperfect which should fail to notice and give prominence to his religious character. . . . He was ready on all proper occasions to express his belief in Divine revelation, and to defend it against the objections of the sceptical. In commenting upon the proposed prayer test, he said that every thoughtful man might find a test in his own experience, and that it was enough for him that the Saviour was himself accustomed to pray, and assured us that prayer had its answer. He once remarked that communion between man and his Maker seemed to him as reasonable and real as that between one human being and another. In conversing with him on these subjects, I have been struck with the deep feeling and positiveness of conviction with which he spoke. I have heard him say that theology was one of his favorite studies outside of his profession, and that he had weighed and examined the evidences of Christianity with a lawyer's scrutiny, and found them to be sufficient and irrefutable. But his own belief did not rest upon them as much as upon the necessities of his own heart, the study of his own nature, the lessons of experience, and the impression made upon his mind by the Holy Scriptures, especially the New Testament. Many reminiscences of acts and sayings illustrative of this part of his character — the highest and best part of any character, and that which always asserts its supremacy in our regard when the life of a friend is ended — are cherished among his confidential associates. They are attached to every period of his life. Some of them are reserved for the communion of private friendship; but to others the utmost delicacy of feeling would not deny the permanent record of which they are not unworthy. The following was related by a classmate,[1] at the annual dinner of the Class of 1829, after Mr. Curtis's death: — "Among several incidents of a journey on horseback with Curtis to Niagara

[1] Mr. G. W. Phillips.

Falls, during one of our college vacations, I recall an interesting one illustrative of his religious character. One Sunday night, when we had lain by, as our practice was, he asked me if I would hear him read a short prayer; and taking out a pocket prayer-book he read, in that singularly charming voice which remained the same through life, some appropriate prayer. We had very punctiliously avoided saddle-bags, carrying instead the small, round military valise, which held little more than a single change of clothes; but he had remembered, and contrived to find room in his, for the little volume."

On one occasion, while he was practising law at Northfield, Sheriff ——, observing the Bible open before him, playfully remarked that that was a strange book for a lawyer to be seen reading in his office. Mr. Curtis replied, "Then I pity the lawyers; for those who are ignorant of the principles inculcated in that book cannot be thoroughly furnished for the duties of their profession."

In a letter to a clerical friend, who had congratulated him on his appointment to the Supreme Bench of the United States, he expresses with profound humility his sense of obligation to the Divine Power for any success which he had achieved, without invoking which he had never taken any important step, and would not presume to undertake the responsible office to which he had been appointed.

Some time after he had retired to private life, he remarked confidentially to an intimate friend, that he had never taken his seat on the bench, or risen to charge a jury, until he had first offered a silent prayer for wisdom and guidance.

CHAPTER XII.

1860–1866.

Threatenings of Secession. — Efforts to produce a Conciliatory Spirit in Massachusetts. — Civil War. — President Lincoln's Proclamations of September, 1862. — Pamphlet on Executive Power. — Curious Interview with Mr. Stanton. — Death of a Mother. — Appointed Umpire under a Treaty between Great Britain and the United States. — Opinions given at the Bar.

PUBLIC events require to be noticed in this work so far only as a reference to them may be needful to describe the efforts of Judge Curtis to influence the action of his fellow-citizens in accordance with the rule of his life which I have already explained. In the period on which I now enter, he felt the demand which the gravity of the crisis made upon him, in proportion to the dangers which impended over his country. It has been seen, that, during an earlier part of his life, although occupying none but a private station, and with no forwardness to take part in political affairs, he did not refuse to make the efforts that became him, to produce a sound public sentiment on important occasions. He had since filled one of the highest judicial offices in the country, in which he had acquired a greater amount of reputation than any other man had gained in six years of such public service. He was now again a private citizen; but he was one to whom the thoughtful and considerate men of his own community, and a much wider public, looked for the best and most seasonable counsels, — counsels which were all the more deserving of weight, from the fact that he was known to have no political object whatever for himself, or for any party. The class of persons

who, in any serious junctures of public affairs, were likely to urge him to act upon them, were undoubtedly a minority. But they were those whose wishes he could not disregard, even if he required prompting. In truth, however, he required no urging, when his own patriotism and his own judgment taught him that he had a public duty to fulfil. He was then willing to become such a leader of opinion as a wise and disinterested man may be, who utters his own earnest convictions, and leaves them to do what they may for the public good.

Mr. Lincoln was duly elected President of the United States, in November, 1860, without receiving the Electoral vote of a single slave-holding State. With the reasonableness or unreasonableness of the apprehensions which the circumstances attending his election awakened in the minds of the Southern people, I have here no concern. Many will remember the excitement which followed throughout that section of the country; and will recognize the fact, that, through all that region, there was a party, more or less strong, who struggled manfully to retain their States in the Union. If there was any thing that the people of a Northern State could do, without any sacrifice of principle or of any important interest, which would at that crisis strengthen the hands of the Union men of the South, it was certainly fit and proper that it should be done. Above all, if there was any just complaint that the whole people of the South could make of any Northern State, it was a clear duty resting upon such State to remove it.

There had long been upon the statute-book of Massachusetts a law, known as the Personal Liberty Law, that was believed by many competent judges to be in open conflict with a provision of the Constitution of the United States about which the people of the South were peculiarly sensitive The repeal of this law had been several times proposed in the Legislature, and several times refused. It seemed as if the people of the State ought to be willing to

be instructed, in their obligations to the national Constitution, by their own citizens who were most competent to enlighten them. It was now thought to be wise, that a special effort should be made to cause this law to be repealed, before the madness of Secession had extended so far in the South as to make a civil war necessary for the supremacy of the Constitution and the preservation of the Union. Judge Curtis was requested to prepare an Address to the People of the State on this subject, to be signed by a select body of men of known probity, disinterestedness, and weight of character. It was written and issued in the middle of December, 1860. The first signature that it bore was that of the great magistrate who had been Chief Justice of the State for a period of more than thirty years, but who had recently resigned that office.

ADDRESS.

To the Citizens of Massachusetts: —

The undersigned are moved by an imperative sense of duty to address their fellow-citizens of the State of Massachusetts concerning the portentous condition of our public affairs.

We are private citizens, of different political parties, neither holding nor desiring any public employment, having no interest in the subject which is not common to all, and being impelled by no motive save the love of our country and our sense of responsibility to God for the preservation and transmission of the priceless blessings of civil liberty and public order which his providence has bestowed upon us. Many of us have heretofore held public employments, and we say, not in a spirit of boasting, but because the occasion calls on us to say it, that the people have seen we have not been unfaithful to their trusts.

For our honest and profound convictions, for the cause of truth and right, for the sake of your own duties and welfare, we ask you to hear us.

A large and important part of our common country is excited and alarmed. We deceive ourselves if we suppose this excitement and alarm are not real, deep, and general throughout fifteen States,

which have been united to us by the closest ties which ever did, or in the nature of human affairs ever can, connect different political communities.

The foundations of our government are shaken, and, unless the work of destruction shall be stayed, we may soon see that great union, our honor and safety abroad and at home, broken into weak, discordant, and shattered fragments; and that people, who have dwelt under its protection in unexampled peace and prosperity, shedding fraternal blood in civil war.

At such a time, it is a great and solemn duty of the people of every State, to consider well whether any part of the wrong which has produced this condition of our affairs can justly be laid to its charge; and, if any such should be found, every consideration of duty and interest demands that such wrong should be promptly repaired.

No specious fallacies, no blind resentments, no loud recriminations, no false pride, should be allowed to keep us in any wrong which can form even a small part of the causes which threaten a great people with ruin.

Our first duty is with ourselves. It can be performed only by a just, candid, and manly examination of our own conduct.

When we shall have done altogether right ourselves, we can firmly demand all that is due from others, and calmly abide whatever consequences may ensue from insisting on that demand.

Fellow-citizens of Massachusetts, we are forced by these considerations solemnly to declare, that we believe the State of Massachusetts has violated our great national compact, by laws now on her statute-book which are in conflict with the Constitution and laws of the United States.

The Federal government, like the government of each State, extends over the territory of each State and over all persons within its limits. Each of these governments is sovereign and supreme within its own constitutional sphere of action, and entitled to the implicit obedience of the people to its laws, and to its judicial and executive officers appointed to apply and enforce them. It is plain, that, if one of these governments may command its officers and its citizens to do an act, the other cannot command them to abstain from doing it, or require them to do something which prevents or obstructs its execution. It is an inevitable consequence, that, when either persons or property have been taken

into the custody of the law of one of these governments, and its executive officers are required by its laws to preserve that custody, then the other government cannot require its officers and citizens in any manner to interfere therewith. Such interference would be a plain departure from its constitutional powers; and laws commanding it are laws commanding civil war.

Yet it is nevertheless the fact, that if a fugitive from service, whom the Constitution and laws of the United States require to be delivered up, be in the custody of a Marshal of the United States, who is commanded by the laws of the United States to retain that custody, the laws of Massachusetts require every judge of its Supreme Court, its Superior, Probate, or Police Court, (and any justice of the peace in some contingencies,) to issue a writ requiring the Marshal of the United States, having such custody, to bring the fugitive before a State tribunal, to subject him to the control of such tribunal, and to relinquish his custody upon its order. And having thus taken the fugitive from the custody of the law of the United States, the State tribunal is to proceed to a trial of the matters in issue, with forms and principles of its own, which it is believed have never been applied to any other case, which are wholly inconsistent with the laws of the United States, and in open defiance of their authority. And, as if the execution of these laws could not be left to the ordinary instrumentalities, deemed sufficient for the protection of the lives, persons, and property of our citizens, and in preparation, as it would seem, for an inevitable and perilous contest, special commissioners are required to be appointed in each county of the Commonwealth, and the treasury of the Commonwealth is subjected to their unlimited control, for the purpose of provoking the conflict and pressing it onward to its final and inevitable issue of physical force.

Besides the laws already referred to, there are other provisions, which are manifestly designed to surround the performance of our constitutional duty of surrendering fugitives from service with such obstacles as must prevent its performance, even though, by so doing, our own public peace should be left at the mercy of a lawless mob.

We hold it to be plain, that a State has not the constitutional power to subject to severe and ignominious punishment persons who, by mistake of facts, or misapprehension of law, and without

any corrupt or wicked intent, make a claim under the laws and before the authorities of the United States. If such a power existed, every law of the United States could be rendered inoperative by State legislation. For who would demand any right under a law of the United States, if the penalty of an innocent failure to prove his case, which may proceed from merely accidental causes, should subject him to a fine of five thousand dollars, and imprisonment in the State prison for five years? Yet such is one of the laws now on our statute-book.

The volunteer militia are prohibited from acting *in any manner* in the rendition of a person *adjudged* to be a fugitive from service. The volunteer militia is the only arm on which the municipal magistrates of our cities and towns can rely to quell organized and dangerous riots. Every one of its members is a member of the militia of the United States, and they are armed at the expense and under the authority of the United States, expressly conferred by the Constitution. Yet this law declares, that the arms of the United States, in the hands of citizens of the United States, who are a part of the militia of the United States, shall not be used by them to protect officers of the law of the United States from lawless violence in the streets of a city, whose peace the Commonwealth is bound to preserve.

Fellow-citizens, is it consistent with the duty we owe to our common country, to our State, and to ourselves, that such laws should be permitted longer to exist?

We know it is doubted by some whether the present is an opportune moment to abrogate them. It is said, We grant these laws are wrong, *but will you repeal them under a threat?* We answer no. We would do nothing under *a threat.* We would repeal them under *our own love of right;* under *our own sense of the sacredness of compacts;* under *our own conviction of the inestimable importance of social order and domestic peace;* under *our feeling of responsibility to the memory of our fathers and the welfare of our children, and not under any threat.* We would not be prevented from repealing them by any conduct of others, if such repeal were in accordance with *our own sense of right.* He who refuses to do a right thing merely because he is threatened with evil consequences, acts in subjection to the threat; he is controlled by it; his false pride may enable him to disregard the threat; but he lacks courage to despise the wrong estimate of his own conduct,

which conduct he knows would spring only from his love of duty. If every right-minded man must admit that he ought to govern his own conduct by these principles, are they inapplicable to the conduct of a great and populous State? On what ground can it be maintained that hundreds of thousands of innocent citizens are to be subjected to suffering, because the false pride of their rulers refuses to do right? Mankind have been afflicted long enough and grievously enough by commotions and strifes and wars springing from such causes. We had hoped that the nature of our government would protect us from swelling the great sum of human misery produced by the evil passions of rulers. We had hoped that, inasmuch as the masses of the people can have no interest but to do right, they would have the discernment to perceive, and the manliness to do it; and would be too calm, too wise, too magnanimous intentionally to persevere in any wrong; and we hope so still.

But what is meant by the exhortation not to repeal these laws under a threat? Who threatens us if they should not be repealed?

Whatever may have been true in the past, whatever faults of speech and action may have been committed on the one side or on the other, we firmly believe that the men from whom the worst consequences to our country and ourselves are likely to proceed have no wish that these laws should be repealed, and no disposition to use any threats in reference to them. On the contrary, they desire to have them stand as conspicuous and palpable breaches of the national compact by ourselves, and as affording justification to themselves, to the world, and to posterity for the destruction of the most perfect and prosperous government which the providence of God has ever permitted the wisdom of man to devise. How far these acts of ours are from affording any justification for the enormous wrong such men contemplate; how precipitate, rash, and unnecessary are the violent and destructive measures they are seeking to pursue, we know but too well. But we know equally well, that there are other men, living among these last, and connected with them as members of the same society, who are struggling to preserve our government, who are seeking for other remedies than revolution and civil war, who still love their whole country, however bounded, and who would not see the glory of our fathers sink into the darkness of their children's shame; and

we know that these patriotic, wise, and courageous men are checked and weakened in their efforts to save the country by our persistence in our wrong. They threaten no one; but their labors and their sacrifices for our common country call on us, in tones more eloquent than any words, to do our duty, and not to obstruct them in doing theirs.

We have heard it suggested, also, that this is not the time to repeal these laws, because, in any future attempt at a compromise between the North and the South, we should not have them to surrender on our part. But we cannot listen to those who counsel us to make merchandise of our own honor. Shall we grasp what does not belong to us, and, when satisfied it is not ours, say, we will keep it wherewith to make a bargain? And a bargain with whom? With strangers, — with aliens in blood and speech, in interests and destiny? Not so. We all have but one country, one welfare, one destiny; whether that destiny he to climb by the upward path of peace and union to the height where we should be the envy and delight of the nations, or to plunge into the gulf of civil discord, and find a dishonored grave. No serious wound can be inflicted anywhere on our body politic, without making the whole head sick and the whole heart faint. And he who should approach an attempt to cure our disorders, not with a spirit of moderation, of justice, of kindness and fraternal regard, but with a disposition to seem to surrender what is not our own, that we may keep what we have not the courage otherwise to claim, has but a poor kind of cunning and very little manhood.

We do not believe that such is the temper of the people of Massachusetts.

We know they have in time past had great provocations. And we firmly believe that, if they have so far yielded to them as to allow their resentment to press too strongly on their judgment, it is not because they do not love the right, or because they feel any indisposition to discharge honestly and generously every constitutional obligation. The entire history of our State, back to its earliest germ on the rock of Plymouth, forbids us to doubt the integrity, the magnanimity, the intelligence, or the patriotism of our fellow-citizens. To these great qualities we earnestly appeal. We beseech you to consider carefully this momentous subject; to act upon it justly, firmly, wisely, as becomes men to whose care so great privileges have been intrusted, and who are accountable to

posterity, to the world, and to our Creator for their transmission unimpaired to our children. Let those whom you have delegated to represent you know your determination. Cause them to obey it. Let not the public servants be above the people, who are their masters. See that they do right.[1]

No practical effect followed this appeal. It served only to show how the counsels of wise men may be disregarded in times of popular excitement, and to certify to the people of the South that the feelings which then swayed the great majority of the people of Massachusetts were not shared by a select and important body of her best citizens. It is, of course, problematical whether the repeal of this law and of similar laws of some of the other Northern States, would have had any considerable tendency to arrest the progress of Secession; but it is not to be doubted that the duty of removing this cause of complaint was not to be measured by any speculative belief that it would be a useless act. Nor was the refusal to do that act without an unfortunate influence in more than one of the Southern States, a portion of whose people were looking toward the North for some tangible signs of a conciliatory spirit, to which they could

[1] The Address bore the following signatures: —

Lemuel Shaw, Boston.
Benjamin R. Curtis, Boston.
Joel Parker, Cambridge.
Joseph Grinnell, New Bedford.
Isaac Davis, Worcester.
Henry J. Gardner, Boston.
George Putnam, Roxbury.
James Savage, Boston.
George Peabody, Salem.
Homer Bartlett, Lowell.
George Ticknor, Boston.
Jared Sparks, Cambridge.
Albert Fearing, Boston.
Henry W. Clapp, Greenfield.
Nathaniel Wood, Fitchburg.
Charles Theo. Russell, Cambridge
George T. Rice, Worcester.
Edward Dickinson, Amherst.
Levi Lincoln, Worcester.
William Baylies, Bridgewater.
Sidney Bartlett, Boston.
John H. Clifford, New Bedford.
Emory Washburn, Cambridge.
James Jackson, Boston.
Theophilus Parsons, Cambridge.
James Walker, Cambridge.
Edward A. Newton, Pittsfield.
Charles B Goodrich, Boston.
J. G. Abbott, Lowell.
Winslow Warren, Plymouth.
James M. Beebe, Boston.
Linus Child, Lowell.
John Aiken, Andover.
Henry W. Bishop, Lenox.
William G Bates, Westfield.
Samuel L. Crocker, Taunton.
William C Plunkett, South Adams.
David Aiken, Greenfield.
Henry W. Paine, Cambridge.
Isaac L. Hedge, Plymouth.
Chas. S. Storrow, Lawrence.
Increase Sumner, Great Barrington.

point in their controversies with those who were seeking to carry their States out of the Union.

Before the month of February, 1861, had arrived, the people of six of the Southern States had adopted Ordinances of Secession, which, according to their theory of the Constitution, had severed them from the Union, and dissolved their obligations to obey the laws of the United States. Another group of the slave-holding States — from their geographical position between the free States of the North and West and the seceded States of the extreme South known at this time as the Border States — hung trembling in the balance. These were Maryland, Virginia, North Carolina, Kentucky, Tennessee, and Missouri. It seemed to one of the last of a race of statesmen of an earlier period, — a man who had been bred in the best school of constitutional interpretation, who regarded the supposed right of secession as merely mythical, but who knew the strength of popular delusions when stimulated by popular fears, — that the time had come for a union of all sober men upon some conciliatory plan, which would arrest the progress of the revolution, and save the Border States from being ingulfed in it. This was John J. Crittenden, a Senator in Congress from Kentucky. If he had not the force of character and the commanding influence of his great friend and compatriot, Henry Clay, who had twice before successfully intervened between an excited North and an excited South, he had, from his venerable years, his known patriotism, his long experience in the service of his country, his fairness of mind, and his moderation of temper, that which should have caused him, and to a considerable extent did cause him, to be regarded as a fit mediator in this dangerous conflict of ideas and passions, of opposing sectional interests and hostile claims. Mr. Crittenden proposed in the Senate a comprehensive plan of settlement, by which he hoped to effect a compromise between the North and the South, which would have the effect of retaining the Border States in the

Union. If it had received the assent of those who were supposed to represent and act for the Administration that was about to come into power, there can be no rational doubt that Virginia, at least, would not have adopted an Ordinance of Secession, and that it would not have been necessary to save the other Border States by armed occupation.

The details of Mr. Crittenden's plan, and the causes which prevented it from receiving the assent of all parties, do not need to be considered here. For a time, it arrested the attention of the country; and it was while there were hopes that it might take effect, or might lead to measures that would prevent the further spread of the revolution which had been begun in the remote South, that a great popular meeting was held in Faneuil Hall, on the 5th of February, called by and composed of those who desired to sustain Mr. Crittenden's efforts. It was not a meeting of citizens of Boston alone, but it was attended by prominent men from all parts of the State, who filled the historical building to its utmost capacity. At this meeting, Judge Curtis made the following speech: —

Fellow-Citizens, — I suppose every man in this assembly has come into it with the conviction weighing heavily on his heart that our country is in imminent peril. I believe there is not one man here who is not anxiously ready to do what he can to avert the dangers which encompass us, and restore union and peace. What can and should be done? That is the question to-day.

The rapid march of events is leaving little time to deliberate, or even to act. Six States have declared the union between themselves and the other States to be dissolved. The Constitution and laws of the United States are, practically, no longer laws for them. They are about to form a confederacy, the only definite and agreed object of which seems to be the military defence of the position they have assumed.

At least in two places, the military power of the United States and of the seceding States is now set in hostile array, within strik-

ing distance. A supposed public policy, popular passion, any one of the many casualties which attend on hostile forces, in each other's presence, may begin a civil war. We may hear its sounds in the stillness of any evening, or they may be borne to our ears on the next morning's breeze.

Some of the causes which have produced these events have deeply excited and alarmed all the other slave-holding States.

The greater part of the people of those States are about to take early organized action on the question of Secession. It is difficult to see how the next thirty days can fail to produce decisive results, one way or the other. If Maryland, Virginia, North Carolina, Kentucky, Tennessee, and Missouri remain in the Union, I think I can see how we may have peace, and a reasonable hope of restoring our country to its former completeness.

And if we cannot in your time, Mr. Chairman, or in mine, regain the unbroken circle within whose limits we have been permitted to enjoy such security and honor, we shall yet have a great country, which can calmly bide its own time for convincing its former erratic members, in some appropriate ways, that their interests and honor are identical with our own.

Who that loves his country will not do what he can to assist those Border States to remain within the Union? Are there any insuperable difficulties in doing so? Let us consider and decide for ourselves. Let us take hold of this subject as a practical thing, which it belongs to the *people*, the true and only sovereigns, to consider and decide.

We have trusted sundry persons, here and there, with this or that agency in our affairs. We have trusted no man, and no set of men, to make our opinions for us. We form them for ourselves, and hold every public servant accountable accordingly. And in this great, unhappy controversy, which threatens so much that is disastrous to ourselves and our children, we, as a part of the people, choose to come together in this hall, and hear and judge concerning this matter. Such I understand to be the purpose of this meeting; and I proceed to address myself to the topics which seem to me to belong to it.

And I begin by saying, that, whatever may heretofore have been the differences of opinion among reflecting men in the Northern States, I believe all may be found, at this moment, on one side or the other of a line easily described, and that there are not radical

differences between those who are on the same side of that line. It divides those who, in the existing emergency, think every thing reasonable should now be done to meet the views and wishes of the conservative people of the border slave States, from those who think nothing at all should be done. On one side or the other of that line the Federal government and the people of the Northern States must place themselves.

In my judgment, the only doubt is, not whether concessions are ultimately to be made, but whether they are to be made in season; whether concessions are to be so made as to avert civil war; or are to be made in consequence of civil war, and in attempts to repair wounds which civil war will have inflicted.

I look upou this question, whether something reasonable should now be done, or nothing should now be done, in deference to the views and wishes of the slave-holding States still remaining in the Union, as the great and paramount question of this day, — this day, which is one of the very few remaining days in which it can be seasonably decided and acted on. Let it be determined that all just and reasonable concessions should now be made, and I have confidence that it will not be found impracticable to agree what they should be. And therefore I address myself, first of all, to this momentous question, and ask your voices upon it, *whether this be or be not the time to act.*

But before I proceed further, I desire to prevent all possible misconception concerning my own opinion as to what is termed the *right* of secession. I consider the Constitution of the United States to have been ordained by the people of the United States, acting through their several State organizations. I believe it to be what the Constitution asserts of itself in so many words, "the supreme law of the land." Not a league, but a law; like all other laws, binding when obeyed, none the less binding because disobeyed by those subject to its authority.

And, consequently, Secession, whether successful or unsuccessful, is successful or unsuccessful revolution.

At the same time, two things are indisputable. The one is, that the right of revolting against an unjust and oppressive government is one of the inalienable attributes of every people. And the other is, that a union of organized and powerful States necessarily contains within itself organized and powerful instruments of revolution.

The events of the last fifty days have afforded the most striking evidence of this. For, by the mere fiat of conventions, we have seen the laws of the United States silenced, their property seized, and their power, for the time, annihilated throughout a great tract of country, extending from the Atlantic Ocean to the Mississippi River. It is with States thus organized, thus prepared for revolution, that we have to deal. We must bear in mind, also, that the question is not what *we* think of their grievances, or apprehensions of danger to their peace and security, but what they think of them. They will act on their own views of their own necessities, not on ours. And, therefore, if we would form a correct estimate of what their conduct is likely to be, we must not content ourselves with denying that they have occasions for complaint, but must, at least, listen to what they assert them to be.

Now, looking at what has actually occurred in the secession of six States; at the preparations for decisive action already made in some of the Border States; at the common interest of all the slaveholding States in the subject of slavery; at the unanimity of feeling which springs from it; at the conviction which, however ill-founded, undoubtedly now exists, that the President elect will be placed in power by a party confined to the Northern States, hostile to slavery, and dangerous to their peace; — considering that the secession of six States has left the legislative power in the hands of that party; that, in the course of nature, important changes may be expected in the judicial department of the government during the next four years; *and that their sincere and urgent apprehensions of injustice are met only by irresponsible individual assurances that there is no occasion for alarm, while nothing is done to regain their confidence;* — considering all this, should we have any rational ground of confidence that the Border slave States will continue in the Union if we should continue to do nothing?

Undoubtedly there now exists in each of those States a powerful party friendly to the Union. But how long could it stand, how long would it attempt or desire to stand, against a settled conviction in the minds of their people that the North is indifferent to their complaints, and intends to employ no agency to retain them in the Union but military force? Sir, the Union party will dissolve and disappear under the influence of popular passion excited by that conviction, like Northern snow under a Southern sun.

Is this party to be made powerless through our inaction? Will you stand still and see those who would restore peace and union swept into the gulf of secession and war, for want of our encouraging acts and helping hands? If not, let us have action. No matter what becomes of party platforms. We will use the planks of all of them to make a bonfire wherewith to celebrate returning peace, and think that is the best use they were ever put to. Let us have action, — just, wise, conciliatory action. Let us hold out the hand of friendship to every man who has comprehensive patriotism enough to propose a plan for it, whether his name be Seward or Douglas, Etheridge, Adams, or Crittenden. Is there any insurmountable difficulty in agreeing on a plan of pacification? I do not believe it. The subjects are few, easily understood, and lie within a manageable compass. The sober second-thought of the Northern people has never yet failed to be moderate and wise. Upon some important points there are no differences of opinion among them, if we exclude that small number who avow their hostility to the Constitution, and their wish to destroy the government. I pray you to consider each of the principal subjects involved in this unhappy family quarrel, and see if there be not a way of peace, without any sacrifice of integrity or honor.

The most practically important subject, and that from which all the others directly spring, is the existence of negro slavery within the States themselves. Now there is no political party in the North which does not admit that the existence of this institution in any State is, and of right ought to be, wholly dependent on the will of the people of that State; that neither the Federal government, nor the government of any other State, nor the people of any other State, have any just right or claim whatsoever to interfere therewith; that what neither of these have any just right or claim to do, directly and openly, they can have no just right or claim to do indirectly and secretly; that fraud is as unjustifiable as force; that if the legislative power of Massachusetts cannot be used to break the ties between master and slave in Virginia by force, neither can force or fraud be used for that end by citizens of Massachusetts, or by aliens, dwelling within its limits, and subject to its control.

Now if all this be admitted, and, I repeat, I know of no Northern political party which denies any part of it, there ought to be

no real difficulty in procuring suitable provisions of the Constitution and laws to give practical effect to these principles.

First of all, the Constitution of the United States should contain a provision absolutely securing each slave-holding State from all interference with this institution within the State by the Federal government. Suitable laws should be passed by Congress to guard the several States from organized attempts to set on foot, in any other State, the means of exciting insurrection. And I hold it to be the plain duty of every State, also, to enact laws which, without unduly interferring with individual liberty of speech or action, shall punish conspiracies to interfere with the institution of slavery in any other State *by force or fraud.* And I ask you to-day, if there ought to be any just impediment to prevent us from affording to our brethren in the Border States these evidences of our sincerity and these means for their security. Let us not forget that, with them, this is a practical question of the last importance. It concerns the daily and the nightly safety of themselves and their families. If we are sincere in our disclaimer of all right or intention to cause or permit, among ourselves, any attack on their safety, how can we refuse to embody our principles in appropriate legislation. If we could think their apprehensions founded on no facts, would it be right for us to refuse to relieve — even their unnecessary fears? In the face of what has been done in the light of day, and of still more which no sane man doubts has been secretly concocted and executed, what candid man will venture to assert that there is no practical necessity for such laws? I repeat, then, that so far as respects the absolute security of slavery within the States from all attempts at interference by legislation, by force, or by fraud, every political party in the North is pledged to it; and there ought to be no hesitation in proving the sincerity of that pledge by prompt and efficient action. If there should be, let the responsibility rest on those who palter with the danger.

Another difficulty, however, grows out of the fact of the existence of this institution in fifteen of the States; I refer to the use of the territory of the United States. In my judgment, this part of the subject has assumed a factitious importance, and has been surrounded by imaginary difficulties which in no degree belong to it. The causes of this are easily discovered, but the present is not a suitable occasion for their discussion. In general, they may be

said to have been the repeal of the Missouri Compromise; the opinion of the Supreme Court concerning the power of Congress over the Territories; the struggles to establish and exclude slavery in Kansas; and the formation of a political party in the Northern States, which derived some, at least, of its ostensible strength and activity from the excitement which that repeal and opinion and those struggles occasioned. We have nothing to do, at this moment, with the merits of any or all these causes; they who are responsible for each of them may have been wholly right, or wholly wrong, or, which is more often true in respect to great and complicated human affairs, partly right and partly wrong.

However this may have been, and whatever may have been the causes, the consequence was, that, for a time, it seemed as if the question of slavery in the Territories of the United States was not only the paramount, but almost the only, national question worthy of any consideration, — that it was of such stupendous magnitude that the national existence must be staked on it. Now that the smoke of the contest has cleared away, it has become plain to those who have eyes and will use them, that no such proportions now belong to this subject.

In the midst of all the existing excitement and alarm, Kansas has been quietly admitted to the Union as a free State; and New Mexico is the only questionable Territory now belonging to the United States. It was of New Mexico that Mr. Webster said, in 1850, that, though opposed to the extension of slavery, he was willing to trust the laws of nature, which prohibited its establishment there.

It is of New Mexico that Mr. Adams[1] has said, in substance, in that speech, pronounced within a few days in the House of Representatives, admirable in matter and manner, — worthy of Massachusetts, of his ancestry, and of himself, — that, though opposed to the extension of slavery, and though New Mexico is, confessedly, in no condition to be admitted as a State, yet, for the sake of terminating our unhappy quarrels, he would vote to admit her as a slave State, feeling entire confidence that, as only twelve slaves were resident there after a territorial existence of ten years, the laws of nature would take care of the question of slavery in the future, as they have done in the past.

[1] The Hon. Charles Francis Adams.

And now let me ask you, men of Massachusetts, if the peace and welfare of this great and glorious and beloved country of ours is to be kept at hazard by disputes about the particular mode of disposing of such an abstraction as this.

But then further difficulty is found, or made, respecting possible future territory. It is supposed the people of Virginia and Pennsylvania, Kentucky and Massachusetts, New York and Tennessee, are obliged to plunge into a civil war in a quarrel about the sick man's effects. In view of what has been actually done, and omitted to be done, during the past month, it would be extremely rash to feel no apprehensions of this.

But I firmly believe that, if the people can get at this question, they will settle it promptly, and to their own entire satisfaction. For myself, I would not attempt to put aside this subject. I would meet it fairly, upon such grounds, and in such a spirit, as gave us the Constitution of the United States. I would say to our Southern brethren, I admit you have a fair claim to enjoy by your own means, and in your own way, your fair share of any territory owned by the United States. But you must, I think, admit that you are asking for something not a little extraordinary, when you desire us to agree that you shall have every thing which, under any circumstances, and of any extent, and through all time, may be acquired by the United States south of a parallel of latitude, with the consent of a bare majority of those voting in the Houses of Congress. A prudent regard for the future peace of the country forbids us to consent to introduce so fertile a source of agitation. Amend the Constitution, so that no more territory can be acquired without the consent of so large a part of the people that party agitation for this purpose shall be properly guarded against, and the just interests of minorities protected, and we shall not disagree. For my own part, I consider such an amendment of the Constitution far transcends in practical importance any matter now in issue between the Northern and the Border States.

It is the result of such observation and reflection as I have been able to bestow upon the working of the government, and, what is more important, it is the opinion of some of the wisest practical statesmen whom I have known, that the further extension of the United States is fraught with many and great dangers, — amongst which is the ever-increasing difficulty of so harmonizing the public counsels as to be able to agree on the measures neces-

sary for the welfare of the country. I cannot now do more than allude to this subject, great and important as it is. But I can have no hesitation in saying, that, if such an amendment of the Constitution as I have indicated should be one of the consequences of the present unhappy difficulties, it would, in my judgment, add one more to the many instances in which the providence of God has brought good out of evil for our hitherto favored land.

So far as I know, the only other causes of irritation and alarm arise from the constitutional obligation to surrender fugitive slaves. The obligation is admitted. But, on the one side, it is insisted that the Federal legislation on this subject is unnecessarily harsh, irritating, and capable of being used for purposes of oppression. On the other side, it is replied that the legislation of the Northern States is designed to obstruct the execution of the Federal laws, and is insulting to those States whose citizens claim rights under them.

In my humble opinion, both complaints have some foundation, and all cause for both ought to be removed without delay. I believe the Fugitive Slave Law ought to be and can be so modified, as to do away with all just cause of complaint, either of harshness or inefficiency. I have not had opportunity to examine the bill recently introduced by Mr. Douglas into the Senate of the United States; but, from the account I have received of it, there is reason to believe it embodies legislation which will be satisfactory to both sections of the country.

I know it is insisted by some among us, whose opinions I respect, that the State laws commonly called Personal Liberty Bills are not in conflict with the Constitution and laws of the United States. I have not been able to bring my mind to that conclusion. This is not a suitable occasion to enter into an argument on the subject. But I find that in 1855, soon after the extradition of a fugitive slave, the two houses of the Legislature of Massachusetts passed an act, commonly called the Personal Liberty Bill. They sent it to the Governor for his signature. He returned it unsigned, with a message to the effect that he had taken the opinion of the Supreme Judicial Court upon certain questions, and the opinion of the then Attorney-General Clifford upon the bill itself. He quoted a part of the opinion of the court, showing that the State authorities could not interfere with a person in the custody of the laws of the United States; and appended the opinion of the

Attorney-General, that the bill, if passed and obeyed, must produce a conflict between the State and Federal jurisdictions. Instead of inserting any thing to show that it was not the purpose of the Legislature to interfere with fugitive slaves in the custody of the Marshal of the United States, they passed the bill, notwithstanding the Governor's veto. And I feel bound to say, that an examination of those provisions of that law, which still remains on the statute-book, has left no reasonable doubt on my own mind, that it was the intention of the Legislature to require State officers to take fugitive slaves from the custody of the Marshal, and have the claim of the master tried by a jury in a State court.

I believe no constitutional lawyer will undertake to maintain the validity or propriety of such a law. But, in my judgment, there is no necessity to settle the abstract question of the validity of these laws. How do they who assert their validity reconcile them with the Constitution? By denying their applicability to any case which any reasonable man can expect to happen? In other words, by depriving them of all practical importance? Shall such laws be kept on the statute-book, when their only fruits are irritation and bad blood between those who ought to live in peace? Shall they be kept there when proved to be offensive to friendly States? Shall they be kept there when, to say the least, many persons, here and elsewhere, quite competent to form an opinion on such a subject, have publicly and solemnly declared their deliberate conviction that they are in conflict with the Constitution? If they are retained, what will cause their retention? Will it be patriotism and a calm devotion to duty, or blind party spirit? And what will the people say hereafter, what do you think now, of those who would thus hazard our welfare?

Fellow-citizens, I came here to discharge what I believed to be a duty, at a time when our country is in such a condition as to need even the small efforts of one so humble as myself. I thank you for the patience with which you have listened to me.

I need not recount what followed these and all other efforts to stay the march of Secession, or describe how, on the one hand, men like Judge Curtis were ridiculed in the North as "Union-savers," and how, on the other hand, the Secessionists of the South derived new strength

from the unwillingness of a great majority of those who represented the North in the councils of the country, to make any concessions of any kind. When at length a civil war followed, on the great issue of the right of State secession, — an issue transferred from the realms of argument to the dread arbitrament of battle, — Judge Curtis felt it to be his duty to promote every exertion of the authority of the Federal government which was warranted by the Constitution, and needful for the exigency. Mr. Lincoln was inaugurated as President on the 4th of March, 1861. Although no Southern State had participated in his election, he was now the lawful President of the United States; and such a man as Judge Curtis could not hesitate as to where his duty led him.

There lies before me a letter written by him in an early stage of the war, from his home in Pittsfield, to a friend in Boston,[1] which expressed very tersely the whole duty of good citizens at that crisis: —

> In my judgment, there is but one way to avert the peril. Sustain the established government, and especially the President, so long and so far, and by all ways and means possible to a good citizen. . . . Let all be made to know that the people intend to preserve their government, and not to allow it to be controlled by irresponsible cliques or committees, or by any outside influences whatsoever; and that the President may confidently rely on the firmness and good sense and patriotic devotion of the people, if he honestly intends to defend and restore the Constitution and laws of the country.

But later on, when it appeared that "irresponsible cliques or committees" were exercising a control which he deemed most pernicious, and, above all, when the President manifested a willingness to use powers which Judge Curtis did not believe were warranted by the Constitution, he felt constrained to do what he could for the preservation of prin-

[1] Letter to William W. Greenough, Esq., his brother-in-law.

ciples which alone made the struggle for the Union of any value. The Proclamation of the President, issued on the 22d of September, 1862, commonly called his Emancipation Proclamation, was a measure into which he was compelled by persons who would have opposed his administration if he had refused it. It was claimed by a very large body of the citizens of the Northern States, that he could not take this step within the limits of the Constitution. The persons who had urged it upon him were indifferent to the question whether it was or was not a step authorized by the Constitution. The President's own idea concerning the source of his power to take it was, that, as commander-in-chief, prosecuting a war, he could "take any measure which might best subdue the enemy."[1]

If this idea had been suffered to pass unchallenged, there could have been, in principle, no limit to the exercise of power by the President, — not even the limit of the physical force at his command. For if the President, in a civil war for the preservation of the Constitution, and the restoration of its authority in the Southern States, could, by a stroke of his pen, change the State laws which fixed the relation of master and slave in those States, he could by

[1] Aside from the newspapers of the period, I do not know of any authority to which to refer the reader for an account of Mr. Lincoln's feelings or opinions concerning this Proclamation, excepting Mr. Greeley's "American Conflict." That work contains an account of an interview granted by President Lincoln to a deputation of clergymen from Chicago, in which he said: "Understand, I raise no objections to it on legal or constitutional grounds; for, as commander-in-chief of the army and navy in time of war, I suppose I have a right to take any measure which may best subdue the enemy: nor do I urge objections of a moral nature, in view of possible consequences of insurrection and massacre at the South. I view this matter as a practical war measure, to be decided on according to the advantages or disadvantages it may offer to the suppression of the Rebellion." (Vol. II. pp. 251, 252.) At this time, September 13th, Mr. Lincoln was unwilling to issue the Proclamation. It was issued, however, on the 22d of the same month, declaring that on the first day of January then next (1863) the Executive would declare all slaves to be free then held in any States or parts of States continuing in rebellion against the United States.

the same power annihilate their whole political and social fabric, and reduce them in law to the condition of conquered provinces, without even overrunning them. There was either a limitation of his power as commander-in-chief, or there was none. While those who compelled Mr. Lincoln to issue this Proclamation really cared nothing for the source of power to which it was to be referred, and while the majority of the Northern people were perhaps gratified that it had been issued, and thought little of any question of principle involved in it, Judge Curtis felt that he had a duty to fulfil. Nor was that duty made less exigent, when another Proclamation — one creating offences unknown to the laws, subjecting persons committing them, or guilty of "any disloyal practice," to martial law, and suspending the writ of *habeas corpus* — burst upon the country as if it were the announcement of a reign of terror; — a reign which the Secretary of War was prompt to inaugurate as effectually as force could do it, by orders establishing a military police all over the land, to act under his directions in making arrests and reporting "treasonable practices."

No satisfactory reason has ever been given for these acts of Mr. Lincoln's administration. The arbitrary arrests, which so shocked and alarmed men who had deeply at heart the preservation of the existing government, had in most cases no excuse in any necessity of any kind. Some of them were wantonly oppressive; every one of them, in which the person arrested was not in the military service, was a violation of the constitutional liberty of the citizen. The explanation of this strange phenomenon in our history is to be found partly in the existence and activity of a class of men, who were described by Judge Curtis in the private letter above quoted. "The country," he said, "is full of active, ambitious, and unscrupulous men, who are seeking, some of them, their own advancement, some of them to work out their own will, and most of them to accomplish both these objects." Still another explana-

tion is to be found in the fact, that in an Administration too weak to discover and work out the means of salvation for the country within the just powers of the Constitution, there was a Secretary of War whose energy and executive ability were of the kind that prefers the arbitrary to the lawful, and who was by nature excessively imperious.

Shocked as Judge Curtis was by the Proclamations and the accompanying Orders of the Secretary of War, he was, as the reader has by this time learned, not a man of impulses. His large and habitual charity towards the motives of others, and his sense of the extreme gravity of this crisis in the affairs of the country, led him to deliberate carefully before he publicly called in question these acts of the government. There is extant a record of the feelings with which he approached the performance of what he regarded as a public duty, written just before he published the well-known pamphlet entitled "Executive Power." I quote from a letter to his wife, dated on the eve of that publication, and addressed to her at Pittsfield.[1]

BOSTON, Oct. 6, 1862.

. . . I have written a pamphlet on the late Proclamations of the President. I was hard at work on it, *internally*, while at Pittsfield, and, having completed it since my return, have submitted to

[1] On the 29th of August, 1861, my brother was married to Miss Maria Malleville Allen, of Pittsfield, a granddaughter of the Rev. Thomas Allen, who graduated at Harvard College in 1762, and became the first minister of the town of Pittsfield. He went, with a portion of his people, to the battle of Bennington. One of his sons, the Rev. William Allen, D.D., became President of Bowdoin College. Another son, Mr. Jonathan Allen, the father of Mrs. Curtis, followed mercantile pursuits in Boston, and made a good fortune. He afterwards returned to Pittsfield and made an unsuccessful investment of his property in a stock farm. On his mother's side, he was descended from Governor Bradford. He died at Pittsfield in 1845.

Dr. William Allen married Maria Malleville, a daughter of the Rev. Eleazar Wheelock, D.D., the founder and President of Dartmouth College. For this lady Mrs. Curtis was named.

The descent of Dr. Wheelock from Captain Miles Standish is mentioned *ante*, p. 48, note.

some wise friends here the question of *cui bono?* They are far stronger than I am for the *bono*. I have great reluctance to go into the arena. The strife is bitter, and not altogether safe. But if I know myself, this reluctance has not influenced me. It is a feeling, partly, of doubt, whether any opposition to the President is now useful, and, mainly, whether the sacrifice of feeling and interest which I shall make will be outweighed by any public good to be effected. My friends have strongly insisted, and I shall yield and publish it. That it will be read and abused, I do not doubt. That it will greatly influence the country, I more than doubt. But I do not feel at liberty to refuse to make any attempt to keep things from being turned over, which I can possibly effect. If you wake up some morning and find your husband has gone to Fort Warren, do not be disturbed, for he will come out one of the martyrs of this revolution. Seriously, however, though there is no danger to me or mine, there is great and pressing danger to the country, — *danger of the loss of ideas,* — and this I have tried to encounter or obviate. I cannot help to subdue the enemy abroad, — I ought to do what I can to subdue the enemy at home.

The tone of this pamphlet, calm, serious, unimpassioned, but firm and unshrinking, and the personal authority of its author, made it exceedingly obnoxious to the excited partisans of the Administration. If an attack had been made upon the Proclamations in any incendiary spirit, or by one who had less weight of character to support, and less of logical power to enforce, the objections to them, there would have been far less of violent denunciation of the writer. But this compact, perspicuous, and reasoned exhibition of the lawlessness of the Executive acts, in which there was no superfluous word, and no word that could justly irritate, — pointing, as it plainly did, to the character of the revolution which those acts were likely to precipitate, — was met in some quarters by cries of "treason," and the like objurgations.

Yet it would have been well if those who had only opprobrious epithets to oppose to such a production had paused upon a single passage, in which the author said:

"The war in which we are now engaged is a just and necessary war. It must be prosecuted with the whole force of this government, till the military power of the South is broken, and they submit themselves to their duty to obey, and our right to have obeyed, the Constitution of the United States, as 'the supreme law of the land.' But with what sense of right can we subdue them by arms to obey the Constitution as the supreme law of *their* part of the land, if we have ceased to obey it, or failed to preserve it, as the supreme law of *our* part of the land? I am a member of no political party. Duties inconsistent, in my opinion, with the preservation of any attachment to a political party caused me to withdraw from all such associations many years ago, and they have never been resumed. I have no occasion to listen to the exhortations, now so frequent, to divest myself of party ties, and disregard party objects, and act for my country. I have nothing but my country for which to act in any public affair; and solely because I have that yet remaining, and know not but it may be possible, from my studies and reflections, to say something to my countrymen which may aid them to form right conclusions in these dark and dangerous times, I now reluctantly address them."

If one who dealt with momentous public questions in this spirit was to be regarded as a "disloyal citizen," then the free discussion of public measures was at an end, and the time for an irresponsible despotism, having no basis save in the passions of the multitude and the caprices of rulers, had arrived. But the violence, and, in some good degree, the prejudices, of that period have passed away. It is now apparent that it was to courage such as his, to the refusal of men like him to be silenced by the frowns of power, and to their adhesion to sound principle in times that tried the soul as those who are to come after us may haply never be tried, that we owe it that we still have the Constitution of the United States, with its guaranties of social order and

personal freedom. Certainly it will not be denied, that Judge Curtis contributed his part to prevent "the loss of ideas" the preservation of which was essential to our welfare, in the manner and the spirit that became him.

After the publication of this pamphlet in Boston, professional duties in the Supreme Court carried him to Washington; and I make some further extracts from his letters to Mrs. Curtis, written during the winter of 1862–63.

WASHINGTON, Dec. 15, 1862.

. . . The boys have it now in our field, and while American citizens are slaughtering each other in thousands, the need of them is most evident. Washington was always a fatiguing place to me, even when it was a fresh scene, and the place where I had ambitions; and now that I have grown wiser, and have none, in the usual acceptation of the word, and most of my old friends have gone, either to a better world, or to decay here, or run away to Secessia, and with the blackest clouds lowering around our national life, this city is very dreary to me. But I have enough to do to keep me from idle thoughts; and that I am able to work for you and the dear children, in honorable and useful employment, is enough to keep me content, if I have not much about me that is pleasant.

. . . The Administration and its followers are feeling despondent about General Burnside's army. The loss in Saturday's fight was dreadful. I think it will reach, and probably exceed, ten thousand. I see no one who has any discernment of probable end. All looks dark to those who have eyes. It cannot be, that such a state of things should long continue.

WASHINGTON, Dec. 26, 1862.

. . . I called on Mr. Stanton last evening, when I had a right to expect to find him at home. I did not, and was glad not to. I had determined to say, "We will not talk about public affairs." He returned his card the next day. I have been urged to go and see the President. I think not. It would do no good, and would give me no pleasure. I suppose he would say the same. My hopes for the Union and the Constitution are *nowhere*. . . . But I do not know why I should write these things to you. Only my heart and my mind are full of them.

WASHINGTON, Jan. 6, 1863.

. . . Speaking of ——, I have known him a long time, and he is a hard, round, dry little *Ego*, about the size and consistency of a rattan; and I hope that in some future state of existence he will meet with some Aaron who will make the rod sprout and blossom yet. I ought to add, all I know of him is outside, and he may have a world within yet undiscovered by me.

I had a long and interesting conversation with Mr. Stanton last night. He is a strange man, and one of the strangest things is, that he manifests a very strong feeling of regard, I might say affection, for me. I had written a pamphlet directed against his acts, which, whatever may be its merits, has undoubtedly produced a powerful impression on the country against him and the Administration. Loyal certainly, devotedly so, and allowing no man to doubt my devotion to the country, — respectful to the President and to himself, not for rhetorical purposes, but actual conviction, — still [it was] calculated to excite (as in the mind of the President it has excited) hostile feeling.[1] But when I saw him [Mr. Stanton] on the 1st of January, he asked me to name some time when he could see me, and last evening I spent two hours with him, discussing these very questions, in part, and when I came away he said he had not had so pleasant an evening since I saw him last February, and begged me to come again. I cannot

[1] Mr. Lincoln, during his famous contest with Mr. Douglas, when they "stumped" the State of Illinois together, and made speeches against each other from the same platforms, carried with him, as a *vade mecum*, Judge Curtis's dissenting opinion in the Dred Scott case. No doubt it furnished him with many an argument, which he could use pertinently in the discussion of questions debated by him and his antagonist, in that memorable contest. But it is strange that he did not recognize in Judge Curtis's pamphlet, "Executive Power," the same devotion to the Constitution, the same high power of contemplating its true meaning as the only guide of public and official action, which he admired in the dissenting opinion. Mr. Lincoln was too sensible a man not to know that as President, either in his civil or his military capacity, he could not promulgate decrees, that would have the force of laws, affecting the domestic relations of the people of any State or States. If the pamphlet on Executive Power excited in his breast, hostile feelings against the writer, it must have been because he considered that, in the circumstances of the country, he had some right to expect any official act of his to pass unchallenged. That he could reasonably expect this, no one probably would now contend.

I notice that in the records of the Class of 1829, a copy of which, so

doubt his sincerity, but I do not quite comprehend his very decided liking.

Among the arguments or assertions with which the criticisms on this pamphlet abounded, the *dernier resort* was almost universally found in the comprehensive position that "rebels have no rights." Judge Curtis was supposed to have overlooked or disregarded a principle, by which a lawful government, engaged in putting down a rebellion, may resort to any measure or do any act which it deems necessary; that, as rebellion is the renunciation and destruction of all law, rebels are out of the pale of all law. Private letters from persons whose studies or reflections did not enable them to see the unsoundness of such a doctrine, when applied to a civil war for the salvation of a written Constitution, but who caught at the idea that rebels have no rights as the solution of all difficulties, lie before me in considerable numbers. The partisan press of course echoed this supposed principle, in all its forms. It received the sanction, among others, of a gentleman occupying the high position of Professor of Law in Harvard University, in a letter written in his own person and published in one of the

far as they relate to my brother, I have been permitted to see, there is an entry by the Secretary which strongly illustrates how Judge Curtis was by some persons misunderstood. The record speaks at length, and in glowing terms of eulogy, of his dissenting opinion in the Dred Scott case. This is followed by a *note*, in these words: "Again, *and seemingly adverse to the above*, in October, 1862, he prepared a legal opinion and argument, which was published in Boston in pamphlet form, to the effect that President Lincoln's Proclamation of prospective emancipation of the slaves in the rebellious States is *unconstitutional*." It is not a little singular that all could not see, that between the constitutional power of Congress to prohibit the introduction of slavery into a Territory of the United States, and the power of the President to abolish slavery in a State by his Proclamation, there was not even a "seeming" analogy. But in those days they only were consistent who desired to see an end of slavery, regardless of the means. The proposal to abolish it by an amendment of the Constitution proves how futile in point of law was the Proclamation of 1862. But the reader will have the dissenting opinion and the pamphlet on Executive Power both before him, and a comparison will disclose the inconsistency, if any there be. (See *infra*, Vol. II., Index.)

public journals.[1] In short, it was the one great and popular answer, in New England, to Judge Curtis's objections to the President's Proclamations.

He did not deem it needful to enter into a newspaper discussion with any of his critics; but, as the first edition of his pamphlet was immediately exhausted, the publication of a second gave him an opportunity to insert some paragraphs dealing with this assertion that the people of the seceded States were out of the pale of law.[2] So far as I know, these paragraphs constituted the only answer that he made publicly to the criticisms with which his pamphlet was received.

The strictures and commendations of the public press with which this pamphlet was received in different quarters of the country were voluminous. But expressions of the feelings and opinions of persons who stood aloof from the press and its various influences are now more valuable, because they came from more impartial sources. From the letters that lie before me I select two, that emanated from that unbiassed observation of public affairs which private station and high intelligence are best calculated to produce. The writer of one was Dr. James Jackson, who was perhaps the acknowledged head of the medical profession in New England for a long period, and who, in every thing that related to the public weal, was a man of singular wisdom. The writer of the other was a gentleman of great eminence at the Boston Bar, who still adorns it, at an advanced age, but in undiminished activity, who had led and still leads only the life of a distinguished lawyer, and who expressed, in a very terse and perspicuous manner, the appropriate answer to a criticism which appeared in the London Times.

[1] See a communication, signed by the Hon. Theophilus Parsons, printed in the Boston Daily Advertiser, October 24, 1862.

[2] The second edition is the one reprinted *infra*, Vol. II. The new paragraphs are enclosed in brackets.

Dr. Jackson to Mr. Ticknor.

October 20, 1862.

My dear Mr. Ticknor, — Let me thank you for sending me Judge Curtis's pamphlet on Executive Power. I thank you very much for it. I received it last evening, and my son then read it to me. This morning I have read it myself. I cannot tell you how much I have been gratified by the perusal. Many of us thought that the President had taken liberties with the law, which he had not any right to take, within the last eighteen months. But most persons having these thoughts have probably felt, as I have, a reluctance to complain, because we were aware of the very embarrassing and very great difficulties under which this officer was placed upon coming into office, and at the same time had thought he was truly seeking the best welfare of the country, and that he had not any wish to arrogate any powers not belonging to him. To me, certainly, the arrest and imprisonment of citizens by military power, without even stating the causes for such arrests, have appeared unjustifiable and alarming. But the late Proclamations, as they took broader grounds, have appeared still more so. Had the President been thought to have been prompted by personal ambition, and to have harbored any improper desires, I think that through our newspapers and in other ways loud complaints would have been made many months ago. But since the 22d of September, the fear of evil could not be restrained, and it has been evident that an opposition would be made to the course adopted by the commander-in-chief. In this state of affairs, there is great reason for rejoicing that Judge Curtis has given us this pamphlet. So far as I know, there is not any of our distinguished jurists and statesmen to whom our public would listen more readily than to him, — none more fitted, in the general estimation, for the task. This task, so far as I can judge, he has performed with the greatest skill and success. He has arranged in the most lucid manner the points to be considered, he has stated all that can be said in the most logical manner; and he has done this with what may be called true eloquence, if I may use that word in reference to what is written. He has thrown his own feelings into the discussion, and must warm others by the warmth which he shows in regard to the common welfare. In so doing, so far from seeking to find fault with the President, or seeking to alienate his fellow-citizens

from him, he has manifested toward him the kindest feelings, and a confidence in his honesty and integrity, which, I believe, is entertained by the great mass of our people. He has not written a word of which Mr. Lincoln or his friends can complain, while he has not been restrained from describing, in the most distinct and fearless manner, the objections which can be made to the course of conduct under consideration.

I sat down to write you a short note, — and here I am. Perhaps my writing is so bad that you have not got here, where I am. Let me add a hope and wish. From the title-page I have a suspicion that the pamphlet is not [yet] published. But it must be spread abroad very freely. It should reach every man who can understand it. I should like to hear that a million of copies were printed. Possibly it would be best to have it printed in half a dozen newspapers of extensive circulation. . . .

As I trust you will read the end of my note, I here beg your pardon for such a hurried and loose paper, — and, with new thanks, assure you of my great regard for you.

J. Jackson.

Sidney Bartlett, Esq. to Mr. Ticknor.

Friday Evening, Nov. 29, 1862.

Dear Mr. Ticknor, — I return the letter of Sir Edmund Head, and the Times, with my thanks. The Times article is wilfully perverse. The writer could not read the Judge's pamphlet and fail to see that it is wholly based on this proposition, — that this government is dealing with a rebellion, and not with an alien enemy; that, in dealing with such rebellion, it has at all times *professed* to be governed by a written Constitution, the provisions of which it holds to be *constantly applicable to the several States* where such rebellion has sway; and that the purpose of the pamphlet is to show that, professing, as the Executive does, to be governed by that Constitution, its restraints have ignorantly, or by a gross misconstruction, been wholly disregarded. The whole article in the Times wilfully ignores what constitutes the fundamental proposition on which the pamphlet rests, and, though *smart*, is shaped to other issues than those raised by the Judge. Pardon me for adhering to my original view, that, for those who have thought enough to comprehend the pamphlet, an essay to show that in a rebellion

rebels have rights is superfluous, and that it would require an essay of a different character, and one of larger proportions, to deal with the weaker popular delusion as to the effect of the struggle upon our rights and duties. Yours faithfully,

S. BARTLETT.

Any one who shall now carefully read this production, "Executive Power," will notice how sedulously the writer abstained from questioning the motives of these executive acts, and how respectfully he treated the President and his Secretary of War; directing his arguments and comments solely to the constitutional and legal questions. There was great merit and great charity in the adoption of this tone; for, in all the directness with which the writer judged the conduct of the Administration in reference to its constitutional powers and duties, he did not charge, as many of the political opponents of the Administration did, that, while the executive department was prosecuting the war, it was at the same time aiming to control the elections everywhere in the North, and thus to preserve the party supremacy which was both affirmed and denied to be essential to the successful termination of the great struggle. The Emancipation Proclamation was, according to the prevailing belief among the Democrats, conceded to those who demanded it, because it was supposed that it would gain more votes than it would lose. In the same way, it was charged that the Proclamation which suspended the *habeas corpus* as to all persons confined by military authority, and the orders of the Secretary of War establishing a military police for the arrest of "all disloyal persons subject to arrest, under the orders of the War Department, . . . and to perform such other duties as may be enjoined upon them by the War Department," were designed as much to intimidate citizens inclined to write, speak, or vote against the party in power, as they were to prevent actual aid from being given to the enemy in the field. It was said that the motive of these measures was largely political; and that,

while Mr. Lincoln's government was fighting Southern armies in the field, it constantly had its eye and its hand on the elections in the North. Yet in his public criticism of "the late desperately bad measures," as he characterized them in a private letter, Judge Curtis omitted all reference to the complaint that the Administration shaped its measures as the head of a party quite as much as for military purposes. In fact, the pamphlet had no party character or purpose.

One of the most elaborate, and from the writer's premises most consistent, of the many answers to Judge Curtis's pamphlet was made by the London Times, in an article filling more than two of its editorial columns, in its issue of November 13, 1862.[1] It is to be remembered that, at this period, nearly the whole force of British opinion leaned strongly in support of the position that the Southern Confederated States were no longer a component part of the United States, but that they were "a foreign power to the North." The adoption of this view by the public men and the writers of Great Britain who embraced it, and its general acceptance by the governing classes of that country, with here and there a notable exception, had almost the effect that might have followed an actual intervention to bring about the final and practical result, which was assumed to be the existing state of things. It is needless now to speculate upon the causes which produced this opinion in England. All that I am concerned at present to point out is, that the postulates of a complete severance of

[1] It is the article referred to *supra*, in Mr. Bartlett's note. It was sent from London to Mr. Ticknor, by Sir Edmund Head, accompanied by a letter from which I take the following extract: —

"November 16, 1862.

"I send you by this mail a copy of the Times, with a notice of Judge Curtis's pamphlet. It is not to me a satisfactory one in any way. As a matter of course, the stand-point of the Times is different from that of the author, and so likewise is my own. But I scarcely think the importance of the matter is properly estimated. I gave DeLane the pamphlet, in order that some notice might be taken of it; but I am in no way responsible for the article."

the American Union, and of the alien character of the Southern Confederacy, lay at the foundation of all that this able writer in the London Times had to urge against Judge Curtis's views of the nature of the contest. I am not disposed to insist, although I have remarked it for more than thirty years, that Englishmen, probably in consequence of the difference between an unwritten and a written Constitution, have generally been peculiarly liable to adopt views of the American Union in which very few Americans would concur. Doubtless there was a radical difference of opinion between the North and the South, respecting the right of State secession from the Union as resulting from the nature of our Constitution; and it is equally true that, after this supposed right had undergone theoretical discussion in every possible form, and because there was no peaceable solution of it provided for in the Constitution itself, and as the claim would not be surrendered by the people of the Southern States, the practical assertion of the supposed right became a question of physical force between the established government of the United States and the people of the South. In this posture of things, the real question for the government of the United States, which denied *in toto* the existence of any constitutional right of State secession from the Union was, whether it could, consistently with its own constitutional position, adopt the dogma that the Southern Confederacy was an alien enemy, and proceed against the Confederated States and their people in all respects as alien enemies proceed against each other, to all the consequences of conquest and subjugation. By all theories theretofore maintained by publicists, and accepted by the most enlightened nations, a constitutional government which is obliged to wage a civil war in assertion of its lawful authority over its revolted citizens, may treat the military power of the insurgents, for the time being, as a belligerent, and accord to it the rights and usages of civilized war. This is a principle which has

been adopted into the public law of the world, in order to prevent such contests from degenerating into barbarous practices; and because it is a principle of great practical convenience to the lawful government, which is obliged to use military means to regain its lawful authority over the territory and persons comprehended within the sphere of the insurrection. But between this temporary and limited concession of the belligerent character, and the complete concession of the character and position of an alien enemy, there is a plain distinction. The government of the United States, deriving all its powers from a written Constitution, could not, consistently with its claim that the Southern people were "rebels," proceed to treat them in all respects as if they were "alien enemies." The power to declare war, which the Constitution had vested in Congress, and the power to carry on war which it had vested in the President, must both be interpreted by the nature of the war that is at any time undertaken. A war against an alien enemy cannot be a civil war, prosecuted for the recovery of the lawful authority of a constitutional government. A people cannot be at the same time alien enemies to a government and rebels against the lawful authority of that government; and although, when they are the latter, they may be conceded to be belligerents, in a limited sense, until the contest is ended, that concession in no way involves the consequence that they are alien enemies, either during the contest or after it has terminated in the success of the legitimate government.

The writer in the London Times based all his arguments against the views of Judge Curtis upon the assumption that the Southern Confederacy and the people of the Southern States were an alien enemy to the government of the United States. Reasoning from the position that the war was a foreign war, he maintained, in reference to Mr. Lincoln's Emancipation Proclamation, that in a foreign war the commander-in-chief can threaten the enemy with any

thing that he believes will annoy or weaken him. In the same way, he maintained that the fallacy of Judge Curtis's objections that by the other Proclamation the President had undertaken to create offences unknown to the laws of the United States — such as discouragement of enlistments, the resistance to drafts, and other disloyal practices — lay latent in the assumption that the laws of the United States are to be applied to a foreign war. "In vain," he said, "Judge Curtis attempts to reconcile the uses of martial law with the principles of the Constitution. When the Executive has suspended *habeas corpus*, *quoad* Executive, in respect to certain classes, he comes in as commander-in-chief, and deals with these classes as military chief. The whole of the acts of the President, in letter and spirit, are referable to and excusable upon one ground alone, — that which the Democrats will not adopt, and which the Republicans are not bold enough openly to stand upon, — that the States of the South are an alien enemy, and that those citizens in the jurisdiction of the [United] States who aid and abet them are amenable to the customs and usages of all governments towards treasonable subjects. Thus considered, Mr. Lincoln becomes a despot, ruling a prostrate people, who, in time of war, to gratify their lust of conquest, have given up every vestige of liberty, and cannot save their enemies from the measure they have accepted for themselves. The most curious fact, perhaps, in connection with this result of majority doctrines, is the perfect submission of the whole people of the Northern States to decrees which have been stigmatized as illegal in the last degree; that the army of intelligent citizens have yielded to them; that the generals, the most powerful of whom are Democrats, have never dreamt of opposing them. It must be that they feel that the Confederate States have become an independent nation, and are now an alien enemy."

It is a remarkable coincidence, that this opinion of a British writer, put forth for an obvious purpose, fell in with

views which were maintained in this country. There was a large body of opinion in the Northern States which regarded the war as a war for conquest and subjugation, or wished to make it one; so that the Southern States might, as States of the Union, be obliterated, and be reduced to the condition of Territories, — the property of the United States. Practically, this opinion concurred in the dogma of the foreign writer, that the war was, to all intents and purposes, a foreign war; and thus, while the foreigner wished to produce the belief that the American Union was legally dissevered, the domestic press to a large extent, and a considerable party in the North, called loudly for an unlimited prosecution of the war, and a suppression of the political existence of the Southern States.

It was the purpose of Judge Curtis to show that this was not a foreign war, with the rights and powers which one alien enemy can exert against another. He wished to save the government and people of the United States from the deplorable consequences of having on their hands a great collection of conquered provinces, subjugated as an alien enemy is subjugated by a triumphant foe. He saw with perfect distinctness, that, when the line which separates a foreign war and all its incidents from a civil war, that is waged for the recovery of the lawful authority of a constitutional government, was once crossed, the Constitution of the United States could not be saved, either for the North or the South. He looked forward to the time when, the military power of the Southern Confederacy being broken and dispersed, the Constitution could resume its peaceful sway over the people of the South, and they could be restored to their proper participation in its working, — a time which he felt well assured could never come if the Executive were to assume and exercise powers derived from the assumption that he was bound, in prosecuting the war, by no restraints of the fundamental law of his country, and could do any thing that a commanding general may do against an alien

enemy. The assertion that Judge Curtis was unable to reconcile the uses of martial law with the principles of the Constitution, was a mere begging of the question. His English and his American critics should have both attended to his distinctions between military law and martial law; and they should have answered, if they could, his limitation of the latter to the sphere of actual operations in the field. They should not have assumed that the President could extend martial law over the whole country and all its citizens, and then have jumped to the conclusion that the uses of martial law and the principles of the Constitution were irreconcilable. They should have begun with the admission that the Constitution did not allow of the application of martial law to all the citizens of the Union, and then have inquired how, when, and over whom, martial law can ever be exercised in this country.

There was yet another aspect of this very important subject on which Judge Curtis was at variance with his critics, which he saw, and which they, apparently, did not see. "Judge Curtis's argument," said Professor Parsons, "would give the Constitution and the law to the rebels as their sword to smite with and their shield to save them, and leave it to us only as a fetter."[1] If the people of the Southern States, while the President was seeking to suppress what he and the great mass of his fellow-citizens of the North professed to regard as a rebellion, were to understand that they were waging a foreign war, one which had been made such by the will of the Executive of the United States, with the assent of all the people of the North, — one which must be prosecuted to the end of conquest by one party or the other, — or, in other words, if the people of the South were to understand that the Constitution and laws of the United States, the supremacy of which over all opposing force was the great professed object of all Federal hostility, afforded no rule for the action of the Federal government, — then they

[1] Boston Daily Advertiser, October 24, 1862.

were under the most powerful motives for resistance that could ever animate a people. Then they were to fight *pro aris et focis;* and the result must inevitably be, if they were beaten, that they were out of the pale of the Union. What, then, in such an event, would have been *our* condition? With the Constitution abrogated, and with a whole group of States subjugated by military power, what rule, what authority, what source of power but an absolute despotism, would have remained for the government of the conquered or the conquerors?[1]

In a copy of the pamphlet, "Executive Power," presented by Judge Curtis, soon after its publication, to a gentleman still living, and in whose possession it remains, the following note in Judge Curtis's handwriting appears, referring to the President's Proclamation which suspended the writ of *habeas corpus*, and subjected persons guilty of certain offences to martial law, and trial and punishment by military tribunals: —

NOTE. — I understand that the Proclamation of President Lincoln, a copy of which is on the sixth page, cannot be obtained on application to the Department of State. I have not myself made the application, and the person who had so informs me. *All* proclamations of the President are required to be published in Little and Brown's edition of the Acts of Congress, &c. This one is not so published. That it was *issued* there can be no doubt. I took it from the "Intelligencer," which printed it at Washington on the day it was made public. Having been issued, I am sorry any attempts have been made to suppress it.[2]

B. R. C.

[1] One evening, at a party in Washington, after Mr. Stanton was out of office, he came up to Judge Curtis, and, holding out his hand, said, "Judge, now that I have ceased imprisoning my fellow-citizens without due process of law, will you shake hands with me?" My brother did not like banter on such a subject, but nevertheless he shook hands with Mr. Stanton. Their intimacy, however, I think was never renewed.

[2] The facts appear to be these. The Proclamation referred to was not published, as it should have been, (if filed in the State Department,) in the 12th volume of the Statutes at Large, along with the other Proclamations of 1862. It did not make its appearance until the 13th volume was pub-

In the early part of the year 1865, Judge Curtis was selected as umpire, under a treaty between the British and the American governments. This selection of a private individual, and a citizen of one of the contracting countries, for such a duty, was so creditable to the British authorities, and so honorable to the person named, that I think it worthy of explanation.

On the 1st of July, 1863, a treaty was concluded between the two governments, for the final settlement of the claims of the Hudson's Bay and Puget Sound Agricultural Companies. These claims had arisen under the treaty of June 15, 1846, commonly called the Treaty of Oregon; by which the landed possessions of these two companies, and of all other subjects of Great Britain within certain limits, might, under certain circumstances, become the property of the United States, at a valuation in money to be agreed upon between the parties. It was now agreed by the treaty of July 1, 1863, that the settlement of all questions relating to these claims should be referred to two commissioners, one of whom was to be appointed by each government; and that, if they could not agree on an umpire, whose decision was by the treaty to govern in case of their differing upon any of the claims or questions, the umpire should be appointed by the King of Italy. The commissioners appointed under the treaty were Mr. Rose of Montreal (now Sir John Rose), on the part of Great Britain, and the late Judge Alexander S. Johnson, of Utica, in the State of New York, on the part of the United States. Sir Edmund Head, who had been Governor-General of Canada from 1854 to 1860, had, after his return to England, accepted the position of Governor of the Hudson's Bay Company. Being an intimate friend and correspondent

lished, which was in 1866. Whether, in this interval of four years, there was an original on file in the Department of State, would seem to be doubtful. Judge Curtis's manuscript note in reference to it was written after the publication of the 12th volume of the Statutes, which was in 1862.

of Mr. Ticknor, and well acquainted with Judge Curtis, he wrote to the former gentleman as follows: —

SIR E. HEAD TO MR. TICKNOR.

HUDSON'S BAY HOUSE, FENCHURCH STREET
LONDON, Feb. 27, 1865.

MY DEAR TICKNOR, — In July, 1863, there was a convention between the British and United States governments, for the settlement, by commissioners, of the long standing claims of the Hudson's Bay and Puget Sound Companies (under the Treaty of Oregon). The commissioners (Mr. Rose of Montreal and Judge Johnson) have met, and they will have to name an umpire. If none is named by government, the case goes to the king of Italy.[1] Well, the Foreign Office here have asked me, as Governor of the Hudson's Bay Company, if I could suggest any name. I have not hesitated, with the consent of my colleagues in the committee here, to say, that we would feel quite satisfied if the final adjudication of the claims were left to Judge Curtis as umpire. We believe that it would be impossible to find a more honorable or more competent person. I think Lord Russell will probably write out to this effect, and I scarcely see how the American commissioner can object to Judge Curtis, if Rose proposes him. My chief fear is, lest he should decline to accept the office; but I hope, at any rate, he will feel that his ability and integrity are fully and completely recognized in London. I shall be truly sorry, if it is offered and refused. Yours sincerely,

EDMUND HEAD.

TO MR. TICKNOR.

Sunday, P. M.

DEAR UNCLE, — I came home from Hartford with a hoarse cold, which it is highly expedient I should get rid of, as I have

[1] There was apparently a slight inaccuracy in this. The treaty required that, if the *commissioners* did not agree on an umpire, he was to be named by the King of Italy. This inaccuracy, however, is not material to the point for which Sir E. Head's letter is here quoted, namely, that an independent, if not the first, suggestion of the name of Judge Curtis came from England. Sir Edmund meant, in substance, that if the British government did not instruct Mr. Rose whom to suggest or agree to, there would be a practical disagreement between the Commissioners, and the appointment would have to be made by the King of Italy.

two causes to argue this week; so I have stayed in to-day, and do not like to go out, as your note invites me to do.

I should desire you to make my acknowledgments to Sir Edmund for the kind expressions contained in his letter, and indeed for thinking of me at all for such a duty, were it not that, in a matter so purely judicial, it is better for me to have no such intercourse with either side. You will therefore please say to Sir Edmund, that you read his letter to me, and that there is nothing in the character of the office, or in my own engagements, which would prevent me from assuming its duties, if it should be the wish of both governments that I should do so.

I was very unwillingly deprived of the dinner on Friday, but I could not reach Boston in seasou.

Yours always, B. R. Curtis.

So far from there being any objection to Judge Curtis on the part of the American commissioner, I am inclined to believe that Judge Johnson himself had thought of Judge Curtis, previously to the proposal of his name by Mr. Rose, and that, when they again met, each of them found that the other was prepared to name the same person.[1] Judge Curtis was never called upon to act under this appointment, as the commissioners agreed upon the award which they were required to make.

In the autumn of 1865, my mother, then nearly eighty years of age, met with an accident which seemed likely to prove fatal. She recovered from its immediate effects, but died tranquilly on the 7th of February, 1866, in full possession of all her faculties and affections.

To George T. Curtis.

Wednesday, Nov. 20, 1865.

Dear Brother, — I have been absent at Providence all day, and shall be there to-morrow and cannot see mother again till

[1] Judge Johnson informed me, shortly before his death, that he suggested the name of Judge Curtis to Mr. Rose, and he seemed to claim the merit of the selection as belonging originally to himself. The probability is, that there was a coincidence of separate and independent preferences for the same person.

Wednesday. The account I have, and this corresponds with my own observation, is that when not excited she sleeps a great deal; and the nurse, who is skilful and observing, thinks she *may* drop away at any time. But I have no doubt she has much vitality and that, without a sudden shock, which of course *may* come at any moment, she will live through her present state. I wish to give you exactly my own appreciation of her condition, and it is this.

The shock she has received may be such that her nervous system will sink under it. In that case she will die, probably quietly and without suffering; and the present indications are that this would be the result with one of less vital power. I doubt if it will be so with her, for she has a great deal.

My own house has been little better than a hospital. . . . For myself, I have been much pressed by courts and juries, but I shall wind them all up to-morrow, and have some rest. I have kept well and about, — the same as always. Give my love to your wife.

Yours always, B. R. Curtis.

To Mr. Ticknor.

32 Hancock St., Feb. 8, 1866.

My dear Uncle, — I thank you for your note. I should have come to your house this morning, if my exposure last night had not given me a cold which made it necessary for me to keep in doors to-day.

You say well, that, when one has come to the end of a great duty, it is a time to look back and see how it has been done.

Though I have performed neither this nor any other duty so well as I ought, I have tried for forty years to do what my mother would permit me to do for her; and I have the satisfaction of believing that she did not think me wanting in my duty to her.

Though she had to the last half-hour of her life the same energetic purpose to do what her physician judged best, which was characteristic of her, yet she wished to be at rest. Now she is at rest. Affectionately yours,

B. R. Curtis.

To the Hon. Reverdy Johnson.

Boston, July 8, 1866.

Dear Mr. Johnson, — I read the report of your argument on the Test Oath, on my journey hither, and am entirely satisfied of

its soundness, and certainly it is put with great clearness and force before the court.

I hope for the right result, but, in the present condition of things, I do not feel sure of any result of judicial action, where political considerations have, or may have, any place.[1]

With great regard, I am, dear Sir,

Yours faithfully,

B. R. CURTIS.

The following opinions are selected from a great number given in the year 1866.

FEDERAL OR STATE JURISDICTION OVER TRUSTS.— INVESTMENTS BY TRUSTEES.

OPINION.

An executor, guardian, or trustee, appointed by a court of a particular State, is subject to account in a suit in equity, instituted in a court of the United States, between citizens of different States. That the trust has its origin in the action of a State court, and that the trustee is amenable to its jurisdiction, will not exempt him from accountability in a suit in equity in the courts of the United States. But a trustee who has derived his appointment from the act of a State court, and who is bound, by the laws under which he was appointed, to account in the court which appointed him, and who either has there accounted, or is in the process of there accounting, pursuant to the laws under which his obligations were created, cannot in my judgment be drawn away from this appropriate State tribunal, and forced to account in a court of the United States. The reasons for this opinion may be found stated

[1] A provision inserted in the Constitution of the State of Missouri, during the civil war, required priests and clergymen, as a condition of being allowed to continue to exercise their profession, and to preach and teach, to take a prescribed oath that they had not committed certain designated acts, some of which were at the time offences with heavy penalties attached, and some of which were at the time acts innocent in themselves. The Supreme Court of the United States, in accordance with the arguments of Mr. Johnson and Mr. David Dudley Field, held that this provision constituted both a bill of attainder and an *ex post facto* law, within the meaning of the clauses of the Federal Constitution which prohibit the States from passing laws of that character. (See Cummings *v.* The State of Missouri, 4 Wallace's R. 277.)

in the case of *Mallet* v. *Dexter*, 1 Curtis's C. C. R. 178. I have had frequent occasions to reconsider this subject, but have not been able to arrive at any conclusion more satisfactory than the one therein stated.

The case states that the investments in question were duly reported by the trustee to the Chancery Court, and I assume these reports were part of the proceedings in the course of which the trustee had been appointed. It is not stated whether any judicial action was taken thereon, — whether the investments were approved and sanctioned by the court, — whether, under the practice of the court, such reports, not objected to, are deemed to be sanctioned by the court.

If judicial sanction of the investments was obtained, in my opinion their propriety cannot now be questioned in the suit brought in the United States court, or in any other court; upon the plain principle, that the trustee has actually been subjected to a judicial accounting in a tribunal of competent jurisdiction, where the propriety of his investments has been finally settled. If judicial sanction of the investments has not been obtained, I am strongly inclined to think that their subject-matter should be deemed to be so far in progress before the Court of Chancery which appointed the trustee, that any other court should decline to interpose and assume jurisdiction over the subject. But this state of facts would present a question of some difficulty. I have an impression that Judge Giles of Maryland has had this, or a very similar question, before him; and that he gave an elaborate opinion on it, refusing to take jurisdiction. A copy of his opinion might be of service.

As to the validity of the State laws, my opinion is that they protect the trustee. I will state briefly the grounds of that opinion.

I think the following positions should be and will be affirmed by the Supreme Court of the United States.

1. The State of Alabama continued to exist after its attempted secession from the Union, with all its political capacities unimpaired.

2. Its officers not having been sworn to support the Constitution of the United States, and having in fact used the powers of the State to make war on the United States, there was during this war no such government of the State as can be recognized by the government of the United States, in either of its departments, as a lawful government. But it was a government *de facto;* and those

acts of the State which would have been *de jure*, if the officers had been sworn to support the Constitution of the United States, were operative and binding on its citizens who were within the power of the State, as the acts of a government *de facto*.

3. The nature of our government does not permit the United States to destroy a State, or acquire its territory by conquest. It may rightfully subdue, by arms, any number of the rebellious people of a State. But when the authority of the United States has been fully restored by arms, the State remains; and it is both the right and the duty of the people of the State to reconstitute its government so that it will be in harmony with the Constitution of the United States.

The question, at what time the power of the United States is so restored that the people of a State, whose government has been used to make war on the United States, can safely be called together to reorganize its government, is purely a military question, of which the President is the judge, and his action in that capacity is binding on all departments of the government of the United States.

To apply these principles to the subjects under consideration.

If the naked question were presented, whether a law of a State enabling trustees to invest in the bonds of a state or country at war with the United States would be a valid law, I should apprehend it would be held to be invalid; not because of any mere principle of public policy, but because such a law might be deemed in conflict with the law of the United States declaring war, and with the rights of the Uuited States and the duties of its citizens arising from a state of war.

How far the very peculiar facts of this case would influence or control the decision, if this case rested only on the law passed Nov. 9, 1861, I do not find it easy to determine. If the bonds were not taken by the trustee from the State, but were purchased in the market, there is certainly much force in the reasoning drawn from *Armstrong* v. *Toler*, 11 Wheaton, 258, and that class of cases in favor of the validity of the trustee's act. But I have not thought it needful to pursue this inquiry, because I am of opinion that the Ordinance of the Convention and the subsequent act of Feb. 22, 1866, are sufficient to protect the trustee. It will be understood from what I have before said, that I consider this Convention to have been the lawful possessors of all the sovereign power of the people of

Alabama, and this Legislature to have been *de jure* in the exercise of the legislative power of the State under its Constitution, and therefore, unless it can be shown that to validate the acts theretofore done by this trustee is in conflict with the Constitution of the United States, or some constitutional law of the United States, his acts are validated. I do not think this can be shown. If the original transaction were a purchase of bonds from the State or the Confederate States, and in conflict with the Constitution and laws of the United States because it gave aid to the war, still that transaction was wholly completed and closed, and cannot be in any manner affected by this Ordinance or law, and it was a matter of perfect indifference whether the trustee should or should not be held accountable to his *cestui que trust* as for an illegal investment. This principle is brought out with great force by Mr. Justice Nelson in *McBlair* v. *Gibbs*, 17 Howard, 232, and I think it fully supported by the authorities.

In my judgment this principle ought to be applied, with much liberality, to healing acts of legislation which relate wholly to past transactions, are without political significance or effect, and have for their sole and manifest object to prevent public events from working private injustice.

If it be conceded that the investment when made was illegal, and the trustee accountable, it was within the power of the State to *destroy* that accountability; and I am not able to see how the Constitution of the United States, or any law of the United States, required this legal accountability to be preserved.

It is not an objection that the law is retroactive, and takes away an existing right, which does not arise from any contract. I attach importance also to the character and the nature of the act in question. The Legislature, as representing the *parens patriæ*, may do many acts for the protection of the rights of minors and of their guardians or trustees, which would not be generally admissible, and I can perceive nothing inconsistent with sound principles of legislation, in a law protecting trustees and guardians from all consequences of acts done by them in good faith and under color of law, but which subsequent events have proved to be defective or illegal. I think, from my general recollection, that an examination of the legislation of the States, and of the judicial decisions thereon, will disclose many such cases.

It should be remembered what the precise question is. It is

whether a trustee, who has exercised in good faith that discretion in making investments of trust funds which belongs to him, shall be held by a court of equity to have transcended his powers. And, without touching the question whether the particular investment did or did not exceed the then existing powers of the trustee, I do not doubt that it is within the legislative power of the State of Alabama to enact, that investments made in good faith by trustees, though not authorized by existing laws, shall be deemed to be in execution of their trusts. And I perceive no sufficient reason why this law enacted by the Legislature on this subject, should not be respected by the courts of the United States. It is true that the courts of the United States, in the exercise of their equity powers, are not controlled by the laws of the State. But what are equitable rights and titles are not only affected, but in many cases must be absolutely controlled, by those local laws which alone can create and regulate them. And I do not suppose any lawyer, instructed in our complicated system of jurisprudence, will undertake to maintain that a trustee, appointed under the laws of a State, and accountable directly to its courts for the execution of his trust, can be held anywhere, or in any court, to account otherwise than in substantial conformity to those laws. And if those laws, either by way of previous authority, or subsequent ratification, justify his conduct, I do not perceive how it can successfully be questioned.

B. R. Curtis.

CONSTITUTIONAL LAW. — OBLIGATION OF CONTRACTS.

Opinion.

By Stat. 1827, ch. 32, the Boston Beer Company was made a corporation "for the purpose of manufacturing malt liquors in all their varieties, in the city of Boston, and for that purpose shall have all the powers and privileges and be subject to all the duties and requirements contained in an act passed March 3, 1809 (Stat. 1808, ch. 65)," and the corporation was authorized to hold such real estate and personal estate, of limited amounts, as might be found necessary or convenient for carrying on such manufacture.

The corporation having been organized, and its capital stock paid in, real and personal estate were purchased, and fitted for, and applied to such manufacture.

By Gen. Stat., ch. 86, sect. 28, the manufacture of beer for sale is prohibited. By sections 12–15, provision is made for obtaining a license from the mayor and aldermen to manufacture spirituous or intoxicating liquors (which include beer) for export, or use in the arts, or sale to town agents. But a bond with penalties is required to be given to observe all the restrictions of the law.

By Stat. 1829, ch. 53, sect. 16, the act of 1808 and all acts in addition thereto were repealed, with a qualification.

By the Revised Statutes this last-mentioned act was repealed; but this repeal did not revive the act of 1808 (Rev. Stat., ch. 146, sect. 9).

Upon this legislation the question arises whether the prohibition to manufacture beer for sale, contained in the General Statutes, impaired the obligation of the contract contained in the charter.

There can be no doubt that the *powers* granted by the charter itself are materially and substantially abridged by this prohibition. The corporation was empowered by the charter to manufacture beer in the city of Boston; and there can be no doubt that what they were thus empowered to make they were also empowered to sell, in the city of Boston and elsewhere, according to the usual course of such business. The restriction contained in the General Statutes as to quantity, place, person, and use are manifestly substantial and material. So much so, that I understand them to render it impracticable to conduct the business with any profit whatever, and if there was no qualification of the grant of powers contained in the charter, there could be no reasonable doubt that the law which imposed such restriction upon the powers granted as rendered them useless and impracticable, was a law which impaired the obligation of the contract arising from that grant.

Four questions seem to me to arise.

1. Is the prohibitory legislation which impairs the powers of this corporation a lawful exercise of the police powers of the State?

2. Is it within the seventh section of the act of 1808?

3. Has the seventh section of that statute been effectually repealed?

4. Is it competent for the Legislature to re-enact the seventh section of that statute, or in any manner regain the powers over corporations which that section provided for?

As to the First Question. I am of opinion that every grant made by the State is under the protection of the Constitution of the

United States, to the full and entire extent of *the thing granted.* This leaves open the question, in each case, what is the thing granted; or, more properly, in reference to this topic, what restrictions upon the grant *are implied by law from the nature of the thing granted.* Within the limits of these implied restrictions, the Legislature may exercise its police powers in regulating the mode or extent of the use of the thing granted. But outside of the limits of such implied restrictions the Legislature cannot act, for the plain and sufficient reason that its action would derogate from its grant, and thus necessarily impair the obligation of its contract. This distinction between acting within the limits of restriction implied by law from the nature of the thing granted, and acting without such limits, will be found to run through the decisions; and even when it has not been expressly declared, the courts have manifestly upheld the exercise of police powers only by first showing that the nature of the grant was such as to be subject to implied restrictions which allowed the exercise of police powers. (See remarks of the court in *People* v. *Platt*, 17 Johnson, 195, upon the case of *Stoughton* v. *Baker*, 4 Mass. Rep. 522, and the reasoning of Shaw, C. J. in *Commonwealth* v. *Alger*, 7 Cush. 53, *passim.*)

But it seems to me not possible to show that the legislation now in question is within the limits of restrictions implied from the nature of the grant. In effect, the restrictions and prohibitions imposed annul the entire grant. That grant was of a right to employ the capital of the company to manufacture beer in the city of Boston for sale. The prohibition is to manufacture at all without obtaining a license and giving a bond to observe its terms and conditions; and then, only to manufacture for export and sale to town agents, whose sales are restricted within very narrow limits. And it is stated to be true, that the power so to manufacture and sell is not only substantially different from the power granted by the charter, but includes *no part of that power which is of any practical value whatever.*

That the law of Massachusetts at the date of this grant implied that the grant itself might be revoked, or thus restricted, cannot be maintained. In my opinion there was no implication of any restrictions on the grant substantially and materially inconsistent with the fair meaning of the words of the grant itself. This is deducible, not only from the principles which govern the interpretation and effect of such grants, but from the fact that the Legislature, by the

act of 1808, which is referred to in the charter, has expressly defined the extent of its own power to alter or amend the grant; so there is no room for any implication on that subject. It is not intended by this to say, that the Legislature retained *no* power over the corporation, arising from its general authority to make all manner of wholesome laws, &c. There can be no reasonable doubt that both the real and personal property of this corporation, and its franchises and business, were under the control of the legislative power for many purposes and in many particulars. But I have as little doubt that the power of the Legislature substantially to change, restrict, or destroy its franchise to prosecute the business for which the corporation was created, and to which its capital stock was adapted, on the faith of its charter, must be looked for, not in the police powers of the State, but in the reservation contained in the act of 1808 referred to in the charter.

The Second Question.

The seventh section of the act of 1808 is restricted both by its terms and its subject-matter to action by the Legislature, *after notice, upon the charter itself.* General legislation had without notice to the corporation, and without any action upon the specific grant made by its charter, is not within this provision. In a somewhat similar case of *People* v. *Platt*, 17 Johnson, 195, it was deemed most respectful to the Legislature to assume that, in enacting a general law which would impair a grant if allowed to operate thereon, the Legislature did not have the particular grant in view, and did not intend to impair it.

But whatever supposition may be resorted to, it seems to me clear that the provisions of the General Statutes now in question cannot be deemed to be either a further regulation for the management of the business of this corporation, or a repeal of its charter "upon due notice to the corporation."

The Third Question.

The act of 1829, ch. 53, sect. 16, repealed the whole of the act of 1808, subject only to the qualification, "but this repeal shall not affect the existing rights of any persons, or the existing or future liabilities of any corporation, or any members of any corporation, now established, until such corporation shall have adopted this act and complied with the provisions herein contained." In my opinion the qualification has no reference to the subject-matter of the seventh section of the act of 1808, but relates exclusively to the

rights of persons against the corporation and its members, which it was one object of this act to modify, if it should be accepted and its terms complied with by any existing corporation. Its language is wholly satisfied by such a construction, and its terms can properly signify nothing more. "The rights of any person, or the existing or future *liabilities* of *any corporation*, or any members of any corporation," have a natural and appropriate meaning, when applied to the rights of third persons and the corresponding liabilities to third persons of the corporation and its members; but certainly do not fitly describe or indicate a power of the Legislature to alter, amend, or repeal a charter. And subsequent legislation tends strongly to confirm this view.

It should be observed that, by the seventeenth section of this act of 1831, the only power reserved by the Legislature over the charters of corporations established under or adopting that act was a power to sweep them all out of existence by a repeal of the act itself. There was no power to alter or amend a charter, and no power to repeal any one charter. Doubtless this defect was discovered; and March 11, 1831, the Stat. 1830, ch. 31, was passed, which declared that all acts of incorporation *passed after that date* should be subject to be amended, altered, or repealed at the pleasure of the Legislature.

When the Revised Statutes were enacted, and subsequently when the General Statutes were enacted, the legislative power over corporations was declared to extend to those created after March 11, 1831; and there is no trace of any other claim of authority, so far as I know, from the time when the act of 1808 was repealed by the act of 1829, ch. 53, to the present time. It seems to me that these laws in the Revised Statutes and General Statutes must be taken to be well-considered statements of the whole authority claimed by the Legislature over the alteration or repeal of charters; and when it is expressly limited to those created since March 11, 1831, such limitation shows that it was at that date, and by virtue of the act then passed, that this power was called into existence; and that as to corporations previously created no such power existed.

As to the Fourth Question.

When the grant now in question was originally made, it was subject to a reservation, by force of which it might be revoked or modified after due notice to the corporation. By subsequent legis-

lation this reservation was, I think, extinguished. By this relinquishment, the grant, which was originally in part or in whole, became absolute and irrevocable either in part or in whole. The original qualification of the grant, which affected the obligation of the contract arising from it, was removed, the grant became absolute, and the obligation of the contract arising from it was thenceforward unqualified.

The effect of such a relinquishment of a power of revocation, or alteration, in the case of private grants, would not admit of doubt. Once effectually made, the relinquishment of a power over property is a final extinguishment of the power, and it can never be resumed. And after much reflection I am not able to see why the same is not true of the relinquishment of the powers reserved by the legislature in the seventh section of the act of 1808. The subject of the power was private property, whose existence and enjoyment were wholly beyond legislative control save by force of the power reserved. As soon as that power was released, the right to this private property became as absolute as if it had been originally so granted. The reason why the State cannot resume franchises once absolutely granted is that such resumption derogates from its grant, and this impairs the obligation of the contract arising from the grant. But it cannot be material that this contract arises from two acts of the Legislature, instead of one. If the first grant is conditional, and afterwards the condition is released, — if the first grant is revocable, and afterwards the power of revocation is relinquished, — it would be impossible, I think, to distinguish that case from a grant originally absolute and irrevocable. The question in both cases would be whether the act revoking or changing the grant was in derogation of it, as it existed when attempted to be revoked or changed. If the charter of this corporation had contained a section substantially like the seventh section of the act of 1808, and subsequently the Legislature had repealed that section, I am not able to perceive any sufficient grounds for believing that, after such repeal, the grant would be other than it would have been if the charter had not originally contained the repealed section. And the fact that the reserved power was contained in a general law referred to in the charter, does not seem to me to be material.

I ought to say, that, after careful examination, no decision of this precise question has been found, and that I cannot, therefore, rely

on either the reasoning or authority of any court in answering the question. But my own opinion is, that, when the act of 1808 was repealed, the Legislature finally relinquished the powers reserved in its seventh section. And, as has been already noticed in another connection, the legislation, both in the Revised and General Statutes, upon this particular subject, has a very strong tendency to confirm this opinion. It can scarcely be doubted that the 24th section of the 44th chapter of the Revised Statutes, and the 41st section of the 61st chapter of the General Statutes, were each intended to set forth and preserve the entire power of the Legislature to alter, amend, or repeal acts of incorporation; but that power is there expressly limited to acts passed after March 11, 1831.

In answer to the specific questions proposed, —

1. I am of opinion that debts due to the corporation for malt liquor made and sold in the usual course of its business may be collected.

2. I am of opinion that beer manufactured by the company under the powers contained in its charter, and consigned to its agents for sale, *in the usual course of such business*, cannot lawfully be seized and condemned. But I do not think the charter gives the right to become retailers through agents. Such was not the usual course of such business when the charter was granted.

3. I am of opinion that the corporation has the right to sell to its customers beer manufactured by the corporation pursuant to its charter.

4. What rights are acquired by the purchasers to use and sell what is thus purchased, it is not so easy to answer. I should wish to know fully the facts of the particular case before giving an opinion on it. Some considerations likely to bear on any such case may be stated.

1st. It is clear that the right to manufacture malt liquors necessarily gave the right to sell them in the usual course of such business, and that any law which substantially impairs this right of sale is inconsistent with the grant made by the charter.

2d. It is equally clear, that the right of a manufacturer of this article, generally sold, not to consumers, but to wholesale and retail dealers, is substantially impaired, if those entire and principal classes of his customers can make no use, in their business, of what they

buy. A prohibition on wholesale and retail dealers to sell is, in effect, a prohibition to buy.

If the enactment were, that no wholesale or retail dealer should buy any beer of this corporation, I should not doubt that such a law would impair the right of the corporation to sell it, and it can hardly be material, in reference to the corporate rights or powers, whether the prohibition be to purchase, or to make the only use of the article which the purchaser would buy it for.

3d. At the same time, I think the Legislature may regulate the sale of beer by purchasers of it from the corporation, and that such powers of regulation would be very liberally construed by the courts. And, for obvious reasons, I should prefer to give no opinion upon the case of a purchaser from the corporation, without having all the facts before me.

B. R. Curtis.

CHAPTER XIII.

1865–1868.

Accession of Andrew Johnson to the Presidency. — Letter to the Philadelphia Convention of August, 1866. — Impeachment of President Johnson. — Judge Curtis requested to defend the President. — His Opening Argument. — Letters to Mr. Ticknor during the Trial. — Acquittal of the President. — Declines the Office of Attorney-General.

In consequence of the assassination of Mr. Lincoln, which occurred on the 14th of April, 1865, the office and duties of President of the United States devolved on Andrew Johnson, the Vice-President. The personal qualities of Mr. Johnson will be found pretty accurately described by Judge Curtis, in a letter that will be quoted when I reach the period of his impeachment. At the time when he succeeded to the Presidency, but little was known about him, by the people of the United States at large, excepting that he was a man of great honesty of character, and that he had been heroically faithful to the Union, in his own State of Tennessee. The civil war, when he became President, was virtually ended, but its termination had not been officially proclaimed. One of his earliest official acts as President, looking to the re-establishment of constitutional relations between the people of the lately revolted States and the government of the United States, was a Proclamation of Amnesty and Pardon, issued on the 29th of May, 1865, releasing the inhabitants of those States, who had directly or indirectly aided the rebellion, with certain exceptions and on certain conditions, from all penalties incurred under the laws of the United States. The object of this measure

was to put the people of those States into a condition to re-establish for themselves republican governments, in harmony with the Constitution of the United States. Still farther to promote this object, Proclamations were issued successively between the 29th of May and the 13th of July, appointing Provisional Governors for the States of North Carolina, Mississippi, Georgia, Texas, Alabama, South Carolina, and Florida.

These Proclamations were based upon two positions: First, that the Constitution of the United States had guaranteed to every State in the Union a republican form of government, and protection against invasion and domestic violence. Secondly, that the President as military commander-in-chief, and, as chief executive officer of the United States, bound by his official oath to take care that the laws be faithfully executed, was authorized to make known officially that the rebellion was ended, and to take the preliminary steps necessary to enable the people of the lately revolted States to form for themselves loyal State governments, in place of the disloyal governments which it had been the duty of the Executive to suppress. Accordingly, the Proclamations, besides providing for the appointment of Provisional Governors, directed them, at the earliest practicable period, to call conventions of the loyal people of those States respectively, for the purpose of altering or amending their constitutions, in order to form such a republican government, in each of them, as would restore the State to its constitutional relations with the Federal government, and would entitle the State to the guaranty of the Federal Constitution. The sole qualifications which the Proclamations prescribed for membership in these conventions, was the having previously taken and subscribed the oath of amnesty, and a right of voting under the Constitution and laws of the State, in force at the time of the adoption of the so-called Ordinance of Secession. It was left to the conventions, or to the new legislatures that might thereafter be assembled, to fix the qualifications of

electors. The various executive departments of the Federal government were directed by the Proclamations to take all necessary measures to execute the laws of the United States in the several States referred to.

This measure, comprehensive and comparatively free from difficulty, was believed by President Johnson and his official advisers to be substantially in accordance with the policy which Mr. Lincoln would have pursued, if he had lived. But it was the misfortune of Mr. Johnson, that he could be said to have no party to support his measures. The party which had elected both Mr. Lincoln and himself to their respective positions had, as has not infrequently occurred, paid little attention to the personal qualities and political views of their candidate for the Vice-Presidency; so that when Mr. Johnson became President, and when it appeared that he was a man of very firm convictions in regard to his constitutional duties, there was great danger of a conflict between him and the dominant party in Congress.

An occasion was not wanting. The great question of what was to be done with the colored people of the Southern States was looming portentously into view. Mr. Lincoln's Emancipation Proclamation of September 22d, 1862, was followed only by a practical dissolution of the condition of servitude wherever the Federal arms had extended, and it was not felt by him or others to be a safe basis on which to rest the final extinction of slavery. Congress, at its session which terminated early in July, 1864, had passed a bill containing a plan for the restoration of the Southern States to the Union, which Mr. Lincoln had declined to approve. On the 8th of July, 1864, he issued a Proclamation, calling the attention of the people of the United States to this bill. In this Proclamation he referred to a plan of his own, which he had proposed in December, 1863, of which it is here needful to give some account.

Mr. Lincoln's plan of restoration comprehended an Executive pardon and amnesty, with certain exceptions, and an

oath of fealty to the Constitution of the United States, and to the acts of Congress and Proclamations of the President relating to slaves, so long and so far as they should not be modified or declared void by decision of the Supreme Court. It also contemplated the establishment of a State government, by a certain defined proportion of the legal voters of each State, who were qualified to be electors under the old laws of the State; which government, if republican in form, President Lincoln proposed to recognize as entitled to the guaranty of the Federal Constitution. All that he suggested further, in relation to the colored people, was embraced in the following clause: —

"That *any provision* which may be adopted by such State government in relation to the freed people of such State, which shall recognize and declare their permanent freedom, provide for their education, and which may yet be consistent as a temporary arrangement with their present condition, as a laboring, landless, and homeless class, *will not be objected to by the national Executive.*"

This plan of Mr. Lincoln, like the subsequent one of Mr. Johnson, proceeded upon the idea that it was competent to the Executive to take the preliminary steps necessary to assist the people of those States in forming loyal and republican governments. It differed from Mr. Johnson's plan chiefly in this, — that the latter made no reference at all to the colored race. Neither of these two plans, however, contemplated any basis of suffrage other than that which existed before the secession. Mr. Lincoln's plan was much less comprehensive than Mr. Johnson's in respect to the popular basis of the new governments, although neither proposed any suffrage but that of the whites. Nor did the Congressional bill of 1864, which Mr. Lincoln did not approve, embrace negro suffrage, although it contained a provision which undertook to emancipate all slaves and their posterity for ever.

When President Lincoln, in his Proclamation of July 8, 1864, stated his reasons for not approving the Congressional

plan, but laid it before the people of the country for their consideration, he said, that, while he was not inflexibly committed to his own mode of proceeding, he was unwilling to have the free constitutions and governments already adopted in Arkansas and Louisiana, set aside, to the discouragement of the loyal people of those States from further exertions in behalf of the Union; and that he was also unwilling to affirm a constitutional capacity in Congress to abolish slavery in a State. He hoped, he said, to see this done by an amendment of the Federal Constitution. But he nevertheless declared himself satisfied with the "system for restoration" which the bill contained, "as one very proper plan to be adopted by the loyal people of any State choosing to adopt it"; and he professed his entire readiness to aid such people in carrying it out, wherever the rebellion should have ceased, and the people have sufficiently returned to their obedience to the Constitution and laws of the United States. Wherever this should be the case, he promised to appoint Provisional Governors, and to direct them to proceed according to the provisions of the bill.

As the bill had not become a law, it is quite apparent that Mr. Lincoln considered that it was competent to the Executive to adopt and follow any feasible plan that would produce the establishment of State governments, republican in form, in harmony with the Federal Constitution, and consistent with the inherent right of the loyal white people of every State to shape their own political institutions. If he had lived to act finally upon this subject, it is probable that he would, if not hampered by the interference of Congress, have used his own or the Congressional plan indifferently, according as the particular circumstances of each State rendered either the most practicable. Slavery he meant to leave to be abolished by an amendment of the Federal Constitution. Such an amendment was proposed by Congress to the States on the 1st of February,

1865; but it was not finally declared to have been ratified, until the 18th of December, 1865, eight months after Mr. Lincoln's death.[1]

In the mean time, President Johnson's plan for restoring the Southern States to their position in the Union, promulgated in the spring of 1865, awakened the utmost jealousy among the leaders of the dominant party in Congress. Although it differed in no very important particulars from that of their lamented chief, they determined to oppose it. They claimed that the whole duty and power of restoring the Southern States to the Union, and of imposing the conditions on which they were to act, belonged to the legislative department; and that the Executive could do nothing but what he was directed and authorized to do by Congress.

Thus the executive and the legislative departments were directly at variance in regard to the whole subject of restoring the Southern States to the Union. The executive, ordinarily the most feeble of the two departments in any contest between them, was not well supported by the people of the North. Shortly after President Johnson had announced his plan, an amendment of the Federal Constitution, making every person born on the soil of any State a citizen of that State and of the United States, was proposed by Congress to the States.[2] No objection could be, and none was, made to this by President Johnson. But the subject absorbed a good deal of the public attention, and its consideration tended to prevent the people of the North from interposing effectually in the controversy between the President and the Congress in regard to the mode of restoring the Southern States to the Union. That conflict continued, both on this point and many others, until a portion of the reflecting people of the country bethought themselves of a means for concentrating public

[1] Thirteenth Amendment.

[2] Fourteenth Amendment, proposed June 16, 1866; declared adopted, July 28, 1868.

opinion, so as to bring about some result by which the people of the Southern States could be rescued from their anomalous and dangerous condition. A national popular convention was invited to assemble at Philadelphia, on the 14th of August, 1866.[1] Judge Curtis was strongly urged to become a member of this body. How he acted in regard to it, will be seen from the following private, and the subjoined public letter.

To Mr. Ticknor.

Maplehurst, July 27, 1866.

My dear Uncle, — I am afraid you would not have counselled me to do such a thing, but I have written a letter to the managers of the Philadelphia Convention, with liberty to publish it, and it is printed in many papers. But as the country to which I belong does not honor me as a prophet, you will not, or may not, see it, and I therefore send you a copy taken from the Washington Intelligencer. So far as it relates to the subject of the reconstruction of governments in the rebellious States, and the action of the executive power of the United States, it has been thought of long and anxiously, and is the best conclusion I have been able to attain to. It seems to me consistent with our Constitution, and as safe and practical as any thing we can hope for.

So far as it relates to the spirit and general course of action of the government of the United States, I am satisfied it is right.

Neither you nor I have much confidence in "conventions"; but, in the present state of our country, I have hope from all *honest* expressions of popular feeling, and I do not despair that this may be such an expression. The country is partly, and I think generally dissatisfied with the Congress. They have proved wholly unequal to their great task, and I have not felt at liberty, distasteful as it is, to refrain from saying what I thought. I have many expressions of opinion that it is wisely said; but they come mostly from persons under some strong bias.

I am going to Boston on Saturday on professional business. I

[1] This meeting was popularly and derisively called the "arm-in-arm" convention, from the circumstance, that delegates sent from Massachusetts and South Carolina entered the hall on the first day, together, and arm-in-arm.

shall stay at Beverly with Mr. Bartlett. But during the few days I shall be there, I shall try to come to Brookline and see you.

We are all well. The heat has been very great, but relieved almost every day by showers, which have wet my hay, but cooled the air, and assisted all of us to equanimity.

Please give my love to Aunt, and believe me

Yours always, B. R. CURTIS.

TO THE HON. O. H. BROWNING.

PITTSFIELD, July 25, 1866.

DEAR SIR, — I thank you for sending me a copy of the call for the National Convention to be held at Philadelphia on the 14th day of August next.

In the present unhappy condition of our national affairs, it seems to me fit and important that delegates of the people should come together from all parts of our country, to manifest in an authentic and convincing way the adhesion of their constituents to the fundamental principles of our government, and to that policy and course of action which necessarily result from them.

In my judgment the propositions contained in the call of the convention are consistent with those principles and that policy.

The nature of our government does not permit the United States to destroy a State, or acquire its territory by conquest. Neither does it permit the people of a State to destroy the State, or lawfully affect, in any way, any one of its relations to the United States. One is as inconsistent with our Constitution as the other; while that Constitution remains operative, each is impossible.

But the government of the United States may, and must in the discharge of constitutional duty, subdue by arms any number of its rebellious citizens into quiet submission to its lawful authority. And if the officers of a State, having the actual control of its government, have disobeyed the requirements to swear to support the Constitution, and have abused the power of the State by making war on the United States, this presents the case of a usurping and unlawful government of a State, which the United States may rightfully destroy by force; for undoubtedly the provision of the Constitution that "the United States shall guarantee to every State in this Union a republican form of government," must mean

a republican form of government in harmony with the Constitution, and which is so organized as to be *in this Union*.

But neither the power and duty of the government of the United States to subdue by arms rebellious people in the territorial limits of one or more States, nor its power and duty to destroy a usurping government *de facto*, can possibly authorize the United States to destroy one of the States of the Union; or, what must amount to the same thing, to acquire that absolute right over its people and its territory which results from conquest in foreign war.

There are only two alternatives. One is, that, in subduing rebellion, the United States act rightfully within the limits of powers conferred by the Constitution; the other is, that they make war on a part of their own people, because it is the will of those who control the government for the time being to do so, and for such objects as they may choose to attain.

The last of these alternatives has not been asserted by either department of the government of the United States at any time; and I doubt if any considerable number of persons can be found to sanction it.

But if the first alternative be adopted, it follows that the Constitution which authorized the war prescribed the objects which alone can rightfully be accomplished by it; and those objects are, not the destruction of one or more States, but their preservation; not the destruction of government in a State, but the restoration of its government to a republican form in harmony with the Constitution; not the acquisition of the territory of a State, and of that absolute control over the persons and property of its people, which a foreign conqueror would possess, but their submission to the Constitution and laws of the United States. It seems to me a great and fundamental error to confound the case of the conquest of a foreign territory and people with the case of submission to a lawful and established constitutional government, enforced through the powers conferred on that government for that specific purpose. It is quite true that such a civil contest may have, and in our country has had, the proportions of an actual war; and that humanity and public law unite in dictating the application of rules designed to mitigate its evils, and regulate the conditions upon which it should be carried on.

But those rules of public law which concern the rights and powers of a conqueror of foreign territory, reduced by conquest to

entire submission, have no relation to the active prosecution of war. Their operation begins when war has ended in submission; they are the laws of a state of peace, and not of a state of war.

To suppose that the government of the United States can, in a state of peace, rightfully hold and exercise absolute and unlimited power over a part of its territory and people just as long as it may choose to do so, appears to me to be unwarranted by any rules of public law, abhorrent to right reason, and inconsistent with the nature of our government.

When war has ceased, when the authority of the Constitution and laws of the United States has been restored and established, the United States are in possession, not under a new title, as conquerors, but under their old title, as the lawful government of the country; and that title has been vindicated, not by the destruction of one or more States, but by their preservation; and this preservation can be worked out practically only by the restoration of republican governments, organized in harmony with the Constitution.

The title of a conqueror is necessarily inconsistent with a republican government, which can be formed only by the people themselves to express and execute their will.

And if the preservation of the States within the Union was one of the objects of the war, and they can be preserved only by having republican governments organized in harmony with the Constitution, and such governments can be organized only by the people of those States, then, manifestly, it is not only the right, but the constitutional duty, of the people of those States to organize such governments; and the government of the United States can have no rightful authority to prohibit their organization.

But this right and duty of the people of the several States can only begin when war has ceased and the authority of the Constitution and laws of the United States has been restored and established. And, from the nature of the case, the government of the United States must determine when that time has come.

It is a question of great interest, certainly, but not, I think, of great difficulty, how and by whom the government of the United States shall determine when that time has come.

The question whether *de facto* governments and hostile populations have been completely subdued by arms, and the lawful authority of the United States restored and established, is a military and executive question. It does not require legislative action

to ascertain the necessary facts; and, from the nature of the case, legislative action cannot change or materially affect them. As commander-in-chief of the army and navy, and as the chief executive officer, whose constitutional duty it is to see that the laws are faithfully executed, it is the official duty of the President to know whether a rebellion has been suppressed, and whether the authority of the Constitution and the laws of the United States has been completely restored and firmly established.

The mere organization of a republican government, in harmony with the Union, by the people of one of the existing States of the United States, requires no enabling act of Congress; and I can find no authority in the Constitution for any interference by Congress to prohibit or regulate the organization of such a government by the people of an existing State of the Union. On the other hand, it is clearly necessary that the President should act, so far at least as to remove out of the way military restrictions on the power of the people to assemble and to do those acts which are necessary to reorganize their government. This I think he was bound to do as soon as he became satisfied that the right time had come.

After much reflection, and with no such partiality for executive power as would be likely to lead me astray, I have formed the opinion that the Southern States are now as rightfully, and should be as effectually, in the Union, as they were before the madness of their people attempted to carry them out of it; and in this opinion I believe a majority of the people of the Northern States agree.

The work the people are waiting to have done, this convention may greatly help. If it will elevate itself above sectional passions, ignore all party schemes, despise the sordid and petty scramble for offices, and fairly represent the national instinct that the time *now is* when complete union of all the States is a fact which it is a crime not to accomplish, its action cannot fail to be beneficial to our country.

The passions generated in a great and divided people by long and bloody civil war are deep and formidable. They are not confined to one section; the victors as well as the vanquished are swayed by them. They connect themselves with the purest and tenderest sensibilities of our nature; with our love of country; with our love of those who have laid down their lives in the contest; with the sufferings which war, in multiplied forms, always

brings to the homes of men, and still more to the homes of women; and which civil war, most of all, brings to the homes of all.

And these passions are the sharp and ready tools of party spirit, of self-interest, perversity, and, most of all, of that fierce infatuation which finds its best satisfaction in hatred, and its only enjoyment in revenge.

No statesman who is acquainted with the nature of man, and the necessities of civil government, can contemplate such passions without the deepest concern, or fail to do what he fitly may to allay them. Hard enough the work will prove to be, at the best. But a scrupulous regard for the rights of all, and a magnanimous clemency, are twice blessed; they both elevate and soften the powerful, and they reach and subdue what laws and bayonets cannot control.

I believe there is now a general conviction among the people, that this great and difficult work is practicable. That it will long remain so, if the present state of things continues, I have not the hardihood to trust. I look to this convention with hope that it will do much to help onward this instinctive desire of the people of the United States for union and harmony and peace; that it will assert strongly and clearly those principles which are the foundations of our government; that it will exhibit the connection between their violation and the present distracted condition of our country; that it will rebuke the violence of party spirit, and especially of that spirit of hatred which is as inconsistent with true love of our country as it is with true love of our brethren; and that it will do much to convince the people of the United States that they must act soon, in the wisest way, or suffer evils which they and their posterity will long deplore.

With great respect, I am your obedient servant,

B. R. Curtis.

No material effect was produced upon Congress by the proceedings of this meeting. Indeed, so little influence did they have, that on the 2d of March, 1867, although the civil war had been ended for nearly two years, and there was no remaining disaffection to the Union, of any importance, Congress, by a vote sufficient to make it a law over the President's veto, passed its first "reconstruction act."

It was claimed and objected by the Democratic party, that this law treated ten States as if they were still in rebellion, and also as if they had been subjugated, as conquered provinces, to the absolute power of the government of the United States; that the plan of making the adult negro males voters had already taken hold of the leading spirits in the Republican party; and that it was now determined that, without waiting for any amendment of the Federal Constitution on the subject of suffrage in the States, negro suffrage should have its first application in the formation of the new constitutions which the Southern States were to be permitted, under great restrictions, to establish. It was not denied by the Republican leaders, that this radical and sweeping change in the whole structure of Southern society could only be carried out by military power. Accordingly, this law, which was entitled "An Act to provide for the more effectual government of the *Rebel States*," first divided the States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas into military districts, and made them subject to the military authority of the United States as thereinafter prescribed. It then made it the duty of the President to assign an officer of the army to the command of each district, and to detail a sufficient military force to enable such officer to perform his duties and enforce his authority. His duties were made to be to enforce order, and to punish, or cause to be punished, all disturbers of the public peace and criminals; to which end he was to allow local civil tribunals to try offenders, or, when in his judgment it might be necessary, he was to organize military commissions or tribunals for the trial of offenders. All interference, under color of State authority, with the exercise of military authority under this law, was declared null and void. For the formation of State governments and constitutions, it was provided that the conventions of delegates should be elected by the male citizens of the State, twenty-

one years old and upwards, of whatever race, color, or previous condition, who had been resident in the State for one year, and who had not been disfranchised for rebellion, or for felony at common law. It was required that the constitutions, to be framed by the conventions so chosen, should provide that the elective franchise should be enjoyed by all such persons as were qualified by this law to vote for the delegates who were to frame them; that they should be adopted by a majority of such voters; that they should be submitted to and approved by Congress; that, when approved, the legislatures elected under them should adopt the Fourteenth Amendment of the Constitution of the United States.[1] When all this had been done, and when the Fourteenth Amendment had become a part of the Federal Constitution, and not before, any State which had complied with these conditions was to be declared entitled to representation in Congress, and the military government was to cease. But until the State had been so admitted to representation in Congress, any civil government which might exist there was declared to be provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede it; and all elections to office under such provisional government were required to be made by the same universal adult male suffrage, without distinction of race, color, or previous condition.

In opposition to the Republican theory of this measure, it was contended by the President, with the concurrence of the Democratic party, that this enforcement of negro suffrage upon the white people of those States was entirely unconstitutional; that, as a means of compelling ten States to ratify the Fourteenth Amendment of the Federal Constitution, the "Reconstruction Act" was just as effectual as

[1] This was the amendment making all persons, born or naturalized in any State, citizens. It was not declared to have been ratified until July 28, 1868.

any exertion of physical force can be, and no more so. It was contended that this exercise of power could rest upon no legal or political theory but that of a military conquest of the Southern States, — such a conquest as gives to the conqueror a power to mould the institutions and the social fabric of the subjugated people at his pleasure. No people in the world, it was said, were ever subjected to a more complete military government. The establishment of military commanders, with power to enforce a prescribed mode of action by a people in framing new civil institutions and a new social polity, coupled with the condition that they are to have no civil government but a provisional one until they have acted as they are required, and that in the mean time such provisional government shall be subject to the will of the power that tolerates it, was, as the opponents of the Congressional majority held, of the essence of military conquest. When brought into the presence of the Constitution of the United States, or of any rational theory of American institutions, they said that this "reconstruction" scheme would not bear examination. For, it was reasoned, whether there was or was not a right of State secession from the Union, in any constitutional sense, there could be no question that the people of every State, according to the fundamental idea of the American Union, had the sole right to shape their own institutions of government and their own social condition, provided that they conformed them to all actually existing provisions of the Federal Constitution; and that, for any external power to declare in advance who should constitute a part of the governing people of the State, before the Federal Constitution had spoken on the subject of the right of suffrage, was an act of mere physical force, that could rest on nothing but the assumption that the people of that State, or the State itself, had been conquered in a war.

It is not strange, therefore, that President Johnson, with his views, could not approve the "reconstruction" measures.

He was a man who felt deeply the obligations of his official oath to preserve, protect, and defend the Constitution of the United States. Whatever his opinions might be in regard to the expediency of negro suffrage, he could not reconcile to his sense of his constitutional duty a scheme by which the Congress — before it could be claimed that any amendment of the Federal Constitution had deprived the people of every State of the power to regulate the right of suffrage for themselves — was to compel the people of ten States to submit to the formation of a State constitution and government based on the votes of lately emancipated slaves.[1] Nor could he accept a measure founded, as he believed, on the assumption that the war had been a war for conquest and subjugation, and that the entire civil government of those ten States was subject to the paramount authority of the United States. But Mr. Johnson was in the position of a President who, without any considerable following in the two houses of Congress, can exercise over legislative measures only the power of his constitutional "veto." This he had to exercise against a powerful and triumphant majority, large enough at any time to override all his objections, and who entertained diametrically opposite views in regard to the powers of the legislative department.

The idea of securing a large mass of voters in the Southern States, who, from gratitude to the Northern party, which could claim to have bestowed upon them their freedom from slavery, could be wielded as a political force to counterbalance Northern opposition to that party, was regarded by the Democrats as the chief motive which governed those who had the control of a two-thirds majority in both houses. As statesmen, it was said, they ought to have considered whether it was wise to precipitate upon the Southern States a political antagonism of races; that as politicians they

[1] It must be remembered that the Fifteenth Amendment was not proposed until February 27, 1869, and was not declared to have been ratified until March 30, 1870.

might, by a little forecast, have taught themselves that, when the negroes had been educated into some political intelligence, leading individuals among them would be as likely as white men to vote according to their convictions upon the political questions of the time, either State or national; and that, as to the great mass of the ignorant, and, as President Lincoln described them, "laboring, landless, and homeless class," liable to be swayed by superior intelligence and local influences, they were as likely to be politically directed by their former masters as by any other body of men, unless a superior force should be kept constantly at hand, to wield the power at the polls which these lately enslaved men of another race were to have put into their hands. While, therefore, in taking military possession of the Southern States, and forcing negro suffrage by military power, the dominant party in Congress were preparing a machinery for party uses that might work for a time according to their wishes, it was urged that they were also preparing a condition of things which would entail upon them a long and indefinite political necessity for the presence of a force that would stand between the two races, and prevent the political defection of the blacks from being brought about by the natural influences of old habits, old associations, superior intelligence, and common local interests.

In other words, it was objected that the Republicans were preparing a political antagonism between the two races, and weaving it into the whole fabric of political action in such a manner and to such an extent that the party objects could nowhere be accomplished without the presence and the exercise of external force. But what this was to lead to, what it was to entail upon the people of the South on the one hand, and upon the people of the North on the other, was not, as the Democratic party contended, sufficiently considered by public men, who looked only to the immediate political advantage which they expected to derive from extending the predominance of their party into

the Southern States by means of the votes of negroes. What a broader and wiser humanity might dictate, — what might be done, after freedom had been properly established, by leaving the Southern States to concede suffrage to the negroes when the slow process of education had trained them into some degree of fitness for its exercise, — was said to have been fatally overlooked; that the negro vote was wanted for immediate political use, in all its mass of ignorance and degradation; and that this want led to a fatal disregard of the constitutional or other objections to the mode of obtaining what was desired. Such were the chief grounds of the opposition to the "reconstruction" measures.

On the other hand, it was answered by the framers and promoters of the "reconstruction" measures, that slavery must be utterly exterminated before the Southern States could be received back into the Union; that to leave the negroes, although in the legal condition of freedmen, without the ballot, would be to leave them without the means of protecting themselves against a practical re-enslavement by their former masters; that the circumstances under which the war for the Union had been prosecuted, had devolved on the government of the United States an implied authority to take any steps needful to make its future existence secure; that good faith towards the freedmen would require that they should be made practically, as well as legally, secure in their freedom; that the question what measures should be adopted to restore the Southern States to the Union was a legislative, and not an executive question; and that any seeming irregularities in the use of compulsion, whether physical or moral, to bring about the ratification of amendments of the Federal Constitution, would be cured by the general assent and acquiescence of the people both in the North and the South.

Such were the principal differences of opinion prevailing, unequally however, throughout the Northern States, in regard to the measures proper to be adopted for the restora-

tion of the Southern States to their normal relations in the Union. The Democratic party, although concurring in most of the President's opinions, were in no condition to render him an effectual support in any controversy with the Congress, and they had no strong inclination to adopt Mr. Johnson as a representative of their party, although they were disposed, to the extent of their power, to protect him from what they considered to be encroachments upon his executive functions.

The antagonism between President Johnson and the dominant party in Congress, which had begun at a very early period of his administration, continued to grow worse after his veto of the first "Reconstruction Act." That law was followed by two others, amending and extending its provisions, each of which the President refused to sign, and each of which was passed over his veto.[1] This brings the history of the conflict down to the month of July, 1867, in respect to the policy to be pursued towards the Southern States. The breach between the President and the Congress was now irreparable; and it extended to other matters besides the Southern question, and these were of a personal as well as political nature.

Mr. Johnson had inherited from Mr. Lincoln a Cabinet, in which there was one man on whom he found that he could not rely for concurrence in his measures and a faithful support of his policy. This was Mr. Stanton, the Secretary of War, whose political and personal affinities were with the great Congressional majority, which was opposed to the President. According to previous usage, precedent, and recognized constitutional construction, the President was entitled to remove any executive civil officer, and to appoint in his place any person whom a majority of the Senate would confirm; and it had never been denied that

[1] One of these supplementary acts became a law, March 23, 1867. It established, among other things, a registration of voters, under *military supervision*. The other became a law, July 19, 1867.

the President ought to have, as his official advisers, and as his chief agents in the discharge of his executive duties, persons in whom he could place official and personal confidence. The members of the Cabinet which Mr. Johnson had inherited from Mr. Lincoln were continued in office without any removals; but there were two voluntary changes, one in the Post-Office Department, and one in the office of Attorney-General.[1] As finally arranged, the Cabinet, with one exception, were in entire harmony with the President. But a breach between the President and Mr. Stanton became inevitable from the first; and by the time the "reconstruction" measures of the Congress had become laws, over the President's vetoes, this breach between the President and the head of the War Department had likewise become irreparable and notorious.

In this state of affairs, it became the policy of the party which ruled in the two houses of Congress to restrain the exercise of the President's power of removing executive civil officers, who had been appointed with the consent of the Senate, and to make them dependent upon the Senate

[1] Mr. Stanbery, who became Attorney-General under President Johnson, has recently written to me as follows: —

CINCINNATI, December 30, 1878.

MY DEAR MR. CURTIS, — When upon a telegram from President Johnson, in July, 1866, I was called to Washington, there were two vacancies in his Cabinet: in the Post-Office, by the resignation of Mr. Denison, and in the Attorney-General's office, by the resignation of Mr. Speed, to the last of which I succeeded by nomination and confirmation. The remaining five departments were full: the State (Mr. Seward), the Treasury (Mr. McCullough), the War (Mr. Stanton), the Navy (Mr. Welles), and the Interior (Mr. Harlan). About a month afterwards, Mr. Harlan resigned, and was succeeded by Mr. Browning. The Post-Office Department, upon the resignation of Mr. Denison, was carried on for a short time by Mr. Randall, the Assistant under Mr. Denison, and he was soon elevated to the head of the Department by appointment and confirmation.

Mr. Johnson took Mr. Lincoln's Cabinet as he found it. He made no removals, but allowed them to hold over; nor did he by new nominations attempt any change, even after a difference upon the policy towards the South was developed. It was upon their own motion, — I speak advisedly as to Mr. Denison and Mr. Speed, — and without the slightest disturbance of the friendly relations and mutual regard between the President and themselves, that these gentlemen felt that a sense of duty and propriety induced their voluntary retirement. . . .

Sincerely yours, HENRY STANBERY.

as to their tenure of office. To accomplish this, Congress, on the same day on which the first "Reconstruction Act" was passed, over the President's veto, enacted by a constitutional majority, also over the President's veto, a law to regulate the tenure of certain civil offices. It declared that every person holding any civil office to which he had been appointed by and with the advice and consent of the Senate, and every person who should thereafter be appointed to any such office, and had become qualified to act therein, was and should be entitled to hold the office until a successor should have been in like manner appointed, and duly qualified, with certain exceptions. These exceptions were the heads of the seven Executive Departments, who, it was enacted in a *proviso*, should hold their offices respectively for and during the term of the President by whom they had been appointed, and for one month longer, subject to be removed by and with the advice and consent of the Senate.

Such an innovation upon long-established usage of itself marked an open conflict between the President and the legislative department. The innovation was believed by President Johnson, and by many competent judges who were in no way interested in the quarrel, to be contrary to a long-established construction of the Constitution, as well as highly inexpedient. He therefore refused to give his official approval to the law; but his refusal was of no avail. In order that the law might seem to obviate the manifest public inconveniences and mischiefs of such a restriction of the President's power of removal, it was provided that the President, on evidence satisfactory to himself, of misconduct in office, or crime, incapacity, or legal disqualification to perform the duties, might suspend an incumbent, and designate some suitable person to perform the duties of the office temporarily, until the next meeting of the Senate; but that he should, within twenty days after the first day of the next meeting of the Senate, report the

case to the Senate, with his reasons for suspending the officer. If the Senate should concur in those reasons, the President might remove the officer, and appoint a successor by and with the advice and consent of the Senate; otherwise, the suspended officer was to be forthwith reinstated in the office. Severe penalties were enacted for any violations of this law, which were declared to be "high misdemeanors."

As the Congress which passed this law was about to expire, the intent to leave the President incapacitated to make removals from office during a recess of the Senate, and to allow him only to suspend an officer during such recess, and, even after the Senate should be again in session, to have the removal depend upon the pleasure of the Senate, was apparent. Such an encroachment upon functions of the President hitherto supposed to belong to him, and which had been exercised more or less by all of his predecessors, — such a subjection of the President to the will of the Senate in regard to the removal of civil officers, — necessarily made President Johnson's position an extremely dangerous one. If he should exercise his honest judgment, and, treating this law as an unconstitutional exercise of legislative power, should remove an officer who was intrenched behind the statute, he would at once come into open collision with the legislative department, and could only prevail by the aid of the judiciary. If he should submit to the provisions of the law, and suspend an officer, assigning his reasons for asking the consent of the Senate to his final removal, he would have to go to a tribunal which might, for purely political or personal objects, refuse to recognize his reasons as valid, and thus compel him to retain an officer who might be animated by a factious purpose to obstruct him in the discharge of his executive duties, or with whom, for personal reasons, it would be impossible for him to hold harmonious official intercourse.

But when this law came to be applied to the case of Mr. Stanton, two questions arose upon it. First, whether the

members of the Cabinet who had been appointed by Mr. Lincoln were within its provisions after Mr. Lincoln's term of office had been terminated by death, and the President who had succeeded him was holding the executive office for a term measured by the unexpired period which was to elapse before the next regular election of a President. The other question was, whether, if Mr. Stanton was within the law, and could be removed from office only in the mode which it prescribed, Congress had constitutional power to make the removal of civil officers subject to the assent of the Senate.

But notwithstanding that these questions arose on the face of the law, when it came to be applied to the heads of departments who had been appointed by Mr. Lincoln, President Johnson was placed in a great and a dangerous dilemma. The people of the United States had not seen fit to interpose and prevent their Executive from being thus subjected to the will of Congress. They held, in general, throughout the States of the North, the same opinions, and were influenced by the same feelings, as the controlling majority of their representatives in both houses of Congress, — feelings and opinions which had created the belief that the President was an obstruction to the Republican policy, and that it was necessary to control him. To what hazards this conflict carried the people of this country, and how it endangered the constitutional independence of a co-ordinate department of their government, will presently appear.

On the 5th of August, 1867, the President signified to Mr. Stanton that his resignation would be accepted; and on the same day Mr. Stanton refused to resign before the next meeting of Congress. On the 12th of August, the President, by an order in writing, suspended Mr. Stanton from the office of Secretary of War, directed him to transfer to General Grant, as Secretary *ad interim*, the records, books, papers, and property of the department, and authorized General Grant to act as Secretary *ad interim*. To

this order Mr. Stanton submitted, under written protest, as an act of "superior force." The order was not designed to effect a suspension from office under the Tenure of Office Act; but it was issued by the President as an exercise of his power under the Constitution to suspend any civil officer during his pleasure, and indefinitely. On the 12th of December, the President informed the Senate, by message, of what he had done, in the hope that his constitutional powers would be recognized, and also in the hope that it would not be made necessary for him to raise the question judicially whether Mr. Stanton was within the true construction of the Tenure of Office Act. This hope not having been realized, the President was compelled, either to allow Mr. Stanton to resume the duties of the office, or to make a case for judicial determination by removing him. Accordingly, on the 21st of February, 1868, the President issued an order removing Mr. Stanton, and appointing General Thomas, the Adjutant-General of the army, Secretary *ad interim*. Some difficulty was experienced in carrying out this order, in consequence of the refusal of General Grant to surrender the office, according to a promise which the President alleged he had given when he was made Secretary *ad interim*. These proceedings on the part of the President constituted one of the grounds on which articles of impeachment were voted against him by the House of Representatives, on the 24th of February, 1868, charging him with "high crimes and misdemeanors." Another branch of the charges sought to impeach the President, on the ground that he had made certain speeches to popular assemblies, calculated and designed to bring the Congress of the United States into contempt, and to impair its just and lawful authority. Still another branch of the charges imputed to the President an intent to obstruct the law "for the better government of the Rebel States." He was also charged with a design to get possession of the money appropriated to the military service of the United States.

What rendered this proceeding formidable, and full of peril for the President, was that his political enemies were believed to be in a condition to demand his removal from office at the hands of a willing majority of the Senate. It depended entirely upon the construction which two-thirds of the Senate should give to the Tenure of Office Act, and to their decision on its constitutional validity, whether he was to remain President, or be expelled from his office. The great object to be accomplished by the impeachment was to get rid of the President, and to restore Mr. Stanton to the War Department. All the charges which related to other matters were thrown in to inflame the passions of Senators, and to intensify the hatred with which the President was regarded, because he was opposed to the policy of "reconstruction" which the dominant party in Congress had adopted.

As the time for the trial of the impeachment approached, it seemed to the President, his Cabinet, and his friends, that there was one man in the country who might possibly stay what they regarded as an attempt to crush the constitutional independence of a co-ordinate department of the government. To him they appealed. The Constitution required that the investigation and decision of articles of impeachment should be a "trial"; that it should therefore be conducted according to the forms of judicature; that, in the case of an impeachment of the President, the Chief Justice of the United States should preside over the court; that the Senate should be a court, the members of which should be under the sanction of an oath or affirmation, and that, on whatever principles they might hold official acts to be grounds for impeachment and removal, there should be a "judgment." By the nature of such a proceeding, by constitutional provision, and by established precedents, the accused was entitled to "the assistance of counsel for his defence." It was fortunate for the people of the United States that they had recognized and established this

privilege, alike for the lowest and the highest of supposed offenders.

"When the time had come for the selection of counsel to defend the President, the first name suggested was that of Judge Curtis, and no sooner suggested than accepted in full Cabinet, and emphatically by the President himself." These are the words of a gentleman who was present.[1] Judge Curtis had no personal acquaintance with Mr. Johnson, no interest in his political or personal fortunes, and nothing but a sense of duty to lead him to accept the responsible position of leading counsel for the defence on this great trial. It was positively distasteful to him, on many accounts; and, in addition to this, it must necessarily involve serious pecuniary sacrifices, for the President was unable to offer the smallest compensation, and Judge Curtis was busily occupied in a very lucrative practice. The President had nothing to which to appeal, in the mind of his advocate, but a consciousness that he might be able to do a service to his country, — and this was sufficient.

My brother left Boston immediately for Washington, as soon as he had received the President's request. He was followed by a letter from one of his friends at the Boston bar, which I cannot refrain from quoting, because it admirably expressed the feelings of his professional brethren, who best knew the motives which would sustain him, and the character of the efforts which they might expect from him.

MR. CAUSTEN BROWNE TO JUDGE CURTIS.

BOSTON, March 1, 1868.

MY DEAR JUDGE, — I cannot deny myself the pleasure of writing you a single word upon the news we find in the morning papers, — that you have been offered and have accepted the duty of leading counsel for the President. I know well how much higher than those of personal distinction are the considerations

[1] The Hon. Henry Stanbery, then Attorney-General, writing to the author, October 31, 1878.

which have led you to accept the work, and will stimulate you in the performance of it. But, at the same time, you will not fail to recognize, that your taking a place of such supreme professional eminence and responsibility, at such a crisis, must be matter of pride to your brethren at home. None of *us* doubt, nor do I suppose anybody else doubts, that the great duty you have undertaken will be discharged in the best manner, — in such a manner as, if possible, to increase the admiration and respect with which our whole profession regard you.

But if it will lighten the work, or brighten the prospect, to know with what sincere personal interest your "brethren and companions" will follow your course, in this great trial, you cannot doubt that you may rely upon them.

With the most earnest wishes that you may have the health and strength to do yourself and your reputation justice, and that your efforts may be powerful to have law and right upheld in this tremendous public situation, I am, with the greatest respect and regard,

Your friend, CAUSTEN BROWNE.

I did not see my brother on his way through New York; but in a day or two I received a letter from him, begging me to come to him. He said, that he was there in Washington with "this portentous business" on his "shoulders," and alone. He wished, he said, to confer with me, on some of the constitutional questions which lay at the basis of the case; that the Attorney-General had been too much occupied with his official duties to give any time as yet to consultations upon the President's answer to the charges.[1] I went to Washington immediately, and joined him at Willard's Hotel. He was engaged in making the first draft of the President's answer; and he did not feel satisfied with one of the constitutional positions on which he

[1] At this time, the other gentlemen who took part in the President's defence — Messrs. Evarts of New York, Groesbeck of Ohio, and Nelson of Tennessee — had not been retained or had not arrived in Washington, and the Attorney-General, Mr. Stanbery, was very busy. To my great and painful regret, my brother's letter to me has been lost. It was a very impressive exhibition of his feelings in regard to the duty which he had undertaken.

had based a part of it, or with the "traverses" with which he had encountered the charge which he was then considering. After we had conversed for some time on the constitutional question, he desired me to take this particular charge, and, without reading his draft, to draw an answer to it. I consented to do this, as a means of assisting his mind to a third form of the answer which would be more satisfactory to him; for I saw how his mind was working upon the subject, and that, as soon as he viewed it through the medium of another person's ideas and expressions, the right form and substance of the pleading would at once come to him. There was to be a Cabinet meeting that forenoon, at which he was to be present. It was to be his first introduction to the President. The consultation related to the substance of the defence, and to the employment of other counsel. On his return to the hotel, he told me how much he had been impressed by the calm, honest sincerity of Mr. Johnson, and spoke of him very much as he did in the letters which will be quoted hereafter. I then gave him the sketch of one part of an answer which he had desired me to make, and in a very few minutes it turned out as I anticipated; his mind settled at once upon a third and better form than his own first draft, or mine. I did not remain in Washington long, and did not witness any part of the trial.

After many preliminary proceedings, the trial of the Impeachment began before the Senate, on the 30th of March, 1868, the Chief Justice of the United States presiding.

The Managers of the Impeachment were of course first heard. When they had opened their charges and adduced their evidence, there was much cause for anxiety among the friends of the President and the impartial spectators; for it was believed that a large majority of the Senators were bitterly hostile to him. Judge Curtis was to open the President's defence. He shared the anxiety that was felt

by others on account of the political and personal hostility of so many of the Senators to the President; but when he rose to speak, he manifested no solicitude whatever. He knew that he could place the defence of the President upon unanswerable grounds of law, and that, when this had been done, his acquittal would depend entirely upon there being a sufficient number of the hostile Senators, who were capable of rising above party and acting for their country. Of his manner and bearing, and of the effect of his argument upon those who heard it, I should have preferred to adopt the descriptions of others, even if I had been present. As I was not, I have only to quote from what was written by witnesses of the scene. That he rendered a great public service, that when he had concluded his address to the Senators the acquittal of the President was substantially secured, and that, though much was well and ably said after him by his colleagues, nothing needed to be added to an argument which had exhausted the case, is the concurrent testimony of most of those who were present or who have read the trial. So that, all things considered, — the greatness of the occasion, the disastrous consequences that must have followed the conviction of the President, the danger that party spirit would be stronger in the breasts of Senators than the spirit of justice and obedience to constitutional duty, and the manner in which this great responsibility was borne by him on whom it chiefly rested, and who was perhaps best able to reach the judgment and convictions of the most conscientious members of the tribunal who were politically opposed to the accused, — this argument may be considered the most interesting forensic effort that is recorded in our annals.

If I were to indicate those parts of it which are most worthy of study by the ingenuous youth of our country who desire to understand its national institutions, I should point, first, to its exposition of the true meaning and operation of the Tenure of Office Act; next, to the very skilful and clear

manner in which the President's constitutional power to remove civil officers was vindicated, so far as the defence of the President required that it should be; to the explanation given of the President's ministerial duty in executing laws, whether passed with or without his assent, and his right and duty to subject any law which he deems to be an encroachment upon his constitutional prerogatives to a judicial test; to the noble answer which was made to the position that the Senate "were a law unto themselves"; and to the grand commentary which was made upon the nature of that freedom of speech which is secured by the Constitution. It was when the President's advocate drew towards the close of this part of his argument, that there burst from him, in unaccustomed warmth, an indignant protest against the standard of judgment by which the managers sought to impeach the President for speaking improperly of the Congress, in the following words: —

So that this prohibition in the Constitution against any legislation by Congress in restraint of the freedom of speech is necessarily an absolute prohibition; and therefore this is a case not only where there is no law made prior to the act to punish the act, but a case where Congress is expressly prohibited from making any law to operate even on subsequent acts. What is the law to be? Suppose it is, as the honorable Managers seem to think it should be, the sense of propriety of each Senator appealed to. What is it to be? The only rule I have heard, the only rule which can be announced, is that you may require the speaker to speak properly. Who are to be the judges whether he speaks properly? In this case the Senate of the United States, on the presentation of the House of Representatives of the United States; and that is supposed to be the freedom of speech secured by this absolute prohibition of the Constitution. That is the same freedom of speech, Senators, in consequence of which thousands of men went to the scaffold under the Tudors and the Stuarts. That is the same freedom of speech which caused thousands of heads of men and of women to roll from the guillotine in France. That is the same freedom of speech which has caused in our day, more than

once, "order to reign in Warsaw." The persons did not speak properly in the apprehension of the judges before whom they were brought. Is that the freedom of speech intended to be secured by our Constitution?

The following description of the scene when he rose to speak, of his manner and his matter, is taken from one of the public journals of the time: —

The Senate and all the spectators in the Chamber greeted Mr. Curtis with a respectable bustle, that might have passed for a murmur of applause. He stood at the end of the table provided for the President's counsel, nearest the Chief Justice, where he commanded a view of the whole court. He was attired, as usual, in simple black, which set off to advantage his large and shapely proportions. His manner was an incarnation of dignity, self-possession, repose. A more impassive face, with eyes less anxious and inquiring, or more confident, steady, and serene, was never gazed at by an expectant audience. It was the face and massive head of a thoughtful and deliberate jurist. A forehead loftier and rounder than would have been seemly at the peak of any other figure in the Chamber, inspired belief in the quantity of the brains behind it, and something about the firm, calm lips of the man led everybody to anticipate that what they were to utter would be devoid of any thing so uncharacteristic as passion or prejudice, or an appeal to the infirmities of his hearers. His mere presence, standing there during the few seconds which elapsed while the occupants of the floor and galleries were settling themselves to listen, taught to all sensitive observers a lesson. It showed how perfect a self-poise the consciousness of profound attainments, knowledge of the subject of which he is about to treat, and conviction of the justice of his cause give to a speaker. It showed what an ineffable charm, so to speak, exhaled from a man who unites to learning and experience a modesty rather left to be inferred than obtrusive, and which was succeeded by an entire absence of arrogance or airs. Mr. Curtis's voice as he began was so low that it scarcely filled the Chamber, which, however, immediately became so still that the second sentence was heard in the remotest corner. That sentence was the key-note of his remarks. It indicated their character and foreshadowed the argument. It

confirmed the respect with which every member of the Court who might have conceived that his address would have been opened by an accusation, just or unjust, heard him. Within a few moments afterwards he had fairly entered into the merits of the case, and had made one of a series of points against the impeachment which, as they were successively presented in the course of his remarks, excited the admiration, if they did not shake the partisan purpose, of the President's worst enemies. Soon his tones sought a higher level, and his hands, clasped at first behind him or resting on the edge of the table before, were raised to assist the persuasion of what he said, with forceful gestures. It became evident, to those who were not already familiar with his style of delivery, that Mr. Curtis was not, in the highest sense, an orator. He spoke from voluminous notes, and frequently consulted and read from the books of reference beside him. The clearness of his statements, the accuracy of his logic, and the precision and steadiness with which he advanced from every premise he established to conclusions, needed, in fact, no fiery oratory to enhance the effect. If his tones did not often thrill the heart, they reached the brain. They were earnest, if not eloquent, and there was a certain fascination in their monotony. They bore a heavier burden of matter than the chaff blown from the lips of many windy elocutionists, and that is one reason why their equable, repressed accents were tolerable. Two or three times Mr. Curtis indulged a fervor which gave to his aspect an inspiring majesty and glow. Then his voice had the tremor of a water-fall. Then his form shook like a pine; but, as a pine recovers itself after a gust, and stands erect and stately as before, so, in an instant after these noble outbursts, the speaker of to-day was seen composed and motionless, as if every hot impulse in his nature had been thrust back beaten into its lair. After Mr. Curtis had spoken about two hours, a recess of twenty minutes was taken. He then resumed his argument and continued until half-past three, P. M., when the court adjourned. It is generally conceded that the speech, of which I have not attempted to give you any synopsis, is so far an original and invincible effort. It has made an immense impression here in Washington, and there are applications by hundreds, who cannot be admitted, to hear the conclusion of it to-morrow. When it is finished, as it is expected to be about two o'clock, the President's counsel will begin to submit documentary and oral testimony for the defence

J. B. S.

This graphic account came from the pen of an accomplished journalist, accustomed to view men and things with a practised eye, and well able to appreciate the intellectual and moral characteristics of such a performance.[1] One other description, from the pen of a lady who was among the audience, is all that I need quote. It was written to Mrs. Curtis, immediately after the close of the speech.

WASHINGTON, Friday, April 10.

MY DEAR MRS. CURTIS, — I have just returned from the Senate-Chamber, filled with delight and admiration at Mr. Curtis's great argument. For power and condensation of thought, and for dignity and persuasiveness of delivery, it was indeed a glorious effort. It is so very infrequently that women have such an opportunity, that I cannot tell you how we have enjoyed it. Even political antagonists confess the greatness of the argument: indeed, it seems to bring back the times when "there were giants on the earth." You will have later and more full accounts, but I cannot deny myself the pleasure of being the first *female reporter* to you. With much sympathy, in which my husband and my daughters unite very cordially,

I am very hastily and sincerely yours,

HARRIET B. LORING.

It remains for me now to give two private letters, written by my brother during the trial: —

TO MR. TICKNOR.

WASHINGTON, March 26, 1868.

MY DEAR UNCLE, — I would gladly comply at once with your request for copies of the report of the trial of the President, but at present I cannot. There is a government report, which is furnished day by day to each of the counsel. This copy I cannot spare, and I know not how to procure others. There will be, of course, one or more authentic editions for sale. The trial has not yet advanced far enough to bring them forth. I will be watchful and supply you if I can.

[1] The writer of this letter was Mr. J. B. Stillson, at that time attached to "The World," as a correspondent.

As to the case itself, I have very little to say. There is not a decent pretence that the President has committed an impeachable offence. "*The party*" are in a condition to demand his removal from power, and do demand it. What the result is to be, you can imagine as well as I can. Do not listen to any rumors about the President's resignation. No one connected with the case has thought of advising it, and, if every one advised it, the President would not listen to such advice. He is calm, cheerful, and self-sustained. He firmly believes he has been and is right, he knows he is honest and true in his devotion to the Constitution. If he is expelled from his office, he will march out with a firm step and a strong heart.

I feel grateful to Aunt and yourself for your kindness to my wife in my enforced absence. It is very injurious to my interests, and sorely against my wishes and tastes and feelings, to be here. I cannot help it, and must do what I am able to stand up against this great public wrong. Yours always,

B. R. CURTIS.

TO THE SAME.

WASHINGTON, April 10, 1868.

DEAR UNCLE, — I concluded my argument to-day at two and a half, P. M., and came to my lodgings, leaving my associates to go on with the evidence for the couple of hours of the session which remained. I had an attentive audience from the Senate, and from the crowded galleries and aisles. How much permanent and useful effect I have produced, I have no means of judging. Washington is full of rumors, most of which are false, and all of so doubtful authority that nothing can be predicated of them.

Please do not read the very incorrect reports of my argument which are in the newspapers. They mortify me. I will send you in "The Globe" a correct copy, and before I leave here I shall be able to supply you with reports of the trial which are authentic, or rather to cause them to be supplied, for I do not expect to remain here till the case is ended. I shall come home when the evidence is closed and the speeches begin. The case will be effectively and actually settled *before* that time. There are from twenty-two to twenty-five Senators, who began the trial with a fixed determination to convict. I have no reason to suppose any one of them is shaken, or will be. About twelve to fifteen of the dominant

party had not abandoned all sense of right, and given themselves over to party at any cost. What will become of them I know not, but the *result* is with them. The President himself preserves his calmness, and to a great extent his equanimity. My respect for the moral qualities of the man is greatly enhanced by my knowledge of him. He is a man of few ideas, but they are right and true, and he could suffer death sooner than yield up or violate one of them. He is honest, right-minded, and narrow-minded; he has no tact, and even lacks discretion and forecast. But he is as firm as a rock; and if he should be convicted, he will go out with a firm reliance that the time will come when "black lines" will be drawn around that Senatorial record, by the command of the people of the United States. I have so little time to write letters, that I wish you would show this one to my wife.

Yours always,

B. R. Curtis.

The future necessity for "black lines," to expunge a record of conviction did not arise. On the 26th of May, 1868, after arguments by the other counsel for the President, and a reply by the managers, the proceedings were brought to a close. The two principal articles, charging an intent to violate the Constitution and the Tenure of Office Act, by the removal of Mr. Stanton from the War Department and the appointment of General Thomas as Secretary *ad interim*, were alone voted upon. The votes were 35 yeas, and 19 nays; and as the requisite two thirds had not voted "guilty," a judgment of acquittal was entered. Of the twelve or fifteen Republican Senators with whom Judge Curtis said the result rested, seven voted "not guilty."[1]

[1] The Republican Senators who voted to acquit the President were Messrs. Fessenden, Fowler, Grimes, Henderson, Ross, Trumbull, and Van Winkle (seven). The Democratic Senators voting for his acquittal (twelve in number) were Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Saulsbury, and Vickers. One of the Republican Senators said afterwards, when taxed with want of fealty to his party, "Judge Curtis gave us the law, and we followed it." On the day following Judge Curtis's opening

JUDGE THOMAS TO MR. TICKNOR.

BOSTON, May 13th, [1868.]

MY DEAR SIR, — It will give me very great pleasure to dine with you on Saturday, and to meet Judge Curtis. The Judge has discharged a great public duty with signal fidelity and ability. We owe him a large debt, not only as citizens of the country, but as sons of Massachusetts, that he has saved us from the fathomless infamy into which the course of our Managers and Senators would have otherwise sunk her good name. Our culture, forensic power, and manliness have not all gone. We have an estate at least by the *Curtis-y*.

With great respect, very faithfully yours,

BENJ. F. THOMAS.

On the 12th of March, Mr. Stanbery resigned the office of Attorney-General, in order to devote his energies exclusively to the defence of the President. Immediately after his acquittal, the President, of his own motion, renominated Mr. Stanbery for the same office; but the Senate, with little delay, refused to confirm the nomination. On the 8th of June, Mr. Stanbery left Washington for his home in Ohio.

On the 5th of June, the President sent a telegraphic despatch to Judge Curtis, asking if he would accept the office of Attorney-General. It was with no purpose of rewarding or compensating him for his great services that the President made this offer. He was really embarrassed in finding a suitable person to whom he could tender this place in his Cabinet, after the Senate had rejected Mr. Stanbery; and he naturally turned to the man whom he thought the most suitable, and who was among those who could, with political consistency, support the course of his administration. The following was the answer returned, by letter, as soon as Judge Curtis saw the President's despatch: —

argument, another Republican Senator asked a political friend if he had heard it. "No," was the reply, "I was absent; but I have read it, and I wish I hadn't."

To President Johnson.

Boston, June 8, 1868.

Mr. President, — On my return to Boston this evening, after an absence of four days in New York, I found your telegram of the 5th instant, asking if I would accept the office of Attorney-General. My family being in the country, no one here had opened the despatch, and it was delivered to me on my arrival at my hotel. The answer, which I immediately sent, you doubtless received.

But I desire to express to you my gratitude for the inquiry you made, and my regret that it is not in my power to accept the honorable and important office to which it relates. You will not expect me to enter into any detailed reasons for this conclusion; but I hope you will allow me to say that there is *no* public office which I shall ever be induced to accept willingly, and that I shall never accept one save from such imperative commands of duty as I cannot resist. And even if my resolve concerning this subject were not fixed, as it is, my duties to my clients who have extensively trusted and relied on me, and whose interests might materially suffer by my withdrawal thus suddenly from their service, and the condition and affairs of my family, would necessarily preclude me from returning an affirmative answer to your question.

I desire to add, that, though I have had very slight connection with the politics of the country, and they are now in a condition when one would not willingly plunge into them, there has been nothing in your general course of political action which I do not approve of; that I am not in the least degree influenced to answer your question negatively by any thing which I apprehend in the future policy or measures of your administration.

With great respect, I am your obedient servant,

B. R. Curtis.

CHAPTER XIV.

1869–1874.

Professional Duties. — Letters to Mr. Ticknor and William E. Curtis. — Death of Mr. Ticknor. — Deaths of Young Children. — A Short Tour in Europe. — Letter from London to G. T. Curtis. — Declines an Appointment as Counsel for the United States at the Geneva Arbitration. — Letter to the Hon. Reverdy Johnson concerning the Office of Chief Justice of the United States. — Lectures at the Cambridge Law School. — Death of his eldest Daughter. — Letter to G. T. Curtis. — Continued Professional Labor. — Declining Health. — Death at Newport. — Independence of Character.

THE last five years of my brother's life were years of great professional labor, checkered by great domestic sorrows. His engagements in the Supreme Court of the United States, and his occupations at home, were very weighty. In these five years he argued twenty-two causes in the Supreme Court,[1] and twelve at the Law Terms of the Supreme Court of Massachusetts,[2] besides many others in the Circuit Courts of the United States, while he also wrote forty-five opinions, as chamber counsel, on a great variety of important questions. The following letter gives token of the constant demands upon his energies.

To MR. TICKNOR.

21 MARLBORO' STREET, Feb. 5, 1869.

DEAR UNCLE, — I came home from Washington on Tuesday evening, and hoped to have a little rest; but I am again summoned, and must leave to-morrow morning. I have not left my house since

[1] Embraced in Wallace's Reports, from the 10th to the 19th volumes inclusive.

[2] Embraced in the Reports of that court, from the 105th to the 112th Massachusetts, inclusive.

my return except in a close carriage, for I have a bad cold; otherwise I should have been to see you. Mr. Gardner was kind enough to take my turn of the Club on the 29th of January. I should have it on the 12th instant. But I doubt if I shall be here in season. I hope I may be, for I think my present call to Washington will not detain me through the whole week. Still, if it were certain that I could return in season, I should not like to leave the care of this dinner on my wife, who is far from well, and no longer has Robert to relieve her from all thought about it. May I rely on you to take the Club and fill my place? In my present roving life, I am not a fit person to be a member of any "stated congregation"; and another year I will order things differently.[1]

I have passed some weeks at Washington, among the men who are supposed to know most of public affairs. As to General Grant,[2] I am satisfied that he has kept his own counsels, whatever they may be. Whether he has the wisdom to know that it depends on him to submit to, or resist, a merely centralized parliamentary government, and if he has the wisdom whether he has the power to resist it, I do not know. . . . General Grant knows that it was not the Republican party which has put him in power, but his hold on the country which has retained them in power. But, if he appreciates his position, he also knows that the legislative power, having, with the acquiescence of the country, conquered one President, and subdued the Supreme Court, and filled all the offices with their creatures dependent on their will, will not subside into that coequal position assigned to them by the Constitution without a desperate struggle. He is a bold President who enters on it. He must have great qualities and the safest and ablest advisers to succeed. I hope he may try it. I need not say I hope he may succeed.

Yours always,

B. R. CURTIS.

TO WILLIAM E. CURTIS, ESQ., OF NEW YORK.

21 MARLBORO' STREET, March 23, 1870.

MY DEAR MR. CURTIS, — Since I received your kind letter with its enclosure, I have been so afflicted with a catarrh, that I

[1] For a brief account of this dinner-club, see Life and Letters of George Ticknor, Vol. II. p. 445.

[2] Elected President in November, 1868, and was to be inaugurated March 4, 1869.

have neither been to my office nor into court except a few times on the most urgent occasions. Latterly I am better, and I hope to go along as usual; but my correspondence has suffered, and among other things I have not answered your kind letter, for which I thank you much.

I have no doubt the Connecticut people of our name came from the same William and Sarah Curtis of Roxbury from whom I am descended. I inclose a memorandum of the pedigree, so far as you are interested in it. As for arms and crests, I imagine that they paid very little attention to them, and took no care to use or transmit them, whatever their right may have been. They were farmers at first, upon land granted to the first settler, William, and afterwards his descendants engaged in all usual pursuits; but I think there has been no generation of them which has not had one or more graduated at Harvard College, and usually more than one.

They have continued to own parts of the land granted to them in 1632 "on Stony Brook," and would doubtless have continued to own much more, if from farms the land had not become building-lots in a populous neighborhood. So far as I know, what you say of your part of the family is quite applicable to the rest of them. They have been, hereabouts, a sturdy race of people, without any claims to great refinement, but with just claims to honesty. kindliness, and the most unmistakable determination to have their own way. I should say this, — that the first William and Sarah, who came over from the county of Essex in 1632, must have had a great deal of that valuable quality; for surely their descendants have got from somewhere *strong wills*. Dr. Walker, in one of his sermons, said, "Knowledge is not power, will is power." If so, we are a powerful race of people; for, right or wrong, all those of our race whom I have known have had enough of it. I may add, that in general, and so far as I know, the descendants here have been useful and respectable people.

I enclose a memorandum, entirely authentic, as to the earlier genealogy, and am, with great regard,

Your kinsman and friend,

B. R. Curtis.

P. S. — Accidentally, the seal of your letter was destroyed. If you will send me an impression of it, I should like it, and if you

are willing to put your "arms" into the hands of some one who will draw and color it for a fee which I will pay, my children would be glad to see it.

B. R. C.

As belonging to this period, I select some opinions upon interesting subjects, given in the course of his practice.[1]

ILLINOIS TWO PER CENT CLAIM.

Opinion.

I have been requested to examine the claim of the State of Illinois to be paid by the United States two per cent of what has been received by the United States from the sales of public lands within that State made after its admission to the Union.

This claim grows out of the sixth section of the act of April 18, 1818, for the admission of that State to the Union, on an equal footing with the original States. That section is as follows: —

"That five per cent of the net proceeds of the lands lying within such State, and which shall be sold by Congress, from and after the first day of January, one thousand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz.: two fifths to be disbursed, under the direction of Congress, in making roads leading to the State; the residue to be appropriated by the Legislature of the State, for the encouragement of learning, of which one sixth part shall be exclusively bestowed on a college or university."

It is stated as matter of fact, that a system of internal improvements was begun under the authority of Congress, and large expenditures were made thereon in the States of Ohio and Indiana, which resulted in the creation of roads in those States; and other large expenditures were made for similar purposes within the State of Illinois, which did not result in the completion of any useful or practicable roads; and that while matters were in this condition Congress finally abandoned its original intention and policy of creating a national road from Wheeling on the Ohio River to the Mississippi River, and all work thereon was ended, and those parts

[1] It must be understood that the opinions embraced in this and in the tenth and twelfth chapters are but a small proportion of the whole number given between the years 1857 and 1874.

of the road which had been built and made practicable in Ohio and Indiana, that is to say, the roads contemplated by the act of 1818 to be built out of the reserved two per cent, "leading to the State of Illinois," were by the United States granted to the States in which they lay, upon new contracts and conditions, by which those States became the owners thereof, by which these States were enabled to, and did, in point of fact, impose a toll for the use of the same as being the absolute property of each of them.

Before considering what is the true meaning and effect of the subsequent legislation of Congress in 1855 and 1857, I think it most material to observe that, when these last-mentioned acts were passed, the United States had clearly failed to keep and perform the compact contained in the sixth section of the act of 1818, admitting the State of Illinois to the Union.

It must be borne in mind that the agreement of the United States to disburse two per cent of receipts from the sales of public lands within the State of Illinois "in making roads leading to the State," had a sufficient and corresponding consideration in the stipulation of the State not to tax the public lands in the hands of purchasers or patentees, until after the lapse of certain fixed periods; that this agreement to reserve two per cent of the sales of public lands, and expend what was thus reserved in the public works described, had all the elements of a contract; that it created a trust when the designated moneys were received; and that before the acts in question were passed, the United States had not merely failed to perform that contract and execute the trust, but that Congress had, before the passage of the act of 1857, fixed the fact finally and irrevocably that the contract would not be performed and the trust would not be executed.

It is true that what had been done upon the roads in Ohio and Indiana might possibly have been taken as a compliance with the contract and an execution of the trust, if Congress had not by its acts rendered it impossible to consider the construction of these roads in Ohio and Indiana an execution of the trust or a performance of the contract. Having caused them to be built, Congress might have permanently dedicated them to a free public use if they really were such roads leading to the State of Illinois as were contemplated by the act of 1818, and the United States might have rested in the conclusion that they had thus performed their contract and executed their trust. But it is also true that Congress

might, from some change in its policy, make such appropriation of these roads as to be wholly inconsistent with their creation being a compliance with the contract, and an execution of the trust.

After a careful consideration of the action of Congress upon the subject of this road in Ohio and Indiana, the only satisfactory conclusion I can come to is, that when Congress transferred the road to the States of Ohio and Indiana, with power to levy a toll thereon, subject only to certain restrictions in favor of the United States, and abandoned the further prosecution of the work, it did thereby abandon the performance of the contract, and did finally declare that the trust to expend two per cent of the receipts from sales of public lands in the State of Illinois, for the purposes and in compliance with the contract designated in the act of admission of the State, would not be executed.

And this I believe to have been the actual state and condition of the relative rights and obligations of the United States and of the State of Illinois at the time of the further legislation now in question, in 1857.

The condition of the relative rights and obligations of the State and the United States was this, — the United States, for a valuable and adequate consideration, had agreed to expend two per cent of the receipts of the sales of public lands within the State of Illinois "in making roads leading to the State."

The United States had begun to execute the trust. It had built roads in Ohio and Indiana. But from a change in the public policy of Congress, instead of allowing those roads when built to remain free and open for public use, the United States transferred them to Ohio and Indiana as the several property of each of those States, with power to impose tolls for their use. I cannot think this was a fair and full compliance, or indeed any compliance at all, with the contract and the trust under which the United States received these moneys.

Under the contract certain moneys, in which the State of Illinois must be deemed to have had an interest, were reserved to build roads leading to that State. Nothing is said, and certainly nothing can be implied, leading to the conclusion that, when built, they could not be used freely, and without charge. The United States reserve no right to themselves to impose a toll for the use of the roads so built out of the moneys which Illinois agrees, for a valuable con-

sideration, should be appropriated to build them. Still less do the United States reserve any right to convey the roads to Ohio and Indiana, and enable those States to control, manage, discontinue, and levy tolls on such roads. And when this was done, in my judgment, the United States finally abandoned the contract, and finally and decisively refused to execute the trust.

Such seems to me to have been the state of facts, and the rela tions of the State of Illinois to the United States, when the act of March 3, 1857, "An Act to settle certain accounts between the United States and the State of Mississippi and other States," was passed.

The State of Illinois then had a *just claim* on the United States, capable of liquidation in the Land-Office, founded on the fact that the United States had agreed, for an adequate and valuable consideration, to appropriate two per cent of the receipts from the sales of public lands sold within the State, to make roads leading to the State, and had not performed this contract.

Now concerning the Act of March 3, 1857, there are certain things undoubtedly true.

1st. That it relates to the state of the account between the United States and the several States, arising out of the sales of public lands within such several States.

2d. That it assumes that this account arises out of the stipulations made by the United States in respect to the reservation of five per cent, for the benefit of such States, from the proceeds of the sales of public lands within such States.

3d. That it commands the Commissioner of the General Land-Office to state such an account.

Thus far is clear. The doubts which arise are: —

1st. Whether this legislation had any other scope or effect than this, — to direct the Commissioner to include Indian and other reservations.

2d. Whether the Commissioner, in stating the account required by this law, should go into the inquiry how far the United States had executed its trust as respected the two per cent by "making roads leading to the State," and should pass on that general question, and in some way arrive at its results.

Upon the first of these questions, I find myself unable to entertain any doubt.

The act in question, by its first section, requires an account to be

stated between the State of Mississippi and the United States for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State; and it directs and requires that in stating that account the Commissioner of the General Land-Office, who is commanded to state the same, shall include certain described items.

I am wholly unable to perceive why the whole of this mandate of the Legislature should not be obeyed. And if the whole is to be obeyed, there must be:—

1st. An account stated of the sum or sums of money due to the State.

2d. There must be included therein the items designated.

To state an account of the items specially required to be included therein would not approach so near to compliance with the act, as to state an account of the sums of money due to the State without including these special allowances. The latter would obey the general order of Congress, and disregard one of its details. The former would disregard the general order to state an account, and substitute in its place obedience to a special direction as to particular items to be included therein.

It is every day's practice for courts to order an account to be taken, covering a particular subject-matter, and direct that certain items shall be included in the account. I never supposed any one could believe that such an order would be complied with by taking an account of the items specially directed to be included in the account.

If the sole object of Congress had been to allow the State of Mississippi and each of the other States two per cent on a fixed valuation of one dollar and a quarter *on the lands reserved from sale*, why was not this, and this alone, said by Congress? Why should an account have been directed of the sum or sums of money due to the State on account, not of these reservations, but "of the public lands in the said State"? The question being whether the account is to be restricted to "reservations," or to include all sales of public lands, how is it possible to escape from the express words of the act, that the account is to be of what is due "on account of the public lands in said State," and that the reservations are to be "included," as one of its items? If this is true as between the State of Mississippi and the United States, it is equally true as between the State of Illinois and the United States, by force of the

second section of the act of March 3, 1857, which applies "the same principles" to each of the other States.

Upon the *second* of these questions, — namely, whether the Commissioner, in stating the account required by this law, should go into the inquiry how far the United States had executed its trust as respected the two per cent by "making roads leading to the State," and should pass on that general question, and in some way arrive at its result, — I am of opinion that the act in question neither required nor allowed any such inquiry by the Commissioner.

1st. The act gives no directions to make such inquiry, or to include in the account any such items.

2d. The state of facts then existing afforded no foundation for any such inquiry, or any materials whereby the Commissioner of the General Land-Office could state any account including such deductions. There were no accounts in his office, or under his official knowledge, which would enable him to make such deductions as matters of account, and no charges had been made anywhere against the proposed account.

3d. In point of fact, the United States, instead of complying with its promise to expend the money in building roads "to the State," had long before the date of this law wholly abandoned the execution of the trust, and had made such disposition of the property as was inconsistent with its performance. The assumption that this act of Congress requires the Commissioner to make allowances to the United States for expenditures by the United States in building roads, is an assumption that Congress meant to require allowances under a contract for what was not done in performance of that contract, and this assumption is made without any expression of the will of Congress to that effect. In my opinion it is unfounded.

Congress has required an account to be stated respecting a particular subject-matter. It gives two directions as to the mode of stating that account: —

1st. "What sum or sums of money are due to the said State, *heretofore unsettled, on account of the public lands of the said State?*"

2d. The other is a direction to "include in said account" certain reservations.

To suppose that "heretofore unsettled" remitted the State to the Commissioner of the General Land-Office, to inquire how much

the United States, under its old and abandoned system of public improvements, had spent in "making roads to the State," seems to me wholly inadmissible.

And there is one among many reasons why it is not admissible, which I may properly state.

The act of March 2, 1855, had reference to the State of Alabama. The United States had made no expenditures of this character which could be deducted from the account under this act. I understand none were deducted. The first section of the act of March 3, 1857, respects the State of Mississippi. The United States had made no expenditures of this character which could be deducted from the account under this act, and none were deducted. Now the second section of this act of March 3, 1857, which is now in question, requires the Commissioner to state an account between the United States and each of the other States "*upon the same principles.*" How then can the Commissioner state the account upon any different principles? How can he undertake to say, I insist the United States owes you nothing, not because this account of the title of the State to five per cent of the sales of the public lands has ever been settled, but because I find by inquiry, out of my own department, that the United States undertook to perform the trust for which they reserved this money, and before they voluntarily abandoned its performance, and made what they had done useless to the State of Illinois, they had spent all the money reserved. Who authorized the Commissioner to enter into this inquiry? In my judgment his jurisdiction to make it was as unfounded as the conclusion at which he arrived. That conclusion seems to have been, that, because the United States spent money to make roads *within the State of Illinois*, which were abandoned without completion, and are said to have been worthless, their cost should be allowed as coming under the contract to expend the two per cent "*in making roads leading to the State.*" I am unable to agree to this conclusion.

In my opinion the act of March 3, 1857, contains a direction to the Commissioner of the General Land-Office to state an account in which he is to credit the State of Illinois with five per cent of the sales of public lands made within that State; and is to charge that State with the moneys which have been paid by the United States towards a settlement of that account. And under that act, in my opinion, he has no authority to include in that

account any other item, except what he is expressly directed to include, namely, the reservations at their fixed valuation.

B. R. Curtis.

Boston, Oct. 25, 1870.

CHANGES IN THE USE OF PUBLIC PROPERTY, WHICH AFFECT PRIVATE RIGHTS.

Opinion.

I have read and considered the bill of the United States against the Illinois Central Railroad and others, and the answer of the defendants thereto; I have also examined the statutes of the State of Illinois submitted to me, and I have considered the questions which I apprehend are raised and involved by the said bill and by the subject-matter on which it is founded. And my opinion is, —

1st. That *if* the Secretary of War had power to make the dedication in question (and I strongly incline to think he had, as an incident to the power of sale conferred by the act of March 3, 1819), the United States have no remaining interest which can enable them to maintain this bill.

2d. If the Secretary had authority to make the dedication, there was an effectual dedication of the land in question for the purposes expressed on the plat, "that it should be public ground, for ever to remain vacant of buildings."

3d. Its dedication as public ground vested the fee of the land in the municipal corporation, subject to the controlling power of the State, which might change the use so far as the use was merely public.

4th. This dedication, and the accompanying sales of the lots immediately adjacent, and which were purchased with some reference to it, conferred private rights upon the owners of those lots to have the dedication continued; how many of these lots thus obtained some right arising from the dedication, it is not necessary now to consider.

5th. Though owners of lands take their titles subject to such injurious changes as the Legislature may see fit to make in adjacent lands or waters belonging to the public, yet this subjection of private to public rights cannot be extended to such a case as that now presented. The rule is to have a fair and reasonable application to cases where it was obvious to the private owner when he acquired his title that changes injurious to him might be required to enable the public more completely or effectually to enjoy *the particular public*

use for which the property in question was held by the public; or, at furthest, some similar or analogous use capable of being there contemplated. And a diversion of the adjacent public property to another public use, wholly different from that to which it was specially and specifically dedicated, though made by the authority of the Legislature, cannot be considered as made in conformity with private right, but in derogation thereof.

6th. But this existence of private rights is no restraint on the power of the Legislature to change the use of public property. It merely secures to the owners of those private rights compensation for their destruction, to the extent of the actual injury they may suffer by the change. And if the injury worked by the change, viewed as a whole, is nothing, the damages recoverable are nothing.

7th. The act of the Legislature of Illinois granting to the three railroad corporations the fee of the land in question for the erection of a passenger depot thereon, and other business purposes of those corporations, has effectually changed the public use, without, however, depriving the private persons, having a vested interest in the former use, of their claim to compensation.

8th. This new appropriation of property has been made by the State, not by an exercise of its rights of eminent domain to take private property for public use, but by virtue of its power to change the uses of property held for the public. But when such a change is made by the State, if any vested private rights are taken away *by mere force of that act of the State*, it is required that some reasonable provision should be made by the Legislature for compensation for the destruction of such vested private rights.

9th. In this case there is no such destruction of vested private rights by force of the act of the Legislature: it only conveys the right and title of the State. If there are vested private rights, (and I think there are,) they remain unaffected by the act of the Legislature; and so there was no necessity for the Legislature *by this act* to make provision for compensation.

10th. How these private rights can be condemned, by force of the existing charters of either of the three roads, "for the erection of a passenger depot, and for such other purposes as the business of the said companies may require," must depend on the true construction of their charters, and the general laws on which they are engrafted. As they stand, the condemnation must be *of the land.* This would necessarily carry with it all opposing rights and inter-

ests. The question is, whether either of the corporations has power to condemn land for these purposes of depot accommodations, &c. I have examined the charters and the general laws, and see no reason to doubt the existeuce of the power. But it is so peculiarly a question of local law that I think the opinion of gentlemen of the bar of the State far more important than my own.

11th. My advice would be to proceed to condemnation. If the owners of these rights appear and claim damages, their rights will be thereby extinguished. If they do not appear, the condemnation can be set up by a supplemental cross-bill as a bar.

12th. The suit by the United States seems to me founded on no title whatever.

The suit by one or more of the owners of lots I think may be maintained as an assertion of their private rights until they shall be extinguished by a condemnation. When that condemnation shall be had in due course of law, I think their title will be extinguished.

B. R. Curtis.

Boston, Nov. 5, 1870.

MINNESOTA STATE BONDS. — QUESTION OF LIEN UPON THE PROPERTY MORTGAGED TO THE STATE TO SECURE THEM.

Opinion.

I have examined the case stated by Messrs. M. and B. for an opinion of counsel respecting the rights of holders of bonds of the State of Minnesota upon property conveyed by the several railroad corporations therein mentioned to the State of Minnesota, as security for the payment of the said bonds. I will now state my answers to each of the questions proposed, and indicate the grounds and reasons upon which they seem to me to be correct.

The first question is: Would the State, having granted away the property free of all claim, be a necessary party, if suable?

In my opinion, the State, if suable, would be a necessary party. The foundation of the suit is alleged claims against the State, and an equitable right to have certain property in the hands of the present corporations affected by a trust, and appropriated to pay those claims. In my judgment, a court of equity would in ordinary cases require the debtor to be made a party, that a just and final account might be taken of the amount of the debt, and thus the whole matter be finally concluded as between all the parties.

But in this case the State cannot be made a party, and is under no responsibility, directly or indirectly, to the present railroad corporations, and has no interest whatever which can be affected by a decree.

The question is in substance this: If a State holds property affected by a trust, and conveys it to a third person with notice of the trust, is the *cestui que trust* without remedy against the third person, whom be can sue, because that person holds under the State, which he cannot sue? I do not think a court of equity would take that view; and the reasoning of the Supreme Court of the United States in *Osborn* v. *Bank of United States*, 9 Wheaton, 738, respecting the relation of a State to a suit against one claiming under its authority, confirms my opinion.

The second question is: Do the public acts, mortgage deed, and foreclosure proceedings, and their recitals, affect all parties who have dealt with the State, its grantees and assigns, in respect to this property, with sufficient notice of the beneficial interests of the bond-holders, so as to charge the property therewith in the hands of the new organizations?

I answer the question in the affirmative. The public laws of the State, and the trust and mortgage deeds and their foreclosures, form the title of the grantors, of which the grantees of the State are presumed to have had notice. It was only under and by virtue of these laws, which clearly show the title of the State and the trusts attaching to that title, that any conveyance could be made by the State.

The third question is: Will equity compel the application of the property or its proceeds, or any and what part of it, mortgaged to secure the State liability, to the payment of the State bonds? i. e. make each new organization account for the property it received to the extent of the State bonds issued to its route, converting them severally by construction into trustees to this end?

When one for whose accommodation negotiable paper is issued by a third person, conveys property either to such third person to indemnify him, or conveys it to a trustee for that end, equity treats the property as set apart for the payment of the debt; and any party interested in its payment may have the aid of a court of equity to compel the application of the property to make such payment. And the obligation so to apply it attaches upon the property, and follows it into the hands of any third person who takes it with

notice of the obligation. The leading case on this subject is *Maure* v. *Harrison*, 1 Eq. Ab. 93, K. 5, and it has been followed by many others. In *Moses* v. *Murgetroyd*, 1 Johns. Ch. R. 119, 129, Chancellor Kent said: "I shall, then, consider this fact as well made out; viz. that the assignment of the 12th of February, 1806, though absolute on the face of it, was intended by the parties to it to be a security only to the intestate for his indorsement of the notes in question. This being the case, the plaintiffs, as holders of the notes, are entitled to the benefit of this collateral security given by their principal debtor to his surety; and the case of *Maure* v. *Harrison* is directly to this point. These collateral securities are, in fact, trusts created for the better protection of the debt; and it is the duty of this court to see that they fulfil the design. And whether the plaintiffs were apprised, at the time, of the creation of this security, is not material. The trust was created for their benefit, or for the better security of their debt; and when it came to their knowledge, they were entitled to affirm the trust, and to enforce its performance." See also *Phillips* v. *Thompson*, 2 Johns. Ch. 418; *Clark* v. *Ely*, 2 Sand. Ch. 166; *Wright* v. *Morley*, 11 Ves. 22.

The only difficulty I have found in answering the question has been in ascertaining what property can be considered as having been effectually set apart for the payment of these bonds. After careful consideration, I am of opinion that the following-named property was so set apart: —

The railroad corporations were, by what is called in the case the loan amendment, required to provide for the payment of the principal and interest of the State bonds delivered to them for their accommodation, and, *to this end*, they were required to convey to the State their title to the first two hundred and forty sections of land, which were to be disposed of in such manner as to have application made of their proceeds to pay the interest and sink the principal of the State bonds. I understand from the "Case," that this was done. If so, it is clear that, whatever title the railroad corporations had to these lands (two hundred and forty sections), or any part of them, was thereby effectually set apart and appropriated for the payment of the principal and interest of the State bonds; and each taker of a State bond acquired an equitable right to have the same so applied. I do not think the facts that each railroad corporation also, as part of the same transaction, delivered

to the State its own bonds, and secured them by mortgage of the same and other property, and that the State foreclosed these mortgages for non-payment of the bonds of the mortgagors, in any degree varies the rights of the parties; because these bonds of the railroad corporations, and the mortgages to secure them, were given to indemnify the State, and if the trust-deeds had not been executed, all title acquired by the State under foreclosure must necessarily be affected by the same trust, and bound by the same obligation to holders of bonds of the State to appropriate the property acquired by the foreclosure to the payment of the principal and interest of the bonds of the State, to secure the payment of which the bonds, by force of which the foreclosure took place, were given to the State.

The entire security, in the different forms in which it was given, was designed and appropriated to the payment of the principal and interest of the bonds of the State; and it was not in the power of the State, by any contrivances, to take away from the holders of its bonds the benefit of securities which the State itself held for the payment of its bonds, so as to prevent a court of equity from following out the trusts which actually existed, if such a court could obtain jurisdiction over the subject-matter. And when any third person, who could be sued in a court of equity, obtained title to the property thus charged with a trust, with notice of the trust, I see no reason to doubt that the trust could be, and ought to be, enforced. Looking more particularly at the several mortgage transactions, they appear to have differed in some details. The mortgage to the State of two hundred and forty sections of land was required by "the loan amendment" to be made by absolute conveyances to the State of those lands, upon the trusts declared in that amendment. These conveyances are stated to have been made. And in my opinion these lands, so far as the companies had title, were held by the State upon the trusts thus declared, which set apart this property for the payment of the bonds, and the mortgages have no reference to these particular lands. What is hereafter said about the foreclosure of these mortgages must be understood as not referring to the title to these lands, which was fixed by the loan amendment and the laws enacted to carry it into effect.

As to the mortgages, the Minneapolis and Cedar Valley Railroad Company issued no mortgage bonds beyond those delivered to the State. The other three railroad corporations issued mortgage

bonds to other persons. In some cases the foreclosure was made by the Governor, acting as attorney, in fact, of the mortgagees; in others, the trustees acted. In my opinion, it is not material by what lawful agency the foreclosure was made. The title held by the State was held to secure the payment of the principal and interest of the State bonds. Each holder of those bonds had a vested interest in that application and use of the title, and a clear equitable right to have it so applied; and the particular forms the State went through to perfect the title, and make it available to the end for which it was created, could not change or defeat the essential purpose for which it was created, or deprive those who had a fixed equitable interest in it of their respective rights.

If the State held its mortgage title affected by a trust in favor of the holders of the bonds which that mortgage title was given to secure, it would be monstrous to hold that the State, by a foreclosure of that mortgage title, could put an end to the trust. Whatever the State did to perfect that mortgage title, by extinguishing the equity of redemption, must be deemed to have been done in its capacity of a trustee; and it would be contrary to the plainest principles of equity to allow the trustee to set up that title, acquired by foreclosure, as overriding the trust. It is true, that if a third person, wholly unaffected by any trust, or by any previous connection with the title, had purchased at the foreclosure sale, he might have held the property free from any trust. But the State, as has been seen, stood in a fiduciary relation to the property and to the holders of the State bonds, and could not divest itself of that fiduciary character by turning a mortgage title into an absolute title. But it was conveyed to other trustees to secure bonds held by the State as part of its security for the payment of its own bonds by the companies; and when the State acquired the legal title by the foreclosures, in my opinion it held it upon the same trusts as it had previously held the bonds of the companies.

The fourth question is: Will the claims of parties who have advanced to the new organizations secured by mortgage liens on the property be postponed to the equitable lien of the State bondholders? The answer must depend upon whether such parties had actual or constructive notice of the trust; and as all the material facts on which the title of the State bond-holders depends are upon the face of the laws of the State, and the title deeds to and from the State under which the new organizations claim, I am of opinion

that notice is to be imputed to parties who have taken mortgages of the property from the present organizations.

The fifth question, as I understand it, has been already answered. The lands conveyed by the railroad companies to the State have passed from the State to the present organizations, but affected by a trust in favor of the holders of bonds of the State.

The sixth question is: Were these contracts between the State and the bond-holders in respect to these two hundred and forty sections, and between the trustees in the trust deeds and the bond-holders in respect to the rest of the Congressional grant, or any part of it, impaired by the Minnesota Legislature, in violation of the Constitution of the United States?

As respects the two hundred and forty sections, I answer in the affirmative, — as to the residue, in the negative.

Though there is no separate question proposed concerning the effect of lapse of time, that inquiry is implied in the third question.

It has already appeared that, in my opinion, a trust was created in favor of the holders of bonds of the State, and I think this was an express, in contradistinction to a constructive trust. If the deeds to the State had in words declared the interest of the bond-holders in the property, their legal effect would have been precisely the same as without such an express declaration. And so, if the amendment of the Constitution and the laws which provided for the security of the bonds of the State had, in terms, declared that, in case of default of the State and the corporation to pay the interest or principal of the State bonds, their holders would have a right to have the security deposited with the State by the corporations applied to pay the State bonds, this express declaration would have amounted to no more than the necessary legal effect of the transaction without such declaration. Of course, if an express trust arose out of these transactions, that trust has not been affected by lapse of time.

If it should be held to be only a constructive trust, there is no rule in equity which fixes any precise time as a bar. It must depend on the circumstances of the case. *Michoud* v. *Girod*, 4 Howard, 503.

Assuming that these trusts were in effect denied by the State, by the acts of March, 1862, I do not think a court of equity would treat the lapse of time as a bar. Considering that the bonds of the State have been held by a numerous class of persons, no one of

whom could reasonably be expected to act alone, and that it was not legal laches to hope that a returning sense of justice would relieve the State from repudiation by payment of the bonds, I think it would be harsh and inequitable to hold lapse of time to be an effectual bar.

B. R. CURTIS.

December, 1871.

OPINION ON THE CITIZENSHIP OF C. W. A.

Temporary allegiance to a foreign country is not a renunciation of native citizenship.

CASE.

In the latter part of the year 1861, C. W. A., who was a native born citizen of the United States, and owner of several vessels then being in English ports, became apprehensive of war between the United States and Great Britain.

He and his family were then in England. He went to the city of Hamburg for the purpose of placing his vessels under the Hamburg flag, and in order to do so, he took before the proper office of the city, the following oath:—

EXTRACT FROM THE JOURNAL OF THE LICENSE OFFICE.

According to the journal kept at the License Office, No. 57, it appears that C. W. A., on the 17th of January, 1862, has taken the oath, of which a copy is affixed below, and by so doing has acquired the position and the privileges of upper-citizenship of the city of Hamburg.

Hamburg, Jan. 17, 1862. Att. Claussen Dr., 1st Officer License Office, Citizen's Oath. I vow and swear to God, the Almighty, that I will be true and faithful to the Free and Hanseatic Town of Hamburg and to the Senate, that I will strive for the best of the city, and try and protect it from injury as much as may be in my power, that I will conscientiously observe the constitution and the laws, that I will honestly and without cavil pay all duties and taxes as now ordained, or as they may hereafter be agreed upon between the senate and the common council, and that I will never seek my advantage to the disadvantage of the city. So help me God.

(Signature of the holder,) C. W. A.

He had no intention of remaining permanently in the city of Hamburg, or of making that the home of himself and family, none of whom went there, and he himself was only in the city about three weeks.

The question is, whether Mr. A. ceased to be an American citizen by reason of the facts above stated.

OPINION.

I am of opinion he did not.

1st. So far as I know, it is universally agreed by all courts and writers on the subject of change of allegiance, that it cannot be effected without an actual change of domicile, which certainly did not take place in this instance.

So the Supreme Court held in *Blight's Lessee* v. *Rochester*, 7 Wheaton, 535.

In the several opinions given by the heads of Departments to the President of the United States, in response to his letter of August 6, 1873, this requirement of a change of domicile is fully admitted. And it is upon this principle that the treaties between the United States and foreign countries concerning naturalization have uniformly required, in addition to the act of naturalization, a defined period of continued residence in the adopted country, of sufficient duration, when accompanied by the act of naturalization, to show an intention permanently to remain there.

2d. The act done by Mr. A., in taking the oath in the form above mentioned, does not amount to a renunciation of his native allegiance, or to a declaration of a determination permanently to remain in Hamburg. It is consistent with its just meaning to hold that his purpose was to require such commercial privileges as the laws of Hamburg bestowed on those who, while resident there, would engage to be true and faithful to the city and its government.

I do not profess to know with certainty what the laws of Hamburg were in this particular, but on page 121 of the volume published by executive authority in 1873 containing papers relating to change of allegiance, I find the following statement: — "*Hamburg*. . . . Aliens can become naturalized after six months residence on payment of a small fee. The law of Hamburg is said to recognize a double allegiance in persons thus naturalized, and does not require any renunciation of native allegiance." This statement is taken from the report of the British Commissioners, whose high character leaves no doubt in my mind of its correctness. And it is to be observed, that the form of the oath taken by Mr. A. is entirely consistent with this statement.

There is another ground upon which I rest my opinion. In May, 1868, a treaty was concluded between the United States and the King of Prussia, in the name of the North German Confedera-

tion, which embraced the city of Hamburg. Although this treaty does not expressly relate to the past, nor in terms to the future, my opinion is that the governments of the two countries must consider and treat it as applicable to then existing cases, as well as to those which might be wholly created in the future. In other words, that the terms of this treaty furnish the rules for the decision of every case which might come in question after it was concluded and ratified. If this be so, it is quite certain that Mr. A. does not come within its requirements, and is not a citizen or subject of any North German State.

I cannot doubt that, if the Emperor of Germany were applied to to protect the rights of Mr. A. from aggression by the authorities of the United States, his answer would be, and must be, "Mr. A. is a citizen of the United States, and not of North Germany."

B. R. CURTIS.

April 13, 1874.

In January, 1870, we lost the dear kinsman who was so eminent in the world of letters, and of whom my brother said that nothing could measure what he owed to him.[1] I do not, however, reckon the death of Mr. Ticknor among the deeply afflicting sorrows of my brother's last years. True, the withdrawal of that remarkable intellect left a great void in the lives of all who had lived in close communion with it; and the cessation of his daily manifestations of affection and interest was the cessation of that which seemed for a time, to all who dwelt within their influence, a necessity of existence. But Mr. Ticknor died in a ripe old age, in what we feel to be the natural order of Providence; and after he had, with characteristic punctuality and method, arranged every thing in reference to the close of life. Calmly, minutely, and wisely, with a business-like regularity, he made himself and all his affairs ready for the summons; and then cheerfully awaited it, happy and making others happy, and grateful for the extraordinary felicity that had been his lot. There was

[1] Life of Mr. Ticknor, Vol. II. p. 402, note.

not, therefore, in his death, cause for a more poignant feeling, than the tender regret with which we part from those who are appointed to leave us after life's duties have been all discharged and its blessings all enjoyed.

But in the spring of 1871 the deaths of two young children brought to my brother an affliction of another character. As a needed relief from its exhausting and depressing influences, both parents were advised to go abroad. My brother had never been in Europe before; but of course the circumstances under which he made this brief tour of four months precluded his acceptance of social engagements. The following letter to me is all the record of his visit to London that I have.

To George T. Curtis.

London, June 25, 1871.

Dear Brother, — We have now been a month in England, and half that time in London. We have seen and enjoyed much, and both Mallie and I are better than when we left home. We have received much kind attention from those whose attentions are gratifying, and I have regretted that Mallie could not more enjoy it. Mr. Denison,[1] to whom Mr. Adams gave me a letter, has been extremely kind and useful to me. Through him I have seen and heard all of the House of Commons I desired, and many other things besides. The Attorney-General,[2] and Sir Roundell and Lady Palmer,[3] have also been very kind, as have many others.

We shall leave London the last of this week for Oxford, &c., &c., and, after seeing the Lakes and Scotland, return here, and go to the Continent about the 1st of August. We have taken passage home for October 21st, per Russia.

Neither the courts nor the Houses of Parliament have produced just the impressions I expected. But both are eminently practical,

[1] The Rt. Hon. John Evelyn Denison, at that time Speaker of the House of Commons. After his retirement from that office, he received a peerage, with the title of Lord Ossington. He was a descendant of the distinguished John Evelyn, of the reign of Charles II. He died March 8, 1873.

[2] Sir Robert Pollett Collier.

[3] Sir Roundell Palmer afterwards became Lord Chancellor, with the title of Lord Selborne.

and manliness and good temper are pleasant things to see, even if somewhat mixed with dulness. I have sat part of a night to hear a debate on the ballot, and Mr. Denison was here this afternoon to say that the debate would go on to-morrow night, and some of the best speakers would address the House; so I shall go again to-morrow. I have *seen* the Tichborne trial, the House of Lords as a Court and as a House, all the Courts of Common Law, and on Tuesday am to go to the Courts of Chancery. As to the "sights," we have done many, though many remain.

Mr. Denison said he had received your Life of Mr. Webster, and if the proper acknowledgment had not been made he was very sorry, and he directed his secretary to take a note of it.[1]

Mallie and I send love to Louise, and I am, as ever,

Yours affectionately,

B. R. CURTIS.

This letter really gives no adequate idea of the attentions which he received in London from persons of the highest distinction. But their invitations were necessarily declined, and he could only see them at his lodgings, or when he met them in such public places as he visited. But I am told that the concourse of his visitors fully marked the estimation in which he was held in England. On the Continent, he and his wife travelled, in a very private manner, through Holland, Germany, Austria, Switzerland, and France. He found his greatest pleasure in the churches and galleries, which afforded him opportunities of studying works of art that he had never before enjoyed. The journey was of some benefit to his health, and he brought home a rich fund of recollections. But, loving his own fireside better than all other places or scenes in the world, he cared less than most persons do for the changes and varied interests of travel.

[1] Mr. Denison was an intimate friend and correspondent of Mr. Webster for more than thirty years. Judge Curtis, after his return, mentioned a very gratifying and distinguished attention shown to him by Mr. Denison, who took him by the arm, led him across the floor of the House of Commons, and placed him in a special seat on the right of the Speaker's chair.

On landing at New York, in the latter part of October, 1871, he was met by the intelligence that he had been selected as one of the counsel for the government of the United States, to prosecute its claims before the Board of Arbitration that was soon to sit at Geneva, under the Treaty of Washington. His private affairs, and his engagements already made, might perhaps have been arranged so as to admit of his accepting this appointment. But he scarcely felt equal, in strength and spirits, to the encounter of another voyage across the Atlantic, immediately after his return home, without some urgent call of duty. In truth, it was his constant habit to regard all such things in the light of duty. He did not covet distinctions, or need them; and, not feeling that his services on this occasion were necessary to the country, its conspicuous character did not tempt him. If, however, news of the appointment had reached him before he left Europe, he would doubtless have remained, and taken part in the proceedings at Geneva.

In the autumn of 1872 and the spring of 1873, at the request of the Corporation of the University at Cambridge, Judge Curtis delivered a course of lectures at the Law School, on the Jurisdiction and Practice of the Federal Courts.[1] No compensation was proposed or stipulated for this service. At a subsequent time, a pecuniary compensation was offered. Its disposal will be seen from the following note: —

To President Eliot.

Washington, October 11, 1873.

My dear Sir, — Your letter of the 11th instant, enclosing check for $500, voted by the Corporation by reason of my lectures at the Law School, was forwarded to me here. It was not my intention

[1] The lectures were wholly oral; but Judge Curtis's son, the late Mr. Walter Curtis, caused them to be phonographically reported, and the manuscript reports are extant. It is to be hoped that they may at some time be published, with the necessary annotations.

to accept any pecuniary compensation for that service. I did not say so, because I wished not to make that difference between myself and other lecturers, to whom this compensation was important. I therefore receive [the check] and return for the Treasurer the necessary formal receipt; but I enclose the check indorsed to your order, requesting you to take the needful measures to have the amount expended in the purchase of books for the library of the Law School, relating to the Constitution and laws of the United States, and the practice of the national courts; such purchase to be made under the direction of those charged with the purchase of books for that library.

I remain, with great respect, your obedient servant,

B. R. CURTIS.

CHARLES W. ELIOT, ESQ., *President, Harvard College.*

In 1873, after the death of Chief Justice Chase, there were many important persons who desired that the office should be tendered to Judge Curtis. There was, however, very little probability that their wishes would be gratified. Expressions of such wishes reached him from many quarters, and he spoke to me freely concerning them. He said that, if the offer were made to him, it would oblige him to decide a very embarrassing question, one which he hoped he should never have to consider. The following note was entirely in accordance with the private expression of his feelings to me and others.

TO THE HON. REVERDY JOHNSON.

BOSTON, May 23, 1873.

MY DEAR MR. JOHNSON, — I thank you for your kind letter. If I am to consult and be governed by my own personal wishes, I can say that I do not want the office of Chief Justice, and shall be better pleased to have it offered to another than to myself. At the same time, if it should be tendered to me, I should be put to the decision of a very grave question, which I do not see that I am now, or probably shall be, required to decide.

For your own kind appreciation, I beg you to believe I am grateful. There is no man living who knows better than yourself what that place requires and involves; and as you have known me

as a judge and as a member of our profession for a long time, and under changing and difficult circumstances, I value very highly your estimation of my fitness for this great office.

With great respect and regard, I am, dear Sir,

Your obedient servant,

B. R. Curtis.

In the month of February, 1874, another sorrow came to weigh heavily on his energies, and to tax his paternal sympathies. His second daughter, a married woman and mother of young children, died in Pittsfield at this time.[1]

To George T. Curtis.

Boston, March 2, 1874.

Dear Brother, — I thank you for your kind and consoling letter. It was very pleasant to me. I returned from Pittsfield depressed, not only in mind, but body; but have been gradually gaining strength, though I am in the doctor's hands. I keep employed in small ways, well knowing this is best, and if called to Washington shall go, as both Mallie and I think it will be useful to me. Of course she will go with me. Do not suppose I am really ill, but for the time I am not as well as usual. I will endeavor to let you know when I pass through New York. Give my love to Louise.

Yours always, B. R. Curtis.

When I saw him in New York, a short time after this note was written, I observed a considerable change in him. There was the same calmness of spirit, the same clear and well-poised intellect, the same determination to do the duty of the passing day, and the same mental power to do it. But it was evident that the sorrows which I have mentioned, and others which have needed no mention, had told upon his physical system. He was greatly depressed. Perhaps it would have been better for him if he had now refrained from work. But it had always been his rule —

[1] Elizabeth Ticknor Curtis, born in Boston, June 15, 1836; married to John Proudfit Brown, of Pittsfield, January 15, 1862; died at Pittsfield, February 21, 1874.

one of his habitual methods for preserving his submission to the will of God — to be constantly employed. He knew his own nature best; and I therefore think it was a wise determination for him, not to withdraw from the active duties of his profession. They demanded great efforts; but, with his experience and his familiarity with the subjects that came before him, he could make all the efforts that were required. They involved, undoubtedly, a very high class of professional studies and exertions; but he had long walked, with a free and firm step, upon the loftiest ranges of the law, and, notwithstanding his depression of spirits and some loss of physical strength, his step did not now falter.

There are recorded in his Opinion Books, between the months of April, 1873, and June, 1874, some of the ablest and most elaborate of this class of productions that he ever wrote;[1] and one of the most striking arguments that he ever made was delivered in the Circuit Court of the United States at Hartford, on the 19th of September, 1873. It related to the constitutional validity of an act of Congress, which had authorized a suit in equity to be brought, in the name of the United States, against the Union Pacific Railroad Company, its stockholders and bond-holders, in any Circuit. Judge Curtis's argument on this entirely new and very important question could not have occupied in the delivery more than half an hour, — such was its condensation and its rejection of all superfluous matter. It is placed in the second volume of this work.[2]

In the latter part of June, 1874, he went with his family

[1] Two of these opinions, signed respectively on the 24th of April and the 30th of June, 1874, related to the constitutional validity of acts of the Legislatures of Wisconsin and Iowa, each of which affected vitally the interests of important railroad companies and their bond-holders.

[2] I have been requested by a professional friend who was concerned in this case to have this argument included in the present collection of Judge Curtis's productions, as a model forensic speech, and an admirable specimen of his manner. The last cause which he argued in the Supreme Court of the United States was that of *The Dollar Savings Bank* v. *The United States*, reported in 19 Wallace, 227. It was argued January 22, 1874.

to pass the summer months in Newport, having rented a commodious house situated on the highest ground of that city of villas. After the 1st of July, his health began to fail, and he went very little abroad, unless it was to drive in a carriage. He passed the greater part of every day sitting or walking upon the piazza of his house, in the fine air of that region, and reading light books. He performed no labor, and saw no one on business. Towards August, he became seriously ill, and remained in his chamber. Early in that month, he desired that I should be informed of his illness. I went to him at once. On the morning of my arrival, I passed several hours with him alone. He was dressed, but did not leave his couch. He conversed naturally, and not without cheerfulness, seemed to be interested in what was going on in the world, and did not intimate that he did not expect to be again well. Indeed, I was so much reassured by my private conference with the attending physician, who had been exceedingly watchful of the case, and who attributed the symptoms to general debility rather than to any organic disease, that I returned to my home, believing that a nourishing diet, rest, and the sea air would restore him. When I left him he took leave of me without emotion, and with kind messages to my family. Neither of us thought that we were never to meet again.

In a short time after my visit alarming symptoms began to appear. Dr. Gray, of Utica, a very eminent practitioner, happening to be in Newport, was called in consultation. The following letter informed me that, although the case had become very grave, there was still great hope.

NEWPORT, Sept. 1.

In answer to your kind letter this morning, — I was only too happy to telegraph you the joyful hope the doctors left with us this morning. We esteem it a special providence that Dr. Gray has been here, and able to give the most careful attention to the Judge's case. . . . There was every threatening of hemorrhage of

the brain; but under the treatment of Dr. Gray such quiet, restful sleep has been obtained, and the other symptoms so controlled, that they say this morning they feel the crisis to have passed, and that the Judge will get well. On Thursday last they felt the greatest anxiety; . . . but he yielded to the medicines wonderfully, and all his conditions are more natural. I have a trained nurse, as I found after six weeks of watching I gave out. We keep the utmost quiet, the doctors not wishing the Judge to use his mind in the least, and he lies on his bed, with an occasional change to the couch for relief. There must still be weeks of care and rest before a complete cure.

I hope Dr. Metcalfe will not come here especially to see the Judge, unless, after Dr. Gray leaves, there should be a recurrence of unfavorable symptoms, when I would telegraph either for him or for our own physician, Dr. Clarke, in whose opinion the Judge has great faith. I can say nothing upon this subject, or any other, to the Judge in his present condition, but in a few days we hope he will be able to make "decisions" for himself.

Resting easy under these assurances, I waited for further intelligence from my friend, Dr. John T. Metcalfe, of New York, who, I knew, had gone to Newport. On the 15th of September, I received the following note, written on the previous day: —

NEWPORT, Sept. 14, 1874.

MY DEAR CURTIS, — I have been here since Thursday evening last. Every day I have seen your brother, with Dr. Sands. The Judge has for a long time been in such a condition as to make his medical advisers uneasy with regard to his future health; but since yesterday his condition has grown much worse. . . .

I see no reasonable hope for any amendment. . . .

I shall probably remain here several days longer, and will telegraph you, in case any very alarming symptoms arise.

In haste, very sincerely yours,

JOHN T. METCALFE.

After the receipt of this note, I prepared to leave immediately for Newport, on the 16th; but in the morning of that day, while I was on my way from my summer residence on Long Island to the city of New York, I met the

public news that my brother had died on the 15th. I could only reach Boston in season to join with others in following his remains to their last resting-place in Mt. Auburn. There we laid what was mortal, "looking for the general resurrection in the last day."

When the golden bowl is broken, what boots it to know why its charmed circle did not longer remain intact? "The days of our age are threescore years and ten; and though men be so strong that they come to fourscore years, yet is their strength then but labor and sorrow; so soon passeth it away, and we are gone."

It was not given to this man to attain even the shorter period which the Psalmist allots as the measure of our days. Yet his was a complete and rounded life. Its whole duration was a little less than sixty-five years; its term of activity, after the time of education had passed, was but forty-two. Without the stimulus of ambition, as that passion is commonly felt and manifested, and with the sense of duty as its habitual guide, — freed from the love of applause which weakens and from the fear of man which betrays, — his life was a greater blessing to its possessor, and to those whom it most nearly touched, than are the lives of many who seek and win what are called the prizes of the world. Of him, it might be said, in the quaint words of Wotton's hymn: —

> "How happy is he born or taught,
> That serveth not another's will;
> Whose armor is his honest thought,
> And simple truth his utmost skill!"

I have seen discussions in which it has been debated whether he was a great man; and have read what has been said upon either side of that very unimportant question. I can concur with one who has said: "It does not admit of denial that Mr. Curtis's character bore that genuine stamp of greatness which cannot be counterfeited or disputed, the test of which is the spontaneous recognition and homage of

men. Everywhere and at all times, on the bench, at the bar, in every assembly, whether large or small, in the most select company and in general society, his presence was impressive and commanding. No man, however great, could look down upon him. Very few could feel themselves to be his peers. Most men, even those of a high order of mind and character, intuitively acknowledged his supremacy." [1]

I have quoted these words, because I suppose they will be ratified by the general testimony of those who knew him; and because the reverend author, when he referred to the supremacy that was acknowledged, meant that it was acknowledged without being claimed. But if the question of his greatness must be raised, and I were to record that which best expresses my own sense of his rank among men, I should add a little to old Wotton's idea of human felicity, and should suggest, that, as the "honest thought" was in this case the thought of an intellect of the highest order, as the "simple truth" was drawn from the deep fountains of reason, and made useful in human affairs by all that learning and experience could do for them, there was enough for greatness, upon any rational test of that grade of character. In one thing, surely, it will be allowed that he was great; for, throughout life, he had been mindful of the prayer, and had received its answer, "So teach us to number our days, that we may apply our hearts unto wisdom."

It is a common observation, that the fame of lawyers, even when they have been very distinguished in their day and generation, is an evanescent fame. It is not often that the most brilliant abilities of the advocate, or the most profound learning of the judge, produce impressions upon society which cause them to be long personally remembered. But there have been lawyers and judges whose

[1] Dr. Robbins's Memoir, read before the Massachusetts Historical Society.

fame has been lasting, and of whom liberal minds in after ages seek to have all the knowledge that can be attained, even if they have left nothing but what was uttered at the bar, or delivered from the bench. He whose life I have now traced was of the highest rank, in both capacities. It may be, that his name will be enrolled among the few great lawyers of whom the world perpetually takes notice. But if what I have said of him shall prove to be only for those who knew and loved or honored him, it may not have been written in vain.

After his death, the members of that bar into whose crowded competitions he came at the age of twenty-five, who had known him as advocate, judge, citizen, and friend, as no others could have known him, assembled to pay their tributes to his character. They were men who could not have stood over his grave to utter an unmeasured or an unmerited word; and when they had expressed what they felt to the tribunal over which he had once presided, there came from his successor an elaborate portraiture of his professional and public character, in which the tenderness of the friend mingled with the judgment of the magistrate.[1] Similar proceedings took place at the bar of the Supreme Court of the United States.[2] These honorable tributes are on the public records of the country.

For me, it has seemed enough to allow the course of his life, his actions, his motives, and his aims, to describe what he was. When this has been done faithfully, readers of biography do not need an extended and formal portrayal of character.

Still there is one trait on which I may dwell, because it marked his whole life, and gave singular force to all his actions, — I mean his peculiar independence.

[1] The reply of Mr. Justice Clifford to the address of the bar of the Circuit Court, together with the other proceedings, was published in a pamphlet; but the whole is of too great extent to be repeated in this work.

[2] These proceedings are contained in the 20th volume of Wallace's Reports, pp. i.–xiv. They occurred on the 13th of October, 1874.

In speaking in a former chapter of the change in his religious sentiments, I have observed that it was not followed by any change in his religious life. The independence of thought, feeling, and action, of which I am about to speak, if not derived from, was strongly tinctured by, the religious feelings which were always a part of his character from his earliest days. Independence is a quality which, when not sustained by a religious faith, may lead its possessor into too great a disregard of the opinions of his fellow-men. When it is united with any tendency to religious fanaticism, it may do great mischief in the world. When it exists along with a sober, rational, and moderated faith, it substitutes in the place of human applause, as the guide or aim of life, the highest standard by which life can be regulated.

It will be admitted by all who knew the man of whom I speak, that they have rarely known any one, constantly engaged in the affairs of a conspicuous profession, and having great power to attain worldly distinction, who yet cared so little for the praise of men. "Trahimur omnes studio laudis et optimus quisque maxime gloria ducitur." These were the words of one who never knew the superior force of that sense of duty, which another civilization than the Roman has substituted for the love of glory. Cicero — for it is he who declares that human applause is with the best men the main-spring of good actions — tells us that virtue itself can desire no greater reward for labors and perils, than the reward of praise and glory. If this is withdrawn, what is there, he asks, for which, in such a narrow and brief course of existence as ours, we should occupy ourselves with such labors?[1] The great Roman lawyer understood himself, and he understood the men among whom he lived and acted. But perhaps he did not know that, because the

[1] "Nullam enim virtus aliam mercedem laborum periculorumque desiderat præter hanc laudis et gloriæ; quæ quidem detracta, judices, quid est quod in hoc tam exiguo vitæ curriculo et tam brevi tantis nos laboribus exerceamus."

pursuit of what he called glory was, in the best life of his age and country, the chief object and the strongest motive of individual action, the state had no deep foundation in the noblest forms of human character. It had institutions, jurisprudence, power, wealth, culture, letters, arts; but in all that splendid civilization there was no higher individual motive than the love of personal distinction. It is true that Cicero, in that love of fame which he makes the strong principle of our nature, comprehends the desire to stand high in the estimation of posterity; and he puts posthumous fame as the one great object which enables the soul to endure the exertions of this life. But it is, after all, the hope of making our own names illustrious, which he assigns as the grand stimulus of our labors, and which he considers as alone adequate to render them endurable.

Certainly it is not to be claimed that what we call the Christian civilization has eradicated the love of glory from the human heart; or that the desire for distinction is inconsistent with the religious character. We know, sometimes to our cost, that, both in great and little men, ambition is still a most powerful incentive. But that which may be claimed for modern society is, that it can and does produce men, in whom there is another principle of action; and who, though they may have begun life with the ordinary desire for worldly distinction, learn, as they grow older, that there is a better and safer principle to sustain their exertions than the love of applause. It is because there are men who come to learn this, that modern society is sometimes saved from the mischiefs which would otherwise be brought upon it by those who never do learn it.

In the case of the person whom I have endeavored to describe, the indifference to praise arose from no contempt for mankind, and from no disposition to reject human sympathy. It arose from a naturally elevated temperament, which had been cultivated into a fixed moral condition; one which made his desire and intention to do his duty, "in that

state of life to which it had pleased God to call him," so superior to the dictates of ambition that the conviction that he had done his duty was always his sufficient reward. To do what he considered to be right, — to do it bravely, disinterestedly, when he was called upon to make sacrifices, and without the smallest regard to the opinions of men when the thought of their opinions might have deterred him from doing it, — became the habit of his life. His was a large and grand nature, in which nothing petty or narrow mingled. He never sought honors of any kind; and those which came to him unsought never seemed to stir his pride to any weak manifestation that he had gained a coveted distinction. He was glad to have a national reputation; but he spoke of it, when to those nearest and dearest to him he spoke of it at all, with a kind of childlike simplicity and humility.

The world at large did not know the gentleness and sweetness of his nature; for these are things that are not revealed by such a man, save in his domestic circle, or among his most intimate friends; and one whom the world has been accustomed to regard as only grave and cold or stern, it does not expect to learn was tender, ever thoughtful of the feelings of others, and habitually charitable in his judgments. Yet that this was true of him, his contemporaries who knew it have abundantly testified. It sometimes happened to him, as it will happen to all men in important positions, that he was made the object of foul and unjust aspersions. But even against the authors of such calumnies he never allowed his indignation to carry him beyond a just exposure or rebuke of the injury which they were doing to the best interests of society, by their assaults upon one who for the time had those interests in his keeping. Any injury which they could do to his reputation as a magistrate, when he held a high judicial place, or that the public would permit them to try to do, was a matter, as he once expressed it, of far greater concern to the public itself

than it was to him; and at all periods of his life he was content to leave his motives to be judged by his acts.

For the rest, — for the measure of his intellect, for the true position that should be assigned to him as a jurist, and for the estimate of his rank among the important men of his time, — I leave what is here written to the decisions of the present, and to the correcting review of future generations, who may take notice of his character, or cherish his name.

APPENDIX.

I.

WALTER CURTIS.

WALTER CURTIS, second son of Judge Curtis, and the oldest of his sons who grew to manhood, was born in Boston, February 3, 1838. He entered Harvard College in 1856, but in consequence of ill-health he left that institution in 1859, without taking a degree. He first engaged in a banking business in Iowa, in which he was not successful. On the breaking out of the civil war, he received a commission in one of the Massachusetts Regiments of Volunteers. In November, 1862, he was detailed and commissioned as Assistant Quartermaster of Volunteers, with the rank of Captain. He served in that capacity at Washington, until the 1st of January, 1864, when he resigned. Such were his accuracy and method, that, on the settlement of his accounts at the War Office, involving very large sums of money, they were found to be correctly balanced to within a fraction of a dollar.

He returned to Boston, studied law, was admitted to the bar in 1866, and immediately took a high rank. In intellect he strongly resembled his father. He had the same power of clear statement, the same logical and concise method of reasoning, and the same habit of simple, strong, and direct presentation of a case. It was a common remark at the Boston bar, that, in listening to Mr. Walter Curtis, if one

did not look at him it was difficult to believe that it was not his father who was speaking. Yet the son was not an imitator of the father. They resembled each other because nature had cast their intellects in the same mould.

After a successful practice of ten years, failing health rendered it expedient for him to make an overland journey to the Pacific coast. On his return, he was seized with pneumonia, and died at Omaha on the 31st of August, 1876, at the age of thirty-eight, leaving a widow and three children. Competent judges, who had every opportunity to appreciate this young man, regarded him as capable of rivalling his father; and there can be no more severe ordeal for any man than that which he must encounter by such a comparison. I might have spoken of my brother's estimate of his son; but remembering the cases of the elder and the younger Burke, and what paternal partiality is, I have here recorded of my nephew the judgments of others only, as I have received them.

Judge Curtis's eldest son and eldest daughter died in childhood, in 1842. The second daughter, who lived to womanhood, died, as has been mentioned, in 1874. Three young children, a son and two daughters, died in 1867 and 1871. Two sons and three daughters survive.

II.

NOTE ON PRESIDENT LINCOLN'S PROCLAMATION SUSPENDING THE WRIT OF HABEAS CORPUS, ETC.

SINCE the text and note on page 366, in regard to this Proclamation, were printed, it has been ascertained, at the State Department, that an original of the Proclamation is now on file, but it bears no mark indicating the time when it was deposited. The proclamation, when printed in the "National Intelligencer," at Washington, bore date Sept. 24, 1862, and purported to be under the seal of the United States, and to be in due form signed by the President and countersigned by the Secretary of State. Where the original was during the interval between the publication of the twelfth volume of the Statutes at Large (1862), and the publication of the thirteenth volume (1866), or whether there was an original during that period, I have not been able to ascertain.

President Lincoln had, previously to the date of this proclamation, acted upon the assumption, in particular cases, that he could suspend the writ of *habeas corpus* in the case of persons who had been arrested and were in confinement by any military authority, although they were merely citizens. Thus, in the case of John Merryman, which occurred at Baltimore, in May, 1861, the commander of Fort McHenry, in making return on Chief Justice Taney's writ for the production of the body of the prisoner, informed the Chief Justice that he was "duly authorized by the President of the United States, in such cases, to suspend the writ of *habeas corpus* for public safety." The Chief Justice issued an attachment against the commanding officer for a contempt in not obeying the writ; but as the Marshal had not the necessary means to execute the attachment against a superior military force, the Chief

Justice excused him from the performance of that duty, and put on file, and sent to the President, his written opinion that "the President, under the Constitution of the United States, cannot suspend the privilege of the writ of *habeas corpus*, nor authorize a military officer to do it." This elaborate opinion exhausted the whole subject of the President's supposed power to suspend the writ, or to arrest and confine persons not subject to the rules and articles of war, for any offence against the United States, except in aid of the judicial authority and subject to its control. "No official notice," said the Chief Justice, "has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended except by act of Congress." He concluded his very dignified and forcible discussion of this subject as follows: —

"In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the District of Maryland, and direct the Clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation, to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

"R. B. TANEY,
Chief Justice of the Supreme Court of the U. S."

Nevertheless, arbitrary arrests of persons not subject to the rules and articles of war continued to be made in places where the courts of the United States were in the full exercise of their authority, sometimes by the order of the Secretary of State, and sometimes by the order of the War Department; and on the 24th of September, 1862, as if to give some color of legality to this exercise of power, the Proclamation was published, on which Judge Curtis commented in his pamphlet entitled "Executive Power." An account of the whole proceedings in Merryman's case, and a full copy of the opinion of the Chief Justice, may be found in the Appendix to his Memoir by Mr. Tyler, pp. 640–659.

There is no parallel case, that I am aware of, of a refusal of the Executive to be governed by a decision of the judicial department of the government on a question relating to the executive powers. Many Presidents have differed from the constitutional views of Congress, and have refused to sign bills on which they have held that the measures proposed were not warranted by the Constitution. The most notable instance, perhaps, is that of General Jackson's refusal to sign a bill rechartering the Bank of the United States, because he held that Congress had no constitutional authority to grant the original charter, although the Supreme Court of the United States had decided that Congress had full constitutional power to do so. Mr. Webster's powerful argument in opposition to the President's veto message, while it admitted that each branch of the legislature has an undoubted right, in the exercise of its functions, to consider the constitutionality of a law proposed to be passed, yet maintained that, when a law has once been passed, and signed by the President, and its constitutional validity has been affirmed by a judgment of the Supreme Court, neither the same President nor his successors is or are at liberty to say whether it is constitutional or not. Whatever may be thought of this doctrine, as ap-

plied to the President's participation in legislation, there is an obvious reason why, in the exercise of executive powers, the President is bound by a decision of the judicial department on the existence or non-existence of the power which he claims. That reason is, that the citizen has nothing but the judiciary to which to appeal against executive acts. If it be true that the judiciary was created to act upon the constitutional validity of laws, when they affect the rights of the citizen, it must, *a fortiori*, be true that its decision that an executive act which affects a citizen is unconstitutional, is binding upon the President. Otherwise, the President is the sole judge of the extent of his powers; and if he will not submit to judicial decision, there is no limit to the powers which he may practically exercise.

III.

DEATH OF MR. WEBSTER.

WHILE Chapter VI. of this volume was passing through the press, I had not access to the proceedings which took place in the Circuit Court of the United States for the First Circuit, on the 28th of October, 1852, on the occasion of Mr. Webster's death. I have since obtained a copy of the remarks of Judge Curtis in reply to the resolutions of the Bar, and insert them here: —

I receive with deep sensibility the resolutions of the Bar, and the remarks of yourself, Mr. Attorney, and of the other gentlemen who have addressed us. The death of this illustrious statesman and jurist has produced a profound impression everywhere in the country to whose service he devoted his life, and will be felt as an event not unimportant in the civilized world.

Among the gentlemen of this Bar, of which he was a member, with very many of whom he held relations of private friendship, and for whom, as a body, he was ever ready to manifest a fraternal regard, and in this Court, which, for more than thirty years, he has enlightened and assisted by his labors, a deep feeling of private grief mingles itself with our sense of the public loss. How great this loss is cannot be described, for it cannot now be even known. The darkness of the future covers the dangers which the Providence of God may permit our country to encounter, and hides from view our needs for the patriotism and surpassing mental power of Mr. Webster. In a government depending for its existence on opinion, the withdrawal of a mind which exercised so great an influence for the preservation and stability of our country, not only in the public councils, but among the people themselves, is a loss indeed.

We submit ourselves to it as inevitable, as having come at the time appointed by the will of Him in whose hand is the destiny of nations and of men, and with gratitude that so much has been accomplished by him, and so much left for the instruction of this

and future times. Of his services and works as a statesman, I can say nothing after what others have said.

But receiving these communications from his brethren of the Bar, I am strongly reminded of the importance to them of the memory and fame of this great lawyer. The illustrious names and great deeds which centuries have gathered are the richest treasures of a nation. The masterpieces of literature and art dignify the pursuits in which they were produced.

We may claim Daniel Webster as an American lawyer. Born during the war of the Revolution, in a family which took an honorable part in that great struggle, he was imbued from his infancy with American ideas and principles. He was reared in the simple habits of a New England home. He was forced early into the rough and invigorating contact with nature among the mountains where he had his birthplace. He was trained in the college of his native State. He studied our common law; for although it was painfully wrought out from age to age in another land, yet it was by our ancestors, and I thank God that, by as good a title as can be shown under its rules, it is our healthy and manly intellectual, as well as political inheritance. He knew it as it is in Littleton, in his great commentator, and in Plowden and Saunders, as well as in its more modern sources. His mind was imbued with its logic, and its peculiar style was as familiar to him as that of Taylor or Milton. Its fundamental principles had become a part of the structure of his mind, and under these new skies he maintained and advanced those great principles of personal liberty under the law and by the law, and the absolute security of private property, which constitute the vital power of the common law. But it must not be forgotten, for the honor of American jurisprudence, and for his honor, that he entered a field such as has existed nowhere else in any age.

It was and is one of the excellences of the Constitution of the United States, that it did not attempt too much, that it is neither a treatise nor a code, but a simple enumeration of the great powers and principles necessary to constitute the government of our country. When this government was put into operation in the same territory and over the same people, having distinct State governments of their own, questions of the last importance to the tranquillity and peace of the country, and to the efficiency and success of the new government, necessarily arose. Few men whose atten-

tion has not been particularly directed to this subject, are aware of the number, the importance, or the difficulty of these questions. A country, already vast in extent, and whose resources, in a rapid course of development, were incalculable, — whose people, after great suffering, had, by their own acts, become a nation, — had created a court of justice, and delegated to it the power, and imposed upon it, under the most solemn sanctions, the duty of declaring void all legislative acts not in conformity with the Constitution, and of restraining within their appropriate limits of power the State sovereignties under which the people lived.

Questions which elsewhere could have been settled only by mere force, or by diplomatic negotiations, which force influences, were here to be brought to an arbitrament, according to the staid, settled, and regular course of judicial procedure.

Into these contests Mr. Webster entered, and for them he was fitted, I think, as no other man has been. He brought to these great debates extensive and accurate historical learning, especially concerning the Constitution itself; a clearness of conception, comprehensiveness of grasp, and logical power never surpassed; and to all these was added a command of the English tongue, which, for demonstrative oratory, has, I think, not been equalled.

We may all conceive, what many yet know, that he was able to render, and did render to his country, and to the cause of justice and peace, the most eminent service, in this unobtrusive but important scene of action. And we shall make but poor use of his great example if we do not borrow from it higher conceptions and broader views of the capacities and duties of his and our profession. Of even the most prominent causes of great and permanent public importance in which Mr. Webster was engaged, there is not time here to speak, but it may be said generally, without doing any injustice to the great magistrates by whom they were determined, what indeed they were ever ready to acknowledge, that they derived most important assistance from the labors of Mr. Webster.

It is the general destiny of lawyers to leave behind them but few traces, and no monuments, of their intellectual labor. Eloquence and learning, and devotion to duty, and strenuous effort, and high courage, serve their uses of the day, and doubtless find their regard in the breast of their possessor, but with him often dies even their memory. How little do we know of the forensic arguments of Ames, or Dexter, or Otis. Vague impressions of

their power still linger on the fleeting recollections of a few living men, to depart, when they go home, and leave no trace behind.

To a very considerable extent Mr. Webster will probably not partake of this ordinary lot of his brethren. Many of his forensic arguments have been made in causes of such great and permanent importance, they are so admirable in themselves, and in general have been so well preserved, that they may be expected to be recurred to and studied while the Constitution shall endure.

What estimate posterity may form of the importance to them of this part of his labors, it would be presumptuous in us to attempt to decide. But for ourselves we can declare, that he who has strengthened the foundations of the Constitution, and shielded it from hostile attack, and made apparent to the affections of the people, the strength and beauty of its proportions and the peace and safety which are to be found only within its walls, has rendered to us a service not lightly to be esteemed or soon forgotten.

That in this I do but feebly express what this nation now feels, no man can doubt. To what has been so eloquently said at the Bar concerning his life and his death, it cannot be necessary that I should express my assent. But I desire to say, what I strongly feel and what it must gratify every man who loves his country to feel, that the death of Mr. Webster has given us a new and affecting proof that we are indeed one people, united by a common attachment to our country and to its great institutions and principles, and to the men who represent and uphold them; that underneath the strife of parties and the more miserable contests of sections and factions, deep in the American heart is a love of the whole country, and therefore it is that from that heart has come the utterances of grief, which arise everywhere over this broad land; grief for the loss of the man whose heart was large enough, and whose mind was comprehensive enough, to include this Union, with all its interests, and dependencies, and opinions, and obligations, and rights. And the great principles which he had so powerfully taught in his life, receive from his death a new sanction by his countrymen.

IV.

CASES ARGUED BEFORE THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, FROM 1836 TO 1851.

GREENLEAF *v.* FRANCIS, 18 Pickering, 117. Trespass on the case for diverting water.

CLAPP *v.* LEATHERBEE, 18 Pick. 131. Writ of entry to recover certain mortgaged premises.

WIGGIN *v.* SUFFOLK INS. CO., 18 Pick. 145. Assumpsit to recover insurance on property on board a brig.

WIGGIN *v.* AMERICAN INS. CO., 18 Pick. 158. Same.

TUCKER *v.* BOSTON, 18 Pick. 162. Writ of entry.

STURTEVANT *v.* ROBINSON, 18 Pick. 175. Scire facias.

COMMONWEALTH *v.* AVES, 18 Pick. 193. The slave Med.

CURL *v.* LOWELL, 19 Pick. 25. Trespass for breaking and entering.

COREY *v.* COREY, 19 Pick. 29. Assumpsit for work and labor.

HODGES *v.* HOLLAND, 19 Pick. 43. Promissory note.

EMERSON *v.* BAYLIES, 19 Pick. 55. Assumpsit. Partner.

WHITWELL *v.* BRIGHAM, 19 Pick. 117. Assumpsit. Bill of Exchange.

WILLIAMS *v.* RUSSELL, 19 Pick. 162. Bill in equity.

SALE *v.* PRATT, 19 Pick. 191. Trespass for entering close and removing sea-weed.

STARBUCK *v.* NEW ENG. MARINE INS. CO., 19 Pick. 198. Insurance.

PARKMAN *v.* WELCH, 19 Pick. 231. Bill in equity to redeem certain parcels of land.

JELLISON *v.* LAFONTA, 19 Pick. 244. Principal and Agent.

TISDALE *v.* HARRIS, 20 Pick. 9. Statute of Frauds.

MILLS *v.* GORE, 20 Pick. 28. Bill in equity to compel redelivery of a deed.

OVERSEERS OF THE POOR OF BOSTON *v.* OTIS, 20 Pick. 38. Writ of right.

HEWES *v.* PARKMAN, 20 Pick. 90. Trover against an officer for an attachment of the goods of a firm.

HEWES *v.* BAYLEY, 20 Pick. 96. Partner.

Trask *v.* Vinson, 20 Pick. 105. Promissory notes.

Adams *v.* Haffards, 20 Pick. 127. Trespass for assaulting and beating.

Salisbury *v.* Bigelow, 20 Pick. 174. Bill in equity to compel the specific performance of an agreement for the purchase of land.

Hall *v.* Jackson and Tr., 20 Pick. 194. Trustee process.

Clapp *v.* Tirrell, 20 Pick. 247. Writ of entry to recover lands.

Holland *v.* Cruft, 20 Pick. 321. Bill in equity to set aside a fraudulent assignment.

Whitaker *v.* Sumner, 20 Pick. 399. Trover against a sheriff for merchandise.

Goddard *v.* City of Boston, 20 Pick. 407. Petition for assessment of value of land taken for a street.

Loring *v.* Neptune Ins. Co., 20 Pick. 411. Insurance.

Commonwealth *v.* Farmers' and Mechanics' Bank, 21 Pick. 542. Bill in equity by Bank Commissioners to enjoin bank.

Boston Manuf. Co. *v.* Inhabitants of Newton, 22 Pick. 22. Taxation of water power.

Taunton Copper Co. *v.* Merchants' Insurance Co., 22 Pick. 108. Insurance.

Stone *v.* Fowle, 22 Pick. 166. Promissory note.

Reynolds *v.* Ocean Ins. Co., 22 Pick. 191. Insurance.

Lowell, Appellant, etc., 22 Pick. 215. Appeal from a decree of the Judge of Probate.

Hooper *v.* Jellison and Trs., 22 Pick. 250. Trustee process.

M'Gaw *v.* Ocean Ins. Co., 23 Pick. 405. Insurance.

Jackson *v.* Mass. Mutual Fire Ins. Co., 23 Pick. 418. Insurance.

Wiggin *v.* Tudor, 23 Pick. 434. Action for rent.

Henshaw *v.* Sumner, 23 Pick. 446. Trespass against a sheriff for taking and carrying away certain merchandise.

Allen *v.* Kimball, 23 Pick. 473. Promissory note.

Bishop *v.* Shepherd, 23 Pick. 492. Assumpsit for the services of minor son.

Bryant *v.* Russell, 23 Pick. 510. Bill in equity to enforce the execution of a trust.

Whitwell *v.* Wells, 24 Pick. 25. Replevin for goods.

White *v.* Patten, 24 Pick. 324. Writ of entry.

WHITWELL ET ALS. *v.* BURNSIDE, 1 Metcalf, 39. Bond.

REYNOLDS *v.* OCEAN INS. Co., 1 Met. 160. Insurance abandonment.

WHITWELL ET ALS. *v.* WILLARD, 1 Met. 216. Auditor.

JOHNSON *v.* JORDAN, 2 Met. 234. Trespass for breaking and entering close, &c.

BROOKS ET AL. *v.* WHITE, 2 Met. 283. Promissory note.

CARNEGIE ET AL. *v.* MORRISON ET AL., 2 Met. 381. Assumpsit founded on a letter of credit.

ORIENTAL BANK *v.* HAWKINS, 3 Met. 332. Writ of entry.

STEVENSON ET ALS. AND PERIT ET ALS. *v.* AUSTIN ET ALS., 3 Met. 474. Bill in equity to determine title to certain goods.

GRAY *v.* BENNETT, 3 Met. 522. Bill in equity to recover usurious interest.

RICHARDSON *v.* SUFFOLK INS. Co., 3 Met. 573. Insurance.

ATLAS BANK *v.* NAHANT BANK, 3 Met. 581. Insolvent Bank.

ORIENTAL BANK *v.* TREMONT INS. Co., 4 Met. 1. Insurance.

MACKAY *v.* HOLLAND, 4 Met. 69. Promissory note.

WINSOR ET AL. *v.* DILLAWAY, 4 Met. 221. Action for a commission for sale of a brig.

JACKMAN *v.* BOWKER, 4 Met. 235. Order.

CARTER *v.* SIBLEY, 4 Met. 298. Trespass for taking and carrying away goods.

HEARD *v.* PROPRIETORS OF MIDDLESEX CANAL, 5 Met. 81. Land damage.

CARY *v.* DANIELS, 5 Met. 236. Trespass on the case for the obstruction of a stream.

GOULD *v.* GOULD ET AL., 5 Met. 274. Bill in equity. Mistake.

BLANCHARD *v.* STEARNS ET ALS., 5 Met. 298. Action against selectmen for refusing to put name on voting list.

WRIGHT *v.* DAME ET ALS., 5 Met. 485. Bill in equity to charge with execution of a trust.

TALBOT *v.* CAINS, 5 Met. 520. Trespass on the case.

COFFIN *v.* HEATH ET AL., 6 Met. 76. Bill in equity. Lien on land.

DENNY ET AL. *v.* CABOT ET ALS., 6 Met. 82. Assumpsit for goods sold and delivered.

STEDMAN *v.* EVELETH, 6 Met. 114. Trespass against a sheriff for selling certain stocks.

ATKINS *v.* CHILSON ET ALS., 7 Met. 398. Bill in equity. Easement.

PROPRIETORS OF HOLLIS STREET MEETING HOUSE *v.* PIERPONT, 7 Met. 495. Bill of discovery.

AUSTIN *v.* CHARLESTOWN FEMALE SEMINARY, 8 Met. 196. Writ of entry.

CARY *v.* DANIELS, 8 Met. 466. Trespass on the case. Obstruction of water privilege.

HOWARD *v.* BATES ET AL., 8 Met. 484. Complaint for flowing land.

DAVIS ET ALS. *v.* SIGOURNEY, 8 Met. 487. Will.

ST. LOUIS PERPETUAL INS. CO. *v.* HOMER, 9 Met. 39. Promissory note.

PIPER *v.* RICHARDSON, 9 Met. 155. Writ of entry.

BAKER ET ALS. *v.* ATLAS BANK ET ALS., 9 Met. 182. Bill in equity. Bank.

GREENE ET ALS. *v.* GODDARD, 9 Met. 212. Breach of contract.

KINGSBURY ET ALS. *v.* GOULD, EXECUTOR, 9 Met. 282. Trust.

WINSOR *v.* SAVAGE, 9 Met. 346. Assumpsit to recover balance of account.

LEWIS ET AL. *v.* BROOKS, 9 Met. 367. Promissory note.

BARING ET ALS. *v.* CRAFTS, 9 Met. 380. Assumpsit to recover balance of account.

BATES *v.* WILLARD, 10 Met. 62. Trespass on the case against a sheriff for alleged default of his deputy.

GREW *v.* BREED ET ALS., 10 Met. 569. Bill in equity. Bank.

MURDOCK ET ALS. *v.* MILLS ET ALS., 11 Met. 5. Bills of exchange.

CHILDS ET ALS. *v.* RUSSELL ET AL., 11 Met. 16. Will.

COMMONWEALTH *v.* PHŒNIX BANK, 11 Met. 129. Bank.

DESHON *v.* MERCHANTS' INS. CO., 11 Met. 199. Insurance.

PYNCHON *v.* STEARNS, 11 Met. 304. Waste.

PYNCHON *v.* STEARNS, 11 Met. 312. Writ of entry.

LEWIS ET AL. *v.* BROOKS, 12 Met. 304. Promissory note.

GREW ET ALS. *v.* BREED ET ALS., 12 Met. 363. Bank.

SMITH *v.* HURD ET ALS., 12 Met. 371. Action on the case for nonfeasance and misfeasance.

TREMONT BANK *v.* CITY OF BOSTON, 1 Cush. 142. Taxation of real estate of bank.

WHEELER *v.* STONE ET ALS., 1 Cush. 313. Suit to recover a certain wharf and flats.

DRAKE *v.* CURTIS, 1 Cush. 395. Same.

CODMAN AND WIFE *v.* COFFIN, 2 Cush. 365. Specific performance of contract.

MEIGS *v.* THE MUTUAL MARINE INS. CO., 2 Cush. 439. Insurance.

VINCENT *v.* SPOONER, 2 Cush. 467. Action to recover dower.

NELSON, DISTRICT ATTORNEY, *v.* CUSHING ET ALS., 2 Cush. 519. Will.

PIERCE *v.* INHABITANTS OF CAMBRIDGE, 2 Cush. 611. Taxation.

COMMONWEALTH *v.* BOSTON AND MAINE R. R., 3 Cush. 25. Land damage.

FITCHBURG R. R. CO. *v.* BOSTON AND MAINE R. R., 3 Cush. 58. Land damage.

STEVENS *v.* BLANCHARD ET AL., 3 Cush. 169. Promissory note.

HAYES *v.* THE WESTERN RAILROAD CORPORATION, 3 Cush. 270. Action by a brakeman to recover for injuries received.

SHELTON *v.* CODMAN ET AL., 3 Cush. 318. Covenant of peaceable possession.

CARTER *v.* HOLBROOK ET ALS., 3 Cush. 331. Partnership.

BROWN ET AL *v.* LAWRENCE ET ALS., 3 Cush. 390. Writ of entry.

CASCO MANUFACTURING CO. *v.* DIXON ET AL., 3 Cush. 407. Action on the case by a buyer of cotton for false and fraudulent packing thereof.

CORNELL *v.* JACKSON, 3 Cush. 506. Action for covenant broken.

CHASE *v.* THE SUTTON MANUFACTURING CO., 4 Cush. 152. Complaint for flowing land.

BOWERS *v.* SUFFOLK MANUFACTURING CO., 4 Cush. 332. Action on the case for the disturbance of a right of way.

EDWARDS *v.* SUMNER, 4 Cush. 393. Assumpsit for money had and received.

TOWLE *v.* KETTELL ET AL., 5 Cush. 18. Assumpsit to recover for the charter or freight of a vessel.

CHACE ET ALS. *v.* BROOKS, 5 Cush. 43. Assumpsit on a contract of guaranty.

BAKER *v.* ADAMS, 5 Cush. 99. Writ of entry to recover possession of a dwelling-house.

FORBES *v.* APPLETON, 5 Cush. 115. Voluntary payment under a claim of right.

ROBINSON *v.* BAKER, 5 Cush. 137. Replevin.

MELLEDGE *v.* THE BOSTON IRON CO., 5 Cush. 158. Assumpsit for goods sold and delivered.

TALLMAN *v.* TALLMAN, 5 Cush. 325. Action on an award.

PARKER *v.* MAY ET ALS., 5 Cush. 336. Information for the purpose of preventing the misapplication of certain funds.

BOSTON AND LOWELL R. R. Co. *v.* BOSTON AND MAINE R. R., 5 Cush. 375. Trespass on the case.

CITY OF ROXBURY *v.* BOSTON AND PROVIDENCE R. R. CORPORATION, 6 Cush. 424. Bill in equity to compel defendants to raise a highway.

HUNNEWELL *v.* TAYLOR ET ALS., 6 Cush. 472. Partition.

BROWN *v.* WEBBER AND TRUSTEE, 6 Cush. 560. Trustee process.

COMMONWEALTH *v.* ALGER, 7 Cush. 53. Constitutional law. Harbor.

BOSTON *v.* CAPEN, 7 Cush. 116. Bond.

HOLBROOK *v.* JACKSON ET AL., 7 Cush. 136. Assumpsit for goods sold and delivered.

REGGIO ET AL. *v.* BRAGGIOTTI ET AL., 7 Cush. 166. Trespass on the case for breach of warranty.

MASSACHUSETTS IRON Co. *v.* HOOPER ET ALS., 7 Cush. 183. Lien.

SALTONSTALL ET ALS. *v.* PROPRIETORS OF LONG WHARF, 7 Cush. 195. Writs of right.

SMITH *v.* CITY OF BOSTON, 7 Cush. 254. Land damage.

BAKER ET ALS. *v.* MANUFACTURERS' INS. Co., 7 Cush. *Appendix.* Insurance.

ADAM ET ALS. *v.* BRIGGS IRON Co., 7 Cush. 361. Bill in Equity. Mining land.

OPINIONS OF THE SUPREME COURT OF THE UNITED STATES DELIVERED BY JUDGE CURTIS, FROM 1851 TO 1857.

NEILSON *v.* LAGOW ET AL., 12 Howard, 98. Courts of the United States.

RUSSELL *v.* SOUTHARD ET ALS., 12 How. 139. Mortgage.

WILBUR *v.* ALMY, 12 How. 180. Mortgage. Trust.

ACHISON *v.* HUDDLESON, 12 How. 293. Taxes. Cumberland Road.

COOLEY *v.* THE BOARD OF WARDENS OF THE PORT OF PHILADELPHIA, ETC., 12 How. 299. Constitutional law. Pilots and pilotage.

MCCORMICK *v.* GRAY, 13 How. 26. Partnership.

BUCKINGHAM *v.* MCLEAN, 13 How. 150. Bankrupt.

NEVES *v.* SCOTT, 13 How. 268. Courts of the United States.

PHIL., WIL., & BAL. R. R. CO. *v.* HOWARD, 13 How. 307. Covenant.

VERY *v.* LEVY, 13 How. 345. Equity.

HAGAN *v.* WALKER, 14 How. 29. Equity.

SILSBY *v.* FOOTE, 14 How. 218. Patent. Juror.

CHRISTY *v.* SCOTT, 14 How. 282. Ejectment.

CHRISTY *v.* FINDLEY, 14 How. 296. Same.

CHRISTY *v.* YOUNG, 14 How. 296. Same.

CHRISTY *v.* HENLEY, 14 How. 297. Same.

GENERAL MUTUAL INS. CO. *v.* SHERWOOD, 14 How. 351. Insurance.

WEBSTER *v.* COOPER, 14 How. 488. Devise.

KANOUSE *v.* MARTIN, 15 How. 198. Courts of the United States.

GARROW *v.* DAVIS, 15 How. 272. Equity.

CURRAN *v.* STATE OF ARKANSAS, 15 How. 304. Constitutional law.

WINANS *v.* DENMEAD, 15 How. 330. Patent.

TURNER *v.* YATES, 16 How. 14. Writ of error.

STUART *v.* MAXWELL, 16 How. 150. Revenue law.

CARROLL *v.* CARROLL'S LESSEE, 16 How. 275. Will.

STEAMBOAT NEW WORLD *v.* KING, 16 How. 469. Master and servant.

LAWRENCE *v.* MINTURN, 17 How. 100. Ships and shipping.

SHIELDS *v.* BARROW, 17 How. 130. Equity.

RING *v.* MAXWELL, 17 How. 147. Revenue law.

UNITED STATES *v.* NICKERSON, 17 How. 204. Fisheries.

HENDRICKSON *v.* HINCKLEY, 17 How. 443. Equity.

STEVENS *v.* GLADDING, 17 How. 447. Equity.

CHRISTY *v.* ALFORD, ADMR., 17 How. 601. Limitation.

SMITH *v.* STATE OF MARYLAND, 18 How. 71. Constitutional law.

BUSH *v.* COOPER'S ADMINISTRATOR, 18 How. 82. Bankrupt act.

RICHARDS ET AL. *v.* HOLMES ET AL., 18 How. 143. Trusts.

SCHOONER FREEMAN, ETC. *v.* BUCKINGHAM ET AL., 18 How. 182. Admiralty law.

MCLAUGHLIN *v.* SWANN ET AL., 18 How. 217. Attachment.

MURRAY'S LESSEE ET AL. *v.* HOBOKEN LAND AND IMPROVEMENT CO., 18 How. 272. Constitutional law.

KINSMAN ET AL. *v.* PARKHURST, 18 How. 289. Patent rights.

LAFAYETTE INS. CO. *v.* FRENCH ET AL., 18 How. 404. Corporation law.

CROCKETT ET AL. *v.* NEWTON, 18 How. 581. Collision.

CONNER ET AL. *v.* ELLIOTT ET AL., 18 How. 591. Constitutional law.

THOMAS ET AL. *v.* OSBORN, 19 How. 22. Commercial law.

BETTS *v.* LEWIS AND WIFE, 19 How. 72. Practice.

UNITED STATES *v.* LE BARON, 19 How. 73. Bond. Deed.

DUPONT DE NEMOURS & CO. *v.* VANCE ET AL., 19 How. 162. Commercial law.

COMMERCIAL MUTUAL MARINE INS. CO. *v.* UNION MUTUAL INS. CO., 19 How. 318. Contract.

MCREA ET AL. *v.* BRANCH BANK OF ALABAMA, 19 How. 376. Practice.

BULKLEY *v.* HONOLD, 19 How. 390. Vessels.

STURGIS, PLFF. IN ERROR, *v.* HONOLD, 19 How. 393. Same.

CASES ARGUED BEFORE THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, FROM 1857 TO 1874.

MERCHANTS' BANK OF NEWBURYPORT *v.* STEVENSON ET ALS., 10 Gray, 232. Corporation law.

BOSTON AND MAINE R. R. *v.* BARTLETT ET AL., 10 Gray, 384. Equity.

HENSHAW ET AL. *v.* BANK OF BELLOWS FALLS, 10 Gray, 568. Railroad.

WHITTENTON MILLS *v.* UPTON ET ALS., 10 Gray, 582. Corporation law.

BANGS *v.* LINCOLN ET AL., 10 Gray, 600. Insolvent debtors.

ROGERS ET AL *v.* JACKMAN ET AL., 12 Gray, 144. Assignee in insolvency.

RUSSELL *v.* HOWE, 12 Gray, 147. Constitutional law.
PINGREE *v.* COFFIN ET ALS. 12 Gray, 288. Equity.
COLE ET ALS. *v.* UNION MUTUAL INS. CO., 12 Gray, 501. Marine insurance.
BAKER ET ALS. *v.* MANUFACTURERS' INS. CO., 12 Gray, 603. Marine Insurance.
ROGERS ET AL. *v.* CURRIER ET ALS., 13 Gray, 129. Ship lien.
RICH *v.* ROGERS ET ALS., 14 Gray, 174. Will.
ELLICOTT ET ALS. *v.* ALLIANCE INS. CO., 14 Gray, 318. Marine insurance.
BIGELOW *v.* INHABITANTS OF RANDOLPH, 14 Gray, 541. Town.
GRAND JUNCTION RAILROAD AND DEPOT CO. ET AL. *v.* COUNTY COMMISSIONERS OF MIDDLESEX, 14 Gray, 553. Railroad.
ERICKSON ET ALS. *v.* NESMITH, 15 Gray, 221. Action.
HARTSHORN ET AL. *v.* SHOE AND LEATHER DEALERS' INS. CO., 15 Gray, 240. Marine Insurance.
MOTTE *v.* ALGER ET AL., 15 Gray, 322. Disseisin.
MICHIGAN STATE BANK *v.* GARDNER ET ALS., 15 GRAY, 362. Equity. Principal and agent.
CUNNINGHAM ET ALS. *v.* MUNROE, ADMINISTRATOR, 15 Gray, 471. Payment. Partnership.
SHAW ET ALS. *v.* NORFOLK COUNTY R. R. CO. ET ALS., 16 Gray, 407. Railroad. Equity pleading.
FAY *v.* ALLIANCE INS. CO., 16 Gray, 455. Marine insurance.
PARSONS ET AL. *v.* MANUFACTURERS' INS. CO., 16 Gray, 463. Marine insurance.
MIDDLESEX MANUFACTURING CO. *v.* LAWRENCE ET ALS., EXECUTORS, 1 Allen, 339. Bond.
PADDOCK AND FIELD *v.* COMMERCIAL INS. CO., 2 Allen, 93. Marine insurance.
MERRILL *v.* BOYLSTON FIRE AND MARINE INS. CO., 3 Allen, 247. Marine insurance.
WILLIAMS ET AL. *v.* BRADLEY ET ALS., 3 Allen, 270. Will.
COMMONWEALTH *v.* BANK OF MUTUAL REDEMPTION, 4 Allen, 1. Bank.
ERICKSON ET ALS. *v.* NESMITH ET ALS., 4 Allen, 233. Corporation law.
CUNNINGHAM ET ALS. *v.* HALL, 4 Allen, 268. Warranty.
COMMONWEALTH *v.* TOWNSEND, 5 Allen, 216. Practice.
BAYLIES ET ALS. *v.* PAYSON, 5 Allen, 473. Equity.

SMITH *v.* BOSTON AND MAINE R. R., 6 Allen, 262. Contract.

DOLE ET AL. *v.* NEW ENGLAND MUTUAL MARINE INS. CO., 6 Allen, 373. Insurance.

INHABITANTS OF PLYMOUTH *v.* RUSSELL MILLS, 7 Allen, 438. Equity.

MERCHANTS' BANK OF NEWBURYPORT *v.* STEVENSON ET ALS. 7 Allen, 489. Equity.

BARNARD ET ALS. *v.* VERMONT AND MASSACHUSETTS R. R. CO., 7 Allen, 512 Corporation law.

CITIZENS' MUTUAL FIRE INS. CO. *v.* SORTWELL ET ALS., 8 Allen, 217. Insurance.

WALES ET ALS. *v.* CHINA MUTUAL INS. CO., 8 Allen, 380. Insurance.

THAYER *v.* WELLINGTON ET ALS., 9 Allen, 283. Will.

CHASE *v.* ALLIANCE INS. CO., 9 Allen, 311. Ship.

ATTORNEY-GENERAL *v.* RECTOR AND CHURCHWARDENS OF TRINITY CHURCH ET ALS., 9 Allen, 422. Charitable uses.

BODMAN ET AL. *v.* AMERICAN TRACT SOCIETY ET ALS., 9 Allen 447. Will.

GARDNER *v.* BOSTON WATER POWER CO. ET AL., 9 Allen, 466. Contract.

UNION RAILWAY CO. *v.* MAYOR, &C. OF CAMBRIDGE ET AL., 11 Allen, 287. Railroad.

ELY ET AL. *v.* MCKAY ET ALS., 12 Allen, 323. Specific performance.

WALLACE *v.* BEEBE ET ALS., 12 Allen, 354. Contract.

PENNIMAN ET AL. *v.* SANDERSON ET ALS., 13 Allen, 193. Trustees.

DABNEY *v.* NEW ENGLAND MUTUAL MARINE INS. CO., 14 Allen, 300. Insurance.

SMITH *v.* MUTUAL LIFE INS. CO. OF NEW YORK, 14 Allen, 336. Equity.

ESSEX CO. *v.* PACIFIC MILLS, 14 Allen, 389. Currency.

BOSTON GAS-LIGHT CO. *v.* OLD COLONY AND NEWPORT RAILWAY CO., 14 Allen, 444. Railroad.

RYDER ET AL. *v.* PHŒNIX INS. CO., 98 Mass. 185. Marine Insurance.

SHAW *v.* SPENCER ET ALS., 100 Mass. 382. Trust.

PALMER, ADMINISTRATOR, *v.* STEVENS, 100 Mass. 461. Equity.

OLIVER *v.* LIVERPOOL AND LONDON LIFE AND FIRE INS. CO., 100 Mass. 531. Tax.

MASSACHUSETTS GENERAL HOSPITAL *v.* INHABITANTS OF SOMERVILLE, 101 Mass. 319. Tax.

RYDER ET AL. *v.* PHŒNIX INS. CO., 101 Mass. 458. Review.

STOCKBRIDGE IRON CO. *v.* HUDSON IRON CO., 102 Mass 45. Equity pleading and practice.

POLLOCK *v.* LEARNED, 102 Mass. 49. Widow.

COOMBS *v.* NEW BEDFORD CORDAGE CO., 102 Mass. 572. Master and servant.

COMMONWEALTH *v.* EASTERN R. R. CO., 103 Mass. 254. Railroad.

KEENE *v.* EASTERN R. R. CO., 103 Mass. 259. Same.

THWING *v.* GREAT WESTERN INS. CO., 103 Mass. 401. Marine insurance.

BREWER *v.* BOSTON THEATRE, 104 Mass. 378. Corporation. Equity.

PADDOCK AND FIELD *v.* COMMERCIAL INS. CO., 104 Mass. 521. Marine insurance.

BACON *v.* POMEROY ET ALS., 104 Mass. 577. Partnership.

ROTCH *v.* MORGAN, 105 Mass. 426. Executor.

ELLIS *v.* BOSTON, HARTFORD, AND ERIE R. R. CO., 107 Mass. 1. Mortgage.

EMERY *v.* PARROTT, 107 Mass., 95. Insane person. Equity.

MERRIMACK MANUFACTURING CO. *v.* QUINTARD ET ALS., 107 Mass. 127. Damages.

CORY *v.* BOYLSTON INS. CO., 107 Mass. 140. Marine insurance.

STOCKBRIDGE IRON CO. *v.* HUDSON IRON CO., 107 Mass. 290. Equity. Deed.

SOHIER *v.* TRINITY CHURCH, 109 Mass. 1. Trust.

HOWARD *v.* GREAT WESTERN INSURANCE CO., 109 Mass. 384. Marine insurance.

FLORENCE SEWING MACHINE CO. *v.* GROVER AND BAKER SEWING MACHINE CO., 110 Mass. 1. Injunction.

WORCESTER GAS LIGHT CO. *v.* CITY OF WORCESTER, 111 Mass. 353. Contract.

LOWELL *v.* BOSTON, 111 Mass. 454. City. Constitutionality of a certain statute.

COMMONWEALTH *v.* SHOE AND LEATHER DEALERS' INS. CO., 112 Mass. 131. Insurance.

CASES ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES, FROM 1857 TO 1874.

DEAN *v.* MASON ET AL., 20 How. 198. Patent rights.

LAWRENCE *v.* TUCKER, 23 How. 14. Mortgage.

THE ISLAND CITY, 1 Black. 121. Salvage.

THE SHIP MARCELLUS, 1 Black. 414. Practice.

THE UNITED STATES *v.* ANDRES CASTILLERO, 2 Black. 17. Land law.

CALAIS STEAMBOAT CO. *v.* VAN PELT'S ADMINISTRATOR, 2 Black. 372. Principal and agent.

PARKER *v.* WINNIPISEOGEE LAKE COTTON AND WOOLLEN COMPANY, 2 Black. 545. Chancery.

CROSS *v.* DE VALLE, 1 Wallace, 1. Alien. Devise. Equity. Pleading.

TURRILL *v.* THE MICHIGAN SOUTHERN ETC. R. R. Co., 1 Wall. 491. Patent.

HAWTHORNE *v.* CALEF, 2 Wall. 10. Constitutional law.

LOWBER *v.* BANGS, 2 Wall. 728. Charter-party.

THE KIMBALL, 3 Wall. 37. Lien.

STANLEY *v.* COLT, 5 Wall. 119. Legislative power.

MAURAN *v.* INSURANCE COMPANY, 6 Wall. 1. Insurance.

THE AMELIE, 6 Wall. 18. Commercial law. Lien.

RUBBER COMPANY *v.* GOODYEAR, 6 Wall. 153. Practice.

LORINGS *v.* MARSH, 6 Wall. 337. Will.

UNITED STATES *v.* ADAMS, 7 Wall. 463. Heads of departments. Government contracts.

AGAWAM COMPANY *v.* JORDAN, 7 Wall. 583. Patent. Evidence.

THE FLOYD ACCEPTANCES, 7 Wall. 666. Bills of exchange.

FURMAN *v.* NICHOL, 8 Wall. 44. Jurisdiction. Constitutional law. Bank.

PAUL *v.* VIRGINIA, 8 Wall. 168. Constitutional laws.

MOREY *v.* LOCKWOOD, 8 Wall. 230. Patent.

HOME OF THE FRIENDLESS *v.* ROUSE, 8 Wall. 430. Constitutional law.

THE WASHINGTON UNIVERSITY *v.* ROUSE, 8 Wall. 439. Constitutional law.

WILLARD *v.* TAYLOE, 8 Wall. 557. Equity.

THE POTOMAC, 8 Wall. 590. Admiralty. Collision.

HEPBURN *v.* GRISWOLD, 8 Wall. 603. Legal tender.
MAGUIRE *v.* TYLER, 8 Wall. 650. Public lands.
THE HARRIMAN, 9 Wall. 161. Charter-party.
UNITED STATES *v.* ADAMS, 9 Wall. 554. Court of Claims. Practice.
WALKER *v.* WALKER'S EXECUTOR, 9 Wall. 743. Trustee. Husband and wife.
STIMPSON *v.* WOODMAN, 10 Wall. 117. Patent.
MARBLE COMPANY *v.* RIPLEY, 10 Wall. 339. Equity. Entry for condition broken. Corporeal interest.
LIVERPOOL INS. CO. *v.* MASSACHUSETTS, 10 Wall. 566. Constitutional law. Corporations.
MERCHANT'S BANK *v.* STATE BANK, 10 Wall. 604. National banks. Principal and agent.
VIRGINIA *v.* WEST VIRGINIA, 11 Wall. 39. Constitutional law. Jurisdiction.
GARNETT *v.* UNITED STATES, 11 Wall. 256. Jurisdiction.
MCVEIGH *v.* UNITED STATES, 11 Wall. 259. Confiscation acts.
GALVESTON RAILROAD *v.* COWDREY, 11 Wall. 459. Mortgage.
MOWRY *v.* WHITNEY, 14 Wall. 620. Patent.
MADDOX *v.* UNITED STATES, 15 Wall. 58. The Rebellion. Purchasing agents.
THE NITRO-GLYCERINE CASE, 15 Wall. 524. Common carriers.
DAVIS *v.* GRAY, 16 Wall. 203. Condition. Practice. Conflict of jurisdiction.
OSBORNE *v.* MOBILE, 16 Wall. 479. Constitutional law.
WILLIAMS *v.* BAKER, 17 Wall. 144. Des Moines river grants.
HOLDEN *v.* JAY, 17 Wall. 211. Breach of condition. Indian tribes.
STATE *v.* STOLL, 17 Wall. 425. Construction.
CARLTON *v.* BOKEE, 17 Wall. 463. Patent.
UNITED STATES *v.* BUZZO, 18 Wall. 125. Internal revenue. Practice.
TRASK *v.* MAGUIRE, 18 Wall. 391. Taxation.
CASE OF THE SEWING MACHINE COMPANIES, 18 Wall. 553. Jurisdiction.
BULLARD *v.* BANK, 18 Wall. 589. Lien. Bank stock.
THE DOLLAR SAVINGS BANK *v.* UNITED STATES, 19 Wall. 227. Internal revenue.

INDEX TO VOLUME 1.

University Press: John Wilson & Son, Cambridge.